PRESTIGE ESTATES PROJECTS LTD.

Analysis of Power Situation & Solutions

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Introduction

Prestige is in the business of construction. They are into commercial, residential, hospitality, retail, etc., development.

Developments

Residential

- They may sell most of the apartments or independent houses to individuals.
- They may keep some of units and let them out.
- Mostly maintenance will be with the company at least for the initial few years.
- Each individual unit may have its own power connection.
- The number of occupants will be in hundreds if not thousands.
- High power consumption during 6PM to 10PM.

Commercial

- A portion or entire space may be sold to one or more big customers.
- A portion or entire space may be kept with the company and given on long term lease to big customers.
- The number of occupants will be few, at the most few tens if not single digit.
- Maintenance will be with the Prestige at least initial few years.
- There may be individual electricity meter or common meter.
- High power consumption between 10AM to 10PM if it is a retail space and between 10AM to 6PM if it is an office space.

Retail

- A portion or entire space may be sold to one or more big customers.

- A portion or entire space may be kept with the company and given on long term lease to big customers.
- The number of occupants will be few, at the most few tens if not single digit.
- Maintenance will be with the Prestige at least initial few years.
- There may be individual electricity meter or common meter.
- High power consumption between 10AM to 10PM.

Hospitality

- The entire space may be sold or kept with the company and give away on long term lease.
- The number of occupants will be one.
- Maintenance will be with the Prestige at least initial few years.
- There will be one electricity meter.
- High power consumption round the clock.

Rentals

- All the units will be with the company and will be rented out.
- They have both apartments and independent homes.
- Each individual unit may have its own power connection.
- The number of occupants will be in hundreds if not thousands.
- High power consumption during 6PM to 10PM.

Power Tariff

- Most of the categories of developments will come under commercial. The power tariff is highest for commercial.
- As far residential complexes are concerned, it seems Prestige is catering to high end customers. Hence these facilities are expected to have all modern amenities including Air conditioning among others. Hence easily the power consumption per month per unit will be in hundreds of kwh, pushing them to higher brackets of tariff resulting in thousands of rupees of power bills each month!!!
- In summary the power tariff for these facilities is very high. Hence the Cross Subsidy Surcharge is very high for these consumers.

Power supply situation in general

- All over India, the gap between demand and supply is more than 10% and increasing year after year.
- The southern Grid is not well connected with rest of India.
- The power prices are going up year after year. Now Central Government agreed with the developers to pass it on the increased cost of coal from imports to the consumers!!!
- Ref: Annexure - VI

Current power situation of Prestige's Communities

- Prestige's developments are commercial and residential catering high end customers.
- Power requirements are pretty high.
- They are paying highest power charges in the State
- They can't tolerate power cuts.
- Resorting to expensive backup options including diesel generators which are more than three times the price of regular power.

What to do?

- Explore suitable options for long term uninterrupted quality power supply
- Explore suitable options for some control on the ever increasing power prices
- Explore business opportunities while solving the power problems.
- Prestige should head this effort since it has maintenance obligations at least for the initial few years, if not for any other reasons.

Why Prestige Should Take Initiative?

- Premium can be charged based on amenities provided.
- Helps to increase Brand value and with that company value.
- Minimum responsibility of the developer to take care of basic requirements of the customers.
- It is just developing a system but not spending additional rupees.
- Huge business opportunity

Solutions

- Signing long term PPA with one or more suppliers, by paying cross subsidy surcharge if needed.
- Develop captive power and avail waiver of cross subsidy surcharge.

Note: *In 2011, The Ministry of Law has conveyed its consent to Ministry of power that all bulk power consumers (i.e. consumers with generation/ load greater than 1MW) would be deemed open access consumers as per the Electricity Act 2003.*

Conventional Vs. Renewable Sources of Energy

- International price of coal is increasing day after day and the developers are incurring thousands of crores of rupees of losses forcing the central government and CERC to pass on the extra cost to the consumers violating all bidding and PPA rules (Annexure – VI).
- Conventional energy based PPAs can't stand the pressures of input costs as mentioned in the previous point.
- The input costs of renewable sources of energy are negligible to nil. Operational and maintenance are the only costs.
- Once the plant is ready based on renewable sources of energy it will become like annuity bond. Moreover, the life of the plant is around 20 to 25 years.
- Open access consumers have Renewable Energy Purchase Obligations in general and Solar Energy Purchase Obligations in particular.
- Hence it is better to go for Renewable source of energy instead of conventional energy.

Cross Subsidy Surcharge

It was introduced to take care of subsidies given to other under privileged or priority sector consumers. This has been increasing year after year due to popular policies like free power to farmers, introduced by the Governments without budgetary support.

The Electricity Act 2003 provided open access to consumers and these consumers need to pay cross subsidy surcharge. This Act provided captive option to avail waiver of this cross subsidy surcharge.

Note: *As of today Karnataka is not charging cross subsidy surcharge on inter-state open access consumers to encourage private power imports due to acute power shortages. But this can be re-imposed at any time in the future.*

Captive Power Plant - Definition

" 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;

Primary Conditions:

1. Not less than twenty six percent of the ownership is held by the captive user(s), and
2. 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

Ref: *Annexure – II*

Captive Power Plant – Cross Subsidy Surcharge

1. No cross subsidy surcharge on captive power plant (Ref: Annexure – I)
2. The cross subsidy surcharge in Andhra Pradesh for the year 2012-13 is as given below:

		Cross Subsidy Surcharge FY(2012-13)			
		CPDCL	EPDCL	NPDCL	SPDCL
		Rs./Unit			
L.T Category					
LT-I	Domestic	0.20	0.14	0.12	0.18
LT-II	Non-Domestic	1.29	1.92	0.72	1.68
	Advertising Hoardings	3.44	4.76	3.47	0.00
LT-III	Industrial (Normal)	0.95	1.87	1.27	1.55
	Industries (SSI)	2.06	2.13	1.35	0.65
H.T Category					
HT-I A	Indl - 11 kV	1.88	2.18	1.71	1.58
	Indl - 33 kV	1.72	2.00	1.78	1.69
	Indl – 132 kV & above	1.43	2.26	1.70	2.28
HT- IB	Ferro Alloys -11 kV	0.34	0.00	0.00	0.00
	Ferro Alloys - 33 kV	0.65	0.83	0.00	0.36
	Ferro Alloys -132 kV & above	0.51	0.45	0.00	0.00
HT-II	Others - 11 kV	2.65	3.29	3.31	2.87
	Others - 33 kV	2.72	3.26	3.06	2.71
	Others- 132 kV & above	2.61	2.80	2.95	0.00
HT-III	Aviation activity at Airports – 11 kV	2.27	2.73	2.51	2.22
	Aviation activity at Airports – 33 kV	2.22	2.63	2.42	2.20
	Aviation activity at Airports – 132 kV	2.02	2.53	2.33	2.28
HT- V	Railway Traction	1.31	1.67	1.50	1.26
HT- VI	Townships & Residential Colony Lighting				
	11 kV	0.61	1.03	0.86	2.15
	33 kV	0.93	3.91	1.08	0.00
	132 kV & above	0.00	0.00	0.76	0.00

Captive Power Plant – Protection from Section 11 of Electricity Act, 2003

1. It is only applicable for open access, but not for Captive Power Plants
2. States frequently resort to invoke this section to restrict open access even though after clarifications from the Central Government against this.
3. Karnataka is frequent offender

Ref: *Annexure – III*

Captive Power Plant – Inter State

1. Section 9 (2) of Electricity Act, 2003, provides open access right to Captive Power Plant. This is both inter-state and intra-state. Ref: Annexure – I
2. The difference between inter-state and intra-state is RLDC, one or more SLDCs and one extra transmission charge/loss which may be around 30-35 paise/unit.

CHARGES FOR OPEN ACCESS IN INTER-STATE TRANSMISSION (BILATERAL) for the year 2012-2013		
1	TRANSMISSION CHARGES	Rs./ MWh
	APTRANSCO	90.97
	KPTCL	80
	KSEB	80
	TNEB	270.11
2	OPERATING CHARGES	Rs./ Day
	To each RLDC involved	2000
	To each SLDC involved	2000
3	APPLICATION FEE	Rs./ Application
	To NODAL RLDC	5000

Ref: *These numbers are obtained from Power Grid/ SRLDC websites*

Captive Power Plant – RECs (Renewable Energy Certificates)

1. All the Grid connected Captive Power Plants are eligible for RECs.
2. If any other producer (Other than Captive Power Producer) uses waiver of cross subsidy surcharge, he will not be eligible for RECs.
3. The following incentives can't be used to get eligibility for RECs:
   a) concessional tariff with local utilities
   b) concessional wheeling and transmission charges and losses
   c) electricity duty exemption
   d) VAT exemption
   e) In general, any incentive from either State or Center.

4. The new floor and forbearance prices are shown below for 2012-17:

	Non Solar REC (Rs/MWh)	Solar REC (Rs/MWh)
Forbearance Price	3300	13400
Floor Price	1500	9300

Simple Open Access

1) Purchase power or sell power from/to anyone in the country
2) Need to pay Transmission and wheeling charges and losses among other things.
3) Can't use any incentive from either State or Center including Cross subsidy surcharge to get eligibility to participate in RECs.

Advantages of REC Eligible Captive Power

1) Assured Power supply from within for 25 years
2) Exemption from cross subsidy which is as high as Rs.2/unit for some type of consumer (HT commercial)
3) It is as if purchasing power through open access.
4) Power prices from RE (Renewable Energy) sources are under control since there is no raw material whose price might change every day.
5) Additional income from RECs
6) It is like hedging power prices
7) If the landing cost is more (due to charges and losses) then, the power from the power plant can be sold locally and again purchased locally by the consuming entity.

Captive Option - Precedents

DLF Case

- DLF Utility is owned by Building owners (other DLF group companies) (>90%)
- These share holders use more than 80% of the power produced by DLF Utility.
- DLF Utility did not want to pay cross subsidy surcharge arguing it is captive as per the Electricity Act, 2003.
- Haryana Electricity Board did not agree with DLF Utility and demanded the later to pay cross subsidy surcharge.
- The matter went to Haryana Electricity Regulatory Commission (HERC). HERC sided with Haryana Electricity Board saying the consumers of the power are the tenants, not the building owners.
- DLF Utility appealed in the Appellate Tribunal. The Tribunal also agreed with HERC and Haryana Electricity Board.
- DLF Utility got a notice from Haryana Electricity Department demanding Rs.586 crores towards cross subsidy surcharge arrears.
- Ref: Annexure – IV

Honda Case

- One of the group companies of Honda owns captive power plant and building that consumers power.
- That group company leases the building to another group company of the Honda.

- Even though both the group companies are owned by Honda, Haryana Electricity Regulatory Commission ruled that cross subsidy surcharge should be paid since the consumer did not invest directly in the power producing company.
- Ref: Annexure - V

Conclusions

- The power consumer should directly invest in the power plant supplying power and satisfy all the conditions laid down in the Electricity Act, 2003 and The Electricity Rules, 2005.

NNR's Solutions

NNR is currently developing around 300MW solar power plants in Andhra Pradesh and many are in the pipe line.

NNR can provide customized captive power options to avail waiver of cross subsidy surcharge along with other benefits.

NNR is also ready to provide 24 hour power supply using banking and in house power trading, if required.

As per The Electricity Act 2003, " 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;

Primary Conditions:

1. Not less than twenty six percent of the ownership is held by the captive user(s), and
2. 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

On the face of it, it sees complicated and requires substantial initial investments!! But if you go through The Electricity Rules 2005, it is not that complicated and does not require substantial investments as it appears.

Here are the simple calculations to find out minimum investment, in terms of months of power bill, required for Captive power plant:

1. *Let us say you want to purchase on the average 1.6 MU (Million Units) per year at the rate of Rs.8.50/unit (at plant).*
2. *One MW Solar power plant can produce on the average 1.6 MU/year.*
3. *Let us say the capital expenditure of the 1MW solar power plant is Rs.7.0 Crores. Out of this 20% would be equity and the remaining debt.*
4. *Hence total equity = 7.0*20% = 1.4 Crores*
5. *Out of total equity, minimum equity from your end to be eligible for captive = 26%*
6. *Hence your minimum investment = 1.4*26%=0.364Crores=36.4 Lakhs*
7. *Total Power bill/year = 1.6*8.50 =13.6 Million = 1.36 Crores*
8. *Average monthly power bill = 1.36 Cr/12 = 11.33 lakhs*
9. *Hence the investment in terms of no. of months of power bills = 36.40/11.33= 3.2 months.*

Hence if you can invest just 3 to 4 months' power bill one time, you can avail waiver of cross subsidy surcharge forever with assured power supply along with hedging on power prices (through equity investment) !!!

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All Captive Options

The Electricity Rules 2005 clearly explains the captive options.

1. You can use Captive Option on your own if you are using 1MW or more per year on your own.
2. You can form Co-Operative Society with other consumers. Then the Captive rules are applicable to the Co-operative society, not to you as member directly.

3. You can form an association with other people or entities. You need to invest and consume power according to your share in the association.

We can build customized power units as per rules and your requirements (capacity).

Captive Options for Prestige

Based on our understanding Prestige has three types of facilities under its management:

1) Owned and run by Prestige but given for short term rent like in the case of Hotels. In this case Prestige should invest 26% equity into the power unit with capacity equal to its requirements. Let us say Prestige owns a hotel which consumes 1MW. Then it needs to invest minimum 26% equity for 1MW plant only.
2) Owned by Prestige but given for long term lease like commercial complexes, retail space, hotels, etc. Here Prestige needs to form cooperative society with the tenants, the final consumers of power. The Society should invest minimum 26% equity into the power unit with capacity equal to its requirements, same as above.
3) Sold out completely to third parties. Here Prestige needs to form cooperative society with the owners/tenants, the final consumers of power. The Society should invest minimum 26% equity into the power unit with capacity equal to its requirements, same as above.

Advantages of Cooperative Societies to Members

1) Avail waiver of cross subsidy surcharge.
2) Protection from Sec.11 of the Electricity Act 2003 that gives right to State to ban open access.

3) Uninterrupted quality power supply.
4) Have control on power prices directly or indirectly. If the power prices go up, they will get profits from the captive plant as per their share.
5) Investment is only 3-4 months of power bills in advance.
6) Membership is open ended.
7) Each member will have equity in the captive power unit. Hence the member's property value includes the membership value. As the captive plant makes more money, the membership value of the society goes up.

Advantages of Cooperative Societies to Prestige

1) Increase in Brand Value. The services are very important component in customer satisfaction.
2) Full fill the promise of 24 hour uninterrupted power supply at cheaper rate.
3) Better value to the members of the community. Hence Prestige can charge premium for their developments.
4) Most of the customers of Prestige are commercial and high end individual customers who are not interested in making their own arrangements for services like power. They like plug and play. Prestige can deliver this using Cooperative Society route.
5) Good business opportunity.

Captive Power – Tentative Charges/Losses

Date		Hours		Scheduled (MW)				Route	
From	To	From	To	Requested (MW)	MWh	Accepted (MW)	MWh		
01-01-14	31-12-14	6	18	100	166,440	100	166,440	Southern Region	
AP To Karnataka Border									
i) Transmission Charges									
		Rate (Rs/MWh)			MWh			Total (Rs)	Rs/unit
(a) Intra State									
AP		90.97			166,440			15,141,047	0.10
(b) Inter State									
Wheeling		240			166,440			39,945,600	0.27
							Total (i)	55,086,647	0.37
ii) Operating Charges									
RLDC/SLDC		Rate(Rs/Day)			Number of Days			Total (Rs)	
AP SLDC		2000			365			730,000	0.00
SRLDC		2000			365			730,000	0.00
							Total (ii)	1,460,000	0.010
iii) Non-Refundable Application fee								5,000	0.00
						Grand Total (i+ii+iii)		56,551,647	0.38

Intra State Karnataka									
i) Transmission Charges									
		Rate (Rs/MWh)			MWh			Total (Rs)	Rs/unit
(a) Intra State									
Karntaka (Deduct AP transmission losses)		133.15			159,749			21,270,594	0.14
(b) Intra State Wheeling									
Wheeling		60			153,327			9,199,632	0.06
							Total (i)	30,470,226	0.21
ii) Operating Charges									
RLDC/SLDC		Rate(Rs/Day)			Number of Days			Total (Rs)	
Karnataka SLDC		2000			365			730,000	0.00
							Total (ii)	730,000	0.00
						Grand Total (i+ii)		31,200,226	0.21
						Total Charges/Unit		0.60	
Transmission and Distribution Losses									
							%	MWh	
AP Transmission Losses							4.02%	6,691	
Karnataka Transmission losses							4.02%	6,422	

Karnataka Distribution losses							4.06%	6,225	
				Total Losses			12.10 %	19,338	
				Net Power				147,102	
								Method	
					Net power(MWh)			147,102	
					Let us say Landing price/unit Landing Price/unit			8.50	
					Revenues			1,250,367,965	
					Charges			87,751,873	
					Net Revenues			1,162,616,092	
					Realized price/unit at plant			6.99	
					Hence charges + losses per unit			1.51	
					Total Charges/unit			0.60	
					Losses/unit			0.92	

Annexure – I

Cross Subsidy – Captive Power – Electricity Act 2003

Sec. 2(8) of Electricity Act, 2003 (Captive Generating Plant)

" 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;

Sec. 9 of Electricity Act, 2003 (Captive Generation)

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

   Provided, that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.
2. Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

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

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

Sec. 38 (2)(d)(ii) of Electricity Act, 2003 (Central Transmission Utility and functions)

Any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central 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.

Sec. 39 (2)(d)(ii) of Electricity Act, 2003 (State Transmission Utility and functions)

Any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further 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 may be levied till such time the cross subsidies are not eliminated:

Provided also that the manner of payment and utilisation of the surcharge shall 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.

Sec. 40 (c)(ii) of Electricity Act, 2003 (Duties of Transmission Licensees)

Any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate 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.

Sec. 42 (2) of Electricity Act, 2003 (Duties of Distribution Licensee and open access)

The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational

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

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

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

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

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

Annexure – II

The Electricity Rules 2005

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 co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

Explanation:-

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

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.

Explanation.- (1) For the purpose of this rule.-

a) "Annual Basis" shall be determined based on a financial year;

b) "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

c) "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.

Annexure – III

Open Access – Sec 11 – Electricity Act 2003

Directions to Generating Companies

11. (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. - For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

Annexure – IV

DLF Case

DLF gets Rs 586 cr notice from Haryana electricity board

DLF Utilities Limited has been served notice over payment of cross-subsidy surcharge.

JATINDER PREET CHANDIGARH | 13th Oct 2012

Troubles continue to mount for DLF in Haryana. DLF Utilities Limited has been served notice to pay Rs 586 crores to Dakshin Haryana Bijli Vitran Nigam (DHBVN) by 31 March 2013.

The company has been involved in litigation with DHBVN over payment of cross-subsidy surcharge. The Haryana Electricity Regulatory Commission had held in a judgement in August last year that it was required to pay the cross-subsidy surcharge in view of the fact that the appellant has been providing electricity to the owners of seven commercial buildings who are allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses.

The company, engaged in the generation of electricity, contended that no open access has been availed of by it and that it uses its own dedicated transmission lines and does not use the network of DHVBN and, therefore, is not liable to pay cross subsidy surcharge. The contention was negated by the Commission.

The company challenged the order in an appeal to the Appellate Tribunal Authority for Electricity that was dismissed by a two-member panel comprising of V.J. Talwar and P.S. Datta on 3 October. It held that the appellant is liable to pay cross subsidy surcharge and supply to the commercial establishments by the building owners from the main receiving panel under the guise of dedicated transmission line is not in accordance with the law and, therefore, has to be stopped. However, to safeguard the interests of the individual and consumers, the authority directed the Commission to regularise the supply to such consumers by 31 March 2013. Subsequently the DHBVN has sent the notice to DLF Utilities Limited to pay Rs 586 crores as cross-subsidy.

Appellate Tribunal For Electricity
Appellate Tribunal For Electricity
M/S Dlf Utilities Limited vs Haryana Electricity Regulatory ... on 3 October, 2012
Appeal No. 193 of 2011

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.193 of 2011

Dated 3rd October, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

M/s DLF Utilities Limited,

DLF Gateway Tower,

7th Floor, DLF City, Phase-III.

Gurgaon - 122002.

(Through its Authorized Signatory Mr. Ajay Gupta)

...Appellant(s)

Versus

1. Haryana Electricity Regulatory Commission

Bays No. 33-36, Sector-4,

Panchkula-134112.

(Represented by its Secretary)

2. Dakshin Haryana Bijli Vitran Nigam Limited,

C-Block, Vidyut Sadan,

Vidyut Nagar, Hissar - 125 005.

(Represented by its Chairman & Managing Director)

...Respondent(s)

Counsel for the Appellant (s) : Shri S.Ganesh, Senior Advocate Shri V.P. Singh, Advocate

Shri Dushyant Manocha, Advocate

Shri Paresh Bihari Lal, Advocate

Counsel for the Respondent (s) : Shri Amit Kapur, Advocate Shri Vishal Anand, Adv. for R-2

Ms. Shikha Ohri for R-1

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JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appeal presents a pure legal question as to whether the appellant which is a Company engaged in the generation of electricity is liable to pay cross-subsidy surcharge even when no open access has been availed of by it and uses its own dedicated transmission lines and does not use the network of Dakshin Haryana Bijli Vitran Nigam Ltd., the respondent no.2 herein. The Haryana Electricity Regulatory Commission by the impugned order dated 11.08.2011 held that even though open access on the distribution system of the respondent No.2 was not availed of by the appellant it was required to pay cross-subsidy surcharge in view of the fact that the appellant has been providing electricity to the owners of seven commercial buildings who are allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses. The case of the appellant that the appellant was providing electricity without using open access to the co-owners of the power plant through dedicated transmission lines as envisaged under Section 10 (2) of the Electricity Act, 2003 and, therefore, not liable to pay cross subsidy surcharge was negated by the Commission in the impugned order now under challenge in this appeal.

2. So far as the Memorandum of Appeal is concerned, it presented the aforesaid legal question as to whether the appellant was liable to pay cross subsidy surcharge even when no open access was availed of by it

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through the use of the network of the respondent No 2, but as will be seen in the sequel the magnitude of the appeal has been widened at the instance of the respondent No 2 by raising the question that how far could it be legal for the building owners to distribute electricity to their tenants who have been running their commercial establishments from the main receiving panel (HT/LT) of each of the commercial buildings, if the appellant is not a captive power plant. In the course of this judgment, we have found it absolutely proper to traverse this legal point also on the grounds as will be noticed hereinafter even though no cross appeal / cross objection was preferred against the observation of the Commission on this point that went in favour of the appellant.

3. There are seven commercial buildings owned by the DLF Group of Companies which are being provided with electricity by M/s. DLF Utilities Ltd., a power generating company and admittedly the said building owners have let out their respective spaces to various tenants. The respondent no.2 filed a petition before the Commission praying for levying electricity duty, cross-subsidy and additional surcharge on the ground that the building owners who are a cross-subsidizing category are provided with electricity by the owners of the building without paying any cross-subsidy surcharge. The appellant filed a written response maintaining that the question of payment of cross-subsidy surcharge under Section 42(2) of the Act would arise only when open access was sought for and granted by the Commission. According to the appellant, open access as defined under the Act means the use of 'transmission lines' or 'distribution system' and the words 'transmission lines' are clearly distinguishable from 'dedicated transmission lines', the latter having been defined in Section

2 (16) of the Act. The use of dedicated

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transmission lines has no nexus with open access. Therefore, the question of applicability of Section 42(2) and the consequent open access Regulations framed thereunder do not have application in the present situation. Secondly, the Haryana Open Access Regulations clearly provide that they are applicable only in cases when open access is sought for. The reasoning of the Commission that the appellant was liable to pay cross-subsidy surcharge on account of the fact that but for the appellant the building owners who belong to cross-subsidizing category would have taken electricity from the respondent no.2 at the prevalent tariff having an element of cross subsidy is erroneous because it was not obligatory on the part of the building owners to mandatorily seek electricity connection from the respondent no.2 alone and it cannot be taken for granted that the building owners, but for the presence of the appellant, would have been the valued customers of the respondent no.2. The Act 2003 has for the first time introduced the concept of open access which has been introduced for the expansion of the sector rather than restricting its development. Thirdly, the building owners who are also the co-owners of the appellant's power plant collectively hold 98% of the equity share of the appellant and they do not have any connection with the respondent no.2 for receiving electricity. That is to say, the building owners are not the consumers of the respondent no.2. In the Aggregate Revenue Requirement petition the respondent no.2 does not show the possible revenue earnable from the building owners. Fourthly, the argument of the respondent no.2 that it needs to be compensated for the loss sustained by it because of loss of customers on account of the presence of the appellant is untenable in view of the grounds as above. Cross-subsidy surcharge is not to be treated as a compensatory charge because it is the established legal position, maintains the appellant, that in matters of taxes, the Page 4 of 44

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provisions of the statutes should be strictly construed. The decision of the Tribunal in Aryan Coal case is not applicable to the facts and circumstances of the present case because CERC Regulations expressly provide for payment of cross-subsidy irrespective of the mode of supply and that the said CERC Regulations are distinct from the Haryana Open AccessRegulations,2005

4. The respondent no.2 in its counter-affidavit contends that the appellant does not qualify itself to be a captive power plant and when it is not a captive generation plant, the supply of power would be subject to the provisions of the Act and that cross-subsidy surcharge is leviable and payable by a power plant despite the fact that electricity is being supplied from the dedicated transmission lines to the building owners. The appellant is supplying electrical energy from its power plant to various independent commercial establishments in the DLF owned buildings, and had not there been any power plant of the appellant in the complex of the DLF Utilities, then the building owners or their tenants who are running commercial establishments would have been subjected to tariff of the respondent which undoubtedly would have within it an element of cross-subsidy. Thirdly, Sections 9 and 10 make it clear that the generating companies or the captive power plants supplying electricity to end users are subject to the provisions of the Section 42(2) which has two aspects, namely, (a) Open Access and (b) Cross-subsidy. Section 42(2) has not restricted it to open access on the lines of the distribution licensee, meaning thereby that this Section cannot be read to confuse open access with a distribution licensee. Cross-subsidy is payable as a charge to be paid in compensation to the distribution licensee irrespective of whether its system is or is not used and this is

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the ratio of the decision in Aryan Coal case decided in Appeal No. 119 of 2009 and Appeal No. 125 of 2009 on 09.02.2010. The decision in Aryan Coal case is clearly pointer 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. A generating plant is entitled to supply power to consumers using the dedicated transmission lines which are laid from the place of generation to the place of consumption on payment of cross-subsidy. It is by creation of balance of interest of the entities and the interest of the distribution licensee that the scheme of the Act is achieved. Merely because the Regulations do not specify levy of cross-subsidy surcharge the appellant cannot run away from its liability to pay cross-subsidy surcharge. The Regulations framed by the Commission do not override the substantive provisions of the Act; therefore, it cannot be said that the Regulations which were considered in Aryan Coal case did provide for payment of cross-subsidy regardless of the mode of supply do not apply in the present case because the Haryana Regulations do not provide for such payment of cross-subsidy. Dedicated transmission lines is only for evacuation of power from a particular project, while transmission lines can be used by any utility subject to availability of capacity in the lines and payment of transmission charges. Therefore, even if the sale of electricity is being undertaken through dedicated transmission line, cross-subsidy surcharge and additional surcharge will be applicable. Thus, the alleged exclusive use of dedicated transmission lines is no ground for refusal to pay cross-subsidy surcharge in view of a conjoint reading of Sections 10 (2) and 42 (2) of the Act. Under the Haryana Open Access Regulations, cross-subsidy surcharge is leviable even if the appellant is supplying electricity from dedicated lines. The second proviso to Section 42 (2) of Page 6 of 44

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the Act specifically provides that surcharge levied under that Section shall be utilized to meet the requirements of current level of cross- subsidy within the area of supply of the distribution licensee. Therefore, the appeal of the appellant has no merit.

5. The Commission in its written submission submits that Section 10 (2) provides that a generation Company may supply electricity to any consumer subject to the Regulations made under sub-Section (2) of Section 42 of the Act and the Haryana Open Access Regulations notified by the Commission under sub-Sections (2), (3) and (4) of Section 42 of the Act squarely apply to the appellant for levy of cross-subsidy surcharge. The decision in Aryan Coal case has in fact been followed in the impugned order. The appellant supplies electrical energy to seven commercial buildings owned by DLF Group of Companies who are engaged in the business of letting out space in the buildings to various tenants who operate their own businesses and commercial ventures. Furthermore, the building owners have entered into energy purchase agreement with the appellant to set up power plant for them in the basement of the building or near the buildings. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables up to the main electricity receiving panel of each building. The respondent no.2 took objection to the supply of such electricity from the generation plant of the appellant to the seven commercial buildings through the dedicated transmission lines and then further to the companies occupying those building without obtaining a license and this objection raised by the respondent no.2 was found to have merit in it particularly when the generation plant of the appellant does not qualify itself to be a captive generation plant in view of the fact

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that 51% of the power so produced by the appellant is not used by the building owners who are said to be the co-sharers of the plant but is being used by the companies occupying these buildings as tenants which is not in conformity with Rule 3(1) of the Electricity Rules, 2005. The licensee accordingly issued a notice on 17.9.2010 to the appellant directing it to submit an affidavit within seven days along with supporting documents to prove bona fide consumption of 50% of electricity for its own use, but as the reply of the

appellant was not satisfactory, the licensee filed a petition before the Commission which passed an impugned order dated 11.8.2011 in Case No.8 of 2011. According to the Commission, under Section 7 of the Electricity Act, 2003, a Generation Company can establish, operate and maintain a generation plant without obtaining a license and Section 9(1) and 10(1) respectively provide that a captive Generation Company as also a Generation Company can establish, operate and maintain 'dedicated transmission lines'. Section 10(2) provides that a Generation Company may supply electricity to any consumer subject to the regulations made under sub-section (2) of Section 42 of the Act. The building owners are in the business of letting out space in the buildings to various tenants / companies to operate their business. In terms of the lease agreements, the building owners are required to provide air-conditioning, electric supply, water supply, security, horticulture, operation of common facilities to the occupants and for supply of electricity and chilled water the building owners have entered into an energy purchase agreement with the appellant to set of power plant for them in the basement of the building or near the buildings and supply electrical energy to them and chilled water on payment of charges / tariff as per the agreement. The appellant has accordingly set up a 40 MW co-generation plant and a chilling unit at building no.10 (one out of the seven buildings), Energy Page 8 of 44

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Center, Phase-II, Gurgaon. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables up to the main electricity panel (HT/LT) of each building. According to the Commission, cross subsidy surcharge is payable on the supply of electricity from the generation plant of the appellant to the tenants / companies occupying the buildings from the date of commencement of supply to the buildings and the open access regulations notified by the Commission under sub-section (2), (3) & (4) of Section 42 of Electricity Act, 2003 will squarely apply to the appellant for levy of cross subsidy surcharge and the Commission's decision is based on the decision of this Tribunal in Aryan Coal Beneficiations Pvt. Ltd. Vs. Chhattisgarh State Electricity Board dated 9.2.2010.

6. The appellant filed a rejoinder with a supporting affidavit on 27.3.2012 contending that the reply of the respondent no.2 is based on an incorrect appreciation of the appellant's case. The Commission, the respondent no.1 herein, did not act upon and follow its own Regulations, 2005. The appellant did not suppress any material fact from the Commission. Levy of cross subsidy surcharge on the appellant can be done only in accordance with the Regulations,2005 and can in no manner be done de hors the Regulations,2005 in terms of which levy of cross subsidy is not dependent upon the captive status of the appellant. On the contrary, the levy of cross subsidy depends upon the question whether open access has been availed or not. The issue of captive status is unrelated to the issue of cross subsidy. Regulations, 2005 provide for levy of cross subsidy on the consumers availing open access to the transmission lines or distribution system of the licensee. The appellant has not been using the transmission line or distribution system

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of the licensee. Section 42 of the Act also relates to levy of cross subsidy when open access is used of the licensee. The decision of the Hon'ble Supreme Court in U.P. State Electricity Board Vs. City Board, Mussorie (1985) 2 SCC 16 is misplaced in this connection because in the reported case, it was held that tariff can be fixed by the Commission having jurisdiction to do that even where there are no Regulations. But when Regulations have been framed, the fixation of tariff has to follow the Regulations. Similarly, the reliance placed on the decision of this Tribunal in SIEL Ltd. Vs. PSERC, 2007 (APTEL) 931 is also inapplicable. The words 'subject to rules' imply 'in accordance with the Rules'. Since, the building owners are not consumers of the respondent no.2, the latter would not have considered any alleged revenue to be realized from the building owners in its ARR. The contention of the respondent no.2 that providing of electricity by the appellant to its building owners has resulted in loss of revenue to be generated though cross subsidy from such consumers is not based on the provisions of the Act, 2003. As is evident from the statutory definition of Open Access under

the 2003 Act, it means the non-discriminatory provision for the use of transmission lines or distribution system. As can be seen from Section 2(72) and 2(16), the "transmission lines" and "dedicated transmission lines" are separately defined terms in the 2003 Act. Thus, when the 2003 Act provides "open access" as the usage of transmission lines, it means that "open access" does not apply to the situation wherein dedicated transmission lines are used by consumers. It is apparent that the term "non-discriminatory provisions for use" does not apply for one's own private / dedicated transmission line and it would be applicable only when common facilities of a licensee are apportioned for usage without discrimination between various applicants for such usage. Wheeling applies only to the facilities of distribution licensee or Page 10 of 44

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transmission licensee. In other words, there cannot be a case where open access is applicable for the usage of an entity's own 'dedicated transmission lines'. It is submitted that if the intention of the legislature was that cross subsidy is payable for the usage of one's own dedicated transmission lines, so that "open access" is applicable to dedicated transmission lines also, then the statutory definition of the "open access" would have included dedicated transmission lines also (since it is separately defined in the 2003 Act and the same would have been incorporated in Section 42(2) of the 2003 Act.

7. Upon the pleadings as aforesaid, the point for consideration is whether the appellant is liable to pay cross subsidy surcharge as has been levied upon it by the Commission in the Impugned Order when open access is not availed of by the appellant. The further point is whether the tenants / lessees under the building owners can legally receive distribution of electricity by the building owners beyond the delivery point or the load centre.

8. We have heard Mr. S.Ganesh, Learned Sr.Advocate appearing for the appellant, Ms. Sikha Ohri, Learned Advocate appearing for the respondent no.1 and Mr. Amit Kapur Learned Advocate appearing for the respondent no.2.

9. Learned advocate for the appellant makes the following submissions:-

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a) Legality of supply of power by the appellant to the building owners as has been raised by the learned advocate for respondent no.2 in course of hearing of the appeal is beyond the purview of the appeal in view of the fact that the same has attained finality and challenge has not been made thereto.

b) The Commission does not dispute the correctness of supply of power by the appellants to the building owners.

c) The appellant has been utilizing its own dedicated transmission lines and has not applied for open access.

d) The appellant is supplying electricity under Section 10(2) of the Act which is subject to Section 42 (2) of the Act and the Regulations made thereunder. The Open Access Regulations, 2005 notified by the Commission which is consistent with Section 42 (2) of the Act makes it clear that when open access is availed of, levy of cross subsidy surcharge is justified.

e) The Commission's order makes it clear that the appellant has not been using open access.

f) 'Open access' as defined is Section 2 (47) of the Act implies "non-discriminatory provisions for use" of transmission lines or the distribution system for the use to a licensee, consumer or a person engaged in the

generation. The definition of open access consciously uses the term 'transmission lines' as opposed to 'dedicated transmission lines' which amply clarifies the legislative intent that open access and its consequent charges would be applicable only in case where transmission lines as opposed to dedicated transmission lines are utilized.

g) The definition of open access involves a non-discriminatory usage of transmission lines, the underlying rationale being "non- discriminatory." It is difficult to fathom as to how would the same Page 12 of 44

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apply to one's own dedicated transmission lines, where the question of non-discrimination, would not arise at all. h) Open access is necessarily limited to the usage of the licensee's network. The definition of open access under Section 2 (47), the definition of transmission lines under Section 2 (72) and the definition of dedicated transmission line under Section 2 (16) of the Act - all read together with Section 42 (2) of the Act makes the position clear that open access is inter-related to the distribution system of the licensee.

i) The Commission was wrong in holding that but for the appellant the building owners would have taken their quantum of power from the respondent no.2 and would have paid the consequent cross subsidy surcharge because the Act, 2003 does not provide that a person has to take necessarily electricity energy from a specified licensee.

j) The Commission was wrong in invoking the 'spirit' behind Section 42(2).

k) No surcharge can be levied without the authority of law. In this connection, the decisions in The State of Kerala and Ors. Vs. K.P.Govindan, Tapiocs Exporter and Ors. (1975) 1 SCC 281, A.V. Subha Rao Vs. State of Andhra Pradesh, AIR 1965 State Commission 1773 and Bansal Wire Industries Limited & Anr. Vs. State of Uttar Pradesh & Ors. (2011) 6 SCC 545 have been cited. l) The Commission cannot follow the decision in Aryan Coal Case because in that case, it was held that payment of cross subsidy arises when open access is used. Moreover, the decision in Jindal Steel and Power Ltd. Vs, CSERC and Ors, 2008 ELR (APTEL) 628, OCL India Limited Vs. Orissa Electricity Regulatory Commission, 2009 ELR (APTEL) 0765 and Kalyani Steels Limited, Page 13 of 44

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Karnataka Vs. Karnataka Power Transmission Corporation Limited, 2007 APTEL 895 fortify this position.

m) The Commission did not correctly interpret its own Regulation 11 (6) (b)(2) of the Chhattisgarh State Electricity Regulatory Commission (Intra-state open access in Chhattisgarh) Regulations, 2005.

n) The Commission could not have levied cross subsidy surcharge upon the appellant in the absence of a mechanism to compute the same. The decisions in C.I.T. vs. B.C. Srinivasa Setty (1981) 2 SCC 460 and PNB Finance Limited Vs. CIT -I, New Delhi (2008) 13 SCC 94 have been cited.

o) Cross subsidy is not payable by a generator because the appellant is not a consumer in view of Regulation 14 of the open access Regulations, 2005.

p) The argument of the respondents with reference to paragraph 16 & 17 of the decision in the Aryan Coal case and that cross subsidy surcharge is in the nature of compensatory charge is not acceptable as being devoid of merit.

q) The argument of respondents that the Commission has power to levy cross subsidy surcharge in view of Section 86 (1)(a) and (c) of the Act, 2003 is not acceptable in view of the fact that the Commission was not

determining the tariff under the aforesaid provision of the Act but was adjudicating upon the complaint lodged by the respondent no.2.

r) The Tribunal must not adjudicate upon the issue of legality of providing a power by the appellant to the building owners because that issue has not been appealed against and the Commission did not question such legality. Reference in this connection has been made to the decisions in Badri Narayan Singh Vs. Kamdeo Prasad Page 14 of 44

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Singh and Anr. AIR 1962 State Commission 338, Premier Tyres Limited Vs. Kerala State Road Transport Corporation, (1993) 2 SCC 146 and K.K.John Vs. State of Goa (2003) 8 SCC 193.

10. Ms. Sikha Ohri, learned advocate appearing for the Commission has in her oral submissions elaborated the points canvassed in the written submissions and reiterated the findings made by the Commission in the impugned order, as such repetition of oral submissions is not necessary.

11. The Learned Advocate for the respondent no.2, Mr. Amit Kapur makes the following submissions:-

a) The appellant is supplying electricity at the main receiving panel of the building to the several companies which are all building owners (DLF Group of Companies which own seven buildings in DLF Cyber City) by using its dedicated transmission line. b) There is Energy Purchase Agreement between the appellant and the building owners in terms of which the appellant raises invoices upon the building owners for supply of such electricity and the building owners leased out spaces to various tenants to operate their businesses which implies that consumption of electrical energy is mainly for the use of the tenants and not for the building owners.

c) The building owners pay to the appellant on account of electrical energy.

d) The Delivery/Metering Point for the electricity would be at the main receiving panel (HT/LT) of each of the buildings. This implies that Page 15 of 44

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the distribution of electricity beyond the Delivery Point is sub- distribution of electricity by the building owners. e) The building owners and the tenants have entered into by and between them lease deeds.

f) The building owners are operating and maintaining a sub- distribution system for supplying to the consumers. g) The building owners do not have any license to supply electrical energy to the traders and businessmen occupying spaces of the building owners, nor do they have franchise from any licensee. h) Thus, Sections 12 & 14 of the Act are violated because in terms of the aforesaid two sections, such supply requires a license and in absence of such license / franchise, the appellant or the building owners cannot supply electricity to tenants occupying different apartments in the building in DLF Cyber City on rental basis. i) Though the Commission did not find illegality or violation of any provisions of the Act in the matter of supply of electricity from the generation plant of the DLFU to the DLF group of companies i.e. building owners who are said to be the co-sharers / owners and though such alleged legality has not been questioned in the counter-affidavit of the respondent no.2, the said respondent no.2 is entitled to raise the question as it is a pure question of law which can be raised at any stage in course of the hearing of the appeal particularly when this is not disputed that the distribution of electricity to the tenants happens at the behest of the building owners beyond the delivery point and that lease deeds have been entered into by and between the building owners and the tenants which imply that the ultimate end-users are the tenants who run their commercial establishments through use of such electrical energy.

j) Under Section 2 (16) of the Act, the dedicated transmission lines which a Generation Company can establish can go up to load centre which has been interpreted by this Tribunal in Nalwa Steel and Power Ltd. Vs. Chhatisgarh State Power Distribution Co. Ltd. : 2009 ELR (APTEL) 609 and such load centre can also be a consumer.

k) Thus, if a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers in a particular area then supply beyond the load centre for consumption to a large group of consumers does not become a supply through a dedicated transmission line.

l) It is the settled position of law that in order to ascertain whether the building owners are distributing electricity or not the content and substance of the agreement with all its surrounding circumstance is relevant. The observation of the Commission in this respect is not legal.

m) In terms of Section 9 or Section 10 of the Act, it is open to the generation Companies as also the captive power plant to supply electricity to the end users subject to Section 42 (2) of the Act. Section 42 (2) deals with two aspects namely i) open access and ii) cross subsidy. Open access has not been restricted on the lines of distribution licensee.

n) Cross subsidy surcharge is a compensatory charge and it does not depend upon the use of the distribution licensee's line. It is a charge to be paid as compensation to the distribution licensee irrespective of whether its line is used or not because but for the open access, the consumers would have taken power from a

distribution licensee through a tariff that has an element of cross subsidy.

o) Section 86 (1) (a) read with Section 62 of the Act gives the Commission the power the to determine tariff for generation of wheeling of electricity. Therefore, the appellant cannot question the power of the Commission to determine cross subsidy surcharge which has been done in terms of Regulations 33 of the Tariff Regulations framed by the Commission.

p) Merely because Regulations do not specify levy of cross subsidy surcharge and additional surcharge, the appellant cannot run away from its liability to pay towards its liability on account of cross subsidy surcharge.

q) The appellant suppressed a material fact from this Tribunal to the effect that it had preferred a review application before the Commission against the impugned order dated 11.8.2011 which inter alia held that the appellant does not qualify to be a captive generation plant.

12. As said at the beginning, though the appeal presented a legal question as to whether the appellant which is a company engaged in the generation of electricity is liable to pay cross subsidy surcharge when no open access is availed of by it as it uses its own dedicated transmission line and does not depend upon the distribution network of the respondent no.2, the dimension of the appeal has now been widened in this that in course of hearing of the appeal, the respondent no.2 has also presented a legal point as to whether a generation company, if it is not a captive power plant, or for that matter the building owners can distribute electrical energy to divergent people who are the end users by supply of

electrical energy beyond the load centre up to which it can supply electrical energy through dedicated transmission lines. It was the argument of the learned senior counsel for the appellant that since the respondent no.2 has not preferred any cross appeal and when the Commission upon examination of all the facts has come to the conclusion that supply of energy to the end users who were in this case are tenants under the building owners is not illegal because of such supply being made through dedicated transmission lines, it is no longer open to the respondent no.2 now to question the legality of such finding, as such this Tribunal must restrict itself to the deliberation of the question as to whether when open access is not availed of by the appellant in supplying electricity energy to the occupants under the building owners cross subsidy surcharge is payable in terms of Section 42 (2) of the Act. It has been the counter argument of the respondent no.2 that even though no cross appeal has been preferred by the respondent no.2 it is still eligible to ventilate the point, it being a pure question of law and this Tribunal like the court of appeal in a civil court can traverse apart from the question of fact a question of law too even when such question is not raised because a question of law need not be originated through pleading and when this is a Tribunal to hear appeal under Section 111 of the Act both on the question of fact as well as law the pleading on the question of law is neither necessary nor is it important, rather it being a redundancy altogether.

13. Having heard the learned counsels for the parties, we are firm of the opinion that the argument of the respondent no.2 cannot be brushed aside because it is the settled position of law established through a catena of decisions that a first appellate court, as this Tribunal is,

obligated upon examining both the material questions of fact and law and simply because a finding on law has not been challenged by a party affected by such finding it cannot be said that such a finding of law must escape the scrutiny of the first appellate court particularly when arguments are placed questioning the legality of such finding. This is also so when the finding is the finding of mixed question of fact and law. The Honourable Supreme Court in Chhatisgarh Vidyut Mandal Abhiyanta Sangh Vs. CSERC : (2007) 8 SCC 208 is referable in this connection. In Cellular Operators Assn. of India Vs. Union of India : (2003) 3 SCC 186, it has been held that TDSAT's jurisdiction extends to examine the legality propriety and correctness of a direction / order or decision of the Authority, TDSAT being an expert body is entitled to exercise its appellate jurisdiction both on facts as also in law over a decision of the Authority and the Tribunal's decision on facts and law is final and the appeal lies to the Hon'ble Supreme Court only on substantial question of law. Though a Tribunal can mould its own procedure, the age-old tested fundamental principles enunciated through different provisions of Civil Procedure Code cannot be departed from, and Order 41, Rule 33 that delineates the power of the appellate court is relevant for reproduction:

" Power of Court of Appeal- The Appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require , and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

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Provided that******(omitted as being not necessary)" This Tribunal in New Bombay Ispat Udyog Ltd. vs. MSEDCL: (2010 ELR (APTEL) 653 has held as follows:-

"Provisions of section 120(1) of the Electricity Act,2003 was not enacted with the intention to curtail the power of the Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before the Tribunal. On the contrary, the Hon'ble Supreme Court has clearly held that the words 'shall not be bound by' do not imply that the Tribunal is precluded or prevented from invoking the procedure laid down by the CPC. It further sways that the words " shall not be bound by the procedure laid down by the CPC" only imply that the Tribunal can travel beyond the CPC and the only restriction on its power is to observe the principles of natural justice."

The matter of the fact is that a point of law is not required to be pleaded and a Court of law cannot turn its eye when it is raised at any stage of the proceeding , and the Tribunal is well within its jurisdiction to adopt its own procedure as well as the provisions of the CPC. The learned counsel for the respondent no 2 referred to the decisions in Prahlad vs. State of Maharashtra: (2010) 10 SCC 458, Banarasi vs. Ram Phal: (2003) 9 SCC 606, Gosu Jairami Reddy vs. State of APPEAL: JT 2011 (8)State Commission 263, and Jagadish Singh vs. Madhuri Devi: (2008) 10 SCC 497. Accordingly, the legality of raising the legal issue by the respondent no 2 has to be answered in favour of the respondent no 2 in the light of the above discussion. The decision in Badri Narayan Singh vs. Kamdev Prasad Singh and Anr., AIR 1962 SCC 388, as referred to by the learned senior advocate for the appellant is not helpful because the appellant in that case did not appeal against the High Court's Order in the Appeal no.7 confirming the Order of the Election Tribunal setting aside the election of the appellant and on that ground Appeal no.8 was not maintainable. In Premier Tyre Limited Vs. Kerala State Road

Transport Corporation, it was held that the effect of non-filing of appeal against a judgment or decree is that decree becomes final and cannot be taken away. This is a brief judgment but it has reference to Badri Narayan Singh. These two decisions relate to matter of fact in different suits, while in our case, it was the question of law that was raised in course of hearing of the arguments. K.K. John vs. State of Goa (2003) 8 SCC 193 is in a different fact situation not applicable to the present case. Learned senior advocate for appellant refers to State of Kerala Vs. M/s Vijaya Store, (1978) 4 SCC 41, but there the question was raised whether the Tribunal had power to enhance assessment when no cross objection by the department was filed praying for enhancement. This decision is not helpful to us. The decision of the Delhi High Court in Satish Kumar Vs. Prem Kumar : MANU/DE/2423/2008 was one under the Hindu Succession Act. Similarly, the decision of the Allahabad High Court in Chitranjan Singh vs. Samarpal Singh : MANU/UP/3416/2011 is a case under Small Causes Court Act and it is not understood as to how these decision become relevant to the case of the appellant. The Vodafone International Holdings B.V. vs. Union of India and Another reported in [2012] 341 ITR 1 (SC) is a very lengthy decision relating to capital gains and capital asset of a corporate entity under Income Tax Act and we do not think that this decision has any manner of application so far as the ratio of the decision is concerned.

14. We, however, do not attach too much of importance to the submission of the learned Counsel for the respondent no 2 to the effect that the appellant suppressed the fact it had filed a review petition before the Commission against the impugned order dated 12.08.2011 particularly in view of the fact that the appeal encompasses in it all

questions of facts and law though , of course, non- disclosure was unfortunate and must not have happened.

15. Let it be said at the outset that the issue raised in the Memorandum of Appeal and the issued raised by the learned counsel for the respondent no-2 in course of hearing of the appeal are not too remote from each other in as much as the answer to both the issues are available from thorough reading of Sections 9, 10, 42 read with Section 2(15), 2(16), 2(72) amongst other provisions of the Act. Since as a judicial body, we are inclined to follow the precedents, it can be said at the beginning itself that both the issues are covered by the four decisions of the Tribunal namely M/s Jindal Steel and Power Ltd. Vs. Chhatisgarh State Electricity Regulatory Commission 2008 ELR (APTEL) 0628, Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Ltd., Raipur, 2009 ELR (APTEL) 060, Chhatisgarh State Power Distribution Ltd. Vs. Aryan Coal Benefactions Pvt. Ltd. and Anr. 2010 ELR (APTEL) 0476 and Chhatisgarh State Power Distribution Ltd. Vs. Salasar Steel & Power Ltd. & Chhatisgarh State Electricity Regulatory Commission 2010 ELR (APTEL) 0616. The Jindal decision was rendered on 7.5.2008, Nalwa Steel was rendered on 20.5.2009, Aryan Coal came into being on 9.2.2010 and Chhatisgarh State Power Distribution Ltd. Vs. Salasar Steel & Power Ltd. was pronounced on 28.4.2010.

16. For proper appreciation of the issues involved in the appeal, we are further to observe that the Jindal Steel which was first in the series in this connection had occasion to deal with the question as to whether

JSPL which set up a captive power plant at Raipur required a distribution license in the face of provision of Section 10 (2) of the Act and this was dealt with at Paragraph No. 48 onwards. It transpired from this case that a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wanted to supply electricity to a large number of consumers not through dedicated transmission line. In Nalwa, the scope and ambit of dedicated transmission line was considered after considering the second proviso to Section 9 (1) read with Section 42 (2) of the Act. The Aryan Coal Case which directly answers the issue raised by the appellant in the appeal and which was third in the series of the four judgments as aforesaid had occasion to consider both Jindal and Nalwa with approval. The last mentioned case decided on 28.4.2010 again considered the question whether levy of cross subsidy surcharge is permissible even when dedicated lines are used but without availing of the open access and this decision refers to again Aryan Coal Case and also OCL India Ltd. vs. OERC. Accordingly, a composite treatment for both the issues is called for particularly when concerning both the issues, the learned counsel for both the parties relied upon the same judgments but according to their own ways.

17. Having said as above, the first question is whether the appellant, a generation company, is liable to pay cross subsidy surcharge even when no open access has been sought for and availed of and the distribution network is not used of the distribution licensee. The bare undisputed facts are that there are seven commercial buildings owned by DLF Group of companies which are being provided by the DLF Utilities Ltd. and admittedly the building owners have let out their respective

accommodations to various commercial establishments who have been carrying out their commercial venture through use of the electrical energy supplied to them by virtue of bilateral agreements entered into by and between the building owners and such lease-holders/ tenants. The building owners may be the co-owners

/shareholders of the appellant's power plant but the ultimate end-users of electricity generated by the appellant's plant are the tenants. That the generation plant of the appellant does not qualify itself to be captive power plant in view of the fact that 51 % of the power so produced by the appellant is not used by the appellant but by the commercial establishments using the spaces as tenants admits of no dispute in view of rule 3 (1) of the Electricity Rules, 2005. Use of not less than 51% of the aggregate electricity generated in such plant determined on an annual basis is one of the legal criteria for a generating plant to be a captive user. It is not a case that the appellant is a special purpose vehicle formed in terms of rule 3 (1) (b) of the Electricity Rules, 2005. It goes undisputed that by virtue of energy purchase agreement between the appellant and the building owners the appellant raises invoice on the building owners and the said agreement disclosed that building owners have leased out their respective spaces in the buildings to various persons / establishments who have undertaken commercial ventures for commercial gain. The simple fact is that as the appellant is paid for supply of electricity to the building owners, the latter are being paid for in turn by the tenants.

18. Keeping these broad facts in mind it is necessary to examine whether cross subsidy surcharge is payable for supply of electricity even if such supply is made through dedicated transmission line. Though transmission lines and dedicated transmission lines are not one and the

same the definition of dedicated transmission lines as it occurs in Section 2 (16) of the Act requires mentioning:

"(16) dedicated transmission lines means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plan referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be."

Therefore, a generating company using dedicated transmission line can go upto any transmission lines or sub-stations or generating stations or the load centre. For continuation of the discussion reference to Section 9 & Section 10 will be necessary. These two sections are reproduced below:-

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

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

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

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

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

10. (1) Subject to the provisions of this Act, the duties of a generating

company shall be to establish, operate and maintain generating stations, tie-lines,sub-stations and dedicated transmission lines connected herewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

(3) Every generating company shall -

(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority;

(b) co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

Section 42 (2) with its four provisos are reproduced below:-

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

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

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

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

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

Thus, it is seen that both the generation company and captive power plant can supply electricity to the end users through dedicated transmission lines and Section 10 (2) clearly provides that supply to any consumer even through dedicated transmission lines is subject to sub-

section (2) of Section 42 of the Act, and Section 42(2) refers to cross subsidy. Open access, though it is commonly presumed to have co- relation with cross subsidy a closer look at the said section read with the decision Aryan Coal case of this Tribunal rendered hitherto before on this point and in this connection has made the position clear that even though open access may not be used by a generation company cross subsidy

is leviable upon it in favour of a distribution licensee as a compensatory charge. The logic behind such provisions is that but for the open access the consumers would have taken electrical supply from the licensee. The decision in Aryan Coal Case is relevant in this connection.

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"12. The perusal of these Sections would make it clear that the first and 2 proviso to Section 9 when it is read together would clearly envisage for the supply of electricity generated to any consumer subject to regulations made under sub-section 2 of Section 42. Similarly, subs-section 2 of Section 10 also would envisage for the supply of electricity by a generating company to a consumer by a generating company to any licensee in accordance with this Act and the rules and regulations made thereunder and subject to the regulations made under sub-section (2) of Section 42. While the proviso to section 9 uses the expression "the supply of electricity by generating plant through the grid", there is no such qualification provided for in sub-section 2 of section 10. Thus, these sections would make it evident that it is open to the generating company as well as captive plant to supply electricity to end users.

13. Further the consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the Act. Similarly, the transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It is well settled in law that what is not barred or what is not prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. The following is the relevant portion of observations made by the Hon'ble Supreme Court in the case of Suresh Jindal Vs BSES Rajdhani Power Ltd. - (2008) Vol-1 SCC 341. "Section 20 operates one filed namely, conferring a power of entry on the licensee. The said provision empowers the licensee inter-alia to alter a meter which would include replacement of a meter. It is an independent general provision. In the absence of any statutory provision, we do not see any reason to put a restrictive meaning thereto. Even under the General Clauses Act, a statutory authority while exercising the statutory power may do all things which are necessary for giving effect thereto. There does not exist any provision in any of statutes referred to hereinbefore which precludes or prohibits the licensee to replace one set of meter by another."

14. It can not be disputed that when the power plant from which electricity is made available is a captive power plant, no cross subsidy charge is payable. In the same way, if it is not a captive power plant then the cross subsidy is payable. Since Aryan Plant was not paying cross subsidy surcharge, on the finding that it is not a captive power plant, the Aryan Plant had been asked to pay the cross subsidy surcharge for the past use, especially when the plant itself filed an application before the State Commission in Petition No. 11 of 2008 stating that it was prepared to pay the cross subsidy surcharge.

15. The Distribution licensee cannot have any grievance in regard to the order directing the Aryan Plant to pay the cross subsidy charge towards the past use, since the Distribution Licensee in fact is actually benefited, since it is getting cross subsidy surcharge which is higher than the parallel operation charges which was being paid earlier. Once it is held that the generating plant was not operating as a captive generating plant then there was no liability to pay parallel operation charges.

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.

18. In this context, the next question that would arise for consideration is whether the generation plant can use its own dedicated transmission line to supply power to its own coal washeries without obtaining open access. This point has been held in favour of the generating plant by this Tribunal in Nalwa Steel & Power Ltd. Vs CSPDCL & Anr. [Appeal No. 139 & batch - 2009 ELR (APTEL) 609] dated 25.5.2009. In this decision it has been held that the dedicated transmission line can be laid by generating company to the place of consumption of the consumer when a place of consumption is a load centre. This is also held valid in another decision in Appeal No. 10 of 2008 on 22.9.2009 in the case of Dakshin Gujarat Vidyut Vitran Nigam Ltd. Vs. Gujarat Electricity Regulatory Commission."

It is also relevant to refer to the decision in Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Co. Ltd. : 2009 ELR (APTEL)

609.

"11) The new Act envisages grant of transmission license. The new Act also envisages supply by the generating company and the captive generating

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company to a consumer. When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of, if no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term 'subject to' is interpreted to mean 'only under' it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on complying with the relevant rules and on payment of the required charges and not that even if the existing lines are too far away, the generating company cannot directly supply to a consumer.

12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16) means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of load and not an individual industry/factory as consumer. According to Mr. Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr.Ramachandran. A dedicated line can go, admittedly,

from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed dedicated transmission line when we treat the point of consumption as a 'load centre'. In other words, a single consumer can be a load centre. A dedicated transmission line can go from the captive generating station to a load centre and such load centre can also be a consumer. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a generating station under Section 10 of the Act. In this view one may say that a generating company may need license to supply to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it. JSPL is supplying from its captive generating plant to Nalwa for which it needs no license."

The above decision leads us to the position that a generating station can supply electricity on sale to a consumer through dedicated transmission lines upto the load centre which may mean a single consumer subject to Regulations framed under Section 42 (2) of the Act. What is noticed is that in the case at hand the generation company is supplying electricity to a group of consumers on commercial basis which in fact amounts to use of distribution system which has been defined in Section 2 (19) as "distribution system means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers."

19. The Jindal Judgment which has been extensively considered in the Aryan Coal Case requires to be quoted because it covers both the issues mostly. We quote Paragraph 48 to 52 of this decision as follows:-

"48) We can now proceed to examine to what extent the JSPL's supply to the Industrial Park can be held to be permissible activity by virtue of section 10(2) of the Electricity Act 2003. We have already extracted section 10(2) in paragraph 24 above. It allowed a generating company to supply electricity to any licensee or to any consumer. It further prescribes that supply to the licensee will be in accordance with the Act, Rules and Regulations made under the Act. It says further that supply to a consumer will be subject to the Regulations made under sub-section 2 of section 42. The Act does not make supply as a licensed activity. But how does a generating company supply? "Supply" in the Electricity Act 2003 has been defined as sale of electricity to a licensee or consumer. Section 2(70) provided the definition of "supply" which is as under: "2(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer."

49) A sale can be done at bus bar of the generating company. If it is so done, a purchaser of power, whether it is a licensee or a consumer, has to organize its wheeling up to the load centre. However, if this function is not undertaken by a consumer then the wheeling or carrying of electricity from the generating station up to the load centre has to be done either by a licensee or by a generator. Section 12 speaks of license for transmission, distribution and trading. The transmission and distribution can be done only by a licensee. A transmission licensee cannot reach upto the load centre. In order to reach the loads centre the generating company can take the help of a distribution licensee by using the distribution system of the distribution licensee. Here we

may briefly say that 'distribution' is not defined in the Act although distribution licensee, distribution main and distribution system have been defined in section 2 (17), (18) and (19). Distribution system means the wires and associated facilities between the delivery points on the transmission lines or generating station connection

and the point of connection to the installation of the consumer. The distribution licensee operates and maintains a distribution system for supplying electricity to the consumer. "Transmission" on the other hand is defined in section 2(72) as under: "2(72). "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works."

50) In view of this definition, transmission lines cannot be any essential part of the distribution system of a licensee and would not reach the load or installation of a consumer.

51) The generating company can reach the consumer for "supplying" electricity through dedicated transmission lines as defined in section 2(16). Section 10(1) says that the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected therewith. The "dedicated transmission lines" as defined in 2(16) is as under: "2(16). "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub- stations or generating stations, or the load centre, as the case may be;"

52) Thus dedicated transmission lines which the generating station can establish can go upto the load centre. Therefore, a generating station can sell electricity to a consumer through dedicated transmission lines upto the load centre. However, if the generating company, instead of establishing a dedicated transmission line from its generating station upto a particular load centre wants to supply electricity to a large group of consumers in a particular area then what he requires is not a dedicated transmission line but a distribution system for he is certainly not contemplating to have dedicated transmission line for such consumer. If this is the situation i.e. a generating company intends to supply to a group of consumers but not through a dedicated transmission line, does the intended activity become distribution. In that case section 12 of the Electricity Act 2003 makes no exception for him and he would need a license".(Emphasis ours)

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20. Referring to the decision in Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Co. Ltd, this Tribunal held in Aryan Coal case further as follows:-

"27. The energy can be generated and same can be supplied to the consumer within the premises. Similarly where the electricity is generated at one place it may be transmitted to a place of consumption other than the place of generation. In the former case, it can be consumed through internal wiring. In the later case, there is necessity to lay down electricity line from the place of generation to place of use by using the existing line of the licensee through the open access.

28. In the case of Nalwa Steel & Power Ltd. V CSPDCL & Anr. (Appeal 139/2007 & batch- 2009 ELR (APTEL) 609 at para 12 it has been held that the term load centre can be interpreted to mean that even the place of single consumer can be a load centre.

29. If the said finding which is a ratio is followed, then it has to be held that the dedicated transmission line which is laid for supply from the place of generation to the place of consumption can be used on payment of cross subsidy charges".

21. In Kalyani Steels Ltd. Vs. KPTCL : 2007 ELR (APTEL) 895, it has been held inter alia as follows:-

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

43. As regards fifth point, liability to pay cross subsidy, which cross subsidy is part of the tariff as notified by the Commission to all consumers within the area of distribution of second Respondent distribution licensee so long as the appellant seeking for stand by supply of power, it is liable to pay cross subsidy surcharge and there is no escape. The cross subsidy surcharge, which is an element which has gone in the fixation of tariff, would be compulsory in terms of statutory provision. It is not as if the contractual relationship with the second Respondent is severed. The appellant wants to retain its service connection as a consumer and to draw power depending upon the exigency and for the quantum of power drawn as a standby source, the liability to pay the all consequential charges are automatic. We do not

find any illegality in the methodology adopted by the Commission with respect to determination of cross subsidy surcharge."

22. In OCL India Ltd. Vs. OERC : 2009 ELR (APTEL) 765, it has been held inter alia that the underlying philosophy behind cross subsidy surcharge is that a consumer has to compensate for the loss sustained by the distribution licensee. Thus necessarily open access has not been restricted by Section 42 (2) on the lines of the distribution licensee. It is a compensatory charge payable to the distribution licensee on the logic that but for the open access a consumer would have taken quantum of power from a distribution licensee in which case a consumer was required to pay a tariff that definitely has an element of cross subsidy. Reference to sub-section (2) of Section 42 in sub-section (2) of Section 10 is significant and when the two sub-sections of the two respective sections are read together makes the position clear that while there is no legal impediment for a generation company to supply to any consumer, it is always subject to the provision of sub-section (2) of Section 42. Further, the second proviso to sub-section (2) of Section 42 makes it evident that cross subsidy surcharge is intended to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee. A generation company does not require any license unlike a distribution or transmission licensee to generate electrical energy and may also supply electricity to any consumer. It is noticeable that sub-section (2) of Section 10 has two parts, namely a) a generation company may supply electricity to any licensee; and b) it may supply electricity to any consumer. The words "subject to the regulations made under sub-section (2) of Section 42" as it occurs in sub-section (2) of Section 10 qualifies supply to 'any consumer' . Therefore, when a generation company makes supply to any consumer,

such supply is always subject to the regulations made under sub-section (2) of Section 42 which, as held in the Aryan Coal case, means that irrespective of whether open access is used or not, it is liable to pay cross subsidy

and a conjoint reading of Section 10(2) and Section 42 (2) implies that cross subsidy surcharge is payable not only when open access is availed of but also when supply is made by a generation company to a consumer, or else there would not have been any reference to Section 42 (2) in Section 10 (2). The fourth proviso to Section 42(2) further makes it clear that 'such surcharge' is not leviable in case of captive generating plant using open access for carrying the electricity to the destination of its own use. That the appellant is not a captive generating plant, that the ultimate user is not the captive generating plant and that the ultimate users are the commercial establishments admit of no dispute. In the Aryan Coal case, the identical question was raised to the effect as to whether the plant was liable to cross subsidy surcharges for the past use of the electricity generated by it for supply to its own coal washeries to the distribution licensee and consequently the parallel operational charges which were paid earlier by the plant to the distribution licensee shall be adjusted towards the cross subsidy surcharges for the past use. It was held that as consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the law, transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It was clearly held in Paragraph 16 that Section 42(2) cannot be read in a manner as if open access is only intrinsically related to the lines of the distribution licensee as a generation company is legally enjoined to supply electricity to a consumer. It has its own fetter in this that such supply is limited and qualified by Section 42(2).The learned senior advocate for the appellant Page 35 of 44

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refers to paragraph 61 of the decision in Jindal Steel to argue that in that case it was clearly held that the provision of section 42(2) would be attracted only when the access through the existing distribution system is sought, and when no such access is sought the question of application of section 42(2) will not arise. Apparently, it would seem that the observation runs counter to the decision in Aryan Coal case, but it must not be missed that in Jindal Steel case the question was whether JSPL was governed by section 9 or by section 10 of the Act, and the Tribunal held that it was a captive power plant under section 9 of the Act. So far as the issue in the present appeal is concerned, there is no conflict between Jindal Steel and Aryan Coal. The argument of the CSEB was that the supply from a CPP or even under section 10 (2) is permissible only when the same is made by use of the grid or the transmission lines of the distribution licensee by use of open access, and unless open access is availed of supply cannot be made. This contention was negated by the Tribunal holding that it will not be correct to say that even if electricity generated by a CPP or a generation company can be supplied to a consumer without the use of the grid such a supply will not be permissible. The observation was made in that context. What has been provided in sub-section(2) of section 9 has been incorporated through amendment by the Amending Act 26 of 2007 with the qualification that in case of a captive generating plant no license is required for the purpose and the Tribunal after discussing the effect of amendment in section 9 of the Act vis-s vis section 10 held that section 10 even before the aforesaid amendment did not allow distribution.

23. The second question of law canvassed only during the course of argument by the respondent no.2 as to whether any illegality or violation of any provisions of the Act does occur in the matter of supply of Page 36 of 44

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electricity from the generation plant of DLFU to the DLF Group of companies who were building owners goes to the root of the matter Taking a cue from the decision in Nalwa Steel and Power Ltd. vs. CSPDCL and Anr. (Appeal No.139 of 2009), the Commission held that if a consumer can be a load centre then a generation company can supply electricity over a dedicated transmission line to such a consumer or a load centre without any license and accordingly no provision of law is violated. Learned senior advocate for the appellant makes the submission that if supply to the building owners is opposed on the ground that it amounts to the character of distribution then the express provision of Section 10(2) is violated and the Commission has rightly held that such supply is legally justified. Necessarily, the question arises as to the scope and ambit of the concept of

'dedicated transmission line'. We have seen in Section 2(16) that a dedicated transmission line as opposed to transmission lines is electric supply line for point to point transmission for the purpose of connecting electric lines or electric plants of a captive generating plant or a generating station to any transmission line or sub-station or generating station or the load centre. Load centre has not been defined in the Act or in the Regulations. It is true that in Nalwa Steel and Power Ltd., it has been held through interpretation of Section 10 read with Section 2(16) by this Tribunal that the dedicated transmission line can go up to the load centre and such load centre may be the point of consumption or point of destination. It is important to notice that the Tribunal held that a view is possible when one says that a generation company may need license to supply to a consumer through a dedicated transmission line. This observation was made of course after rejection in that case of Mr. Ramachandran's argument that a load centre cannot be consumer because in that case Section 10 would permit a generation company to reach a consumer through such Page 37 of 44

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dedicated line which will amount to distribution which is impermissible under the law. Rejection of the argument was made on the basis of the definition of the dedicated transmission lines which comprised amongst others a load centre. We, therefore, can now say that a generating station can sell electricity to a consumer through dedicated transmission lines. Now, the question arises whether a dedicated transmission line still remains a dedicated transmission line if a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers covered under the area of a distribution licensee. In Jindal Steel and Power Ltd. vs. Chhatisgarh State Electricity Regulatory Commission: 2008 ELR (APTEL) 628, this question has been answered as above. It is only to be noticed that in the Jindal Case this Tribunal noticed and traversed the distinction between the second proviso to Section 9 which came by way of amendment and the provision of Section 10(2) to observe that JSPL's function does not extend to distribution in the name of dedicated transmission line under the law.

24. The point is raised to the effect that Regulation 14 of the Terms and conditions for Open Access for Intra-State Transmission and Distribution System Regulations, 2005 (Open Access Regulations, for short) notified by the Haryana Electricity Regulatory Commission on 19.5.2005 does not speak of levy of cross subsidy surcharge upon a generation company when such company supplies electricity to a consumer without use of open access and only through dedicated transmission line. It is argued that when Section 10(2) speaks of "subject to the regulations under Section 42(2)", there cannot be levy of such surcharge in the absence of regulations. It has been rightly argued Page 38 of 44

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by the learned counsel for the respondent no.2 that when statute clearly provide that supply by a generation company to a consumer is subject to levy of cross subsidy surcharge under Section 42(2) absence of regulation which in effect is supplementary to the statute is of no avail. When a consumer receives supply from a distribution licensee, it makes payment according to a tariff which definitely has an element of cross subsidy; as such it cannot be argued that when the same consumer is supplied electricity directly by generation company, it is exempt from paying any amount that would not have partaken of the character of cross subsidy surcharge. The law does not contemplate any such situation where two consumers located in the same area would be discriminated against each other. Therefore, we do not find any fault with the finding of the Commission in this respect.

25. It may be logically conceivable to say that a load centre can be consumer in view of a generation company having power to reach a consumer through dedicated transmission line, though of course a consumer means under Section 2(15) a person receiving electricity by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public in terms of the Act, 2003. The factuality suggests that there remains no problem when the appellant is supplying electricity at the main board of each of the

seven buildings to the respective building companies, but the core of the issue is whether the building owners can in turn supply electricity to the individual occupants / owners of the apartments in that building without any license or a franchise to distribute or supply electricity. It is the individual occupants of the buildings who occupy different spaces in the

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apartments to promote their commercial ventures and they receive electricity from the building owners in lieu of payments made to them who in turn have entered into the agreements with the appellant for the purpose. This, in fact is distribution beyond the load centre which does not come within the purview of dedicated transmission line. In Jindal Steel there is a reference to a decision of the Supreme Court in A.P. Gas Power Corporation Ltd. vs. A.P. State Electricity Regulatory Commission; JT 2004 (3) 600 where the Hon'ble Court had occasion to deal with the provisions relating to licensee under the Andhra Pradesh Electricity Reforms Act. The Supreme Court held that while no license was required to be taken by a generation company consuming electricity generated by itself but when the question comes with regard to supply of sister concern, it was held that the sister concerns were independent entities and supply to them would amount to supply to a non- participating industry and it would be necessary to have license under the relevant provisions of law. In K. Raheja Corporation Pvt. Ltd. Vs. MERC 2011 ELR (APTEL) 1170, the facts were exactly similar and there the building owners receiving electrical energy at a single point were distributing electricity to numerous traders /businessmen running their commercial establishments by occupying different spaces of those buildings without having their separate meters without liability to pay charges to a distribution licensee or any franchise. We may reproduce Paragraph 21 of this judgment in this connection which will be relevant.

" If according to the learned counsel for the appellant, sub-distribution of electricity to the occupants of a building by the owner or consumer of such building is not unlawful then the provision of Sections 12 and 14 would be nugatory and self-defeating. Learned counsel for the appellant reads the definition of "consumer" in conjunction with the definition of 'person'. So far so there is no harm ,but he is mistaken when he says that a consumer includes a group of consumers. A consumer may mean Page 40 of 44

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a person, and a person may mean a company or a body corporate or association or body of individuals whether incorporated or not or artificial juridical person but the concept of consumer does not extend to a situation where number of end users each living separately in a building and connected to consumer or owner of a building are conjoined together. A body of individuals is comprised within the definition of 'person' but such body of individuals cannot be construed to mean a countless number of independent end users who do not form a body of individuals. The word "group of consumers' is absent in the definition of the word 'consumer'.*****. A consumer does not include a group of consumers in terms of the definition. If a consumer upon receipt of electrical energy distributes such energy to different end users according to their need and if such end users are not consumers within the meaning of the Act and they are charged tariff or fee for such consumption of electrical energy with which a distribution licensee is not concerned then the question may arise definitely whether such distribution of power to different end users within a complex in lieu of a tariff or fee charged by a consumer would amount to unauthorized sale of electricity. A consumer receives electricity only "for his own use" and this excludes a situation where a consumer can on receipt of electrical energy sell a part of that energy or the entire energy itself to different people for their respective consumption. It is only for HT VI category consumer, namely, Group Housing Society where perhaps such single point supply is permitted. Thus, a consumer cannot have his own distribution system for distribution of electrical energy in turn to his tenants/occupiers/users etc. The concept of dedicated distribution facility cannot be invoked in the circumstances of the case.

Thus supply to a consumer through a dedicated transmission line is not objected to but what is objected to is supply to numerous persons in the name of dedicated transmission line but beyond the same in furtherance of commercial interest of the building owners who let out their spaces to their tenants / lessees.

26. It is now necessary to refer to certain decisions cited by the learned senior advocate for the appellant and before we do so we have to observe that the concept of open access is not necessarily limited to the usage of the licensee's network. Whoever a consumer may be,

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supplied by a generation company to a consumer is subject to the provisions of Section 42 (2) read with Section 10(2) and when the law is explicit, it cannot be said with the aid of the decision in "The State of Kerala and Ors. Vs. K.P. Govindan, Tapioca Exporters and Ors., (1975) 1 SCC 281" that no surcharge can be levied without the authority of law. In the reported case, it was held that imposition of administrative charge was without the sanction of the law because the State of Kerala had no power under Section 3 of the Essential Commodities' Act to levy such charge. In A.V. Subha Rao Vs. State of Andhra Pradesh, AIR 1965 State Commission 1773, what appeared was that surcharge as a tax was levied by executive order and not by any law. This is a voluminous judgment against the State of Andhra Pradesh at the instance of 35 appellants in the matter of a Procurement Order. In this case, tax was imposed in the name of surcharge without authority of law. In Bansal Wire Industries Limited and Another Vs. State of Uttar Pradesh and Others (2011) 6 SCC 545, pronouncement was made to the effect that in taxing statute, one has to fairly look at the language. This decision does not appear to be helpful to the appellant because it dealt with the connotation of the expression "tool, alloy and special steels" as occurred in Central Sales Tax, 1956 and the question was whether stainless steel wire was a declared good under that Act. Again, Aryan Coal Case and Jindal Steel are not of any aid to the appellant. So, also is the decision in OCL India Ltd. Orissa vs. OERC (2009) ELR (APTEL) 0765 where it has been held in Paragraph 18 that the underlying philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee. In Kalyani Steels Ltd., it was held that the appellant was liable to pay cross subsidy surcharge for supply to all consumers within the area of distribution of the second distribution licensee so long as the appellant was seeking for standby Page 42 of 44

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supply of power. The facts of the case are slightly different and the ratio of the decision is not commensurate to the arguments advanced by leaned senior advocate of the appellant. In C.I.T. Vs. B.C. Srinivasa Setty, (1981) 2 SCC 460, it was held that goodwill is intangible in nature, insubstantial in form and nebulous in character and denotes benefit arising from connection and reputation and it is an asset of the business. This observation was made while interpreting Section 45 of the Income Tax, 1961. It was held that transfer of goodwill is not subject to income tax under the head "Capital Gains". In PNB Finance Limited vs. CIT-I, New Delhi (2008) 13 SCC 94, the question was whether transfer of banking undertaking gives rise to taxable capital gains under Section 45 of the Income Tax Act and the Supreme Court answered it in the negative. These decisions ,as we read, are not applicable to the facts and circumstances of the case. In J.K. Industries Limited and Others Vs. Chief Inspector of Factories and Boilers and Ors. (1996) 6 SCC 665, the Supreme Court dealt with the question whether in the case of a company running a factory, it is only a Director of the company who can be notified as the occupier of the factory. This decision dealt with how to seek a balance between individual freedom and social control and held that the reasonableness of a provision has to be tested on the basis of the circumstances of training at a particular time and urgency of the evil sought to be controlled. In Haryana Financial Corporation and Anr. Vs. Jagdamba Oil Mills and Anr., (2002) 3 SCC 496, the Court dealt with fairness or otherwise in administrative action.

27. In ultimate analysis, we are to hold two things namely i) the appellant is liable to pay cross subsidy surcharge; and ii) supply to the commercial establishments by the building owners from the main receiving panel (HT/LT) under the guise of dedicated transmission line Page 43 of 44

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is not in accordance with the law and, therefore, has to be stopped. However, to safeguard the interests of the individual and consumers, we direct the Commission to regularise the supply to such consumers by 31st March, 2013.

28. Accordingly, with the observation as above, the appeal is dismissed but without cost.

(V.J. Talwar) (P.S. Datta) Technical Member Judicial Member

Reportable/not-reportable

pratibha

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HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS NO. 33-36, SECTOR – 4, PANCHKULA – 134113, HARYANA

Case No. HERC/PRO- 8 of 2011
Date of Hearing: 29.06.2011
Date of order: 11.08.2011

In the matter of

Petition filed by Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL) through superintending Engineer/ RA, DHBVNL, Hisar vide memo dated 05.10.2010, received in the Commission on 20.10.2010, regarding levying of electricity duty, cross subsidy and additional surcharge on the electricity supplied by the generation plant owned by M/s DLF Utilities Ltd. (DLFU) in the DLF cyber city Gurgaon.

Dakshin Haryana Bijli Vitran Nigam, Vidyut Sadan, Vidyut Nagar, Hisar.

Petitioner

VERSUS

M/s DLF Utilities Limited having its office at DLF Gateway Tower, 7th Floor, DLF City, Phase-II, Gurgaon.

Respondent

Present

1. Ms. Poonam Verma, Advocate for the Petitioner.
2. Shri K.G. Raghavan, Sr. Advocate, Shri V.P. Singh, Advocate & Shri A.K. Gupta, GM/DLFU for the Respondent

Quorum

Shri Bhaskar Chatterjee, Chairman
Shri Rohtash Dahiya, Member
Shri Ram Pal, Member

Order

1. This petition has been filed by Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL), the distribution Licensee for southern circles of Haryana, seeking levy of electricity duty, cross subsidy and additional surcharge on the electricity supplied by the Generation Plant owned by M/s DLF Utilities Ltd. (DLFU) at DLF cyber city Gurgaon to certain Buildings owned by DLF group companies in the cyber city which fall in the area of jurisdiction of the distribution license of DHBVNL.

2. The short facts of the case are as follows:

2.1 DLFU is a company incorporated under Companies Act, 1956 engaged in the business of setting up of energy centers comprising gas / dual fuel based co-generation power plants and vapour absorption machines (VAM) on the surface / basements of commercial / residential complexes for supplying electricity and chilled water for air conditioning. There are seven commercial buildings in which the electricity is being supplied by the generation plant of DLFU. These seven buildings are owned by DLF group companies; hereinafter refer to as "building owners". Four of the seven buildings are owned by DLF Cyber City Developers Limited and the other three buildings are owned by Revkon Partners, Atria Partners and Caraf Builders & Construction Pvt. Ltd. which are all DLF group companies.

The building owners are in the business of letting out space in the buildings to various tenants / companies to operate their business and in terms of lease are required to provide air conditioning, electric supply, water supply, security, horticulture, operation of common facilities etc. to the occupants. For supply of electricity & chilled water (for air conditioning), building owners have entered into an energy purchase agreement with DLFU to set up a captive power plant for them in the basement of the building or near the buildings and supply them electricity and chilled water on payment of tariff / charges as per the agreement. DLFU have accordingly set up 40 MW co-generation plant and a chilling unit at building no. 10 (one out of the seven buildings), energy center, phase –II, Gurgaon. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables upto the main electricity receiving panel (HT/LT) of each building.

The building owners, as stated by DLFU are co-share owners of the generating plant of DLFU having a share holding of around 98.11% of DLFU and together utilize around 80%of the electricity generated by the DLFU's generating plant.

2.2 DHBVNL has taken objection to the supply of electricity from the generation plant of DLFU to the seven building owners through dedicated distribution lines & further to the companies occupying these buildings without obtaining a license stating that the generation plant does not qualify as a captive power plant on account of the reason that 51% of the power produced is not being used by the building owners, the co-share owners of the generation plant, but is being used by the companies occupying these buildings as tenants which is not in line with Rule 3(1) of the Electricity Rules, 2005. DHBVNL accordingly issued a notice dated 17.09.2010 to DLFU directing them to submit an affidavit within seven days along with supporting documents to prove that bonafide consumption of 51% is for its own use.

Not satisfied with the reply of DLFU, DHBVNL filed petition dated 05.10.2010 before the Commission.

3. The petitioner has submitted as under:-

i) The DLF utilities Ltd. (Petitioner has erroneously mentioned DLF limited as owner of the Plant as clarified by the Respondent in the reply) owns and operate a power generation plant of capacity 40MW and has installed 4x5440 KW Gas Turbine, 5x 5225 KW Gas Generation and 7x2000 KVA DG set at Building No. 10, Energy center in Phase-II Gurgaon. The Electricity generated by the plant is being supplied at one point to seven co-share owners of the generation plant viz DLF group companies, which own different commercial buildings, through dedicated distribution lines without using licensee's system. These seven buildings are.

Sr. No.	Buildings	Building Owning Company
1	DLF Building No. 10	DLF Cyber City Developers Limited.
2	DLF Building No. 9A	DLF Cyber City Developers Limited
3	DLF Building No. 9B	DLF Cyber City Developers Limited
4	DLF Square	Revkon Partners (DLF Group Company)
5	DLF Building No. 8	DLF Cyber City Developers Limited
6	DLF Atria	Atria Partners (DLF Group Company)
7	DLF Cyber Greens Building	Caraf Builders & Constructions Pvt. Ltd. (DLF Group Company)

ii) DHBVNL holds distribution licensee in the southern circles of Haryana including the area in which above buildings are located. These buildings are occupied by commercial consumers which in normal course of power being supplied by the licensee would be cross-subsiding other categories of consumers. Illegal supply to these commercial consumers is adversely affecting the revenue flow of the Govt. (in the form of electricity duty) and DHBVNL (in the form of revenue from sale of power).

iii) End users of electricity generated by DLFU's generation plant are the companies occupying the buildings and not the DLF group companies (building owners) who are co-share owners in the generation plant. The building owners have rented / leased out these buildings to various companies. Hence, the supply from the plant does not qualify as captive use and is a case of sale of electricity for which a license is required. Accordingly, a show cause notice has already been issued to M/s DLF on 17.09.2010 (copy attached with the petition).

iv) Since the supply of power from M/s DLFU to the seven commercial buildings does not qualify for captive use, the charges like ED, cross subsidy and additional surcharge should be levied on M/s DLFU as an interim relief to DHBVNL till the time the issue of legalities of supply is settled by the appropriate authority.

v) It is pertinent to refer to HERC order dated 02.08.2010 regarding supply of power from captive plant of Maruti Suzuki Limited to their ancillary units and HERC order dated 25.08.2010 regarding supply from IOCL's captive plant to Cryogenic Oxygen and Nitrogen Plant, built , owned & operated by a Belgian Company located

within the premises of IOCL's Naphtha Cracker Complex. In both the cases, HERC had ordered levy of cross subsidy surcharge and additional surcharge to compensate the licensee for revenue loss on account of consumers in licensed area getting supply from a third party (not from the licensee or own captive plant).

vi) Because of DLFU supplying power from its plants to various independent commercial establishments in DLF group companies' owned buildings, the licensee is losing a large number of key consumers located in its licensed area of supply thereby losing revenue generated through cross-subsidy from such consumers. The cross-subsidy helps the licensee to fulfill its social obligation of supplying power to all consumers at a reasonable tariff based on their capacity to pay.

The Petitioner in view of above submissions has prayed as under:-

a) Levy cross- subsidy and additional surcharge to M/s DLF Limited on the electricity supplied from the plant from its date of commissioning as determined by the Commission under section 42 (2) of the Act.

b) Levy electricity duty to M/s DLF Limited, as determined by the State Govt.

4. In their reply, filed on 16.12.2010, DLFU submitted as under:-

i) To enable the Commission to decide the present dispute in a fair manner, the factual position has been set out herein below:-

a) DLFU has a generation plant which supplies electricity to certain buildings owned by DLF group companies through dedicated transmission lines. For the supply of electricity, DLFU has entered into Power Purchase Agreements with each of these DLF group companies, in terms whereof electricity is supplied by DLFU to these companies who alone are responsible for the payment to be made to DLFU for such supply. In other words, the risk and title of the electricity supplied is passed to the DLF group companies (Building Owners) and the PPAs of DLFU had nothing further to do with supply by such companies to their tenants.

b) The said DLF owned companies or buildings owners, are co-owners of the generation plant of DLFU having a shareholding of around 98.11% of DLFU

and they utilize around 80% of the electricity generated by the DLFU generation plant.

c) The building owners are engaged in the business of leasing out space to various tenants to operate their businesses and in terms of lease, are required to provide fully serviced space with electricity, air conditioning, lifts, fire fighting, water supply, horticulture, security etc to the tenants. The building owners are thus utilizing the electricity supplied from the generation plant of DLFU for their business (of providing world standard office space with 24 hours electricity) i.e. "for own use".

d) The building owners are co-owners of the generation plant to the tune of more than 26% and consume more than 51% of electricity.

Therefore, the generation plant of DLFU is clearly a captive generation plant, within the meaning of rules/ regulations framed under Electricity Act, 2003, which uses its own dedicated transmission lines for supply of electricity.

ii) Question of paying cross subsidy surcharge or additional surcharge as determined under section 42 (2) of EA, 2003 would arise only in the event open access is sought and in the event no open access is sought, as in the present case, section 42 (2) is not applicable. This position has also been up held by APTEL in the case of Jindal Steel & Power Ltd. V/s CSERC, ELR (APTEL) 628 wherein it was held as under:-

> *"….The provisions of Section 42 (2) would be attracted only when the access through the existing distribution system is sought. When no such access is sought the question of application of Section 42 (2) will naturally not arise".*

iii) Generation plant being a captive plant is exempted from payment of electricity duty.

iv) Reliance of DHBVNL on HERC orders in case of IOCL and Maruti Suzuki Ltd.(MSL) is not valid, as the said orders of Commission rely on admission / willingness of the parties and hence cannot be considered as precedent, a fact also up held by the Supreme Court (AIR- 2007 SC- 2640).

5. The petitioner, DHBVNL, thereafter, filed a detailed rejoinder vide letter dated 26.04.2010 rebutting the claims / arguments of the respondent made in their reply to the petition which further stated that:-

i) Recently, it has come to the notice of the Nigam that DLFU have also started supplying to M/s Ambience Developers & Infrastructure Ltd. (Ambience Mall), Gurgaon without obtaining any permission/ clearance from Chief Electricity Inspector (CEI), Haryana or from the distribution licensee and in doing so has contravened Regulation no. 43 of CEA Regulations (Measures relating to safety and electric supply)'2010. As such, a penalty of Rupees One Lakh has been imposed on them by Electrical Inspectorate, Haryana. Further, another consumer M/s Microtek Forgings (Unit of Bajaj Motors Ltd.), Gurgaon has submitted an open access application for supply of electricity from DLFU. These cases further substantiate that M/s DLFU is involved in selling of supply of electricity.

ii) In parawise reply, DHBVNL have rebutted DLFU's submissions / arguments and have reiterated that

- DLFU's generation plant is not a captive power plant
- Both cross subsidy and additional surcharge are applicable even if the distribution system of DHBVNL is not used by DLFU under open access.
- Decisions of the Commission in case of Maruti Suzuki Ltd. and IOCL are not based on any concession given by MSL/ IOCL. Besides, in both the cases, the generation plants are captive power plants and supplying surplus power to other consumers.

6. DLFU thereafter filed an additional affidavit on 21.06.2011 and submitted point wise reply/ response to the issues raised by DHBVNL in its rejoinder.

7. Public Proceedings

i) Before proceeding further the Commission thought it appropriate to give a hearing to both the parties to further elicit their views for coming to any decision in the case. Accordingly, the Commission heard the parties in the hearings held on 17.02.2011and 29.06.2011. In the hearing held on 17.02.2011, Shri P.C. Gupta,

CGM/ Commercial, DHBVNL appeared for the petitioner. He, by and large, reiterated the submissions made in the petition. Shri K.G. Raghavan, Sr. Advocate appeared on behalf of the respondent. He advanced arguments in line with the reply already submitted on 16.12.2010 as discussed in para 4 above. The learned counsel for the respondent also filed an additional affidavit of Shri R.C. Gupta, General Manager of DLFU stating that the respondent wishes to place on record the following documents to corroborate the contentions set out in DLFU's reply :-

a) DLFU supplies power to its captive users pursuant to an energy Purchase Agreement/ Power Purchase Agreement. A sample copy of such an agreement is annexed herewith as Annexure.

b) The captive users of the plant established by DLFU have a shareholding (with voting rights) of around 98.11% of DLFU. A certified copy of the shareholding pattern of DLFU is annexed herewith as Annexure.

c) The consumption pattern of the captive users of the captive generation plant owned and established by DLFU indicates that the captive users consume 89% (approximately) of the net electricity generated by the DLFU captive generation plant of 40 MW. A copy of a chart reflecting the consumption pattern is annexed herewith as Annexure.

A copy of the affidavit was also supplied to the petitioner. Shri P.C. Gupta appearing for the petitioner sought adjournment for filing reply to the additional affidavit before advancing arguments which was granted by the Commission. The case was posted for final argument on 29.06.2011.

ii) In the hearing held on 29.06.2011, Ms Poonam Verma, Advocate appeared on behalf of the petitioner. She elaborated the points mentioned in the petition and argued at length in support of the claims put forward by the petitioner, which have been discussed while deliberating on different issues involved in this case in the following paragraphs.

8. Commission's Order

8.1 The Commission has carefully considered the submissions made in the instant petition and in the rejoinder filed by the petitioner, DHBVNL, the counter

submissions made by the respondent, DLFU, in their replies to the petition and the rejoinder, oral submissions made by the parties during the hearing, the information / additional information furnished at various stages and the various judgments / orders, copies of which were submitted by the petitioner as also by the respondent during the course of hearing.

The various issues which, arise in this case as per the Commission & require adjudication are:-

(1) Whether the generation plant of DLFU qualifies to be a Captive Power Plant as per the provisions of the Electricity Act, 2003?

(2) Whether any illegality or violation of any provisions of the Electricity Act, 2003 is involved in the supply of electricity from the generation plant of DLFU to the DLF group companies i.e. Building owners, who are co- share owners of the Generation Plant, and further to the tenants / companies occupying these buildings?

(3) Whether DLFU/ Building Owners require a transmission/ distribution license as per section 14 or exemption under section 13 of the Electricity Act, 2003?

(4) Whether the Charges like cross-subsidy surcharge, additional surcharge as per Section 42 (2), 42 (4) of the Act, and Electricity duty as per the Punjab Electricity Duty Act, are payable on the supply of electricity from the generation plant of DLFU?

(5) Whether DLFU can supply electricity from its generation plant to the Ambience Mall in the Cyber City, Gurgaon and whether any charge like cross subsidy/ additional surcharge are recoverable on the same.

Now we proceed to deal these issues one by one in the light of arguments/ counter arguments advanced, the statutory provisions and the various judgments / orders quoted by the petitioner/ respondent.

8.2 Whether the generation plant of DLFU qualifies to be a Captive Generation Plant as per the provisions of the Electricity Act, 2003?

i) Statutory provisions

As per Section 2(8) of the Electricity Act, 2003, "Captive Generation Plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co- operative society or association of persons for generating electricity primarily for use of members of such co- operative society or association;

Section 9 of Electricity Act, 2003 which deal with the captive generation is reproduced below:

> **"9.Captive Generation- (1)** Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:
>
> Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:
>
> Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made there under and to any consumer subject to the regulations made under sub- section (2) of section 42.
>
> (2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:
>
> Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:
>
> Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

The 'Requirements of Captive Generation Plant' as laid down in Rule 3 of The Electricity Rules, 2005 are as under:

> " Requirements of Captive Generation 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 power plant-

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

(ii) not less than fifty one per cent. 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 co- operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co- operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent. of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent. of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent."

(b) Not relevant

In the illustration given below Rule 3 of Electricity Rules, 2005, it has been mentioned under explanation (i) (b) that for purpose of this rule, "captive user" shall mean the end user of the electricity generated in a Captive Generation Plant and the term "captive use" shall be construed accordingly.

ii) It has been contended by the petitioner that 'the generation plant of DLFU does not meet the requirements as set out in section 2 (8) and section 9(1) of The Electricity Act, 2003 (EA) to qualify as a Captive Generation Plant (CGP). The BOs may have the requisite share holding of above 26% in the generation plant of DLFU but they are not the end users of the electricity generated at Plant. The end users of electricity are the tenants/ companies occupying these buildings and operating their businesses'. It has further been contended that 'on one side DLFU claims that BOs are co- owners of the generation plant but on the other hand, M/s DLFU have signed energy purchase / sale agreement with the BOs. If the supply had been for own use of DLFU, there would not be any need for the EPA.

The learned counsel for the petitioner, Ms. Poonam Verma, also referred to Rule 3 of The Electricity Rules, 2005 during the hearing wherein, she said, it has been very clearly laid down that "captive user" shall mean the end user of the

electricity generated in a captive generation plant and accordingly generation plant of DLFU does not qualify to be a CGP.

iii) Shri R.K. Raghavan, learned counsel for the respondents advanced arguments as under:-

- As per the definition of "Captive Generating Plant" in the Electricity Act, 2003, the captive generating plant means power plant set up by any person to generate electricity primarily for his own use.

  In this context, following points needs to be noted.

i) As per legal dictionary, the meaning of "own" and "use" are as follows:

"Own" – to have rightfully or possess as property.

"Use"- the application or employment of something especially, a long continued possession and employment of a thing as distinguished from a possession or employment that is merely temporary. In the context of the above, it is to be noted that (a) the building owners carry on long continued employment of electricity from their captive plant (b) the tenants are on temporary basis.

ii) BO is the only entity which is "using" electricity because it is the entity which has long and continued possession and is consuming electricity on a long term basis.

iii) Only the BO has the right to the electricity generated in its captive power plant.

iv) Electricity is an amenity for the buildings and the BO shall consume electricity irrespective of the fact whether the buildings are occupied by the tenants or not.

From the above, it is clear that the tenants are not in the "own use" category and only the BO meet the "own use" criteria. This fact, coupled with the fact that the BO have more than 26% of the equity in DLFU and consume more than 51% of the power generated in the subject power plant, makes it clear that power plant is a captive power plant.

He further stated that it was pertinent to note that BOs only recover the cost of electricity incurred by them from the tenants of the buildings and there is no commercial gain for the BOs on such expenses incurred by them.

iv) The Commission has examined this issue in detail. It is an admitted fact that no meaning can be assigned to the term 'own use' and 'captive use' other than what has been assigned in The Electricity Act, 2003 or The Electricity Rules, 2005. Hence, the Commission is of the view that the tenants/ companies occupying the

said buildings, do not fit into "own use" category. The building owners also do not qualify as captive users in terms of Rule 3 of The Electricity Rules, 2005 wherein it has been provided that 'a "captive user" shall the mean end user of the electricity generated at the captive power plant'. In this case, the end users of the electricity generated at the DLFU's generation plant are admittedly the tenants/ companies occupying these buildings and not the building owners.

Further, the contention of the respondent, that BOs are in the business of leasing out space to the various tenants to operate their business and in terms of the lease agreement entered into with the tenants are required to provide a package of services to the tenants which interalia also include providing electricity and thus are using electricity supplied by the generation plant for their business i.e. for their 'own use', is also not tenable in the eyes of the Law. Business of the BOs cannot include supply of electricity to the tenants as the same is a licensed activity and has to be subject to the provisions of EA, 2003 and rules and regulations made there under. The DLFU cannot justify supply of electricity by the BOs to the tenants based on the plea that BOs are obliged to supply electricity to the tenants as per the lease agreement signed with the tenants. Moreover, it cannot be considered as part of the package services like security, gardening etc. since the supply of power is through meters and end users are expected to pay as per the consumption recorded by the meter. Hence supply of power stands distinctly separate from other package of services contrary to the arguments so elaborately put up by the learned counsel of the respondent.

v) Besides, from the details furnished by DLFU in respect of total generation at the plant and the energy utilized by each of the building owners during the year 2010-11, it is evident the rule of proportionality of consumption as set out in 2nd proviso of Rule 3 (1) of The Electricity Rules, 2005 is also not being met. For example, Caraf Builders and Developers Ltd. owner of the building DLF Cyber Green, has utilized over 25% of the total electricity generated at the plant in 2010-11 whereas its share holding is only 0.05% as per the detail furnished. So on this ground also, the generation plant of DLFU does not qualify as a captive power plant.

vi) In view of the foregoing discussion we hold that generation plant of DLFU does not qualify to be a captive generation plant but only a generation plant' supply from which is subject to relevant provisions of The Electricity Act, 2003.

8.3 (a) Whether any illegality or violation of any provisions of the Electricity Act, 2003 is involved in the supply of electricity from the generation plant of DLFU to the DLF group companies i.e. Building owners, who are co- share owners of the Generation Plant, and further to the tenants / companies occupying these buildings?

(b) Whether DLFU/ Building Owners require a transmission/ distribution license as per section 14 or exemption under section 13 of the Electricity Act, 2003?

Having held that generation plant of DLFU is not a captive generation plant but only a generation plant which fits into the definition of generation company as per Electricity Act, 2003, we now take up the above two issues together.

i) The arguments advanced by the learned counsel for the petitioner on these two issues are as under:-

a) DLFU / Building owners are operating & maintaining a distribution system for supplying power to the consumers (i.e the tenants in different buildings) which amounts to sale of power and requires a distribution license. The business of building owners should be limited to providing space under lease and other common facilities such as air-conditioning lifts etc. but not supply of electricity which is a licensed activity. As such the supply of electricity by DLFU / building owners to the tenants occupying the buildings is illegal.

b) The terms & conditions of the EPA, entered into between DLFU and building owners, like 'tariff and charges' (Article 6), 'Billing & payment' (Article 7), 'Security Deposit' (Article 8), etc are similar to the terms and conditions of an agreement between a distribution licensee and a consumer which also shows that they are involved in distribution of electricity which requires a license as per Section 12 or an exemption under Section 13.

ii) The arguments advanced by the learned counsel for the respondent are primarily based on the contention that DLFU's generation plant is a captive generation plant, co-owned by building owners & they are bonafide captive users of 80% of the electricity generated at the plant and hence there is nothing illegal in it. But once it has been held that DLFU's generation plant is a non-captive generation plant, the arguments advanced by the learned counsel for the respondents cease to be relevant and supply from the DLFU's generation plant has to be looked at as supply of power by a generating company in the light of relevant statutory provisions of the Electricity Act.

iii) As per Section 7 of the Electricity Act, 2003, a generation company can establish, operate and maintain a generation plant without obtaining a license under the Act. Section 9(1) and 10(1) of the Act respectively provide that a captive generation company as also a generation company can establish, operate and maintain 'dedicated transmission lines'. The definition of 'dedicated transmission lines" is given in Section 2(16) of the Act. Further Section 10(2) of the Electricity Act, 2003 provides that a generation company may supply electricity to any consumer subject to the regulations made under sub- section (2) of section 42 of the Act. The relevant sections of the Act, except for section 9, already reproduced in para 10.2, are reproduced below for ease of reference.

> **"7. Generating company and requirement for setting up of generating station**.- Any generating company may establish, operate and maintain a generating station without obtaining a license under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73.
>
> **10. Duties of generating companies – (**1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made there under.
>
> (2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made there under and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer'.
>
> **2 Definitions**
>
> **(16)** "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in

section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;".

There is no dispute in the fact that operation and maintenance of dedicated transmission lines does not require a license as per section 14 of the Act. The Govt. of India has issued an Order under Section 183 of the Act, namely, The Electricity (Removal of Difficulty) fifth Order, 2005 wherein it has been provided that *'a generating company or a person setting up a captive generation plant shall not be required to obtain a license under the Act for operating or maintaining dedicated transmission lines' .* The definition of 'dedicated transmission line as per section 2(16) of the Act, as is evident, includes any electric supply lines for point to point transmission required for the purpose of connecting a captive generation plant referred to in section 9 or a generation plant referred to in section 10 of the Act to the 'load centre'.

From the above it is clear that both, a captive generation company or a generation company can supply electricity over a dedicated transmission line to a consumer / load centre without obtaining a license as per section 14 of the Act. For interpretation of the term 'load centre', it would be appropriate to refer to para 12 of the Order of the Appellate Tribunal of the Electricity (APTEL) in case of Nalwa Steel & Power Ltd. v. CSPDCL and Anr. {Appeal No. 139 of 2009 ELR (APTEL)} dated 25.05.2009 which is reproduced below.

(12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines. "Dedicated Line" as per Section 2(16). means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centre". *Load centre, it is said is conglomeration of load and not an individual industry / factory as consumer.* According to Mr. Ramachandran, Advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr. Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term "load centre". The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed as "dedicated transmission line" when we treat the point of consumption as a "load centre". *Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a generating station under Section 10 of the Act. In this view one may say that a*

generating company may need license to "supply" to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it."

The term 'load centre' as it appears in the definition of 'dedicated transmission line' has been described by APTEL in the above order as conglomeration of load which implies that a 'load centre' can comprise of a cluster or a group of consumers.

iv) Thus both, captive generation company or a generation company can supply electricity over dedicated electric lines to a cluster of consumers subject, of course, to regulations made under section 42 (2) of the Electricity Act. Whereas in case of captive generation company it has been specifically provided by second proviso to section 9, which was inserted w.e.f. 15.06.2007 vide amendment of 2007, that for supply of electricity to a consumer, a captive generation plant shall not need a license, no such exemption is there in case of a generation company and it need to be delved with whether a generation company would need a license for 'supply' to a consumer.

This issue has also been dealt by APTEL and findings given in its order dated 09.02.2010 in case of Aryan Coal Benefications Pvt. Ltd. v/s Chhattisgarh State Electricity Regulatory Commission and Chhattisgarh State Electricity Board, wherein it has been held that for supply of electricity to a licensee or to a consumer both, generation company as well as captive generating station, are similarly placed and second proviso of Section 9 does not place the captive generating company at a higher position than the generating company. Relevant part of para 31 & 32 of the order are reproduced below:-

"(31) ….. There cannot be any distinction between a mere generating company and a captive generation plant in regard to the supply of electricity. A generating company can equally undertake supply of electricity to any licensee or to the consumer under Section 10 (2) of the Electricity Act. Further, Section 49 of the Electricity Act also clarifies the sale of electricity by a generating company to a consumer. Therefore, the second proviso of Section 9 does not place the captive generating company at a higher position than the generating company in regard to the supply of electricity through a dedicated transmission line. Thus, it is clear that both, the generating company as well as the captive generating station are similarly placed.

(32) If the load centre is the installation of the consumer then both the captive generating station and the generating company can install the dedicated transmission line up to the place of the consumer without the need to obtain any license. Load centre cannot be incorporated as not including the installation of the consumer, if such an interpretation is given, both captive generation plant and generating company

cannot lay down the dedicated transmission line up to the place of the consumer. So it has to be held that under the regulation no license is required to undertake supply of electricity through a dedicated transmission line without using the distribution line of the transmission company or the distribution system of the licensee.

v) In the light of the position brought out above it would be safe to conclude that a generation company is permitted to supply electricity to a cluster of consumers (load centre) by establishing, operating and maintaining dedicated electric lines without the need of obtaining any license.

In this context it would also be relevant to refer to paras 11 & 12, reproduced below, of the APTEL Order dated 09.02.2010 referred to above, wherein it has been held by APTEL that sale of electricity by a captive generation plant and a generation company to the end users is permitted.

'(11). Under the Electricity Act, 2003 both the generating company and captive power plant are entitled to supply electricity to others. *The sale of electricity by captive power plant and the generating company to the end users is also permitted.* This is specifically provided under Section 9 and 10 of the Electricity Act, 2003…….

'(12) The perusal of these sections would make it clear that the first and second proviso to Section 9 when it is read together would clearly envisage for the supply of electricity generated to any consumer subject to regulations made under sub section 2 of section 42. Similarly, sub section 2 of section 10 also would envisage for the supply of electricity by a generating company to a consumer, by a generating company to any licensee in accordance with this Act and the Rules and regulations made there under, and subject to the regulations made under sub section (2) of section 42. While the proviso to section 9 uses the expression "the supply of electricity by generating plant through the grid", there is no such qualification provided for in sub section 2 of section 10. *Thus, these sections would make it evident that it is open to the generating company as well as captive plant to supply electricity to end users.*

In the present case tenants / companies occupying the said buildings are the end users of electricity supplied from the generation plant of DLFU & together they can be said to constitute a 'load centre'. They are being supplied electricity over dedicated transmission lines from generation plant of DLFU, in which the DLF groups companies owing the said buildings hold the majority share. Thus it is a clear case of a generation company supplying electricity over dedicated transmission lines to the end users which is in line with the provision of Electricity

Act, 2003 and no license under the Act is required for the same as has been held by the APTEL in the above refereed Order dated 09.02.2010.

The Commission, therefore, holds that no illegality is involved in the supply of electricity from the generation plant of DLFU/building owners to the tenants / companies occupying these buildings through dedicated electric lines and there is no need of any license for the same under the Electricity Act, 2003.

8.4 Whether Charges like cross-subsidy surcharge, additional surcharge as per Section 42 (2), 42 (4) of the Act, and Electricity duty as per the Punjab Electricity Duty Act, are payable on the supply of electricity from the generation plant of DLFU?

i) As already stated, supply of electricity by a generation company to a consumer under the provision of section 10 (2) of the Electricity Act, 2003 is subject to the regulations made under sub- section (2) of section 42 of the Act. The Commission has notified open access regulations under sub-sections (2,3,4) of section 42 of the Act. These regulations provide for levy of cross subsidy surcharge & additional surcharge, in addition to the transmission charges and wheeling charges, on the consumers availing open access to the transmission system / distribution system of the licensee. The additional surcharge is leviable in terms of sub section (4) of section 42 of the Act. It provides that where a consumer or a class of consumers 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. Sub-section (2) to (4) of section 42 are reproduced below:-

" 42. Duties of distribution Licensee and open access

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

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

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

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:
Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .
(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

ii) Apparently supply of electricity by a generation company to a consumer as per section 10(2) of the Act attracts levy of cross subsidy surcharge and additional surcharge if the supply is made by availing open access to the transmission/ distribution system of the licensee. In the present case, the electricity from the generation plant of DLFU/ building owners is being supplied to the consumers i.e. tenants/ companies occupying the buildings through dedicated transmission lines without availing open access and without using the system of the licensee. These consumers, however, are located in the area of the licensee i.e. DHBVNL. This is also a fact that but for the supply from DLFU's generation plant these consumers would have taken the power supply from the licensee and in the result, would have paid tariff applicable for such supply which would have also included an element of cross-subsidy and thus, would have contributed their share of cross subsidy to meet the overall requirement of cross subsidy in the area of supply of the licensee. The

question, therefore, is whether cross subsidy surcharge and additional surcharge would be leviable on supply of electricity by a generation company to a consumer or consumers under the provisions of section 10 (2) of The Electricity Act, 2003 irrespective of whether open access is availed or not i.e. irrespective of whether the system of licensee is used or not.

iii) The arguments advanced by the petitioner / their learned counsel in this regard are as under:-

a) Generation Plant of DLFU is not a captive power plant and hence cross subsidy surcharge is payable.

b) Cross subsidy surcharge as per section 42 (2) of the Act 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 as a 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.

c) APTEL in its order dated 9.02.2010 in Appeal No. 119 of 2009 in case of Aryan Coal Beneficiation Pvt. Ltd. has held that

i) Cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensees are used or not (para17)

ii) Dedicated transmission lines from the generation plant to place of consumption can be used on payment of cross subsidy surcharge (Para 29).

d) The Commission in its orders in case of Maruti Suzuki Ltd. and IOCL has held that cross subsidy surcharge, additional surcharge and electricity duty are leviable.

iv) The main arguments of the respondent are that:

a) 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 (2) will not be applicable.

b) Reliance placed by the DHBVNL on the finding in para 17 (reproduced later in the order) of the APTEL's order dated 09.02.2010 is misplaced as the said finding is in the context of open access which is not the present case.

c) The above contention of the respondent is further reinforced from the findings of APTEL at para 21 of the said order, wherein it has been held that" *The proviso of Section 42 (2) would be attracted only when the open access through distribution system is sought. When the open access is not sought the question of application of 42 (2) will not arise."*

d) The decision of APTEL in the order dated 09.02.2010 relies on Regulation 11(6) (b) ii of the open access regulations of Chhattisgarh State Electricity Regulatory Commission which provide that *"cross subsidy surcharge shall also be liable by such consumer who receive supply of electricity from a person other than the distribution licensee in whose area the supply is located, irrespective of whether he avails such supply through transmission/ distribution network of the licensee or not."* The decision has misquoted the Regulation. In any event, even if a state regulatory commission has made such a regulation it would be ultra vires of Section 42 (2) of the Act.

e) APTEL in case of Jindal Steel and Power Ltd v. CSERC and Ors. 2008 ELR (APTEL) 628 has, at para 61, held that *"The provision of Section 42 (2) would be attracted only when the access through the existing distribution system is sought. When no such access is sought the question of application of section 42 (2) will naturally not arise."*

f) Utility cannot ask for any compensation if it is not supported by law.

v) In this context it is seen that both, the petitioner as well as the respondent have mainly relied on the findings / observations of the APTEL as given in the order dated 09.02.2010 in case of Aryan Coal in support of their respective contentions. We have closely examined the said order of the APTEL in the light of arguments/ counter arguments advanced by the parties and observe as under:

a) This issue has been examined in depth by the APTEL in this order in the light of various statutory provisions and APTEL's earlier judgments in similar cases.

b) The findings of the APTEL quoted at iv) (c) and (iv)(e) above by the learned counsel of the respondent have been supposedly kept in view by

the APTEL while arriving at the final decision on this issue as these judgments have been referred to in the order dated 09.02.2010.

c) The APTEL has given a very well reasoned decision on this issue in the said order. The relevance paragraphs of the order dated 09.02.2010 are reproduced below:

"(16) Section 42 (2) deals with two aspects; (i) open access and (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."

"(28) In the case of Malwa Steel & Power Ltd. v. CSPDCL and Anr. (Appeal 139/2007 and Batch 2009 ELR (APTEL) 609 at para 12, it has been held that the term load centre can be interpreted to mean that even the place of single consumer can be load centre."

"(29) If the said finding which is a ratio is followed then it has to be held, that the dedicated transmission line which is laid for supply from the place of generation to the place of consumption can be used on payment of cross- subsidy charges."

"(36) in the light of the above discussions, we make the following conclusions:

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".

We are not in agreement with the argument of the learned counsel of the respondent that finding of APTEL in para (17) above is in the context of open access (to the distribution system of the licensee) which is not the present case. In this context, it needs to be noted that the term 'open access' used in para 17 above in the line *'but for the open access the consumer would have taken power*

from the licensee…' apparently refer to open access (to receive power from other than the licensee) without using distribution lines of the licensee. The argument advanced by the learned counsel, therefore, is not tenable

We also do not agree with the argument that decision of the APTEL in this order relies on the regulation 11 (6) (b) (ii) of the open access regulations of Chhattisgarh State Electricity Regulatory Commission. It is an admitted fact that what is not permitted under the Act cannot be part of any regulation. The APTEL has upheld regulation 11 (6) (b) (ii) of the CSERC as the same has been found by the APTEL in line with the provisions of the Electricity Act, 2003.

We are fully in agreement with the decision of the APTEL on this issue as given in para (16), (17) & (29) above as the same, in our opinion, is in line with the spirit behind the second proviso of sub section (2) of section 42.

In view of the above we hold that cross subsidy surcharge is payable on the supply of electricity from the generation plant of DLFU/ building owners to the tenants/ companies occupying the buildings from the date of commencement of supply to each of the buildings.

vi) Regarding levy of additional surcharge we note that DHBVNL have themselves admitted in the rejoinder that 'a plain reading of the Sub section 42 (4) would show that a consumer is liable to pay, additional surcharge only if he is liable to pay wheeling charges and not otherwise'. It has been contended that 'DLFU is not utilizing licensee's system for supply of electricity to avoid payment of wheeling charges; Once it is held that DLFU should supply electricity through licensee's system, they would be liable to pay additional surcharge on the wheeling charges.' We do not find any justification in the above request of the DHBVNL as the same is not supported by the provisions of the Electricity Act, 2003. Supply of electricity from the generation plant of DLFU through dedicated lines without using system of the licensee is permitted under the Electricity Act, 2003. There is, therefore, no ambiguity that levy of additional surcharge shall be attracted only when an existing consumer opts to get supply of electricity from a person other than the licensee.

In view of the above, we hold that additional surcharge is not payable on the supply of electricity from the generation plant of DLFU/ Building owners to the tenants / companies occupying the said buildings.

vii) As far as issue of levy of electricity duty is concerned, the Commission observes that it relates to Govt. of Haryana. The issue of electricity duty is neither covered under the provision of the Haryana Electricity Reform Act, 1997 (No. 10 of 1998) nor The Electricity Act, 2003 (36 of 2003) and hence falls outside the purview of the Commission. The petitioner is free to take up with the State Govt. in this regard.

8.5 Whether DLFU can supply electricity from its generation plant to the Ambience Mall in the cyber city, Gurgaon and whether any charge like cross subsidy/ additional surcharge are recoverable on the same.

i) In view of findings given in paras 8.2 to 8.4 of this order, it is evident that supply of electricity by DLFU from its generation plant to Ambience Mall amounts to supply of electricity by a generation company to a consumer through dedicated transmission line which is permitted under The Electricity Act, 2003 but it will be subject to levy of cross subsidy surcharge. The additional surcharge, however, will not be applicable as the supply is over dedicated line without using licensees system

ii) We, therefore, hold that DLFU can supply electricity from its generation plant to the Ambience Mall in the cyber city, Gurgaon but it is subject to levy of cross subsidy surcharge as determined by the Commission from time to time

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 plan 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 eventuality 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.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 11th August, 2011.

Dated: - 11.08.2011
Place: - Panchkula

Sd/-	Sd/-	Sd/-
(Ram Pal)	(Rohtash Dahiya)	(Bhaskar Chatterjee)
Member	Member	Chairman

Annexure – V

Honda Case

HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS NO. 33-36, SECTOR – 4, PANCHKULA

Case No. HERC/PRO-36 of 2012

Date of hearing: 27.02.2013

Date of order: 09.04.2013

IN THE MATTER OF:

Supply of Electrical Power from Captive Power Source of M/s Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI) to Group Company M/s Honda R&D India Pvt. Ltd. (HRID) located within existing premises of M/s HMSI.

M/s Honda Motorcycle & Scooter India Pvt. Ltd., Manesar, Gurgaon

(Petitioner)

VERSUS

Dakshin Haryana Bijli Vitran Nigam Limited through its Managing Director, Vidyut Nagar, Hisar.

(Respondent)

PRESENT:

On behalf of the Petitioner

1. Shri Suraj Thapa, Honda Motorcycle & Scooter India Pvt. Ltd.
2. Shri Prashant Khurana, Honda Motorcycle & Scooter India Pvt. Ltd.
3. Shri Vinod Bhardwaj, Advocate for Honda Motorcycle & Scooter India Pvt. Ltd.

On behalf of the Respondent

1. Shri K.K Gupta, S.E (RA), DHBVNL, Hisar
2. Shri Hoshiyar Singh, AE (RA), DHBVNL, Hisar
3. Shri Varun Pathak, Advocate for DHBVNL

Quorum

1. Shri R.N. Prasher, Chairman
2. Shri Rohtash Dahiya, Member
3. Shri Ram Pal, Member

ORDER

1. The petitioner M/s Honda Motorcycle and Scooter India Pvt. Ltd., (HMSI) vide their letter dated 23rd October, 2011 intimated that they propose to lease out 2nd & 3rd floors to M/s Honda R & D India Pvt. Ltd (HRID) in their upcoming Technical Center Building in the existing company premises at IMT Manesar, Haryana. They further informed that M/s Honda Motorcycle and Scooter India Pvt. Ltd. is 100% subsidiary of M/s Honda Motor Company Ltd., Japan and that M/s Honda R & D India Pvt. Ltd is 100% subsidiary of M/s Honda R&D Company Ltd., Japan. The letter further stated that HMSI has its own captive power plant of 18.4 MW at IMT Manesar, Haryana & they will be supplying electrical power for office lighting & air conditioning load to the two floors to be occupied by HRID.

   They thus requested the Commission to clarify whether HMSI needs any license to supply electricity through their own dedicated lines to their group company as mentioned above. They further stated that they are also ready to pay any applicable charges determined by the Commission by way of regulations / orders framed / passed in pursuance to various provisions of the Electricity Act, 2003.

   On the above request of the company, the Commission decided to seek comments from the distribution licensee of the area i.e. DHBVNL. As such vide Commission's letter No. 3066/HERC/T-120 (Misc) dated 27.12.2011, the DHBVNL was asked to offer their comments in the matter.

2. The DHBVNL, vide their letter No. Ch.82/SE/RA-230 dated 06.08.2012, offered their comments in the matter which are reiterated below:-

i) Section-3 of the Electricity Rules, 2005 specifies the requirements of captive generating plant as below:-

   "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 per cent. of the ownership is held by the captive user(s), and*

ii) *Not less than fifty one per cent. of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:*

As per the details provided by HMSI, HMSI and HRID are 100% subsidiaries of Honda Motor Company Ltd., Japan and Honda R & D company Ltd. Japan, respectively. With reference to the above said requirements of Electricity Rules, 2005 and information provided by HMSI, it is evident that the HRID (user) is not holding 26% of the ownership in the power plant of HMSI. The said power plant cannot be considered as a captive power plant and, therefore, it is a case of sale of electricity by a generator (HMSI) to a consumer/load centre (HRID).

ii) Honda Motor Cycle & Scooter India Pvt. Ltd. (HMSI) should be requested to submit proper documentation proving that the plant is captive in nature according to Section 9 of the Electricity Act, 2003. If the plant is captive, then the supply of electricity to Honda R&D India Pvt. Ltd. (HRID) by plant of Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI), through their dedicated lines, falls under the purview of above said Section of Electricity Act. In that case M/s Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI), is not required to obtain any license for supply of electricity to Honda R & D India Pvt. Ltd. (HRID).

iii) Para 21 (2) of chapter VI of HERC Regulation No. HERC/25/2012 (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission & Distribution System) notified on 11th January, 2012, specifies the following.

"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".

Therefore, considering the above facts, it can be concluded that HRID, located in the area of supply of DHBVNL, is receiving electricity from generator HMSI and as HRID is not a captive user, it is liable to pay cross subsidy surcharge and other charges, as determined by HERC and the State Govt. from time to time, to DHBVNL.

3. In view of the above comments of DHBVNL, the company (HMSI), vide Commission's letter No. 5011/HERC/T-120 (Misc) dated 09.11.2012 was again requested to clarify whether HMSI and HRID, which are stated to be the subsidiaries of the parent company i.e. Honda Motor Company Ltd. Japan, meets with the requirement of Section-3 of the Electricity Rules, 2005 *'Requirements of Captive Generating Plant'*. If yes, then the details may be supplied.

4. The company (HMSI) then replied in the matter vide their letter bearing No. HMSI/ENV/12-13/42 dated 22.11.2012 and submitted some documents explaining relationship of Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI) & Honda R & D (India) Pvt. Ltd. (HRID) with the parent company Honda Motor Company Ltd. Japan. The detail of their reply is as below:-

a) Honda Motor Company Ltd. Japan submits Annual Report on Form 20 F to USA Stock Exchange every year wherein the parent company (Honda Motor Company Ltd. Japan) declares its subsidiaries worldwide. On June 21, 2012, Honda Motor Company Ltd. Japan has filed with the Securities and Exchange Commission its annual report on Form 20 F for the year ended March 31, 2012, wherein it is clearly mentioned that Honda Motorcycle & Scooter India (Pvt.) Ltd., and Honda R & D Co. Ltd., Japan are 100% subsidiaries of Honda Motor Co. Ltd. Japan.

b) Honda R & D (India) Pvt. Ltd. submits Form 20 B after the end of every financial year to Ministry of Corporate Affairs. As per Form 20 B submitted by the company for FY 2010-11, Honda R&D (India) Private

Limited was holding 11,000,000 shares, out of which 10,999,999 shares were owned by Honda R & D co. Ltd. Japan and 1 share was owned by Honda R & D South East Asia Co. Ltd. Thailand. This shows that Honda R & D (India) Pvt. Ltd. is wholly owned subsidiary of Honda R & D Co. Ltd. Japan.

c) The company has submitted an Affidavit No. 05AA 446010 from Honda Motorcycle & Scooter India (Pvt.) Ltd., India and an Affidavit No. D 142510 from Honda R&D India Pvt. Ltd. stating that Honda Motorcycle & Scooter India (Pvt.) Ltd., and Honda R&D India Pvt. Ltd. are wholly owned subsidiaries of Honda Motor Co. Ltd. Japan.

d) The company further states that in view of the above submissions and as per Section 4 of the Companies Act 1956, Honda Motorcycle & Scooter India (Pvt.) Ltd., Honda R & D Co. Ltd., Japan and Honda R&D India Pvt. Ltd. are wholly owned subsidiaries of Honda Motor Co. Ltd. Japan and owned 100% by Honda Motor Co. Ltd. Japan.

The captive generation plant is primarily for own captive consumption by Honda Motorcycle & Scooter India Pvt. Ltd. and even after supplying electricity to group company Honda R&D India Pvt. Ltd., more than 51% of generation would be utilized by Honda Motorcycle & Scooter India Pvt. Ltd.

The captive generating plant is in ultimate control of Honda Motor Co. Ltd. Japan. Further, Honda R&D India Pvt. Ltd., in ultimate control of Honda Motor Co. Ltd. Japan can use captive consumption of the same parent company Honda Motor Co. Ltd. Japan.

Thus Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI) and Honda R&D India Pvt. Ltd. (HRID) qualify for captive status and meet with the requirement of Section 3 of the Electricity Rules, 2005.

5. After considering the reply submitted by HMSI & the comments offered by DHBVNL, the Commission thought it appropriate to give a hearing to both the parties to further elicit their views for coming to any decision in

the case. Accordingly the Commission heard the parties in the hearing held on 27.02.2013.

6. Proceedings

6.1 Sh. Vinod Bhardwaj, Advocate appeared for the petitioner. He, first of all explained the details of the correspondence made between the parties and the Commission and thereafter, by and large, reiterated the submissions made by the petitioner vide their letter dated 22.11.2012.

He stated that Honda Motor Company Ltd., Japan had submitted Form 20 F for the period ending March 2012 with the United States Securities and Exchange Commission. As of March 31st, 2012 the company had 94 Japanese subsidiaries and 284 overseas subsidiaries. The details indicated in this Form 20F shows that Honda Motor Company Ltd., Japan have 100% ownership and voting interest in the companies Honda R&D Company Ltd., Japan and Honda Motorcycle & Scooter India Pvt. Ltd., India.

He further stated that the company Honda R&D India Pvt. Ltd., have filed their annual return for FY 2010-11 on Form 20 B, in which Capital Structure of the company, authorized share capital breakup and issued share capital breakup and other details have been mentioned. As per details mentioned in this return, Honda R&D (India) Private Limited was holding 11,000,000 shares, out of which 10,999,999 shares were owned by Honda R & D Co. Ltd. Japan.

The Commission pointed out to the learned counsel that the address of the registered office of the company, as mentioned in Form 20B and that mentioned in the Affidavit were different. To this, he clarified that the address mentioned in Form 20B was of their old premises. The company has since shifted their registered office to a new premises, whose address has been mentioned in the Affidavit.

The learned counsel further mentioned that the petitioner has attached two Affidavits, as Annexures 3 & 4 to their letter dated 22nd November, 2012. As per Affidavit at Annexure–3, 100% control of Honda Motorcycle & Scooter India Pvt. Ltd. is lying with Honda Motor Company Limited

Japan and as such the company is a wholly owned subsidiary of Honda Motor Company Limited Japan. Further as per Affidavit at Annexure–4, 100% control of Honda R&D (India) Pvt. Ltd., is lying with Honda R&D Company Limited Japan. Further, 100% control of Honda R&D Co. Ltd., Japan is lying with Honda Motor Co. Ltd., Japan. In conclusion, the company i.e Honda R&D (India) Pvt. Ltd. is a wholly owned subsidiary of Honda Motor Co. Ltd., Japan.

He, thereafter, pleaded that in view of the details submitted by the petitioner and as explained by him, Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI) and Honda R&D India Pvt. Ltd. (HRID) qualify for captive status and meet with the requirement of Section 3 of the Electricity Rules, 2005.

Further commenting on the comments submitted by respondent DHBVNL, vide their letter dated 6th August 2012, he stated that Regulation 21 (2) of HERC Regulation NO. HERC/25/2012 dated 11th January 2012, with regard to levy of cross subsidy surcharge, is not applicable to petitioner. He read out the provision of Regulation 21, which is reproduced below:-

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 surcharge 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.

He stated that the petitioner i.e HMSI as well as HRID are not the consumers of the distribution licensee of the area i.e DHBVNL. The DHBVNL has neither incurred any expenditure for making arrangements for supply of power to HMSI nor they have any liability to supply the same. The generation plant installed by HMSI is of captive nature and as such the cross subsidy surcharge is not applicable in their case because of the following proviso under Regulation 21 (1).

"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".

With this he closed his arguments.

6.2 Sh. Varun Pathak, Advocate appeared for respondent DHBVNL. In his preliminary objection stated that the petitioner should have intimated about change of address of their registered office which they did not.

Then taking the case on merits, he stated that the details supplied by the petitioner do not fall in the definition of 'Captive Generating Plant' as defined under Section-3 of the Electricity Rules, 2005 and, therefore, the company HRID is liable to pay cross subsidy surcharge on the electricity supplied to them by HMSI from their Captive Power Plant. He stated that this is a similar case as was covered in the following judgments of the Hon'ble Appellate Tribunal for Electricity.

i) Order dated 3rd October, 2012 in Appeal No. 193 of 2011 in the matter of M/s DLF Utilities Limited, Gurgon versus HERC & DHBVNL.

In this case the Appellate Tribunal for Electricity has upheld the order dated 11.08.2011 passed by the Commission in case No. HERC/PRO-8 of 2011 in the matter DHBVNL versus M/s DLF Utilities Limited, with regard to payment of cross subsidy surcharge by M/s DLF Utilities Limited. In this case the Commission had observed that though open access on the distribution system of the DHBVNL was not availed of by M/s DLF Utilities Limited, it was required to pay cross-subsidy

surcharge in view of the fact that M/s DLF Utilities Limited have been providing electricity to the owners of seven commercial buildings who are allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses.

ii) Order dated 4th October, 2012 in Appeal No. 200 of 2011 in the matter of M/s Maruti Suzuki India Ltd, New Delhi versus HERC & DHBVNL.

The learned counsel stated that the Hon'ble Appellate Tribunal for Electricity in this case has held that cross subsidy surcharge is payable even when the supply is through dedicated lines by a company to its ancillary units.

The case of the present petitioner is clearly covered by the above judgments of the Hon'ble Appellate Tribunal and deserves to be dismissed. HRID India is not a captive consumer being a separate and distinct entity in law from HMSI and is thus, liable to pay cross subsidy surcharge in accordance with the provisions of the Act and the regulations framed there under.

He further stated that HRID has no ownership in the company HMSI, which has installed the generating plant.

The respondent DHBVNL also filed a written Note on arguments in the case, vide their letter No. Ch. 120/SE/RA-230 dated 20.03.2013. The Note details various provisions in the Electricity Act 2003, with regard to 'Captive Generating Plant' (Section-2 (8)), 'Captive Generation' (Section-9), and 'Requirements of Captive Generating Plant' (Rule 3 of Electricity Rules, 2005). The Note further details the orders passed by the Hon'ble Appellate Tribunal for Electricity in two cases as referred in Para – 6.2 above and further summarizes that HRID India is not a captive consumer being a separate and distinct entity in law from HMSI and is thus, liable to pay cross subsidy surcharge in accordance with the provisions of the Act and the regulations framed there under.

6.3 After closure of arguments by learned counsel of the respondent, learned counsel of the petitioner stated that the two judgments of Hon'ble Appellate Tribunal for Electricity as referred by learned counsel of the

respondent are not relevant in the present case as the situations in both the cases were different.

In the matter of M/s DLF Utilities Limited, Gurgon versus HERC & DHBVNL, M/s DLF Utilities Limited have been providing electricity to the owners of seven commercial buildings who were allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses.

In the matter of M/s Maruti Suzuki India Ltd., New Delhi versus HERC & DHBVNL, M/s Maruti Suzuki India Ltd., were supplying power to its ancillary units through dedicated lines.

7.0 Commission's Order

7.1 The Commission has considered the submissions made by the petitioner, the replies submitted by respondent DHBVNL, oral submissions made by the parties during the hearing, written note on arguments submitted by respondent DHBVNL and various judgments / orders, copies of which were submitted by the respondent during the course of hearing.

The various issues which, arise in this case as per the Commission & require adjudication are:-

(1) Whether the generating plant of HMSI meets with the requirements of Captive Generating Plant, as specified under Rule 3 of the Electricity Rules, 2005, for supplying electricity to HRID ?

(2) Whether the cross subsidy surcharge, as per Section-42 (2) of the Electricity Act, 2003 and the Regulations made under thereof, is applicable on the supply of electricity from the generating plant of HMSI to HRID ?

Now we proceed to deal these issues one by one in the light of arguments, counter arguments advanced, the statutory provisions and the various judgments/orders quoted by the respondent.

7.2 Whether the generating plant of HMSI meets with the requirements of Captive Generating Plant, as per Rule 3 of the Electricity Rules, 2005, for supplying electricity to HRID ?

i) Statutory provisions

The 'Requirements of Captive Generating Plant' as laid down in Rule 3 of The Electricity Rules, 2005 are as under:

"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 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 co- operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co- operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent."

(b) Not relevant

Explanation – (1) For the purpose of this rule-

(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant.

In the case under consideration, the company Honda Motorcycle & Scooter India Pvt. (HMSI), who have installed a generating plant of 18.4 MW in their building at IMT Manesar (District Gurgaon) has leased out 2nd & 3rd floors of their building to Honda R&D India Pvt. Ltd. (HRID). They will be supplying electrical power for office lighting & air conditioning load to the two floors to be occupied by HRID.

The Commission has considered the documents submitted by the petitioner vide their letter dated 22.11.2012, as detailed under Para-4 above and the arguments made by learned counsel of the petitioner, and observes as below:-

a) The detail indicated in Form 20-F submitted by the petitioner, shows that the company Honda Motor Company Limited Japan has 100% ownership and voting interest in the companies Honda R&D Company Limited Japan and Honda Motorcycle & Scooter India Pvt. Ltd., India.

b) The detail indicated in Form 20-B submitted by the petitioner for FY 2010-11, shows that the company Honda R&D India Pvt. Ltd had 11,000,000 shares out of which 10,999,999 shares were owned by Honda R&D Company Ltd. Japan.

The above documents, however, no where indicate that the company Honda Motorcycle & Scooter Pvt. Ltd., India has the equity share capital with voting rights in Honda R&D India Pvt. Ltd., India and vise versa. The two companies also have not made association of persons. As such the two companies together do not fit in the definition of Requirements of Captive Generation Plant as specified under Rule 3 of Electricity Rules, 2005 and qualify as captive users.

The two affidavits submitted by the petitioner also do not indicate so.

In view of the foregoing discussion we hold that the generating plant of HMSI does not meet with the requirements of Captive Generating Plant, as specified under Rule 3 of the Electricity Rules, 2005, for supplying electricity to HRID.

7.3 Whether the cross subsidy surcharge as per Section-42 (2) of the Electricity Act, 2003 is applicable on the supply of electricity from the generating plant of HMSI to HRID ?

In exercise of powers conferred by Section-42 (2) read with Section-181 of the Electricity Act 2003, the Commission notified Regulation No. HERC/25/2012 on 11th January, 2012 called as the 'Haryana Electricity Regulatory Commission (Terms and conditions for grant of connectivity

and open access for intra-state transmission and distribution system) Regulations, 2012'. Regulation 21 of these Regulations is again reproduced below.

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 surcharge 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.

(3) The consumers located in the area of supply of a distribution licensee but availing open access exclusively on inter-State transmission system shall also pay the cross subsidy surcharge.

(4) The cross subsidy surcharge shall be leviable at the rates as determined by the Commission from time to time.

In the case under consideration, the company HRID will be taking electricity from the generating plant installed by HMSI through a dedicated line and not from the distribution licensee of the area i.e. DHBVNL.

Having held in Para 7.2 that the generating plant of HMSI does not meet with the requirements of Captive Generating Plant, as specified under Rule 3 of the Electricity Rules, 2005, for supplying electricity to HRID, taking of electricity by HRID from the generating plant of HMSI will be a case of availing open access by HRID through a dedicated line.

We, therefore, hold that, as per Regulation 21 (2) of HERC Regulation No. HERC/25/2012, cross subsidy surcharge is payable by M/s Honda R&D India Pvt. Ltd (HRID) on the electricity received by them from the generation plant of M/s Honda Motorcycle & Scooter India Pvt. Ltd. (HMSI), from the date of commencement of supply.

The Commission disposes of the matter accordingly.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 9th April, 2013.

Date: 09.04.2013
Place: Panchkula

(Ram Pal)	(Rohtash Dahiya)	(R.N. Prasher)
Member	Member	Chairman

Annexure – VI

Other Related Material

Date		Hours		Scheduled (MW)				Route	
From	To	From	To	Requested (MW)	MWh	Accepted (MW)	MWh		
01-01-14	31-12-14	6	18	100	166,440	100	166,440	Southern Region	

AP To Karnataka Border

i) Transmission Charges

	Rate (Rs/MWh)	MWh		Total (Rs)	Rs/unit
(a) Intra State					
AP	90.97	166,440		15,141,047	0.10
(b) Inter State					
Wheeling	240	166,440		39,945,600	0.27
			Total (i)	55,086,647	0.37

ii) Operating Charges

RLDC/SLDC	Rate(Rs/Day)	Number of Days		Total (Rs)	
AP SLDC	2000	365		730,000	0.00
SRLDC	2000	365		730,000	0.00
			Total (ii)	1,460,000	0.010

iii) Non-Refundable Application fee		5,000	0.00
	Grand Total (i+ii+iii)	**56,551,647**	**0.38**

Intra State Karnataka

i) Transmission Charges

	Rate (Rs/MWh)	MWh		Total (Rs)	Rs/unit
(a) Intra State					
Karntaka (Deduct AP tr	133.15	159,749		21,270,594	0.14
(b) Intra State Wheeling					
Wheeling	60	153,327		9,199,632	0.06
			Total (i)	30,470,226	0.21

ii) Operating Charges

RLDC/SLDC	Rate(Rs/Day)	Number of Days		Total (Rs)	
Karnataka SLDC	2000	365		730,000	0.00
			Total (ii)	730,000	0.00
		Grand Total (I+ii)		**31,200,226**	**0.21**
		Total Charges/Unit		**0.60**	

Transmission and Distribution Losses

	%	MWh
AP Transmission Losses	4.02%	6,691
Karnataka Transmission losses	4.02%	6,422
Karnataka Distribution losses	4.06%	6,225
Total Losses	**12.10%**	**19,338**
Net Power		**147,102**

		Method I
	Net power(MWh)	**147,102**
Let us say	**Landing Price/unit**	**8.50**
	Revenues	**1,250,367,965**
	Charges	**87,751,873**
	Net Revenues	**1,162,616,092**
	Realized price/unit at plant	**6.99**
	Hence charges + losses per unit	**1.51**
	Total Charges/unit	0.60
	Losses/unit	0.92

Forum of regulators

Karnataka Electricity Regulatory Commission						**ANNEXURE-I**
CASE I	**Charges for 5MW at 11 KV industrial consumer availing Intra-State Open Access for 1 Month-BESCOM**					
Monthly Open Access Charges:						
S. No.	**Particular**	**Charges**	**Calculation**	**Total (Rs.)**	**Charges for 5 MW capacity for 1 Month (Rs.)**	
	Total Power transfered in a Month(Units)		**5000x30x24**	**3600000 Units**	**3600000**	A
1	Transmission Charges [Per MW basis]		5x95869	479345		B
	Transmission Loss of % in kind which will be deducted from the energy input.		4.03%	20129		C
	Net Transmission Charges		B+C	**499474**	**499474**	D
2	Wheeling Charges for BESCOM [Per unit basis]		3600000x0.06	216000		E
	Wheeling Loss of % in kind which will be deducted from the energy input.		4.06%	9141		F
	Net Wheeling Charges		E+F	**225141**	**225141**	G
3	Operating Charge (SLDC Charges)	SLDC charges included in Transmissiion charges				H
4	Reactive Energy Charges per Kvar $					I
5	Cross Subsidy Surcharge per unit basis for BESCOM		3600000x0.78	**2808000**	**2808000**	J
6	Additional surcharge		case to case basis			K
7	Interconnection Charges		Not applicable			L
8	Standby Charges [Minimum]*		(200/.745)x5000	**1342282**	**1342282**	M
10	Parallel operation charges/Grid support charges		((5000/0.9)*.75*180)	**750000**	**750000**	N
13	Other Charge[Meter reading cahrges]		1*1000	**1000**	**1000**	O
	Connectivity Charges		not applicable			P
	OA Application Registration Fee + Processing fee**		5000+30000	**35000**		Q
	OA agreement fee					R
	Net Open Access Charge	Rs	D+G+H+I+J+K+LM+N+O+P+Q+R		**5625896**	S
	Effective Open Access Charge(per Unit)		S / A		**1.56**	**Rs/Unit**
CASE-II	**Tariff for consumer taking power from licensee (5MW at 11 KV)**					
S. No.	**Charges**	**Calculation**	**Total (Rs.)**			
1	**Monthly Consumption**	**5000x30x24**	**3600000 Units**	a	**3600000**	
2	Energy Charges (Monthly)	(100000*3.55+3500000*3.95)	**14180000**	b	**14180000**	
3	Demand Charges (Monthly)	(5000/0.9)*.75*180)	**750000**	c	**750000**	
4	Subsidy by Govt.		0	d	**0**	
7	Any Other Charges (Please Specify)		0	e	**0**	
8	Total Charges per month	b+c-d+e	14930000	f	**14930000**	
	Effective Charge Rs/Unit	f / a		**Rs/Unit**	**4.15**	
	$ The Consumer has to maintain PF at 0.90.					
	* assuming no energy is drawn. If energy is drawn Rs. 6/unit is to be paid.					
	* *One time fee and therefore not included in per unit cost.					
	Note: 1. For NCE sources Transmission & wheeling charges are in Kind only and is fixed at 5%.In addition for wind & Mini-hydel Banking charges at 2% is levied.					
	2. The above charges are as per the latest order issued by the Commission, which is challenged befor APTEL.					

Forum of regulators

ILLUSTRATIVE CASE OF OPEN ACCESS CHARGES CALCULATION AS PER PRESCRIBED FORMAT DECIDED BY FOR

Case I : Charges for 5MW at 11KV Industrial Consumer Availing Intra-State Open Access for 1 Month					
SR NO	**PARTICULARS**	**CHARGES**	**CALCULATION**	**TOTAL (RS)**	**CHARGES FOR 1 MONTH**
Case 1	**Charges for 5 MW at 11KV Industrial Consumer Availing Intra-State Open Access for 1 Month**				
	Total Power Transferreed in a Month (Units)		3600000.00		
1	Transmission Charges (Rs/Mw/Day)	680.00	3400.00		
	Transmission Loss of % in kind * (in %)	4.20%	142.80		
	Net Transmission charges			**3542.80**	**106284.0000**
2	Wheeling Charges (Ps/KWh)	13.48	16176.00		
	Wheeling Loss of % in kind *(in %)	10.01%	1619.22		
	Net Wheeling Charges			**17795.22**	**533856.5280**
3	Operating Charges (SLDC Charges) (per day)	2000.00	2000.00	**2000.00**	**60000.0000**
4	Reactive Energy Charges				
	Drawal of KVARH(Assume 5000 KVARH)	10	500	**500**	**15000.0000**
5	Cross Subsidy Charges (Rs per KWH)	0.51	61200	**61200**	**1836000.0000**
6	Additional Surcharge				
7	Interconnection Charges				
8	Standby Charges				
9	Parallel Operation Charges				
10	Other Charge				
	Connectivity Charges	---	---		
	OA Application Registration Fee	5000.00	5000.00	**5000.00**	**5000.00**
	OA Agreement Fee (Not Applicable for STOA)	---	---		
	Net Open Access Charges	**Total**		**90038.02**	**2556140.53**
	Effective Open Access Charges per unit (Rs./ Unit)				**0.710039036**

(To be applicable to Discom)

Case 2 : Tariff for Consumer Taking Power from Licensee (5 MW at 11KV)					
1	Monthly Consumption		120000.00		3600000
2	Energy Charges (Monthly) (Rs per Unit)	4.150	498000.00		14940000
3	Demand Charges (Monthly) (KVA per month)(Rs)	2.370	284400.00		8532000
4	**Subsidy by Government (15% E.D.)**	15%	74700		2241000
5	**Any other Charges (Peak Charges for 8 hours)**	0.750	30000		900000
6	Total Charges per Month	**Total**	**887100.00**		**26613000.00**
	Effective Charges per unit (Rs./ Unit)		**7.3925**		**7.3925**

Comparative Chart of Open Access Charges at State Level

State	Open Access Charges (Rs./kWh)*	Tariff (Discom)**
Assam	2.94	3.25
Chhattisgarh	0.98	3.11
Haryana	0.81	4.55
Himachal Pradesh	1.39	3.04
Karnataka (BESCOM)	1.9	4.15
Maharashtra (MSEDCL)	0.84	4.53
Orissa	1.6	2.91
Punjab	0.57	5.2
Rajasthan	0.97	3.98
Uttar Pradesh	0.76	4.29
Madhya Pradesh	1	4.57
Uttarakhand	0.69	3.27
Gujarat	1.34	7.39
West Bengal	3.77	4.68
Tamil Nadu	2.47	3.96

*OA charges for a consumer of 5MW at 11 KV (33 KV in some cases) seeking OA for a month. This includes transmission & wheeling losses (Rs/kWh) calculated assuming power purchase cost as Rs 4/kWh.
**Tariff for an embedded consumer of 5MW at 11 KV (33 KV in some cases).

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Net cost of power from Open Access (Rs./kWh) in States

Assumptions: 1. Base Energy Consumption (X) = 3600000 kWh | 2. Power Purchase cost assumed (Y) = 4 Rs./kWh | 3.Duration = 1 Month | 4. Load = 5MW

S. No.	State	Voltage level	Wheeling Loss (%)	Energy injected into system at T>D (kWh)	Transmission loss (%)	Energy injected into system at G>T (kWh)	Loss (kWh)	Loss in Rs.	Loss (Rs./kWh)	Effective Open Access Charges (Rs./kWh)*	Net OA Charge (Rs./kWh)	Net cost of power from Open Access (Rs./kWh)	Tariff (Discom)** (Rs./kWh)	Difference
			A	B=X/(1-A/100)	C	D=B/(1-C/100)	E=D-X	F=ExY	G=F/X	H	I=G+H	J=Y+I	K	L=J-K
1	Assam	11KV	20.04	4502251.13	6.10	4794729.63	1194729.63	4778918.53	1.33	1.61	2.94	6.94	3.25	3.69
2	Chhattisgarh (Short term)	33KV	6.00	3829787.23	4.03	3990608.77	390608.77	1562435.07	0.43	0.55	0.98	4.98	3.11	1.87
3	Haryana	11KV	6.00	3829787.23	2.10	3911937.93	311937.93	1247751.72	0.35	0.47	0.81	4.81	4.55	0.26
4	Himachal Pradesh	11KV	7.50	3891891.89	3.71	4041844.32	441844.32	1767377.26	0.49	0.90	1.39	5.39	3.04	2.35
5	Karnataka (BESCOM)	11KV	4.06	3752345.22	4.03	3909914.78	309914.78	1239659.13	0.34	1.56	1.90	5.90	4.15	1.75
6	Maharashtra (MSEDCL)	11KV	9.00	3956043.96	4.85	4157692.02	557692.02	2230768.08	0.62	0.22	0.84	4.84	4.53	0.31
7	Orissa	11KV	8.00	3913043.48	4.50	4097427.73	497427.73	1989710.90	0.55	1.05	1.60	5.60	2.91	2.69
8	Punjab	11KV	-	3600000.00	9.75	3988919.67	388919.67	1555678.67	0.43	0.13	0.57	4.57	5.2	-0.63
9	Rajasthan	33KV	3.80	3742203.74	4.40	3914439.06	314439.06	1257756.24	0.35	0.62	0.97	4.97	3.98	0.99
10	Uttar Pradesh	11KV	8.00	3913043.48	5.00	4118993.14	518993.14	2075972.54	0.58	0.18	0.76	4.76	4.29	0.47
11	Madhya Pradesh	33KV	-	3600000.00	4.90	3785488.96	185488.96	741955.84	0.21	0.79	1.00	5.00	4.57	0.43
12	Uttarakhand	11KV	$	3600000.00	$	3600000.00	0.00	0.00	0.00	0.69	0.69	4.69	3.27	1.42
13	Gujarat	11KV	10.01	4000444.49	4.09	4171040.03	571040.03	2284160.12	0.63	0.71	1.34	5.34	7.39	-2.05
14	West Bengal	11KV	8.00	3913043.48	4.00	4076086.96	476086.96	1904347.83	0.53	3.24	3.77	7.77	4.68	3.09
15	Tamil Nadu	11KV	7.25	3881401.62	3.50	4022177.84	422177.84	1688711.37	0.47	2.00	2.47	6.47	3.96	2.51

Note: The input energy has been arrived by grossing up the base energy (3600000 units) by losses at wheeling & transmission losses at relevant voltage level for the consumer. Loss of actual energy has been computed as a difference between the energy arrived by grossing up and the base energy.Base energy = 3600000 units=X.

*Reference: Illustrative case on Open Access on 'FOR' website.

**Tariff for an embedded consumer of 5MW at 11 KV (33 KV in some cases).

$Actual Losses on case-to-case basis

Forum of Regulators

Sanjay Jog | Mumbai September 06, 2011 Last Updated at 00:43 IST

Power consumers form group captive projects for rate relief

For long, this problem has persisted — and now there seems to be a solution emerging. At least in a few states in the country's west and south. Drawing power has largely been a constraint owing to poor access from distribution companies and their demand for paying cross-subsidy charge.

Of late, Maharashtra, Rajasthan, Tamil Nadu and Andhra Pradesh among others are witnessing a new trend wherein a group of associations or consumers would form group captive power projects. After all, the Electricity Rules 2005 make it clear: Any association of persons having 26 per cent shares in a generating company can consume power more than 51 per cent — and can be treated as a captive power.

Power industry sources say it provides an easy route for consumers, as the price in the market nowadays is less than Rs 3 a unit while its production (using imported or open-market coal) comes to Rs 3.50 a unit.

"Second," as a source points out, "consumers of captive power need not pay cross-subsidy charges — they are exempted for a captive power plant under section 42 of the Electricity Act, 2003. Besides, several states have exempted them from paying electricity duty."

Section 5.2.25 of the National Electricity Policy is devoted to the formation of captive power plants by group of consumers.

Thane Belapur Industries Association says a consumer opting for an open access is looking for a reduction in electricity rate that is charged by the state electricity board (SEB). "When one buys electricity from inside or outside the state, one has to pay electricity charge to the generator plus the wheeling charges depending upon intra- or inter-state and then the cross-subsidy surcharge," points out its group leader Ashok Pendse.

"Now, the question is that SEBs are asking for a pound of flesh by cross-subsidy surcharge. Hence, the sum total of all these three things is unviable," he notes.

"The moment you go to captive in any form, the cross-subsidy surcharge becomes zero. Hence the tariff becomes very attractive."

Further, the consumer will get a relief from knocking the doors of the utility. Third, SEBs are now talking about standby; they have to give power in case of failure. That issue gets resolved the moment you go to captive, Pendse says.

Concurs Jayant Deo, a former member of the Maharashtra Electricity Regulatory Commission. "This is a good trend," he says. "It is no more the responsibility of the government to supply power. Therefore, society has to make efforts. This is in the right direction."

The debt-servicing cost is not required to be paid by the users in this set-up; therefore the cost of power will come down.

"Such plants can have a lifetime of about 25 years and thereby securing the power supply for the next 25 years," adds Deo. "As the years progress, the loan is completely repaid, the cost will further come down."

Power analyst D Radhakrishna says the group captive power project will be attractive for the consumers.

"For instance, on taking an equity in any company of, say, Rs 5 crore, they can save at least a cost of Rs 1 on a unit, particularly in states like Maharashtra, Tamil Nadu, Karnataka and Punjab besides the megacities of Mumbai and Delhi where they are paying Rs 5.50 to Rs 6 per unit of electricity," he notes. "Also, they can earn profit in the company where they are pledging equity."

MANIKARAN POWER LIMITED

Group Captive

Back

The Electricity Act 2003 (EA 2003) allowed freedom for the captive power generators and captive consumers. Till couple of years after the EA 2003, the captive power sector was closed for any external investment and the growth was not enthusiastic. A few of the states had allowed sharing of a power plant among the consumers subject to rigid rules on consumption, investment and ownership. Excess capacity could not be economically exploited and the electricity boards had a tight grip over the excess power available in the captive system and paid a nominal tariff – in several states almost only variable cost. Ministry of Power (MoP) empowered by the EA 2003- brought out a Notification on 8th June 2005 (GCPN). Salient features of the GCPN are:

1) Captive generating plant was defined as one in which captive consumers (a) hold a minimum of 26% of the ownership (b) consume not less than 51% of the aggregate generation computed on an annual basis

2) If the generating plant was set up by a registered cooperative society the consumers collectively have to consume not less than 51% of the aggregate generation implying that in case of any other form of entity, this obligation is to be in proportion to the ownership rights.

Section 9 of the Electricity act 2003:-Group captive power plant, unlike an individual captive power plant, is a unique structure where a developer sets up a power plant for collective use of many industrial consumers who should have 26 per cent equity in the plant and must consume 51 per cent of the power produced.

Sec 38,39 and 40 of the Act made it mandatory for the Central Transmission Utility (CTU) and the State Transmission Utility (STU) to provide non discriminatory Open Access to the captive generator for the use of transmission system for his/their own use without any surcharge.

This **Group Captive** policy is a boon for the industrial consumers. Industrial consumer segment is growing at a fast pace, which doesn't want to depend on state utilities for its power needs because they are expensive and unreliable.

The extensively high tariff of SEB's are a huge burden to the industrial consumers. The objective would be to sell to these Industrial consumers. The price will be at a discount to the EB High Tension tariff (say 5-7% - net of wheeling) or at a fixed rate not less than the rate for wind farms in the state payable by the Discoms (for power from wind farms).

These are specially beneficial for small and medium scale industries that don't have the wherewithal to set up or manage their own power plants but need power to run their businesses. Also, through such an arrangement the industries **are exempt from paying the cross-subsidy surcharge**.

The concept is very much essential in the states where EB industrial tariffs are very high. The government, through group captive power plants policy, gave an alternative route to the industries.

THE HINDU

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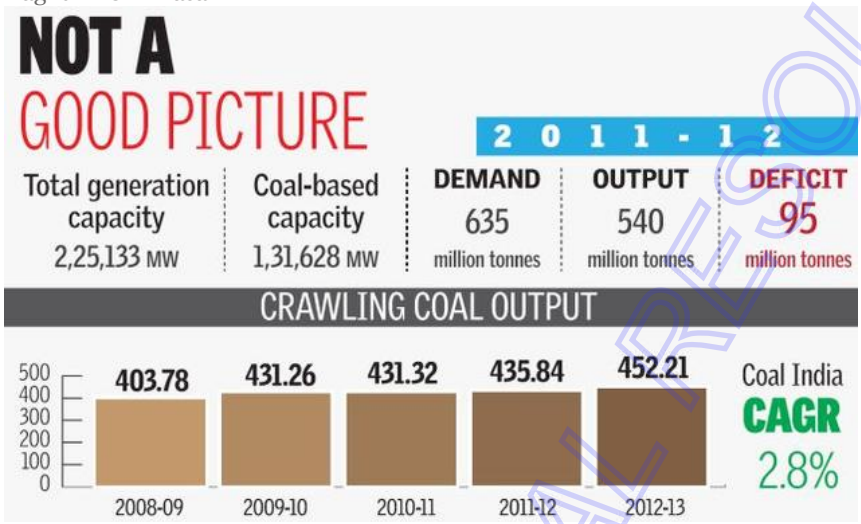
NEWS ANALYSIS

It's a coal fact, consumer has to pay

Raghuvir Srinivasan



Crawling coal output

Just consider these. You have an asset in the form of a power plant that is either lying idle without generating a unit of electricity or is operating at sub-optimal levels for want of coal, the fuel. The main supplier of coal in the country which digs up more dirt than coal is not able to meet the fast-growing demand for the fuel nor is it able to ramp up its own production.

The country is starved of electricity with a demand-supply gap of more than 10 per cent, and growing. And then, there is precious capital locked up in these idle plants, both as equity from the promoting companies and as loans from banks and financial institutions. There is a risk that these loans will become non-performing assets and stress balance-sheets of banks.

Hobson's choice

What option does the government have faced with these? Allow power companies to import coal, even if at higher prices, to tide over the next couple of years until Coal India, the main producer, is able to increase its output. That is exactly what it did on Friday when it allowed power projects — those already commissioned and those under construction now — to import coal to meet the shortfall.

Such shortfall will amount to 35 per cent of the quantity that Coal India agreed to supply this year; fall to 33 per cent in 2015-16 and further to 25 per cent by 2016-17. In other words, Coal India will increase production in the current Plan period but there will still be a deficit of 25 per cent between demand and supply of domestic coal even after four years from now.

The fall side of the government's move though is that power tariffs may rise as imported coal is costlier than domestic coal and the higher cost will be passed on to buyers which are the state distribution utilities. Australian thermal coal prices averaged around $94 a tonne (about Rs.5,600) in May. The latest basic price of the best quality coal from India is Rs.3,900 per tonne in comparison.

One, two, three

There are three options on how to handle the extra cost. First, it can be forced on the generation companies but the problem is that they are all in bad financial shape with some of them posting losses. Indeed, that is exactly why these companies did not resort to importing coal until now. For example, Adani Power reported a loss of Rs.1,952 crore in 2012-13.

Second, the distribution utilities, most of them owned by the respective state governments, can absorb the extra cost of between 10-25 paise per unit.

This is not an option for most of the state utilities except the healthier ones such as Gujarat's.

The final option is to pass on the higher tariffs to consumers, which is the most likely scenario. The only way that this can be avoided is if state governments decide to compensate the electricity utilities for the higher cost, which is a possibility.

Consumers, at least in industry if not domestic ones too, are unlikely to complain subject to two caveats — one, that this will ensure increase in power supply without outages and two, the net increase in per unit tariff is contained at 25 paise.

The first will take some time to happen as some of these power plants will come on stream in the next year or two. On the second, there is little guarantee because global coal prices can be volatile. And if they do rise, such increase will be passed through to consumers.

The long-term solution to this, indeed by 2017 when the current Plan ends, is to increase domestic production, if necessary by opening up coal mining to private participation, given Coal India's obvious inability to meet demand. With 260 billion tonnes of coal reserves, it is an appalling sight indeed to see power plants idling and industry and domestic consumers alike starving for power.

Keywords: thermal power plants, Coal India, coal imports, coal reserves, coal block allocation, electricity generation

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THE TIMES OF INDIA

Power tariffs to soar on gas, coal price spike

Sidhartha, TNN | May 29, 2013, 01.25AM IST

NEW DELHI: Cost of electricity and fertilizer are set to flare up as state utilities and fertilizer companies are contracting gas at over $20 a unit - which is almost five times the cost of the fuel from non-auctioned blocks as well as from Reliance Industries' Krishna-Godavari fields.

As a result, the cost of power produced from this gas works out to over Rs 12 a unit, while Iffco will produce urea at its Kalol plant at $600-650 a tonne or around Rs 35 a kg, which is 50% higher than the global price of fertilizer. The sudden spike in gas purchased by Andhra Pradesh power utility and Iffco for the second phase of the Kalol unit comes at a time when gas prices, including those produced from Reliance Industries' K-G fields, are being reviewed.

For both the players, little is at stake given that they would pass on the high cost of gas either to consumers or the government, pushing up the subsidy bill. Against Rs 12 a unit, the average cost of electricity in Andhra is around Rs 4 a unit, while households pay Rs 2-2.50 a unit.

Iffco, a famers' cooperative, has decided to play it safe and get the average price of $21 a unit of gas "vetted" by the government. At around $6.5 a unit, the cost of producing a tonne of urea works out to $305 a unit. An increase to around $21 nearly double the cost of production to nearly $600 a tonne, while the current international price is around $425-450 a tonne.

The Andhra state power utility has already purchased regasified liquefied natural gas (RLNG) at $27 a unit, compared to $4.2 a unit for the blocks given on a nomination basis to state-run firms and the K-G gas price. When contacted, an official from the state utility told TOI that the actual price was around $20 a unit, but given the transport charges from the west to the east coast and taxes, the price added up to $27. He then clarified that prices have come down since the March-April peak to around $24.5 a unit now and added the gas had to be contracted to beat the acute power shortage in the state.

Officials at the Centre are, however, foxed by the sharp rise in gas prices, although GAIL India, which is involved in both the transactions has maintained that it is indicative price. The state-owned utility had indicated a delivery price of $13.25-13.50 per million metric British termal unit (mmbtu). Then there are transmission charges and marketing margin, customs duty and state and central levies, which according to GAIL would take the price to $18-19 a unit when deliveries happen 2018 onward.

In case of Andhra Pradesh, the internal transport cost, even at existing prices adds up to over $5 a unit, although GAIL has resorted to a swap arrangement between the delivery cost on the west coast with its facility in the east. The charge appears exorbitant given that it costs just 40 cents to ship gas from Malaysia, and $1.2-1.7 a unit from the Persian Gulf and around $3 a unit from the US.

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