

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.merc.gov.in

Case No. 10 of 2021

**Case filed by Exide Industries Ltd. challenging levy and recovery of Additional Surcharge
by MSEDCL on its captive consumption of electricity.**

Exide Industries Ltd.Petitioner

V/s.

Maharashtra State Electricity Distribution Co. Ltd.Respondent No. 1

CSE Solar Sunpark Maharashtra Pvt. Ltd. Respondent No. 2

Appearance:

For Exide Industries Ltd. Shri Anand Ganeshan (Adv.)

For Maharashtra State Electricity Distribution Co. Ltd. Shri Aashish Singh (Adv.)

For CSE Solar Sunpark Maharashtra Pvt. Ltd. Shri Taral Ajmera (Rep.)

Coram

Shri Sanjay Kumar, Chairperson

Shri I. M. Bohari, Member

Shri Mukesh Khullar, Member

ORDER

Date: 3 June, 2021

1. Exide Industries Ltd. (**the Petitioner**) has filed a Case on 25 January 2021 seeking directions against Maharashtra State Electricity Distribution Co. Ltd. (**MSEDCL**) claiming that MSEDCL has illegally levied and recovered the Additional Surcharge (**ASC**) on the captive consumption of electricity generated from the power plant of CSE Solar Sunpark Maharashtra Pvt. Ltd. (**CSE**) and supplied to the Petitioner under captive Open Access (**OA**) arrangement. The Petitioner has invoked Sections 42(4), 62, 86 and 142 of the Electricity Act, 2003 (**EA**) for seeking relief and requested the Commission to refund the ASC already paid by the Petitioner.
2. **Petitioner's main prayers are as follows:**

- i. Set aside the levy of Additional Surcharge in the invoices raised by the Respondent No. 1 [MSEDCL] for the months of July 2020 to November 2020 on the three manufacturing units of the Petitioner;*
- ii. Direct the Respondent No. 1 [MSEDCL] to not levy Additional Surcharge on the Petitioner's manufacturing units forthwith;*
- iii. Direct the Respondent No. 1 [MSEDCL] to refund the amount of Additional Surcharge paid by the Petitioner's manufacturing units against the monthly invoices raised by it, along with interest;*

3. Petitioner has stated as follows:

- 3.1 Exide is a company engaged in the business of manufacturing of automotive and industrial lead-acid batteries and has its manufacturing facilities at the three locations i.e Ahmednagar, Chinchwad, and Talaja.
- 3.2 CSE Solar Sunpark Maharashtra Pvt. Ltd. has established a 21 MW captive solar generating station at Osmanabad District.
- 3.3 In addition to the consumption of electricity from MSEDCL, the Petitioner also consumes electricity at its manufacturing locations as captive OA consumption from the generating station i.e. CSE Solar Sunpark Maharashtra Pvt. Ltd.
- 3.4 The Petitioner owns equity shares with voting rights to the extent of 27.19% in CSE Solar Sunpark Maharashtra Pvt. Ltd. and therefore, qualifies as a captive consumer of the generating station of CSE Solar Sunpark, in accordance with the provisions of Rule 3 of the Electricity Rules, 2005.
- 3.5 The Petitioner is the sole captive consumer of the generating station of CSE Solar Sunpark and there are no other consumers consuming electricity from the said generating station. Thus, the generating station of CSE Solar Sunpark is not a group captive generating station having multiple captive consumers.
- 3.6 From 1 July 2020, the Petitioner has been procuring electricity from the generating station of the CSE Solar Sunpark, initially under Short Term Open Access (STOA) till 31 October 2020, and thereafter under Medium Term Open Access (MTOA) from 1 November 2020 till date.
- 3.7 The electricity from the said generating station is conveyed through OA to the premises of the Petitioner through the transmission and distribution system in the state of Maharashtra, for which the transmission and wheeling charges and losses are paid by the Petitioner.
- 3.8 The issue in the present case relates to the levy of ASC under Section 42(4) of the EA on the captive consumption of electricity by the Petitioner. Section 42(4) of the EA stipulates that 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 ASC 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.

- 3.9 The said provision refers to “*receive supply of electricity from a person other than the distribution licensee*”. Further, the term “*supply*” is defined in Section 2(70) of the EA as “supply”, in relation to electricity, means the sale of electricity to a licensee or consumer.
- 3.10 Accordingly, one of the essential conditions to be satisfied under Section 42(4) of the EA is that there is a supply of electricity from a person to a consumer. The supply is sale of electricity to a consumer as defined in the Act. Accordingly, there has to be sale of electricity by the Seller to the Purchaser.
- 3.11 In regard to the above, the definition of the “*Captive Generation Plant*” under Section 2(8) provides that “*Captive generating plant*” means a power plant set up by any person to generate electricity primarily for his own use and 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.
- 3.12 In terms of the above definition, the electricity generated by the Captive Power Plant is for his own use. Accordingly, there is an essential distinction between sale of electricity by a person to another person which constitute supply within the scope of Section 42 (4) and generation of electricity for his own use.
- 3.13 Therefore, in terms of the provisions of Section 42 (4) itself, ASC is not payable in respect of the quantum of electricity generated by the Captive Power Plant or a Group Captive Power Plant, and consumed by a captive user when such generating plant and captive user fulfils the conditions mentioned in Section 2(8) of the EA and Rule 3 of the Electricity Rules, 2005.
- 3.14 Section 9(2) of the EA only deals with conveyance of electricity by OA to the destination of use. The provision does not deal with supply at all, as the consumption for own use by captive consumers do not involve supply as provided for in the EA.
- 3.15 Prior to the year 2018, there was admittedly no determination or levy of ASC on captive consumption of electricity in the state of Maharashtra.
- 3.16 The Commission had, for the first time, by its Order dated 12 September 2018 in Case No. 195 of 2017, held that ASC would be leviable on consumers of group captive generating stations in the State of Maharashtra. The Commission has specifically provided exemption of ASC for Captive Users of CPPs to the extent of their self-consumption from such Plants. The Commission noted that frequent changes in the captive users of Group Captive Power Plants (**GCPP**) were leading to stranded contracted capacity of Distribution Licensee. Such captive users are very different from static captive users of original Captive Power Plants as the latter have ceased to be consumers of Distribution Licensees having created their own permanent power requirement through captive mode. There is no power planning needed for such static captive users as against frequently switching users of group captive power plants for whom the power supply is planned and therefore becomes a stranded capacity. Such Group Captive users become liable to ASC due to stranded capacity as applicable to other OA consumers.

- 3.17 The Commission in the said Order had made a clear distinction between group captive power plant and non-group/individual captive power plants. Group captive power plants are provided for in the 2nd proviso to Rule 3(1)(ii) of the Electricity Rules, 2005 which provides for captive consumption of electricity by an association of persons. The principle of association of person has been extended to multiple consumers of a special purpose vehicle being a limited company, wherein the multiple captive users are required to cumulatively hold not less than 26% shareholding and consume electricity on aggregate basis of at least 51% on an annual basis, which consumption is required to be in a proportionate manner to the shareholding of the said consumers.
- 3.18 The above decision dated 12 September 2018 was challenged by two generators, namely M/s JSW Energy Ltd. and M/s Sai Wardha Power Generation Co. Ltd. before the Hon'ble Appellate Tribunal for Electricity (ATE) by way of Appeal Nos. 311 and 315 of 2018. Both these generators were group captive generators, having multiple captive consumers, who in aggregate held more than 26% shareholding in the generating units.
- 3.19 In fact, one of the specific grounds of challenge before the Hon'ble ATE by these two generators was that the Commission had erred in creating an artificial distinction between group captive power plants and non-group/individual captive power plants. It was the specific case that the Commission had erred in levying ASC only on such group captive power plants which had multiple captive consumers, whereas it was admittedly exempted for other captive power plants having single captive consumer.
- 3.20 The Hon'ble ATE by its Order dated 27 March 2019, set aside the above decision dated 12 September 2018 and held that ASC could not be levied on captive consumption of electricity. The Hon'ble ATE also held that group captive power plants cannot be placed in a separate pedestal as compared to non-group/individual captive power plants.
- 3.21 The above decision of the Hon'ble ATE has thereafter been challenged by MSEDCL before the Hon'ble Supreme Court in Civil Appeal Nos. 5074-5075 of 2019. Even in the said Appeal, it is the stand of MSEDCL that the levy of Additional Surcharge was only on the captive consumers of the Group Captive Power Plants.
- 3.22 The Hon'ble Supreme Court, by its Interim Order dated 1 July 2019, has stayed the operation of the Order dated 27 March 2019 of the Hon'ble ATE. The said Civil Appeals are pending adjudication before the Hon'ble Supreme Court.
- 3.23 In the meantime, MSEDCL filed its MYT Petition (Case No. 322 of 2019) before the Commission for the next control period for FY 2020-21 to FY 2024-25. The Commission by its Order dated 30 March 2020 held that its decision in the Order dated 12 September 2018 in relation to the levy of Additional Surcharge on the consumers of group captive power plants would continue, subject to the decision of the Hon'ble Supreme Court. Further the Commission held that in view of the stay directed by the Hon'ble Supreme Court on the Judgment passed by the Hon'ble ATE, the Commission would continue to determine the two categories of captive users who procure power from Captive Power Plants viz., (a) Original Captive Users (who were never consumers of Distribution Licensee) and (b) Converted Captive Users (who subsequently switchover to GCPP mode). The Original Captive Users are the Users who have been

procuring power originally under the captive mode and whose demand has not been included in the power procurement plan of Distribution Licensee whereas Converted Captive Users are the Users who prior to issue of Mid Term Review Order dated 12 September 2018 in Case No. 195 of 2017 were consumers of the Distribution Licensee and who have opted to procure power under Group Captive arrangement, creating stranded capacity for Distribution Licensee.

- 3.24 In terms of the above, there was no occasion for MSEDCL to expand the levy of ASC on the non-group/individual captive power plants and consequently on the captive consumers of such non-group/individual captive power plants.
- 3.25 The Order dated 12 September 2018 as well as the Order dated 30 March 2020 of Commission are clear on the levy of Additional Surcharge, which is restricted to the group captive power plants.
- 3.26 In the proceeding before the Hon'ble ATE, MSEDCL sought to justify the distinction created between group captive power plants and non-group/ individual captive power plants.
- 3.27 When the MYT Order dated 30 March 2020 merely continued the decision in principle as contained in the earlier MTR Order dated 12 September 2018 for levy of ASC on group captive power plants, there was no occasion for MSEDCL to unilaterally seek to expand the scope of the levy of ASC on the non-group/individual captive power plants having a single captive consumer.
- 3.28 However, the Petitioner was shocked to receive the invoices for the month of July 2020 for all its three manufacturing facilities from MSEDCL wherein MSEDCL has levied ASC on the captive consumption of electricity by the Petitioner from the generating station of CSE Solar Sunpark.
- 3.29 Immediately upon the receipt of the above invoices, the Petitioner protested and also sought clarification from MSEDCL on the levy of ASC but was only informed that the levy is in accordance with the policy decision taken by MSEDCL.
- 3.30 Instead of acknowledging that the said levy is erroneous, MSEDCL continued to levy ASC for the following months on the captive consumption of electricity by the Petitioner's units from the generating station of CSE Solar Sunpark. The Petitioner has made payments under protest and without prejudice to its rights to challenge the same before the Commission.
- 3.31 The manufacturing units of the Petitioner have also addressed separate formal communications dated 14 December 2020 to MSEDCL on the issue of Additional Surcharge. In reply, MSEDCL vide its letter dated 1 January 2021 to the Petitioner's Taloja unit (having Consumer No. 028619020181) has maintained its wrongful position and stated that since the Petitioner is a group captive consumer, it cannot be exempted from the levy of ASC. The Taloja unit of the Petitioner, vide its letter dated 25 January 2021, reiterated that the Petitioner is not a group captive consumer, but a single captive consumer and thus, requested MSEDCL to withdraw the levy of Additional Surcharge. The Petitioner, vide aforesaid letter, has stated the shareholding pattern of the generating

station/plant to show that it is the sole captive consumer, holding more than 26% shareholding of its captive generating station/station.

- 3.32 This unilateral action of MSEDCL is not only contrary to the specific provisions of the EA on the levy of ASC but is also in gross violation of Order dated 30 March 2020 passed by the Commission. The Commission has specifically restricted the levy of ASC to group captive power plants and their captive consumers, continuing the same principle as was decided in its earlier Order dated 12 September 2018.
- 3.33 However, the unilateral and unauthorised action of MSEDCL to levy ASC on the Petitioner, who is not a captive consumer of any group captive power plant, is erroneous and in violation of the decision of the Commission.
- 3.34 It is also not open to the MSEDCL to now contend that the ASC is leviable on the captive consumers of even the non-group/individual captive power plants, as it is clearly understood by MSEDCL itself that the levy of ASC was only on the captive consumers of the Group Captive Power Plants.
- 3.35 It is also the stand of the Commission that the captive consumers of non-group/individual captive power plants and the group captive consumers of the group captive power plants stand on a different footing, and it is only the group captive consumers who are liable to pay the ASC.
- 3.36 Thus, the levy of ASC by MSEDCL on the Petitioner, is illegal and without any authority of law. The demands raised therefore need to be set aside and the payments made needs to be reimbursed along with interest.

4. **MSEDCL, vide its reply dated 8 March 2021, stated as under:**

For past period levy of Additional Surcharge:

- 4.1 The Petitioner had made the following OA Applications under the “Group Captive mechanism”.

Sr. No.	Date of OA Application	Nature of OA	Period of OA
1.	20.07.2020	Group Captive	01.10.2020 to 31.10.2025
2.	20.07.2020	Group Captive	01.10.2020 to 31.10.2025
3.	20.07.2020	Group Captive	01.10.2020 to 31.10.2025

- 4.2 Petitioner itself has made the above OA Applications under the “Group Captive mechanism”. Hence, no wrongdoing can be attributed on the part of MSEDCL w.r.t levy of ASC on the Petitioner and hence the prayers in the Petition on such issues seeking retrospective refund etc. deserves rejection by the Commission.

Future Levy of ASC:

- 4.3 The structure under which the Petitioner is availing OA is as under:
- CSE Solar Sunpark is generating Plant.
 - According to the averments in the Petition, Petitioner owns equity shares with voting rights to the extent of 27.19% in CSE Solar Sunpark.

- iii. Petitioner avails OA for three separate units/consumer nos. at different locations.
- 4.4 It is pertinent to note that after availing OA in the past under the “Group Captive mechanism”, the Petitioner now claims that it is not a “Group Captive” and is merely a “Captive Generating Plant”. Hence the following documents would be of utmost importance to ascertain the facts pertaining to issues raised in the Petition w.r.t dispute on the levy of Additional Surcharge on the Petitioner for future purposes:
- i. Share Purchase Agreement.
 - ii. Share Holder Agreement.
 - iii. Memorandum of Association and Article of Association of the Generating Plant.
 - iv. Power Purchase/Delivery Agreement.
 - v. CA Certificate.
- 4.5 The Commission may direct the Petitioner to furnish the abovementioned documents/information to enable MSEDCL to file a detailed reply on the merits of claim of the Petitioner for better adjudication of the dispute at hand.
5. **The Petitioner, vide its rejoinder dated 5 April 2021, stated that:**
- 5.1 There are no other consumers consuming electricity from the said generating station. Thus, the said generating station is not a group captive generating station having multiple captive consumers, but only a captive generating station having a single consumer, i.e., the Petitioner.
- 5.2 The nature of the power plant is not governed by the nomenclature used in any application but based on the legal implication of the admitted factual position. The admitted position is that the Petitioner is the only captive user of the power plant and does not fall within the meaning of a group captive power plant as provided for in Rule 3 of the Electricity Rules, 2005.
- 5.3 At the time of submission of OA Application by the Petitioner, the Petitioner was (incorrectly) advised that only those consumers who have their generating stations set up in their premises which are completely own by them by holding 100% shareholding of the said generating station, fall within the definition of a ‘Captive Power Plant’ and therefore all other captive users ought to choose the option of ‘Captive Group Plant’. Thus, it is wrong for MSEDCL to contend that no wrongdoing can be attributed to it w.r.t. the levy of ASC on the Petitioner.
- 5.4 The Petitioner has always been a single captive consumer of the Respondent No. 2 generating station, the relevant documents containing such information were also made available to MSEDCL in advance. Thus, being a single captive consumer, no ASC can be levied on the Petitioner. Accordingly, the levy of ASC in the invoices raised for the months of July 2020 to November 2020 on the three manufacturing units of the Petitioner ought to be quashed, and the amounts paid ought to be reimbursed to the Petitioner along with applicable interest.

5.5 It was only the nomenclature used, which is being taken advantage of erroneously by MSEDCL. The Petitioner had also submitted the relevant documents to MSEDCL, based on which MSEDCL could have ascertained the same. However, MSEDCL has chosen not to do so. The Petitioner is again filing herewith the documents sought by MSEDCL for it to ascertain the status of the Petitioner.

6. **At the E-Hearing through video conferencing held on 6 April 2021:**

The Advocate for MSEDCL stated that the rejoinder to the replies have been received from the Petitioner only a day before, along with some documents and therefore MSEDCL needed additional time for verifying those documents and making a submission on merit. The Advocate of the Petitioner stated that no new documents had been filed and all these documents were already with MSEDCL since these documents had been filed along with the OA Application. The Commission granted ten days' period to MSEDCL for filing its further submission and the matter was adjourned.

7. **In its reply dated 28 April 2021, MSEDCL stated that:**

7.1 MSEDCL is objecting to the reliefs sought by the Petitioner in present Petition.

7.2 Vide its Preliminary Reply dated 8 March 2021, MSEDCL had sought certain important documents from the Petitioner which have been furnished by the Petitioner along with its rejoinder dated 5 April 2021.

7.3 Though on account of inadvertence and oversight, the OA was granted under "Group Captive" route and strictly as per the application of the Petitioner, the perusal of the documents furnished by the Petitioner along with the rejoinder dated 5 April 2021 raises a more fundamental and a legal issue for the consideration of the Commission. This fundamental issue is as under:

Whether the Petitioner can be granted open access under Section 9 of the EA at all in view of specific facts revealed from the documents?

7.4 The Petitioner has submitted the following documents along with its rejoinder dated 5 April 2021:

- i. Share Subscription and Share Holders Agreement and its amendments
- ii. Memorandum of Association of the Company and Articles of Association
- iii. Power Purchase Agreement and its amendments
- iv. CA Certificate

7.5 A perusal of the various clauses of the above documents reveals that there is a "Sale and Purchase" of power happening between Petitioner and Generator.

7.6 Section 2 (8) of the EA reads as under:

"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;

7.7 Section 9 of the EA reads as under

“Section 9. (Captive generation):

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

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

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

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

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.”

7.8 Section 2 (70) of the EA reads as under:

"supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

7.9 From aforesaid provisions of the EA, it is clear that in captive transactions, a person carries electricity from its generating station to the destination of use. There is no concept of “Sale and Purchase” of power in captive transaction. However, a perusal of the documents reveals that there is absolute “Sale and Purchase” of power happening between Petitioner and Generator under the camouflage of “Group Captive/Captive Generation”.

7.10 In view of the above, the Commission is requested to hold and declare that the commercial arrangement of the Petitioner is not falling under the purview of Section 9 of the EA in the specific facts and circumstances of the present case and thereby dismiss the Petition with a liberty to MSEDCL to change the category of OA from Section 9 to Section 10 of EA.

8. **At the E-Hearing through video conferencing held on 4 May 2021:**

8.1 Advocate appearing on behalf of the Petitioner briefly gave the background of the Petition and further stated that:

- i. MSEDCL is not disputing the fact that the Additional Surcharge is not leviable on the consumers of individual captive power plants and only the consumers availing power from the group captive power plants are liable to pay the Additional Surcharge.

- ii. MSEDCL, in its preliminary reply, had objected to the prayers of the Petitioner stating that Petitioner itself had made its OA Applications under the “Group Captive mechanism”. Hence, MSEDCL has correctly levied the Additional Surcharge on the Petitioner. However, as held by the Hon’ble Supreme Court, incorrect nomenclature does not alter the substantive facts.
- iii. Exide is the sole captive consumer of the generating station of CSE Solar Sunpark and there are no other consumers consuming electricity from the said generating station.
- iv. If nomenclature used at the time of OA Application is sacrosanct for MSEDCL, then at a later stage, MSEDCL cannot raise any dispute on the CPP status of any generation plant which it normally does.
- v. In its reply dated 28 April 2021, MSEDCL has objected to the Petition raising all the way a new argument. After long eighteen years of the EA coming into force in year 2003, MSEDCL, for the first time, has raised the contention that if there exists a PPA between the generator and the consumer with some agreed Tariff for electricity, such arrangement cannot be treated as captive arrangement.
- vi. MSEDCL has requested the Commission to hold that the commercial arrangement of the Petitioner is not falling under the purview of Section 9 of the EA and further sought liberty to allow MSEDCL to change the category of present OA transaction from Section 9 to Section 10 of EA. However, MSEDCL cannot seek its prayers in Petition filed by Exide.
- vii. As per the Companies Act, although the shareholders can hold equity in a company, they do not have ownership over the assets of the company and such shareholders are entitled to dividend payable by the company.
- viii. MSEDCL has raised dispute about existence of the PPA which has specified the Tariff for sale of electricity and claimed that under captive arrangement, there cannot be any sale of electricity with Tariff payable towards the supply of such electricity. However, there has to be some cost associated with supply of electricity and the Electricity Rules 2005 also do not envisage free supply of electricity.
- ix. There are numerous PPAs in place between Captive Power Plants and their consumers across the State and also in the country and there is no PPA which provides supply of free electricity without any cost.
- x. If it was MSEDCL’s claim that the present arrangement is not a CPP arrangement, it is not clear why MSEDCL did not levy Cross Subsidy Surcharge (CSS) on the Petitioner.

8.2 Advocate appearing on behalf of MSEDCL re-iterated the submissions as made out in its replies and further stated that:

- i. The contention raised by MSEDCL in its reply dated 28 April 2021 had also been raised by it in OPGS matter however, the issue was not decided, and it was

held that the matter was falling under jurisdiction of Central Electricity Regulatory Commission (**CERC**). The matter is now pending before the Hon'ble ATE.

- ii. Bare reading of the Section 9 of the EA and the Electricity Rules 2005 would demonstrate that in captive mode of arrangement, there cannot be two separate entities with an arrangement of sale and purchase of electricity between them.
- iii. Before deciding the claims of the Petitioner that it is a consumer of individual CPP and not a GCPP, the Commission should first decide whether at all, the present arrangement falls under Section 9 of the EA.
- iv. MSEDCL has not sought any prayer in its replies as contended by the Petitioner. Rather, it is the submission of MSEDCL that present arrangement falls under Section 10 of the EA and no captive arrangement exists in present case. If the Commission agrees to aforesaid submissions, the Commission may pass appropriate direction allowing MSEDCL to change the category of OA from Section 9 to Section 10 of EA.
- v. The Petitioner has also contended that in last eighteen years since commencement of the EA, there have been a number of similar arrangements all over the State and the country. However, MSEDCL submits that legality of such arrangements needs to be examined and if it is found that such arrangements do not have a legal sanctity, such arrangements should not be allowed to continue.
- vi. It is only after the status of present arrangement is confirmed to be a captive arrangement, the Petitioner's claim of being a consumer of non-group captive power plant could be decided.
- vii. It is the MSEDCL's stand that the entity needs to hold 100% equity in the plant if it is seeking a declaration of being a sole captive user of the plant.
- viii. In past, the Petitioner had been a consumer of MSEDCL. Accordingly, as per principles laid down under the Order dated 12 September 2018 in Case No. 195 of 2017, the Petitioner is entitled to pay Additional Surcharge to MSEDCL.

8.3 In response, the advocate for the Petitioner stated that:

- i. MSEDCL's assertion about a need to have 100% equity in the captive power plant is in a way challenge to the Electricity Rules 2005 and MSEDCL, through the present Petition filed by the Petitioner, cannot raise such challenge.
- ii. The copy of the PPA, based on which MSEDCL is challenging the captive status of the present arrangement, had been filed by the Petitioner along with the OA Application and thus, MSEDCL was aware of the factual status of the arrangement since beginning.
- iii. It appears that MSEDCL is intending to levy CSS on all such arrangements across the State, that too, on retrospective basis.

- iv. The ruling of the Commission in Order dated 12 September 2018 in Case No. 195 of 2017 directing levy of Additional Surcharge on consumers of Group Captive Power Plant, had been set aside by the Hon'ble ATE vide its Order dated 27 March 2019. Although the operation of aforesaid Order of the Hon'ble ATE has been stayed by the Hon'ble Supreme Court, the Order passed by the Hon'ble ATE has not been set aside.
- v. The Electricity Rules, 2005 have provided the criteria of minimum 26% equity to be held by the captive users and minimum 51% consumption by the captive users as the requirement to be fulfilled by the captive power plant and no additional criteria can be imposed on such captive power plants. Also, all the captive users can collectively meet the requirement of minimum 26% equity and there is no requirement to have 100% equity in the plant.
- vi. The Electricity Rules, 2005 provides that captive power plant can be set up by the association of persons. The Rules also state that the captive power plant can be owned by a company formed as special purpose vehicle for such power plant.
- vii. If dispute arises on fulfillment of criteria prescribed in the Electricity Rules 2005, the Parties approach the Commission for resolution of dispute related to determination of captive status.

8.4 Advocate of MSEDCL stated that:

- i. As per Order of the Hon'ble Supreme Court, the operation and implementation of the Order dated 27 March 2019 passed by the Hon'ble ATE has been stated meaning thereby the Order dated 27 March 2019 of ATE does not exist.
- ii. The concept of Group Captive Power Plant is neither provided in the EA nor in the rules and this concept has evolved over the period of time.

8.5 The Commission directed the Parties to file their respective written submissions within seven days.

9. **The Petitioner, in its written submissions dated 11 May 2021, stated as under:**

9.1 The legality of the levy of Additional Surcharge by MSEDCL on the captive consumption of electricity by the Petitioner is the key issue to be decided in the present Petition.

9.2 The undisputed facts of the present Case are as under:

- i. The Petitioner, which holds more than 26% of the equity shareholding with voting rights in the Generating Plant of Respondent No. 2, fulfils the condition as provided in Rule 3(1)(a)(i) of the Electricity Rules, 2005.
- ii. The Petitioner by itself consumes entire 100 % of electricity generated from the Generating Plant of the Respondent No. 2, fulfilling the condition as provided in Rule 3(1)(a)(ii) of the Electricity Rules, 2005.
- iii. No other person claims captive consumption from the generating station of the Respondent No. 2.

- iv. The Petitioner has taken Medium Term Open Access for the captive consumption.
- 9.3 The Petitioner by itself fulfils the captive conditions and qualifies as a captive consumer. The Respondent No. 2 qualifies as a captive power plant. The Respondent No. 2 is not a group captive power plant having multiple consumers. It is in the above factual background that the legality of the levy of Additional Surcharge by MSEDCL on the Petitioner needs to be considered by the Commission.
- 9.4 The Additional Surcharge was held to be applicable on the consumption of electricity by the group captive consumers of the group captive power plants vide Order dated 12 September 2018 passed by the Commission in Case No. 195 of 2017. In the said Order, the Commission had identified the group captive power plants as those where equity shareholding keeps changing frequently in order to maintain 26% equity under the Electricity Rules, 2005 and such frequent change in consumer mix leads to stranded capacity on short term open access. In view of the above, the Commission directed the levy of Additional Surcharge on captive users of the group captive power plants.
- 9.5 The Commission had decided to levy Additional Surcharge only on the captive users of group captive power plants. This was stated to be because of frequent changing of captive users of group captive power plants.
- 9.6 The above Order was challenged before the Hon'ble ATE in Appeal Nos. 311 and 315 of 2018. The Appeals were filed by M/s JSW Energy Ltd. and M/s Sai Wardha Power Generation Limited, both of which were group captive power plants having multiple captive consumers. By its Judgement dated 27 March 2019, the Hon'ble ATE had set aside the Order of the Commission and held that no distinction can be made between a captive power plant having a single consumer and a group captive power plant having multiple consumers. The Hon'ble ATE had, *inter-alia*, held as under:
- “88. In the light of the above discussion and reasoning, we are of the opinion that there cannot be any distinction between an individual captive consumer and group captive consumers or original captive consumers and converted captive consumers. For the above mentioned reasons, the above appeals deserve to be allowed and accordingly allowed. The impugned order dated 12.09.2018 passed by Maharashtra Electricity Regulatory Commission is hereby set aside.”*
- 9.7 The Hon'ble Supreme Court has stayed the operation of the above ATE Order. The interim Order of stay of the Hon'ble ATE would only mean that the execution proceedings pursuant to the direction of the Hon'ble ATE would remain stayed and not that the Order of the Hon'ble ATE itself ceases to exist in law. Reference may be made to the decision of the Hon'ble Supreme Court in the case of *Shri Chamundi Mopeds Ltd. v. Church of South India Trust Association*.
- 9.8 In any event, the said issue itself would not arise in the present case as even by the above Order of the Commission dated 12 September 2018, the levy of Additional Surcharge was restricted only to the group consumers of the group captive power plants and not to power plants such as the Respondent No. 2, which is a single consumer power plant.

- 9.9 This was also specifically clarified and reiterated by the Commission in its Tariff Order dated 30 March 2020, wherein the Commission has specifically continued the application of the earlier Order dated 12 September 2018 regarding levy of Additional Surcharge on the consumers of the group captive power plants.
- 9.10 Thus, it is abundantly clear that the levy of Additional Surcharge is restricted only to group captive consumers of the group captive power plants and not the single captive consumers of a generating station.
- 9.11 The above position in law is in fact not even disputed by MSEDCL. In this regard, MSEDCL in the two replies filed before the Commission in the present case, has not disputed the fact that the levy of Additional Surcharge is only on the group captive consumers of the group captive power plants. The only objection taken by MSEDCL in its replies are as under:
- i. The Petitioner, in its application has selected the option of ‘group captive’ and therefore, being group captive in nature, the levy of Additional Surcharge is correct in the present case.
 - ii. The Petitioner is a separate legal entity from the Respondent No. 2 and Tariff consideration is being paid by the Petitioner for electricity taken from the Respondent No. 2. Therefore, the arrangement does not qualify as captive at all and is non-captive in nature. MSEDCL thus, has contended that the OA granted by MSEDCL to the Petitioner under Section 9 of the EA should be converted to Section 10 of the EA.
- 9.12 The above contentions raised by MSEDCL are ex-facie erroneous and liable to be rejected.
- 9.13 On the 1st issue, the Petitioner has already explained that the nomenclature selected as ‘group captive’ was a mistake and cannot and does not alter the nature of the power plant for the captive consumption. The factual position of the nature of the power plant of the Respondent No. 2 and of the Petitioner being the sole captive consumer remains the same and was in the knowledge of MSEDCL right from the beginning. All the conditions for being a Captive Power Plant in terms of Rule 3 of the Electricity Rules have been fulfilled by the Respondent No. 2 and the Petitioner.
- 9.14 The Petitioner is the sole captive consumer of the generating station and the Petitioner by itself holds more than 26% of the equity shareholding with voting rights in the generating station of the Respondent No. 2. This was also made abundantly clear in the OA application sought for and granted by MSEDCL, which is for the entire capacity of the generating station of the Respondent No. 2. There is also no other OA application made for captive consumption from the said generating station.
- 9.15 In fact, the OA in the present case is Medium Term Open Access, and not STOA. The decision of the Commission regarding levy of Additional Surcharge on group captive was on the basis of frequent change in consumer mix, which does not arise in the present case.

- 9.16 This being the factual position, merely because the nomenclature, inadvertently used as 'group captive', does not change the nature of the power plant or the nature of the captive consumption of the Petitioner.
- 9.17 The well-settled legal position that the nomenclature used is not determinative of the nature of the transaction has been reiterated by the Hon'ble Supreme Court in the matter of *Faqir Chand Gulati v. Uppal Agencies (P) Ltd.*, (2008) and *Mathai Samuel v. Eapen Eapen*, (2012) 13 SCC 80.
- 9.18 In view of above, the first objection raised by MSEDCL regarding the nomenclature used in the OA application is erroneous and is liable to be rejected.
- 9.19 MSEDCL has taken 2nd contention that since there are two different legal entities, namely the Petitioner and the Respondent No. 2, there cannot be any captive consumption at all. This contention is ex-facie erroneous. This in fact amounts to challenge to the Electricity Rules, 2005 by MSEDCL, for which the Commission is neither the forum, nor can MSEDCL can make such contentions as a respondent in the present Petition.
- 9.20 The Electricity Rules, 2005 provides that a shareholder holding a minimum of 26% shares in a company can consume electricity as a captive consumer. The said condition is duly fulfilled in the present case.
- 9.21 The very fact that the Electricity Rules, 2005 provides that holding of 26% shareholding in another company would qualify as captive consumption, itself presupposes two separate legal entities, namely one entity which has issued the shares and owns the generating station and the other entity which is a shareholder. If the contention of MSEDCL is to be accepted, the very Rule 3 providing for 26% shareholding as a condition for captive consumption is to be set aside, which obviously cannot be the position.
- 9.22 The entire country has operated on the basis of Rule 3 for sixteen years now including MSEDCL and this obviously cannot be a stage for MSEDCL to indirectly challenge the Rule itself, particularly in the present proceedings before the Commission.
- 9.23 Even otherwise the contention of MSEDCL is absurd. It is the contention of MSEDCL that since there is a consideration paid by the Petitioner for electricity to the Respondent No. 2, the consumption cannot be captive consumption. By the contention of MSEDCL, captive consumption can only be where there is supply of electricity free of cost and not for any consideration.
- 9.24 Electricity can never be given free of cost, as there is always an economic consideration for electricity. Even when a company itself owns the generating station and also consumes the electricity for its own use, electricity is obviously not free of cost and economic value is always attached to electricity. The Electricity Rules only provide that a shareholder can also consume electricity as captive consumer, provided the shareholder holds at least 26% of the equity shares with voting rights in the company.
- 9.25 Further, there has to be a cost that is to be attributed for the electricity consumed, for various purposes such as tax, transfer pricing of electricity etc. However, merely

because the commercial value is assigned to the electricity, it does not make the electricity non-captive. The EA does not provide that electricity is to be given free of cost in case of captive consumption.

- 9.26 To this extent, the EA and Electricity Rules, 2005 make a deviation from the position under Company Law that a shareholder is not the owner of the assets of the company. Under the Electricity Rules, a 26% shareholder is deemed to be the owner of the company to take electricity as a captive consumer.
- 9.27 This aspect has also been considered by the Hon'ble ATE in its decision in Appeal Nos. 311 and 315 of 2018.
- 9.28 The only issue in the present case is whether the Respondent No. 2 qualifies as a group captive power plant. This is obviously not the case and has in fact not even been disputed by MSEDCL in the replies filed. A group captive power plant is one where there are numerous captive consumers. This is in the nature of an association of persons.
- 9.29 In fact, the Electricity Rules only provide for an association of persons, wherein multiple consumers can come together to form an association of persons and hold 26% of the ownership and consume electricity to the extent of minimum 51% of the generation in proportion to their ownership in the power plant.
- 9.30 This principle of joint ownership and proportionality is not provided for in a company formed as a Special Purpose Vehicle (SPV). It is only by the decision dated 22 September 2009 of the Hon'ble ATE in the case of "*Kadodara Power Limited vs. Gujarat Electricity Regulatory Commission*", in Appeal No. 171 of 2008, that the Hon'ble ATE had considered a group captive power plant also in the nature of an association of persons and applied the rule of proportionality. In this regard, the Hon'ble ATE had, *inter alia*, held as under:

"09) The Commission held that consumption of electricity by the aforesaid companies be treated as sale by a generating company to a consumer through open access. The general finding of the Commission can be found in paragraph 12 of the impugned order which can be extracted as under:

"[12]As noted earlier, in accordance with the Electricity Rules, 2005 notified by the Ministry of Power, the group CGPs are required to fulfill certain conditions. According to these rules, a group CGP may be an association of persons, a company or a co-operative society. The rules also envisage that the company set up for holding, constructing and operating group captive called special purpose vehicle (SPV) will undertake no other business or activity.

The members of the group captive (as shareholders) have to own at least 26% of the share capital. Further they have to consume in aggregate not less than 51% of the power generated by the group CGP. In addition, the captive power or the captive generation has to be consumed by the members in proportion to their share capital with + 10% variation. These conditions have to be met with on annual basis in each financial year. If these conditions are not met with, then the entire power supplied to the

members will be treated as if it were supplied from a generating company. If these conditions are violated, two consequences will follow: [1] electricity duty will be payable on the whole of the generation consumed by the members; and [2] cross subsidy surcharge plus additional charges of open access as prescribed by the Commission will have to be paid on the entire consumption.”

.....

12) The appellants in appeal No. 171 of 2008 contend that the special purpose vehicle is not an association of persons and therefore, for them it will be sufficient compliance of Rule 3 if they comply with the requirement of consumption of 51% of the total generation. According to them the Rule of Proportionality of consumption and ownership prescribed for association of persons is not attracted to the case of a special purpose vehicle. These appellants have also challenged the manner in which the proportionality of consumption and generation by the members of the special purpose vehicles has been assessed by the Commission.

.....

15) The question has arisen because the word ‘association of persons’ is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (1)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding + 10%. A special purpose vehicle is a legal entity owning, operating and maintaining a generating station with no other business or activity to be engaged in by the legal entity. Now if three companies need to set up the power plant primarily for their own use they can come together and form another legal entity which may itself be a company registered under the Companies Act. This company may set up a power plant. In that case the company formed by three different companies would become a special purpose vehicle. If a company which is a special purpose vehicle is one person then all that is necessary is that this company should consume 51% of the generation. However, if it is treated as association of persons apart from a condition of consuming minimum 51% of its generation the three shareholders will also have to consume 51% of the generation in proportion to their ownership in the power plant. It is contended on behalf of some of the appellants before us who are special purpose vehicles that they are not an association of persons and accordingly it is only necessary for them to consume 51% of their generation collectively without adhering to the Rule of proportionality of consumption to their share. This does not appear to us to be the correct view. Section 2(8) of the

Act, as extracted above, says that a captive generating plant may be set up by any person and includes the power plant set up by any cooperative society or association of persons. Mr. M. G. Ramachandran contends that going by this definition if the special purpose vehicle is not an association of persons it cannot set up a captive generating plant because the definition does not mention any person other than a cooperative society and association of person. There is small flaw in the argument of Mr. M. G. Ramachandran in as much as the definition of captive generating plant is inclusive. In other words, the captive generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfil the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant.

.....

16) In case the special purpose vehicle was not required to maintain the rule of proportionality of consumption, the Central Government could have specifically mentioned the same just as it has done for a cooperative society. The Rule having not exempted a special purpose vehicle from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming the special purpose vehicle as has been done in the case of cooperative society it will only be rational and logical to hold that a special purpose vehicle is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'."

- 9.31 In the above case, multiple consumers having shareholding in the same power plant and consuming electricity as captive consumers were considered as an association of persons, for which purpose the principle of proportionality was made applicable.
- 9.32 In the present case, the Petitioner is the only captive consumer, and the question of proportionality also does not arise, which arises in the case of a group captive power plant.
- 9.33 In the above decision of *Kadodara*, the Hon'ble ATE had also held that the captive consumers can transfer the shares from time to time.
- 9.34 In fact, the above reason, namely that there are changes in shareholding of the group captive power plants from time to time to meet the captive criteria, was the basis for the Commission to direct the levy of Additional Surcharge on group captive consumers of the group captive power plants in the Order dated 12 September 2018 in Case No. 195 of 2017.
- 9.35 Though not raised by MSEDCL in its replies filed, a contention was sought to be made in the hearing that a power plant would be a group captive power plant if the captive consumer holds less than 100% shareholding in the company. This contention is also absurd.

- 9.36 The Electricity Rules, 2005 make no distinction on a shareholder holding 100% shares, 50% shares or for that matter any quantum of shares more than 26% for the purposes of captive consumption.
- 9.37 The shareholder, holding 26% or more shareholding in a generating company is entitled to consume the entire electricity as captive consumption. The quantum of shareholding above 26% is irrelevant to consider the nature of the consumption as captive consumption.
- 9.38 A group captive power plant, as was considered in the *Kadodara* case by the Hon'ble ATE and also in Case No. 195 of 2017 by the Commission, is where there are multiple captive consumers, who in aggregate hold 26% shareholding and collectively consume minimum of 51% generation.
- 9.39 A group is where there are two or more consumers. In the present case, it is not understood as to how it would be a group captive power plant, when there is only one captive consumer who by itself satisfies both the conditions as prescribed in Rule 3 of the Electricity Rules, 2005.
- 9.40 The fact that the Petitioner by itself holds more than 26% shareholding in the Respondent No. 2 generating company and the Petitioner being the sole captive consumer of the electricity generated by the Respondent No. 2 is not disputed.
- 9.41 In the facts and circumstances mentioned above, it is respectfully submitted that the levy of Additional Surcharge by MSEDCL on the captive consumption of electricity by the Petitioner is erroneous and is liable to be quashed. The Petitioner is entitled to refund of Additional Surcharge paid together with interest thereon.
10. **MSEDCL, in its written submissions dated 12 May 2021, stated as under:**
- 10.1 As argued by MSEDCL during the hearing dated 4 May 2021, without prejudice to objections raised by MSEDCL vide its "Affidavit in Reply on Merits" dated 27 April 2021, on the issue of "*Whether the Petitioner can avail open access under Section 9 of Electricity Act, 2003 at all in view of specific facts and circumstances*"?, and assuming without admitting that the said proposition is rejected by the Commission, MSEDCL would like to raise the below mentioned question of law for a separate and independent adjudication and determination by the Commission:
- Whether the Petitioner can be treated as a "Captive Consumer" or it has to be treated as a "Group Captive Consumer" in view of specific facts of the case:***
- 10.2 It is an admitted position that the Petitioner being a consumer has invested 26% equity in the generating company.
- 10.3 The generating company and the Petitioner are two separate entities. Hence, the present set-up is one wherein two separate entities are involved. In such a scenario, the present arrangement can only be termed as "Group Captive".
- 10.4 The Petitioner in its Rejoinder dated 5 April 2021 has stated as under:
- "It is stated that when the Petitioner was applying for open access with MSEDCL, the Petitioner was (incorrectly) advise that only those consumers who have their*

generating stations set up in their premises and completely own the said generating station by holding 100% shareholding of the said generating station fall within the definition of a “Captive Power Plant” and therefore all other captive users out to choose the option of “Captive Group Plant”.....

10.5 While MSEDCL clarifies that no such opinion was given to the Petitioner by MSEDCL, however, the said opinion is correct to the extent that whoever has 100% shareholding of the generating station is termed as “Captive Power Plant”. In the present case, the Petitioner only has 26% shareholding in Respondent No. 2. Hence, at the cost of repetition, MSEDCL reiterates that the generating company and the Petitioner are two separate entities. Hence, the present set-up is one wherein two separate entities are involved and can only be termed as “Group Captive”.

10.6 The above position is also clear from the ruling of the Commission in its Order dated 12 September 2018 in Case No. 195 of 2017 wherein the Commission has held as under:

“9.38.19. Though, the Commission has specifically provided exemption of Additional Surcharge in the MYT Order for Captive Users of CPPs to the extent of their self-consumption from such Plants, the Commission noted that frequently changing captive users of GCPP was leading to stranded contracted capacity of Distribution Licensee. Such captive users are very different from static captive users of original Captive Power Plants as the latter have ceased to be consumers of Distribution Licensees having created their own permanent power requirement through captive mode. There is no power planning needed for such static captive users as against frequently switching users of group captive power plants for whom the power supply is planned and therefore becomes a stranded capacity. Such Group Captive users become liable to same Additional Surcharge due to stranded capacity as applicable to other open access consumers.

9.38.20. It is brought to the notice of the Commission that most of the GCPP users avail Open Access under short term basis. The GCPP matrix also keeps on changing frequently in order to meets 26 % equity criteria under Electricity Rules, 2005. Equity is apparently purchased as preferential share at a nominal cost. Hence, change in the consumer mix whereby Consumers switching out of GCPP matrix leads to stranded capacity on Short Term Open Access (STOA) as the quantum of power keeps changing as per the fluctuating number of GCPP users.

9.38.21. If there is stranded capacity created on account of such Consumers switching to Open Access Group Captive arrangement, the Additional Surcharge as determined by the State Commission shall be payable by such Captive Open Access users who are already factored in power procurement plan of Distribution Licensees.

9.38.22. With the increase in this GCPP based OA transactions, the obligation of the Distribution Licensee in terms of power purchase commitments has been and

shall continue to be stranded, and there will be an unavoidable obligation and incidence to bear the fixed costs consequent to such commitments. Such fixed cost of power purchase has to be expected to be incurred with reasonable certainty, and also that such fixed cost of power purchase cannot be recovered from OA Consumers through Wheeling Charges or Stand-by Charges alone.

- 9.38.23. *The Commission is of the considered view that, unless such fixed costs due to stranded capacity are recovered from OA Consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other Consumers through consequent tariff hike.*
- 9.38.24. *The Commission is of the view that, under the circumstances and in pursuance of Regulation 14.8 of the DOA Regulations, 2016, there is a case for recovery of the part of fixed cost towards the stranded capacity arising from the power purchase obligation through levy of Additional Surcharge from OA Consumers including the Group Captive Consumers who have availed such arrangement henceforth.*
- 9.38.25. *Accordingly, the Commission has determined the two categories of captive users who procure power from CGP's viz., (a) Original Captive Users (who were never consumers of Distribution Licensee) and (b) Converted Captive Users (who subsequently switchover to GCPP mode). The Original Captive Users are the Users who have been procuring power originally under the captive mode and whose demand has not been included in the power procurement plan of Distribution Licensee whereas Converted Captive Users are the Users who prior to issue of this Order were Consumers of Distribution Licensee and who have opted to procure power under Group Captive arrangement, creating stranded capacity for Distribution Licensee.*
- 9.38.26. *In view of the above the Commission holds that Additional Surcharge shall be applicable to Captive Users of Group Captive Power Plants; in addition to Open Access consumers.*

10.7 The Petitioner was an erstwhile consumer of MSEDCL who has switched to OA for the first time in the year 2021. Moreover, the generating company and the Petitioner are two separate entities. Hence, the present set-up is one wherein two separate entities are involved. MSEDCL most respectfully submits that in such a scenario, the present arrangement can only be termed as "Group Captive".

10.8 The concept of Group Captive does not find its place either in the EA or the Electricity Rules, 2005 and has evolved as a concept over a period of time. The Petitioners concept of "Group Captive" to only mean a situation where there are more than one consumer is flawed as different generator and a different single consumer investing 26% would also be "Group Captive". In the most respectful submission of MSEDCL, where there

are more than two separate entities involved in a transaction, it has to be termed as a “Group Captive” arrangement.

- 10.9 MSEDCL once again clarifies that the present issue has been raised by MSEDCL without prejudice to the other issue of “*Whether the Petitioner can avail open access under Section 9 of Electricity Act, 2003 at all in view id specific facts and circumstances*”?, which has been raised by MSEDCL vide its “Affidavit in Reply on Merits” dated 27 April, 2021.
- 10.10 MSEDCL further requested the Commission to deal with both the legal issues separately and independently. It is further clarified by MSEDCL, that in case the first issue raised by MSEDCL vide its “Affidavit in Reply on Merits” dated 27 April, 2021 is decided in favor of MSEDCL then the other issue may not require adjudication. However, if the first issue is decided against MSEDCL, then the present issue raised through the present “Written Submissions” would require adjudication by the Commission.
- 10.11 In view of the above, it is most respectfully prayed that the Commission may graciously be pleased to dismiss the Petition filed by the Petitioner being time barred as well as devoid of merits.

Commission’s Analysis and Rulings:

11. Present Petition has been filed by Exide Industries Ltd. challenging the levy and recovery of Additional Surcharge by MSEDCL on the captive consumption of electricity by the Petitioner. It is the claim of the Petitioner that it is a sole captive user of the Power Plant with it holding 27.19% equity shareholding in the power plant and therefore it is a consumer of non-group captive power plant as per provisions of Electricity Rules 2005. According to the Petitioner, such levy and recovery of the Additional Surcharge is illegal as in terms of the ruling of the Commission in Case No. 195 of 2017, the Additional Surcharge is leviable only on the consumers of group captive power plants and not on the individual or non-group captive power plant.
12. The Commission notes that Regulation 8.5 of the MERC (Distribution Open Access) Regulations, 2016 provides the documents to be submitted along with the OA Application. The relevant Regulation reads as under:
- “ 8.5. The Application shall be accompanied by the following documents also, where applicable:*
- *Consent from Seller if Buyer is the Applicant, or consent from Buyer if Seller is the Applicant*
 - **Copy of Supply Agreement**
 - *Proof of payment of Application fee*
 - *Copy of Trading Licence*
 - *Copy of relevant documents from the Power Exchange if power is sought through a Power Exchange (Registration/ Membership details, Member-Client agreement, etc.)*

- *Copy of Memorandum of Association and Chartered Accountant's certificate of shareholding pattern, if power is sought under captive mode*
 - *SEM commissioning certificate, if already installed ”*
13. Thus, as per the aforesaid Regulation, a copy of the power purchase/supply agreement is required to be submitted along with the OA Applications.
 14. From the documents submitted along with the Petition, it is not clear as to whether the power purchase agreement had been submitted along with the OA Applications, however the Petitioner has stated that the copy of the PPA had been submitted along with the OA Applications. MSEDCL has also granted the OA to the Petitioner as sought. Hence, the Commission presumes that the copy of the PPA had been a part of the OA Applications of the Petitioner.
 15. It is observed that at the time of grant of OA, MSEDCL had not raised any dispute on the Petitioner's status of being a consumer of captive power plant citing existence of PPA between the Petitioner and the Respondent No. 2. which is being raised by MSEDCL now in present Petition.
 16. Now, only when the present Petition is filed by the Petitioner, MSEDCL has raised a principal issue objecting to the captive status of the Plant of the Respondent No.2. It is pertinent to note that this principal issue was not raised by MSEDCL during its preliminary reply. MSEDCL, has raised the principal issue only in its subsequent reply which was filed after submission of additional documents by the Petitioner.
 17. MSEDCL, while raising the principal issue, has stated that there is no concept of "Sale and Purchase" of power in captive transaction which is meant for self-use only. Since there is "Sale and Purchase" of power happening between Petitioner and Generator under the camouflage of "Group Captive/Captive Generation", the Commission should hold and declare that the commercial arrangement of the Petitioner is not falling under the purview of Section 9 of the EA (i.e., captive arrangement).
 18. The Commission is of the view that the issue raised by MSEDCL is not limited to the Parties to the present proceeding i.e. the Petitioner, MSEDCL and Respondent No. 2. The Petitioner has raised its individual dispute with MSEDCL about levy of Additional Surcharge. However, MSEDCL has interpreted EA provisions to claim that if there is a purchase and sale of electricity, such arrangement cannot be treated as a captive arrangement as envisaged under the EA. While MSEDCL has every right to raise its contentions, the Commission is of the opinion that if it decides to adjudicate this issue, the outcome of the adjudication (which may be in favour of captive consumers or MSEDCL) may impact other captive consumers in the State. The issue raised by MSEDCL is generic in nature and may have wider implications on the existing as well as future cases of captive arrangement.
 19. The issue raised by MSEDCL might have merit, but in view of the principle of natural justice, it would not be appropriate to deal with the issue through present Petition in a standalone manner in absence of the affected parties i.e. rest of the captive consumers in the State.

20. In light of the above, the Commission is not inclined to address the issue raised by MSEDCL in the present proceeding. MSEDCL is at liberty to file a separate Petition (making the captive consumers, the Respondents to the Petition) where the issue raised by MSEDCL could be adjudicated in a holistic manner vis-à-vis the relevant provisions of the EA, Electricity Rules 2005 and the Open Access Regulations notified by the Commission.
21. Thus, there remains the limited issue to be decided by the Commission about the type of captive arrangement between the Petitioner and the Respondent No. 2, whether it is non-group captive arrangement/individual captive arrangement or a group captive arrangement, for levy of ASC. The Petitioner's claim is that it is a consumer of an individual captive power plant by holding minimum 26% equity shares with voting rights in solar power plant (i.e. CSE Solar Sunpark) and consuming 100% electricity generated by the power plant as per the provisions of Electricity Rules 2005. Apparently, although MSEDCL has raised questions on the Petitioner's captive status itself, MSEDCL appears to have no dispute on the Petitioner's averment that it is a sole captive consumer of the Respondent No. 2.
22. However, MSEDCL has claimed that where the captive consumer has 100% shareholding in the generating station, only such arrangement can be termed as non-group Captive Power Plant. In the present case, the Petitioner has only 27.16% shareholding in Respondent No. 2. Hence, the generating company and the Petitioner are two separate entities, and the present set-up is the one wherein two separate entities are involved. Hence such arrangement can only be termed as "Group Captive". MSEDCL has also stated that the Petitioner was an erstwhile consumer of MSEDCL who has switched to OA for the first time in the year 2021 and hence it is entitled to pay the Additional Surcharge.
23. In response, the Petitioner has stated that MSEDCL's argument amounts to challenge to the Electricity Rules, 2005 by MSEDCL, for which the Commission is neither the forum, nor can MSEDCL make such contentions as a respondent in the present Petition. The very fact that the Electricity Rules, 2005 provide that holding of 26% shareholding in another company would qualify as captive consumption, itself presupposes two separate legal entities, namely one entity which has issued the shares and owns the generating station and the other entity which is a shareholder. If the contention of MSEDCL is to be accepted, the Rule 3 providing for 26% shareholding as a condition for captive consumption is to be set aside, which obviously cannot be the position. A group captive power plant is one where there are numerous captive consumers. This is in the nature of an association of persons. In fact, the Electricity Rules only, provide for an association of persons, wherein multiple consumers can come together to form an association of persons and hold minimum 26% of the ownership and consume electricity to the extent of minimum 51% of the generation in proportion to their ownership in the power plant.
24. It is observed that and as rightly pointed out by MSEDCL, group captive power plant arrangement is not defined under the EA and has evolved over the period of time as per the provisions of Electricity Rules 2005. However, as prescribed by the Electricity

Rules 2005, if the multiple users of a power plant (holding minimum 26% equity in the power plant in an aggregate manner) consume minimum 51% of the electricity consumed in the Power Plant in proportionality of their equity shareholding, then such arrangement qualifies to be a captive arrangement. The relevant extract of the Electricity Rules 2005 is given below:

“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."

[Emphasis added]

25. Thus, it is evident from the aforesaid rules that there can be multiple users or association of persons of a single captive power plant which can hold minimum 26% equity in a collective manner. The other criteria regarding consumption of minimum 51% of electricity generated from the power plant and the criteria for proportionality is examined at the end of the year to ascertain the captive status of the power plant. It is also seen that the Rules also allow even a single captive user with minimum equity shareholding of 26% in the power plant to be a captive user of the plant which can consume minimum 51% energy generated from the power plant.

26. The Hon'ble ATE in its judgment dated 17 May 2019 in Appeal No. 02 of 2018 & IA Nos. 10, 1096 & 1283 of 2018 and Appeal No. 179 of 2018 (M/s Prism & M/s BLA Power v/s MPERC) held that Unit-1 of M/s. BLA is a CGP with M/s. Prism as its captive user as the twin-conditions as per Rule 3 of Electricity Rules 2005 are met by M/s. Prism and M/s. BLA in terms of Unit-1. The relevant part of the ruling is as under:

"9.14 Having found that M/s BLA is an SPV in accordance with Rule 3 and both Appellants having identified Unit-1 of M/s BLA for captive use, it is required to be examined if the two conditions imposed in Rule 3 are met by the Appellants in context of the said Unit-1. It is the contention of both the Appellants that they have fully satisfied the twin conditions in accordance with Rule 3.

(i) In regard to the satisfaction of Rule 3(1)(a)(i) pertaining to M/s Prism owning not less than 26% of the proportionate equity of M/s. BLA related to Unit-1, the Appellants have submitted a certificate from the chartered accountant confirming

that M/s Prism own 30.46% of proportionate equity share capital pertaining to Unit-1 of M/s BLA as on 7 June 2016. The counsel for the Appellants confirm that these shares are equity shares with voting rights. The counsel for Respondents do not dispute this. **Hence it is found that the Appellants comply with the first condition of Rule 3.**

(ii) In regard to the satisfaction of Rule 3(1)(a)(ii) pertaining to 51% of the electricity generated in Unit-1 on annual basis to be consumed for captive use, **it is submitted by the Appellants that in terms of the PSA, M/s BLA's Unit-1 has to supply 63.92% of its capacity to M/s Prism for captive use. Further M/s Prism has submitted that for the period 22.06.2016 (i.e. start of captive supply) to 31.03.2017, they had actually captively consumed 94.55% of the power generated from Unit-1. None of the contesting respondents have disputed this. Hence it is found that the Appellants duly comply with the second condition of Rule 3 also.**

In light of the above, we are of the view that the twin-conditions of Rule 3 are complied with by the power plant (Unit-1 of M/s BLA) with M/s Prism as the Captive User.” [Emphasis added]

27. After examining the Electricity Rules, 2005 and above cited Hon'ble ATE Judgment, the Commission is of the view that the group captive arrangement would be the arrangement wherein there are multiple users of the given captive power plant such as association of persons, registered co-operative society or Special Purpose Vehicle. Therefore, it is difficult to accept the submission of MSEDCL that if there are two different entities, one generator and one captive user, such arrangement has to be treated as group captive arrangement. The Commission agrees with the submission of the Petitioner that the Rules itself presupposes two separate legal entities, namely one entity which has issued the shares and owns the generating station and the other entity which is an equity shareholder/captive user. The Commission notes that it is an admitted fact that the Petitioner is a sole consumer or captive user of the Power Plant of the Respondent No. 2 and owning not less than 26% equity in the Power Plant established by Respondent No. 2. Entire 100% electricity generated in the Power Plant of the Respondent No. 2 is getting consumed by the Petitioner and comply with the minimum 51% consumption criteria. Hence, the Commission finds that twin-conditions of Rule 3 are complied with by the Respondent No. 2 with Petitioner i.e., M/s Exide Industries Ltd., as the Captive User.
28. It is also pertinent to note that the Petitioner is a single legal entity and is having manufacturing facilities at three different locations in MSEDCL's area of supply. Each manufacturing facility has been assigned a separate consumer number by MSEDCL.
29. The Commission notes that the “Consumer” has been defined under the EA as under.

“consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the

purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”

30. Thus, in terms of the above definition, there are three different consumers in the present case. The Commission notes that a single legal entity/person can have more than one consumption premises with separate consumer numbers. Each such location would be treated as a different consumer by the concerned Distribution Licensee.

31. It is also observed that under the Electricity Rules 2005, the captive user has been defined as under:

“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;”

32. Going by the aforesaid definitions of the “Consumer” and the “Captive User”, one can easily say that in present case, Exide Industries is a single captive user of the power plant of the Respondent No. 2 although from MSEDCL’s point of view there are three different consumers. As per the Electricity Rules, 2005, the nature of power plant (captive power plant or otherwise) is totally dependent upon the users in terms of the equity shareholding held by the users and the percentage of electricity consumed by them on an annual basis. The Electricity Rules, 2005 provide that there can be either a single captive user or multiple captive users such as registered co-operative society or association of persons. Registered co-operative society and association of persons envisage more than one legal entity/ person. It is an admitted fact that the Petitioner (which is a single legal entity) is the sole beneficiary of the power plant and thus in spite of existence of three different consumers at three different locations, the power plant needs to be treated as the single user captive power plant and not a multi user captive power plant with co-operative society or association of persons.

33. Further, both the Parties have referred to the Commission’s Order dated 12 September 2018 in Case No. 195 of 2017 (wherein the Commission has allowed levy of Additional Surcharge on the group captive consumers) to support their respective claims. Hence, it would be imperative to examine the ruling of the Commission in the aforesaid Order. The relevant extract of the Order reads as under:

“ 9.38.19. Though, the Commission has specifically provided exemption of Additional Surcharge in the MYT Order for Captive Users of CPPs to the extent of their self-consumption from such Plants, the Commission noted that frequently changing captive users of GCPP was leading to stranded contracted capacity of Distribution Licensee. Such captive users are very different from static captive users of original Captive Power Plants as the latter have ceased to be consumers of Distribution Licences having created their own permanent power requirement through captive mode. There is no power planning needed for such static captive users as against frequently switching users of group captive power plants for whom the power supply is planned and therefore becomes a stranded capacity. Such Group Captive users become liable to same Additional Surcharge due to stranded capacity as applicable to other open access consumers.

9.38.20. It is brought to the notice of the Commission that most of the GCPP users avail Open Access under short term basis. The GCPP matrix also keeps on changing frequently in order to meets 26 % equity criteria under Electricity Rules, 2005. Equity is apparently purchased as preferential share at a nominal cost. Hence, change in the consumer mix whereby Consumers switching out of GCPP matrix leads to stranded capacity on Short Term Open Access (STOA) as the quantum of power keeps changing as per the fluctuating number of GCPP users.

9.38.21. If there is stranded capacity created on account of such Consumers switching to Open Access Group Captive arrangement, the Additional Surcharge as determined by the State Commission shall be payable by such Captive Open Access users who are already factored in power procurement plan of Distribution Licensees.

9.38.22. With the increase in this GCPP based OA transactions, the obligation of the Distribution Licensee in terms of power purchase commitments has been and shall continue to be stranded, and there will be an unavoidable obligation and incidence to bear the fixed costs consequent to such commitments. Such fixed cost of power purchase has to be expected to be incurred with reasonable certainty, and also that such fixed cost of power purchase cannot be recovered from OA Consumers through Wheeling Charges or Stand-by Charges alone.

9.38.23. The Commission is of the considered view that, unless such fixed costs due to stranded capacity are recovered from OA Consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other Consumers through consequent tariff hike.

9.38.24. The Commission is of the view that, under the circumstances and in pursuance of Regulation 14.8 of the DOA Regulations, 2016, there is a case for recovery of the part of fixed cost towards the stranded capacity arising from the power purchase obligation through levy of Additional Surcharge from OA Consumers including the Group Captive Consumers who have availed such arrangement henceforth.

9.38.25. Accordingly, the Commission has determined the two categories of captive users who procure power from CGP's viz., (a) Original Captive Users (who were never consumers of Distribution Licensee) and (b) Converted Captive Users (who subsequently switchover to GCPP mode). The Original Captive Users are the Users who have been procuring power originally under the captive mode and whose demand has not been included in the power procurement plan of Distribution Licensee whereas Converted Captive Users are the Users who prior to issue of this Order were Consumers of Distribution Licensee and who have opted to procure power under Group Captive arrangement, creating stranded capacity for Distribution Licensee.

9.38.26. In view of the above the Commission holds that **Additional Surcharge shall be applicable to Captive Users of Group Captive Power Plants; in addition to Open Access consumers.**

34. Thus, the Order is very clear which makes the Additional Surcharge applicable to captive users of group captive consumers only. Further, it is seen that the Order talks about the “*change in consumer mix*” or “*GCPP matrix*” or “*fluctuating number of GCPP users*” while holding that such change in the consumer mix and the consumers switching out of GCPP matrix leads to stranded capacity as the quantum of power keeps changing as per the fluctuating number of GCPP users. The bare perusal of the aforesaid Order indicates that the intent of the Order is to recover Additional Surcharge from the captive consumers of the group captive power plants where there are multiple consumers. The number of consumers of the given group captive power plant varies in dynamic manner, randomly and repeatedly to ensure the compliance of minimum 26% equity shareholding in the captive power plant. Considering the impact on the Distribution Licensee on account of such frequently changing captive users, the Commission allowed levy of the Additional Surcharge on the captive users of group captive power plant. Present case is different wherein admittedly the Petitioner is a sole consumer of the captive power plant.
35. Further, the Order has referred to the captive users availing OA under STOA whereas in present case barring first few months, the Petitioner has availed MTOA which has ensured certainty in the power sourcing modality of the Petitioner.
36. MSEDCL has stated that the captive user with 100% equity shareholding in the power plant would only qualify to be non-group group captive power plant else it has to be treated as group captive power plant. However, from perusal of the Order, it is seen that the Commission in its Order dated 12 September 2018 in Case No. 195 of 2017 did not differentiate the captive power plant and the group captive power plant based on percentage of equity shareholding of the captive user in the captive power plant. The Order nowhere suggests that a sole user of a captive power plant having equity shareholding less than 100% should be treated as a captive user of the group captive power plant.
37. In light of the foregoing, the Commission is of the view that the present arrangement is not the one which had been envisaged under the MTR Order dated 12 September 2018 for levy of Additional Surcharge.
38. MSEDCL has also pointed out that the Petitioner was the erstwhile consumer of MSEDCL. The Commission is of the opinion that this argument may be factually correct, but the Petitioner cannot be levied the Additional Surcharge on that basis since it was the direction of the Commission to allow the Additional Surcharge on the captive users of the group captive power plants which is not the case here.
39. In light of discussion made in Para 21 to 37 above, the Commission is of the view that, while the captive status of the Petitioner could be determined only at the end of the year based on actual consumption by the Petitioner vis-à-vis the generation from the power plant, the Commission does not find any reason to deny the claim of the Petitioner that it is a consumer of the individual captive power plant.
40. As per the principles laid down under the Commission’s Order dated 12 September 2018 in Case No. 195 of 2017, only the consumers of group captive power plants are

required to pay the Additional Surcharge. Though the applicability of Additional surcharge on such consumers of group captive power plants is sub-judice before the higher forums, neither it is the case of MSEDCL that the consumers of individual captive plants would also be made to pay the Additional Surcharge nor the Commission's Order dated 12 September 2018 intends to allow it.

41. The Commission also agrees with the submissions of the Petitioner that the nomenclature used does not alter the factual position. Therefore, filing of OA Application mentioning the category of "group captive" would not make the power plant a group captive plant.
42. In view of the above, the Commission rules that the Petitioner is a consumer of the individual captive power plant and hence it would not be entitled to pay the Additional surcharge as per the principles laid down under the Order dated 12 September 2018 in Case No. 195 of 2017. Accordingly, MSEDCL is directed not to levy any Additional Surcharge on the Petitioner in future. MSEDCL is also directed to refund the Additional Surcharge paid by the Petitioner. However, no interest shall be payable to the Petitioner on such refund as it was mistake on the part of the Petitioner to provide the correct information at the time of filing its OA Application and MSEDCL based on the details provided in the OA Application had levied the Additional Surcharge.
43. It is clarified that, as mentioned at para. 18 and 19 above, the Commission has not gone into merits of the issue raised by MSEDCL wherein MSEDCL stated that there cannot be "Sale and Purchase" of power in captive transaction and if such an arrangement exists, it needs to be treated under Section 10 of the EA (i.e. supply by Independent Power Producer (IPP), a non-captive generating plant, to OA consumer) and the present Petition has been decided de hors the adjudication of the aforesaid issue.
44. Hence, the following Order.

ORDER

1. **Case No. 10 of 2021 is allowed partly.**
2. **Exide Industries Ltd. is a consumer of the individual captive power plant and hence it would not be entitled to pay the Additional Surcharge as per the principles laid down by the Commission in the Order dated 12 September 2018 in Case No. 195 of 2017.**
3. **Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) is directed not to levy any Additional Surcharge on the Petitioner in future. MSEDCL is also directed to refund the Additional Surcharges paid by Exide Industries Ltd. in past. However, no interest shall be payable to Exide Industries Ltd. on such refund.**
4. **It is clarified that the Commission has not gone into merits of the issue raised by MSEDCL wherein it has stated that there cannot be "Sale and Purchase" of power in captive open access transaction and if such an arrangement exists, it needs to be treated under Section 10 of the Electricity Act, 2003 (i.e. supply by Independent Power Producer (IPP), a non-captive generating plant, to OA consumer) and the present Petition has been decided de hors the adjudication of the aforesaid issue**

raised by MSEDCL. MSEDCL is at liberty to file a separate Petition (making the captive consumers, the Respondents to the Petition) where the issue raised by it could be adjudicated in a holistic manner vis-à-vis the relevant provisions of the Electricity Act 2003, Electricity Rules 2005 and the Open Access Regulations notified by the Commission.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

Sd//-
(Sanjay Kumar)
Chairperson

