

**In the Appellate Tribunal for Electricity, New Delhi**  
**(Appellate Jurisdiction)**

**Appeal No. 316 of 2013**

**Dated: 17<sup>th</sup> May, 2016**

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**  
**HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

**In the Matter of:**

**M/s Sai Wardha Power Co. Ltd.**

*(Formerly known as Wardha Power Co. Ltd.)*

*Having its Registered office at:*

8-2 293/82/A/431/A,  
Road No.22, Jubilee Hills,  
Hyderabad – 500 033

**... Appellant(s)**

**Versus**

**1. Maharashtra Electricity Regulatory Commission**

*Through its Secretary,*  
13<sup>th</sup> Floor, Centre No.1,  
World Trade Centre,  
Cuffe Parade,  
Colaba, Mumbai – 400 005.

**2. Maharashtra State Electricity Distribution Co. Ltd.**

Prakashgad,  
Plot No.G-9,  
Bandra (East)  
Mumbai – 400 051.

**3. Maharashtra State Electricity Transmission Co. Ltd.**

C-19, E-Block, Prakashganga,  
Bandra Kurla Complex,  
Bandra (East)  
Mumbai – 400 051

**... Respondent(s)**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.,  
Mr. Hemant Singh, Mr. Tabrez  
Malawat, Ms. Shikha Ohri,  
Ms. Meghana Aggarwal,  
Mr. Tushar Nagar,  
Mr. Matrugupta Mishra and  
Mr. Anurag Sharma

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan,  
Mr. Ravi Prakash, Mr. Raunak Jain,

Mr. Vishal Anand and  
Mr. D. V. Raghuvamsy for R.1

Mr. Gaurishankar Saikumar,  
Mr. Aditya Dewan, Mr. Raheel Kohli,  
Mr. Gurpreet, Mr. Nitish Gupta,  
Ms Soumya Saikumar, Ms. Pooja  
Nuwal and Mr. Samir Malik for R.2

Mr. M. Y. Deshmukh and Mr. Yatin  
Advs. for R.3

## **J U D G M E N T**

### **PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

The instant appeal, being Appeal No. 316 of 2013, was originally filed by M/s.Wardha Power Company Ltd., under Section 111 of the Electricity Act, 2003, against the order dated 28.08.2013, passed by the Maharashtra Electricity Regulatory Commission (in short the '**State Commission**') in Case No.117 of 2012 whereby the said Petition, filed by M/s Wardha Power Company Ltd. (**WPCL**), dated 17.10.2012 under Sections 40, 42 & 86(1),(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 to invoke the jurisdiction of the State Commission over a dispute which arose between WPCL and the Maharashtra State Electricity Distribution Co. Ltd. (**MSEDCL**) and Maharashtra State Electricity Transmission Co. Ltd. (**MSETCL**) on account of imposition of cross subsidy surcharge (in short **CSS**) on the captive consumers of the appellant/petitioner availing open access as per the provisions of the Electricity Act, 2003 and Electricity Rules 2005 and Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations 2005 has been disposed of holding as under:

- (i) That any Petition as per Regulation 18 of the Distribution Open Access Regulations, 2005, providing for any dispute between the distribution licensee and the supplier is to be adjudicated by the Commission is maintainable as the Commission has the jurisdiction to entertain or decide a dispute wherein the interpretation of the provisions of the Electricity Act, 2003 and Electricity Rules 2005 is required to ascertain the captive status of a generating power plant and levy of the cross subsidy surcharge.

- (ii) That the cross subsidy surcharge shall be levied by MSEDCL (distribution licensee) after ascertaining the captive status of power plant by verifying the generation and consumption data on annual basis at the end of the financial year as per Electricity Rules 2005 and accordingly the bills raised by MSEDCL on cross subsidy surcharge should be revised by MSEDCL and a single bill shall be raised for FY 2011-12, 2012-13 and 2013-14 and onwards, the cross subsidy surcharge shall be raised on annual basis.
  - (iii) That the change in the ownership (shareholding with voting rights) from what was envisaged at the inception of the company does not change the character of the Captive Generating Plant (**CGP**) as it is producing power from its Unit III & IV primarily for the use of captive users and hold not less than 13% of the equity share capital (with voting rights) of the appellant Company.
  - (iv) That the captive users have consumed less than 51% of the aggregate electricity generated by the units identified for captive use, determined on an annual basis and accordingly have not met the criteria specified in Rule 3 of the Electricity Rules 2005.
  - (v) That the prayers of the appellant/petitioner to re-fund the amount paid towards cross subsidy surcharge paid by the consumers and to issue fresh invoices without levy of cross subsidy surcharge are rejected because the appellant/petitioner is captive generating plant which is supplying power to its captive consumers.
- 2) The Commission has noted in the Impugned Order that the Electricity Act, 2003 stipulates that the actual energy consumption by captive users and actual generation from the units identified for captive use shall be considered for ascertaining captive status on an annual basis. The State Commission has further observed that the Commission has not considered the contention of the appellant/petitioner to consider the hypothetical consumption on account of delay in open access towards compliance to the Electricity Rules 2005 towards consumption norm.

- 3) The instant appeal was filed by Wardha Power Co. Ltd. and during the pendency of the appeal the name of the appellant has been changed from Wardha Power Co. Ltd. to Sai Wardha Power Co. Ltd. Hence, the name of the appellant has been subsequently amended by the appellant.
- 4) The appellant, being a generating company, is aggrieved on the following counts by the Impugned Order:
- (i) That the State Commission has not considered the delay occasioned by the conduct of the MSEDCL, a distribution licensee and MSETCL a transmission licensee, respondent Nos. 2 and 3, respectively while determining the 51% consumption criteria as per the Electricity Rules 2005. Both the licensees, respondent Nos. 2 and 3, caused delay while granting open access to certain new captive users and further delay in granting enhancement of open access quantum for certain others.
  - (ii) That the State Commission has held that while fulfilling 51% of the captive criteria, the appellant has to source power to the captive users in proportion in their shareholding. The proportionality principle as held by the State Commission in the Impugned Order, is not applicable since the appellant is a Special Purpose Vehicle (**SPC**) and not an Association of Persons.
  - (iii) That on account of non-consideration of above said delay, the status of the appellant has been raised as non-captive for FY 2012-13. The State Commission failed to appreciate that the reason for the appellant in not being able to source more than 51% of the net energy generated to its captive users was on account of delay in implementation of the open access on account of the conduct of respondent Nos. 2 and 3 and the same ought to have been considered by the State Commission while passing the Impugned Order.
  - (iv) That as a result of the Impugned Order, the captive users of the appellant will have to pay cross subsidy surcharge to the respondent,

distribution licensee, for the power sourced from the appellant in FY 2012-13. The Impugned Order was passed despite the fact that the appellant placed on record documents evidencing that the implementation of open access was delayed by respondent Nos. 2 and 3 on certain extraneous reasons.

- 5) The appellant is a generating company and is engaged in the generation of electricity. The appellant is a Special Purpose Vehicle (SPV), promoted by a group having knowledge in generation and supply of electricity and the SPV was incorporated as a group captive consumer unit. The appellant established four different units of 135 MW each out of which Unit 3 and 4 were developed as group captive generating plants. A number of industries/establishments expressed interest in acquiring shares in the appellant company and also in purchasing power from the appellant company so as to avail the benefit of exemption from payment of cross subsidy surcharge as per the 4<sup>th</sup> proviso of Section 42 (2) of the Electricity Act 2003.
- 6) Respondent No.2 is a distribution licensee in the State of Maharashtra whereas Respondent No.3 is a transmission licensee in the State of Maharashtra. Respondent No.1 is a State Electricity Regulatory Commission which is authorized to discharge various functions and duties under various provisions of the Electricity Act, 2003.
- 7) Facts of the case in brief are as under:
  - 7.1) That the appellant originally developed its two units as group captive generating plants for an entity namely M/s Viraj Profiles Ltd. However, on account of several difficulties arose during the implementation phase of the appellant, particularly those relating to restriction placed on account of Foreign Technical manpower by Government of India. Such restriction was the main cause of the delay of the project in commencing operations by over 15 months beyond the original schedule. Further, there was also a delay, due to the global recession which too had an impact on the captive users with regard to plants for setting up the expansion of facility that would have consumed the power under the

captive route of the appellant. Consequently, the appellant had to tie up with bulk industrial consumers in the State of Maharashtra as captive users by transfer of equity shares with voting rights.

- 7.2) That as a result of restructuring of the group captive structure, the appellant entered into different Power Delivery Agreements and Share Subscription Agreements with each of the captive users. The said agreements were entered on various dates between 12.01.2007 and 08.08.2011.
- 7.3) That the appellant was required by the open access regulations of the State Commission to enter into an agreement with the transmission licensee for the purpose of transmission of electricity and another agreement with distribution licensee for the same purpose.
- 7.4) That on 20.09.2010, the appellant submitted an application to respondent No.3 for grant of Long Term Open Access. Further, on 15.11.2010, the appellant submitted an application to the respondent No.3 seeking Short Term Open Access for supply of electricity to the captive users, enclosing the particulars relating to customer drawl point and shareholding pattern of the appellant duly certified by a Chartered Accountant and with necessary diagram.
- 7.5) The respondent No.3 sought certain clarifications from the appellant vide letter dated 18.11.2010. In spite of clarification given by the appellant, no satisfactory reply was given by respondent No.3. On account of the delay on the part of respondent No.3 to process the open access application of the appellant, the appellant issued letters dated 02.04.2011, 21.04.2011, 25.04.2011 and 29.04.2011 to respondent No.3. Respondent No.3 raised certain new queries regarding processing of the application of the appellant for grant of open access. The appellant answered the said queries vide letters dated 18.05.2011 and 31.05.2011.
- 7.6) That after a lapse of six months from the date of the application dated 15.11.2010, seeking short term open access, respondent No.3 vide letter dated 02.06.2011 informed the appellant that since the captive users are located at

different places, the said captive users must file individual applications for the grant of open access and further, consent from respondent No.3 must also be obtained.

- 7.7) That on 11.06.2012, the appellant submitted a letter enclosing individual applications for the 20 drawl points across Maharashtra along with copies of Power Delivery Agreements with the captive users and single line diagrams along with the necessary demand drafts. The appellant further informed the respondent No.3 that the consent of the concerned distribution licensee (respondent No.2 and Tata Power Ltd.) would be obtained in due course.
- 7.8) The appellant, vide letter dated 14.06.2011, applied to the respondent No.2 for their consent in accordance with the MERC (Distribution Open Access) Regulations, 2005. The appellant also wrote another letter dated 14.07.2011. On the same day, namely 14.07.2011, the appellant wrote to respondent No.3 informing that a request for consent of respondent No.2 had already been made and that their application regarding bulk power transmission agreement be processed further.
- 7.9) That respondent No.2, vide letter dated 15.07.2011, informed that the said consent could not be granted on account of non-compliance of mandatory eligibility criteria. The respondent No.3, vide letter dated 28.07.2011 called upon the appellant to produce the consent of distribution licensees and also the yearly consumption pattern for grant of open access. The appellant, vide letter dated 26.08.2011, furnished necessary particulars to respondent No.2 in order to enable the respondent No.2 to give the necessary consent.
- 7.10) The respondent No.3, vide letter dated 02.09.2011, once again sought production of consent from the distribution licensees (respondent No.2).
- 7.11) That the appellant, vide letter dated 12.09.2011, once again requested respondent No.2, distribution licensee, to give its consent for grant of open access. The conduct of the distribution licensee and transmission licensee (respondent Nos. 2 and 3, respectively) in delaying grant of open access to the

appellant was on account of extraneous reasons, since the respondent No.2, in the event of grant of open access, was likely to suffer a loss with respect to the cross subsidy surcharge. On account of the aforesaid delay to grant open access, the appellant was constrained to institute proceedings before the Commission by filing a petition, being Case No.161 of 2011, wherein the interim order dated 09.12.2011 directing respondent Nos. 2 and 3 to issue speaking orders on the open access applications filed by the appellant was passed by the State Commission. Thereafter, the respondent No.2, vide letter dated 11.01.2012, granted open access to the appellant with a direction that it would be operationalized with effect from 14.01.2012 or any time thereafter after completion of all formalities as per the relevant rules and regulations. The State Commission vide another interim order dated 25.01.2012, in Case No. 161 of 2011, directed respondent No.2 to operationalize the open access granted to Appellant subject to the metering requirements as per the open access regulations. On 20.04.2012, respondent No.2 extended the open access granted to the appellant till 31.03.2013 which was further extended till 31.03.2014.

- 7.12) The appellant in order to ascertain the cause of delay on the part of respondent Nos. 2 and 3, to grant open access to the appellant, through its counsel filed application with the respondent No.2 under the Right to Information Act, 2005 and then the appellant was able to get the extract of a letter dated 11.10.2011, whereby the Managing Director of respondent No.2, distribution licensee, addressed to the Principal Secretary, Energy, Government of Maharashtra referred to some commercial reasons.
- 7.13) The State Commission, during the proceedings of Case No.161 of 2011, vide daily order dated 08.08.2012, wanted the appellant and respondent Nos. 2 and 3 to assist the State Commission on the issue of the policies of captive power plants in India. It was at that stage that the appellant filed the Petition No.117 of 2012 (impugned petition) before the State Commission requiring the State Commission to give a finding with regard to the status of the appellant, which has been disposed of by the Impugned Order dated 28.08.2013 of the State Commission.



- 7.14) It has been stated that the appellant is not agitating the issue of delay in the original grant of open access dated 11.01.2012. However, the appellant in the present appeal has challenged the findings of the Impugned Order with regard to the delay caused by the distribution licensee (respondent No.2) in enhancing the quantum of open access post the open access permission dated 11.01.2012. The appellant also has challenged the delay in grant of open access to certain new captive users as because of the said delay the appellant could not supply 51% of the net energy generated to the captive users in the FY 2012-13. Any delay occasioned on account of the distribution licensee, whether deliberate or otherwise, cannot be the reason to subject the appellant or its captive users to levy of cross subsidy surcharge.
- 7.15) On account of the aforesaid earlier delay, in grant of open access, which was the subject matter of Case No.161 of 2011, the appellant was forced to sell power to third parties and also to shut down/lower generation of the captive units i.e. Unit Nos. 3 and 4. The captive users could only consume the electricity after 11.01.2012 as the open access was granted only on that date by the distribution licensee. Some of the consumers have also increased their demands and increased demand could not be met until 11.01.2012. The said delay prevented the appellant from ensuring supply of electricity to the extent of at least 51% of the electricity generated in the FY 2012-13 as contemplated in Rule 3 of the Electricity Rules, 2005, which provides the following conditions for qualifying as a captive generating plant:
- i) The captive users must hold a minimum 26% ownership in the generating company; and
  - ii) The captive users must consume a minimum of 51% of the net energy generated by such generating company.
- 7.16) According to the appellant, in pursuance to the objections of the appellant, vide letters dated 04.05.2012, 07.05.2012 and 12.07.2012, the distribution licensee, first stopped levying the cross subsidy surcharge from August 2013 and vide letter dated 18.10.2012 promised to re-fund the cross subsidy surcharge paid

to certain selective captive users of the appellant. However, the conduct of the distribution licensee in writing letters to a certain category of captive users viz. Mahindra Group of Companies, promising a selective re-fund of the cross subsidy surcharge levied for the months of April to July, 2012, is unconvincing. The reason of the distribution licensee in promising the said particular category of captive users was the fact that such users were HT consumers of the distribution licensee (respondent No.2). However, in February, 2013 the distribution licensee once again suddenly included cross subsidy surcharge in the invoices issued to the captive users of the appellant. Aggrieved by the continuous change of stand of the distribution licensee, in first imposing cross subsidy surcharge for April to July 2012, second, in stopping the imposition of cross subsidy surcharge for the months August 2012 to January 2013, third in promising re-fund of cross subsidy surcharge to certain category of captive users, and fourth, to again impose cross subsidy surcharge in the month of February 2013, all in the same FY 2012-13, the appellant filed an application, being Misc. Application No. 5 of 2013, seeking quashing of the invoices for the month of February, 2013 which has also been disposed of by the Impugned Order. Further, the State Commission in the Impugned Order has held that the Electricity Rules 2005 do not exempt the SPV from the requirement of consuming 51% of generation in proportion of ownership of persons forming the SPV and the rules of proportionate consumption specified in Rule 3 of the Electricity Rules 2005 would be applicable to the SPV. The State Commission has committed an illegality in recording the observations as the State Commission failed to appreciate that the SPV cannot be equated with an association of persons and SPV is a company incorporated under the provisions of the Companies Act 1956 has amended in 2013. The consumption of energy proportionate to share holding is not provided under Rule 3 of the Electricity Act 2005 in case of SPV. While an SPV is a company and the association of persons is un-incorporated entity and wants the association of persons as incorporated then it becomes a company. Hence, the conditions provided under clause (i)(ii) as modified by clause (b) of Rule 3(3) of the Electricity Rules 2005 are only required to be specified by power plant owned by an SPV so as to qualify as a captive generating plant. Clause (b) makes no reference to the two provisions of clause (a) of sub-clause 1 of Rule 3. The provisos have no

application to the case of the power plant set up by SPV. Hence, the findings of the State Commission holding that proportionate principle is applicable to an SPV is illegal and liable to be set aside. According to the appellant, instead of considering the fact of delay in grant of open access, which being beyond the control of the appellant/captive users and was attributable only to distribution licensee, respondent No.2, the State Commission has denied the status of a captive generating plant to the appellant for the FY 2012-13 in the Impugned Order.

8) We have heard Mr. Sanjay Sen, learned Sr. Adv. for the appellant and Mr. Buddy A. Ranganadhan and Mr. G.Sai Kumar, learned counsel for the respondents and have gone through the respective written submissions including the Impugned Order.

9) The appellant has sought the following reliefs in the instant appeal:

Set aside the findings rendered in the Impugned Order only to the extent:

- i) That cross subsidy surcharge is not payable for the power sourced by the appellant to the captive users for the FY 2012-13 on account of delay caused by respondent, distribution licensee, in grant of open access to the new captive users and the delay in enhancement of the quantum of certain other captive users.
- ii) That distribution licensee, respondent No.2, is liable to re-fund the cross subsidy surcharge levied in the financial year 2012-13 along with interest @ 18% per annum.
- iii) Distribution licensee, respondent No.2, cannot levy cross subsidy surcharge, either midway in a financial year or on a monthly basis.
- iv) The principle, as provided in second proviso to Rule 3 (1)(a)(ii) of Electricity Rules 2005, with regard to the consumption of power in proportion of the shares of captive users in the ownership of the power plant, within a variation not exceeding 10% is not applicable in the case of the appellant on account of it being a SPV.
- v) Any other relief this Tribunal may deem fit and proper in the facts and circumstances of the matter.

- 10) The following issue arises for our consideration:  
Whether the State Commission is empowered to pass an order for relaxation in the norms of captive consumers of at least 51% for being qualified as captive generating plant/captive power plant within the meaning in definition provided under Section 2(8) of the Electricity Act, 2003 and Rule 3 of Electricity Rules 2005 on account of alleged delay in grant of open access to some captive users of the appellant by respondent No.2, distribution?
- 11) On this issue following contentions have been made by the appellant:
- 11.1) That 3<sup>rd</sup> and 4<sup>th</sup> units of the captive generating plant of the appellant were declared as captive units to the various industries who had subscribed to the equity shares with voting rights of the appellant, as required under Rule 3 of the Electricity Rules, 2005.
- 11.2) That respondent No.2/Discom deliberately delayed grant of open access to the captive users of the appellant, thereby resulting in the said captive users not being able to fulfill the 51% minimum captive power criteria, as per Rule 3 of the Electricity Rules 2005. As a result of the said failure, the appellant was rendered as a non-captive generating plant for the FY 2012-13, which enabled the Discom in illegally imposing cross subsidy surcharge on the captive users of the appellant.
- 11.3) That as per Section 42(2) of the Electricity Act, 2003, the captive users of a captive generating plant are exempted from payment of cross subsidy surcharge. However, in the event of the appellant who as a generator, not being able to retain the status of captive generating plant, as per the criteria laid down in Rule 3 of the Electricity Rules 2005, the said exemption from payment of cross subsidy surcharge to the distribution licensee, is removed. The same further enables the distribution licensee/respondent No.2 to collect the said cross subsidy surcharge.
- 11.4) That the distribution licensee deliberately delayed the grant of open access to the appellant for the sole reason to get cross subsidy surcharge from the

appellant, which situation emanates from the FY 2011-12 when the distribution licensee delayed grant of open access to the appellant. Aggrieved by the said delay, the appellant through advocate filed an RTI application with the respondent No.2, distribution licensee, to get a copy of the letter dated 11.01.2011 written by the Managing Director of the Discom to the Government of Maharashtra, wherein the said Managing Director admits that the appellant is a captive generating plant and if the open access is granted, then there would be a loss of cross subsidy surcharge to the distribution licensee.

- 11.5) That when the distribution licensee was delaying grant of open access in the FY 2011-12, the appellant filed a petition, being Case No. 161 of 2011, before the State Commission, in which the State Commission vide interim order dated 09.12.2011 directed the distribution licensee to grant open access to the appellant and due to the interim order, the distribution licensee was compelled to grant open access to the appellant on 11.01.2012.
- 11.6) That the official reason cited by the Discom before the State Commission in delaying grant of open access to the appellant was that the appellant was not a proper captive generating plant as there has been change in the share holding pattern of the appellant. At that time the Discom argued that for being a captive generating plant, the shareholding of the appellant cannot change after the plant was conceived as a captive generating plant.
- 11.7) That this Appellate Tribunal vide its judgments dated 22.09.2009 in Appeal Nos. 171 of 2008 and 172 of 2008 and Appeal Nos. 10 of 2008 and 117 of 2009 held that the change in shares of a captive generating plant cannot affect the captive structure of the said company provided the said company continues to fulfill the 26% equity shareholding criteria as set out by Rule 3 of the Electricity Rules, 2005.
- 11.8) That during the hearing in Case No.161 of 2011 before the State Commission, the Discom on the one hand was questioning the captive structure of the appellant on account of the transfer of shares and on the other hand the Managing Director vide letter dated 11.10.2011 addressed to the Government of

Maharashtra, acknowledged that the appellant was indeed a captive generating plant and the real reason for delay in grant of open access was the fear of the Discom, respondent No.2 of losing cross subsidy surcharge, which is a benefit granted by Section 42(2) of the Electricity Act 2003. The contents of letter dated 11.10.2011 clearly depicts that the Discom was directly acting contrary to the provisions of the Electricity Act, 2003.

11.9) That it is apparent from the aforesaid letter dated 11.10.2011 of the Discom, addressed to Government of Maharashtra, that the real reason for delaying grant of open access to the appellant by Discom was that the Discom was fearing that it would be losing out on the cross subsidy surcharge, even though the Discom believed that the appellant was a captive generating plant, however, officially, through the said correspondence and in affidavits filed by the appellant before the Commission, the Discom argued that the appellant was not a captive generating plant on account of its shareholding structure. Thus the Discom was officially delaying/denying grant of open access to the appellant just on the ground that it was fearing loss of getting cross subsidy surcharge. In such circumstances, the learned State Commission ought to have initiated contempt proceedings against the Discom under Section 142 of the Electricity Act, 2003 for misleading the Commission. But the said Commission while passing the Impugned Order has let off the Discom.

11.10) That it is not open to the respondent, Discom, to argue now that the aforesaid letter of the Discom was considered in order dated 16.08.2013 passed by the State Commission in Case No.161 of 2011 which had been not challenged by the appellant. The Discom again delayed the grant of open access in the next FY, namely FY 2012-13, regarding which the present appeal is under consideration.

11.11) That the issue of delay in grant of open access in the present appeal relates to the FY 2012-13. The mere delay, not even willful, is a sufficient reason for any inability to comply with the condition of 51% minimum consumption as per Rule 3 of the Electricity Rules 2005. The State Commission, in paragraph 108

of the Impugned Order clearly records the fact that the Discom, respondent No.2, caused a delay on account of the shareholding structure of the appellant.

11.12) That the State Commission, in the Impugned Order, in paragraph 108 further records the submission of the Discom that the delay caused, post the original grant of open access dated 11.01.2012, in firstly, enhancement of quantum of captive users and secondly, grant of fresh open access to the new captive users, was procedural and not intentional. It is an established fact that as a result of the delay caused by respondent, Discom, the appellant was unable to comply with the requirement of 51% minimum captive consumption. Admittedly, as per the Discom, the said delay was procedural which means the same was on account of the Discom itself which was certainly beyond the control of the appellant, for which the appellant cannot be penalized (by way of declaring as non-captive for FY 2012-13) on account of not fulfilling the requirement of 51% minimum captive consumption, due to delay on account of delay of Discom.

11.13) That Regulation 4 of the MERC (Distribution Open Access) Regulations 2005 specifies the disposal of an open access application within 30 days from the date of its filing. As per the Regulation 4, dealing with processing of application of open access, the Discom was required to process the application, seeking grant of open access, filed by the appellant/generating company, within the period of 30 days from the receipt of the said application. The said Regulation provides only the following checks in processing an application for grant of open access.

- a) Technical requirements in grant of Open Access;
- b) The details of works to be carried out in the transmission system/distribution system;
- c) Charges to be paid and estimated time period for completion of works in order to provide or enable such Generating Company or Licensee to give such supply.

11.14) None of the above reasons give liberty to Discom in refusing grant of open access on account of interpretation of law. Hence, the delay caused by Discom in granting open access in the FY 2012-13 was malafide.

11.15) It is evident from the reply filed by Discom in Petition No.117 of 2012 of the appellant that the fresh open access was not granted under Section 9 of the Electricity Act, 2003. The appellant, through certain letters of the Discom, was directed to file application for such purpose under Section 9 instead of Section 10 of the Electricity Act, 2003. Section 9 deals with captive generating plant while Section 10 deals with non-captive generating plant. The said direction of the Discom to the appellant, to file application for grant of open access under Section 9 or 10 of the Electricity Act, 2003 is nowhere mentioned as a reason for refusal to grant open access in the aforesaid Regulation 4 of the Open Access Regulations 2005.

11.16) That there is an admission of the fact that open access applications were delayed for reasons not mentioned anywhere in the Open Access Regulations 2005. In this context, a reference to letter dated 21.11.2012, sent by Discom to the appellant, directing appellant to file a fresh application under Section 10 of the Electricity Act, 2003, may be taken.

12) The main contentions of the respondent No.2, Discom, are as under:

12.1) That the following limited points in the instant appeal have been raised by the appellant challenging the Impugned Order dated 28.08.2013, passed by the State Commission.

(a) Delay in granting open access and enhancement of open access quantum to certain new captive users,

(b) Requirement of consumption of electricity by captive users in proportion to their shareholding is not applicable to the appellant.

12.2) That both these points raised by the appellant are devoid of merits, apart from appeal being not maintainable.

12.3) That the issue of applicability of the test of proportionate consumption on a SPV has been conclusively settled by this Appellate Tribunal vide judgment dated 22.09.2009 in Appeal Nos. 171 of 2008, 172 of 2008, 10 of 2008 and 117 of 2009 when this Appellate Tribunal categorically held that a captive generating plant owned by a SPV has to be treated as an association of persons and is thus



liable to consume 51% of its generation in proportion to the ownership of the generating plant.

- 12.4) That the issue of alleged delay in grant of open access (original) has been decided by the State Commission vide its order dated 16.08.2013 in Case No.161 of 2013. Since the order dated 16.08.2013 of the State Commission remained unchallenged hence, became final and binding on the appellant, hence, the present appeal raising similar issue is not maintainable.
- 12.5) That with respect to delay in grant of open access to Mahalaxmi TMT, the Discom granted open access to the consumers of the appellant on 11.01.2012 and M/s Mahalaxmi TMT was included in the list of open access consumers at that time. The said open access granted was renewed in April 2012. However, the appellant did not seek open access for Mahalaxmi TMT in April 2012 for the reasons best known to the appellant and thereafter the appellant submitted an application on behalf of Mahalaxmi TMT only in August 2012 for 10 MW open access capacity. Subsequently, in October 2012 the appellant submitted application for Mahalaxmi TMT for 22 MW open access permission which was granted in December 2012. Therefore, intermittent enhancement, intermittent submission of new application, intermittent change in equity shareholding pattern by the appellant required detailed scrutiny and further various queries raised by the authorities of the Discom in regard to the data/documents furnished by the appellant also required clarification. Thus, the time consumed in granting open access to the consumers of the appellant was merely a procedural delay and not intentional one, as pleaded by the appellant.
- 12.6) With regard to delay in granting open access to M/s Spentex, another consumer of the appellant, the appellant filed an application seeking open access in October, 2012, though the name of M/s Spentex Industries was not included in the original equity shareholding list of the appellant, when open access permissions were issued in January, 2012 and April, 2012. The appellant submitted a revised chartered accountant certificate which revealed that equity shareholding of previous shareholders were reduced and M/s Spentex was included as a new equity shareholder w.e.f. October, 2012. It is such change of equity shareholding pattern of a group captive scheme that was required to be scrutinized in detail by Discom which delayed the grant of open access.

- 12.7) That the appellant could have sought open access for all its consumers from the beginning of the financial year but the appellant has willfully sought open access intermittently, intermittent enhancement and intermittent change in equity shareholding pattern and thereby intermittent addition of new group consumer for which Discom cannot be held responsible for the non-availability of open access.
- 12.8) That the following consumers of the appellant were given enhanced open access permission for the FY 2012-13:

Name	Old OA Capacity	New OA Capacity	Effective Date
Mahindra Ugine Steel Co. Ltd.	24620 KVA	28720 KVA	November 2012
Mahalaxmi TMT	22000 KVA	26000 KVA	March 2013

- 12.9) That further in case of some consumers of the appellant like Viraj Profile, the appellant had demanded open access capacity more than the contract demand, such consumers were having with the Discom. The enhancement in excess of the contract demand could not be granted by the Discom since the same involved technical feasibility issues. Therefore, the allegation of *mala fide* on the part of the Discom is completely erroneous. The conduct of the Discom in the treatment of the appellant does not take the case of the appellant forward in that, the CGP status of the appellant has to be decided on the basis of the statutory provisions of law and not on the basis of some alleged concession or conduct of the Discom.
- 12.10) That there is no concept of the deemed open access either under the Electricity Act 2003 or under the Electricity Rules 2005. Therefore, in the present case, the alleged captive users of the appellant could not have open access and it cannot be argued that the fiction be created to assume that they had open access and hypothetical consumption date be presumed for the purposes of ascertaining captive status of the appellant. The Electricity Rules 2005 stipulate that actual energy consumption by the captive users, actual generation from the units identified for captive use shall be considered for

ascertaining captive status on an annual basis. Therefore, for the purposes of determination of captive status of the appellant, actual figures of consumption and generation are required to be considered and not hypothetical or assumed figures. Hence, the said delay in grant of open access cannot legally lead to the consequence of conferment of the appellant.

12.11) That the State Commission, vide Impugned order, after examining the alleged hypothetical aggregate loss of consumption by non-availability of open access, has come to the conclusion that such hypothetical loss is incorrect and is not congruent to the data of actual consumption furnished by the appellant. The State Commission in the Impugned order, found that the hypothetical data furnished by the appellant was grossly exaggerated.

12.12) The State Commission has correctly rejected the contention of the appellant regarding hypothetical loss of consumption allegedly on account of delay in granting of open access.

12.13) That the allegations with respect to conduct of the Discom in alleged non-availability of open access to the consumers of appellant, are completely false because the said delay in granting of open access is nothing but a result of an approach adopted by the appellant in intermittently filing applications, intermittently seeking enhancement etc. and all the information submitted by the appellant were required to be scrutinized in detail and certain queries were also required to be resolved before granting open access permission.

12.14) That the reliance of the appellant on the application dated 21.12.2012 to the allege *mala fide* conduct of the Discom is also misplaced because once the appellant was not fulfilling the qualifications for being a CGP and further queries were required to check the data furnished by the appellant, in those circumstances, the Discom had no choice but to reject the said application filed by the appellant for granting of open access under section 9 of the Electricity Act, 2003 for want of proper data and other details. In case the appellant was aggrieved by the action of the Discom, the appellant could have approached the Commission for redressal of its grievances. When the appellant approached the State Commission for redressal of its grievances by filing Case No.117 of 2012, the same has been dealt by the State Commission by way of passing the

Impugned Order. The appellant had already raised its grievances in another petition, being Case No.161 of 2011 before the State Commission, seeking compensation from the Discom but thereafter the appellant did not press its prayer for compensation in that petition, which fact is specifically recorded by the State commission in order dated 16.08.2013 in Case No.161 of 2011. The State Commission has rightly noted in the order that group captive structure underwent changes multiple time. The State Commission further correctly recorded that there is no willful delay in granting open access and the delay in the grant of open access cannot be solely attributable to the Discom. Since the said findings of the State Commission have not been challenged by the appellant, it is now not open to the appellant to allege willful and deliberate delay in grant of open access by Discom.

12.15) That reliance upon letter dated 11.10.2011 issued by the Managing Director of the Discom to the Principal Secretary (Energy), Government of Maharashtra by the appellant to allege admission of captive status by the Discom and impute extraneous consideration for the alleged delay in open access is also completely misplaced. The State Commission, by passing the order dated 16.08.2013 rejected the same contention of the appellant which order dated 16.08.2013 had never been challenged by the appellant and now the appellant cannot be allowed to re-agitate the same contentions in the instant appeal.

12.16) Regarding the principle of proportionate consumption of electricity by captive users, the following points have been raised by the respondent, Discom:

- a) That the term 'captive generating plant' has been defined under Section 2(8) of the Electricity Act, 2003 to mean '*a power plant set up by any person to generate electricity primarily for use of members of such Co-operative society or association*'
- b) Rule 3 of the Electricity Rules, 2005 lays down qualifications for acquiring the status of a CGP which provides that no power plant shall qualify as a CGP under section 9, read with clause (8) of Section 2 of the Electricity Act, 2003 unless in case of a power plant not less than 26% of the ownership is held by the captive users and not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for

the captive use. One more proviso has been added here. In case of a generating station owned by a company formed as SPV for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy the conditions contained above. With explanations, the words annual basis, captive users and ownership and SPV have also been explained in Rule 3.

- c) That SPV, as per explanation to rule 3, means 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.
- d) That to acquire the status of a Captive Generating Plant (CGP), the following elements are required:
  - i) Not less than twenty six percent of the ownership is held by the captive users(s)
  - ii) Not less than 51% of the aggregate electricity generated by a CGP, determined on an annual basis must be consumed for captive use,
  - iii) In case, there are more than one owner, rule of proportionality in consumption of electricity generated by a power plant is also required to be met in the following manner:
    - a) If the generating plant is set up by a cooperative society, the condition of use of 51% must be satisfied collectively by the members of the cooperative society;
    - b) If the generating plant is set up by association of persons then the captive users are required to hold not less than 26% of the ownership of the plant and such captive users are required to consume not less than 51% of electricity generated determined on an annual basis in proportion to the share of ownership of the power plant with a variation of 10%.

12.17) That the appellant is admittedly an SPV. The Company Secretary of the appellant vide its certificate dated 30.08.2011 had certified the SPV status of the appellant which the State Commission has specifically recorded in the Impugned Order at paragraph 129.

12.18) That the State Commission has correctly held that a SPV is an association of person for the purposes of the Rule 3 to determine captive status of the appellant by correctly relying upon a judgment of this Appellate Tribunal, in the aforesaid appeals, being Appeal Nos. 171 of 2008, 172 of 2008, 10 of 2008 and 117 of 2009, where this Appellate Tribunal had categorically held that a CGP owned by a SPV has to be treated as an association of persons and thus liable to consume 51% of its generation in proportion to the ownership of the generating plant. In the reported matters, the facts were identical before this Appellate Tribunal where a generating plant was owned by a SPV.

12.19) That the contention of the appellant that the association of person and SPV are two different entities and an association of person cannot be equated with an SPV is absolutely erroneous because a SPV is constituted by its members (persons) who comes together to form a SPV. Similarly, a cooperative society is also constituted by its members (persons), who also come together to form a cooperative society. Rule 3 of the Electricity Rules, 2005 carves out a special provision for a cooperative society. However, no such special provision is carved out in respect of SPV. In fact, Rule 3 (i)(b) specifically provides that a SPV is required to comply with the requirements stipulated in Rule 3(i)(a) and (b). Therefore, the second proviso to Rule 3(i) (b) providing for the test of proportionate consumption is also applicable to a SPV.

12.20) If legislature wanted to create a special provision with respect to a SPVs to the effect that it is not required maintaining the Rule 3, proportionality of consumption, the legislature could have specifically mentioned the same just as it had done for a cooperative society. Therefore, the Rule not having exempted a SPV from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming a SPV has been done in case of cooperative society, a SPV is required to meet the said test to qualify as a CGP.

12.21) That it is also erroneous for the appellant to assert non-applicability of the test proportionate consumption contending that an association of person is a non-

incorporated entity and once an association of person is incorporated, the same sheds its character of being an association of person.

12.22) That it is also erroneous for the appellant to contend that the State Commission while passing the Impugned Order has restrictively interpreted Rule 3. The interpretation of the said Rule 3 by the State Commission is in consonance with the view adopted by this Appellate Tribunal with respect to CGP set up as SPV. This Appellate Tribunal's view is that the principle of proportional consumption is applicable to the consumption of electricity by the shareholders of a company being a SPV. Even otherwise, the interpretation of the Rule 3 to the effect that SPV is also bound to comply with test of proportionate consumption is not restrictive interpretation of the Rule instead of complete and harmonious reading of Rule 3 would make it clear that SPV under Rule 3(ii) (b) is bound to comply with the proportionate consumption of as an association of persons.

12.23) That it is absolutely erroneous for the appellant to contend that the State Commission, vide Impugned Order has attempted to lift the corporate veil derecognizing its status under the Companies Act. Once the qualification is prescribed in a statute or rule for availing a particular privilege, insistence on meeting the same cannot in law be avoided by asserting that corporate veil cannot be lifted to assess whether the qualification has been met or not. Once a generating plant is conferred status of CGP, cross subsidy surcharge is not applicable on such a generating plant.

12.24) As such, the conferment of status of CGP is a privilege therefore, the appellant must strictly meet the requirements laid down under the Electricity Act 2003 and Electricity Rules 2005. The appellant cannot raise the contention that since a company can be sued in its own name and in association of persons, individual members can be sued independently therefore, the State Commission could not have applied the test of proportionate consumption to the appellant. A SPV is a company incorporated by constituting entities (generally other companies as in the present case) for a specific purpose. SPV for that matter in association with these entities is bound to meet the test of proportionality for acquiring the status of a CGP.

13) Mr. Buddy Ranganadhan, learned counsel for the State Commission/ Respondent has endorsed and adopted the same line of arguments which has been taken by Mr. G. Sai Kumar, learned counsel for the respondent, Discom and hence there is no need to repeat.

14) Our discussion and conclusion:

We have cited above the facts of the case, the issue involved and the contention of the rival parties in the upper part of the judgment hence, we directly proceed to our own discussion and conclusion on the said issue.

14.1) The Case No.117 of 2012 was filed by the appellant on 17.10.2012 under Sections 40, 42 & 86(1),(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 before the State Commission to resolve the dispute which had arisen on account of imposition of cross subsidy surcharge on the consumers of the appellant/petitioner availing open access as per the provisions of the Electricity Act, 2003 and Electricity Rules 2005 and MERC (Distribution Open Access) Regulations 2005. The said case has been disposed of vide Impugned Order dated 28.08.2013 passed by the State Commission holding that the State Commission's jurisdiction to decide the said dispute under Regulation 18 of the MERC (Distribution Open Access) Regulations 2005, since the dispute involved the interpretation of the provisions of the Act and Rules in order to ascertain the captive status of the generating power plant of the appellant and the levy of cross subsidy surcharge. It has been specified in the Impugned Order that the cross subsidy surcharge will be levied by distribution licensee (respondent No.2) after ascertaining the status of the power plant by verifying generation and consumption data on annual basis at the end of the financial year as per the Electricity Rules 2005 and accordingly, the bills raised by the distribution licensee on cross subsidy surcharge should be revised and a single bill shall be raised for FY 2011-12, 2012-13 and 2013-14 and onwards, raising cross subsidy surcharge on annual basis. It has been clearly held in the Impugned Order that the captive users of the appellant have consumed less than 51% of the aggregate electricity generated by the units identified for the captive use, determined on an annual basis and accordingly, the said captive users have not



met the criteria specified in Rule 3 of the Electricity Rules 2005. It has been noted in the Impugned Order that the Electricity Act 2003 stipulates that the actual energy consumption by the captive users and the actual generation from the units specified for capital use shall be considered for ascertaining captive status on an actual basis. The main contention of the appellant, before the State Commission, was that since there was a deliberate and intentional delay on the part of the distribution licensee in granting long term open access to the captive users of the appellant, the captive status should be decided proportionately keeping in view the period of the year during which the long term open access was granted by the distribution licensee and the grant of open access remained in force in that financial year, which contention has been rejected by the State Commission holding that since the captive users of the appellant have not fulfilled the criteria of minimum 51% of the consumption of the total generation of electricity by CGP of the appellant. The said CGP has lost the character of CGP, hence, it is liable to pay cross subsidy surcharge for the year 2012-13. The State Commission in the Impugned Order has observed that the State Commission had not considered the contention of the appellant to consider the hypothetical consumption on account of delay in open access towards compliance of Rule 3 to the Electricity Rules 2005 towards consumption norms.

- 14.2) According to the appellant, the State Commission has not considered the delay caused in the grant of open access to its captive users for FY 2012-13 and has failed to consider the said delay having been caused by malafide and deliberate conduct of the distribution licensee, while determining the 51% minimum consumption criteria as per Electricity Rules 2005. The other contention of the appellant is that both the distribution as well as the transmission licensee, respondent Nos. 2 & 3 respectively, caused delay of many months while granting open access to certain new captive users and further delay in granting enhancement quantum to certain captive users. The findings of the State Commission that while fulfilling 51% criteria, the appellant has to source power to the captive users in proportion to their shareholding is not applicable to the appellant as the appellant is a SPV and not an association of persons and due to non-consideration of these facts for the said delay caused in granting open

access, the status of the appellant has been raised as non-captive for the FY 2012-13.

- 14.3) One more contention of the appellant is that the result of re-structuring of the group re-structure, the appellant entered into different Power Delivery Agreements and Share Subscription Agreements with each of the captive users and the said agreements were executed on various dates between 12.01.2007 and 08.08.2011. The appellant was required by open access Regulations of the State Commission to enter into an agreement with the transmission licensee for the purpose of transmission of electricity and another agreement with the distribution licensee for the same purpose.
- 14.4) The facts as emerged from the record are that the appellant on 20.09.2010 submitted an application for grant of long term open access and further on 15.11.2010 submitted one application for seeking short term open access for supply of electricity to captive users. Several correspondence/communications were exchanged between the appellant and the distribution licensee. The main queries regarding processing of the application of the appellant for grant of open access and after a lapse of six months from the date of the said application, the licensee vide letter dated 02.06.11 informed the appellant that since the captive users were located at different places, the said captive users must file individual applications for grant of open access along with the consent of their respective distribution licensees. Many other communications were also exchanged between the parties. Further queries were sought by the licensee and the said application seeking grant of open access was not decided by the distribution licensee. The appellant/petitioner filed petition No.161 of 2011 wherein an Interim orders dated 09.12.2011 and 11.01.2012 were passed and ultimately the open access was granted to the appellant, which was subsequently extended by the distribution licensee vide letter dated 20.04.2012 to 31.03.2013 and further to 31.03.2014.
- 14.5) One more contention hotly argued by the appellant is that one letter dated 11.10.2011 written by the CMD of the distribution licensee to the Power Secretary to the Government, copy of which was furnished to the counsel for

the appellant, under Right to Information Act 2005, depicts the circumstances under which the said delay in grant of open access was caused by the distribution licensee. Since we have cited the complete letter above, we don't feel it necessary to discuss it again here.

- 14.6) We may clearly note here that the appellant has not agitated the issue of delay in the original grant of open access dated 11.01.2012 but has vehemently challenged the finding of the Impugned Order with regard to delay caused by the distribution licensee in enhancing the quantum of open access after the open access permission dated 11.01.2012. Further, the appellant had also challenged the delay in grant of open access to certain new captive users because of which the appellant could not supply 51% of the net energy generated to its captive users in FY 2012-13.
- 14.7) We have also noted the fact that on account of the alleged original delay in grant of open access which was subject matter of Case No.161 of 2011, the appellant was forced to sell power to third parties and also to shut down/lower generation of the captive units i.e. Units 3 & 4 and the captive users could consume electricity after 11.01.2012 from the date open access was granted by the distribution licensee. The gist of contentions of the appellant is that some of the consumers had also increased their demands and increased demand could not be met until the day the open access was granted. The said delay prevented the appellant from supplying minimum 51% of the electricity generated in FY 2012-13.
- 14.8) The repeated contention of the appellant is that the distribution licensee deliberately delayed the grant of open access to the appellant for the sole reason to obtain cross subsidy surcharge from the appellant.
- 14.9) We have also considered the contention of the appellant that Rule 4 of MERC (Distribution Open Access) Regulations 2005 requires the disposal of the said open access application within 30 days from the date of its filing.

- 15) After considering all the contentions of the appellant, we do not find any force or substance in any of the contentions of the appellant for the following reasons:
- 15.1) The aforesaid Regulation 4 of the Distribution Open Access, Regulations 2005 nowhere mandates the disposal of the said application within 30 days from the date of its filing.
- i) What Regulation 4.4.1 of the said Regulations requires is that whenever the generating company or the licensee is connected or intends to be connected to the distribution system of a distribution licensee and intends to give supply of electricity to an eligible consumer or to an eligible person as specified in Regulation 3.1, using such distribution system, ***the distribution licensee shall within a period of 30 days from the receipt of application for open access, intimate such generating company or licensee of a technical requirement, details of works to be carried out, charges to be made and estimated time period for completion of works in order to provide or to enable such generating company or licensee to give such supply with two provisos namely, the distribution licensee shall recover the said expenses and secondly, while determining the expenses to be recovered, the distribution licensee shall take into account the details of works, planned to be undertaken etc. Regulations 4.5 further provides that the applicant for open access shall arrange for all consents and statutory provisions as required by distribution licensee from the applicant under the Act or any other law for the time being in force, for carrying out works required to give open access to the applicant.***
- ii) We have deeply and carefully gone through all the provisions of the Distribution Open Access Regulations 2005, particularly, complete Regulation 4 but nowhere it mandates disposal of the said application within 30 days from the date of its filing. During arguments also the learned counsel for the appellant has completely failed to point out the provision or rule where the distribution licensee is required to dispose of the said application seeking grant of open access within 30 days from the date of its filing. Regulation 4.2, dealing with application by a consumer, provides the provisions for increase of contract

demand/sanction load etc. and all the relevant provisions for grant of open access are given therein. Annexure-I to the said regulations prescribes the form of application for open access requiring many enclosures to be filed along with that application and many other particulars which are required to be complied with or fulfilled by the applicant seeking open access.

- 15.2) This Appellate Tribunal vide judgment dated 22.09.2009 in Appeal No.171 of 2008, Appeal No. 172 of 2008, IA No. 233 of 2008, IA No. 234 of 2008, Appeal No.10 of 2008 and Appeal No. 117 of 2009 in the matter of *Kadodara Power Pvt. Ltd. & Ors. Vs. Gujarat Electricity Regulatory Commission & Anr.* while dealing with the situation whether the provisions of Rule 3 of Electricity Rules 2005 would apply to a CGP which is a SPV, after dealing with all the relevant provisions of CGP and requirement of Rule 3 with reference to SPV having dealt with minimum 51% of total consumption by a captive consumption of the CGP and 21% shareholding in the ownership of the CGP clearly held that the provisions of Rule 3 of Electricity Rules 2005 would fully apply to an SPV and both the requirements of minimum 51% consumption of total generation of electricity and shareholding minimum 26% in the ownership of the CGP are required to be fulfilled by any CGP in order to successfully claim the benefit of Rule 3 of Electricity Rules 2005.
- i) This Appellate Tribunal in its judgment dated 22.09.2009 in Appeal Nos. 171/2008, 172/2008, 10/2008 and 117/2009 in the matter of *Kadodara Power Pvt. Ltd. & Ors. Vs. Gujarat Electricity Regulatory Commission & Anr.* Clearly held that a CGP as an association of persons and is thus liable to consume minimum 51% of its generation in proportion to the shareholding of the generating plant.
- ii) The intermittent enhancement, intermittent submission of new application, intermittent change in equity shareholding pattern by the appellant legally and correctly required detailed scrutiny and further various queries raised by the authorities of the distribution licensee in regard to the data, documents furnished by the appellant, also required clarifications, thus the time consumed

in grant of open access to the consumers of the appellant appears to be merely a procedural delay and not intentional or malafide one.

- iii) That delay in grant of open access of M/s Spentex, another consumer of the appellant, was caused as the appellant filed an application seeking open access in October 2012, though the name of M/s Spentex Industries was not included in the original equity shareholding list of the appellant, when the open access permissions were issued in January 2012 and April 2012. The appellant submitted a revised chartered accountant's certificate which certificate revealed that equity shareholding of previous shareholders were reduced and M/s.Spentex was included as a new equity shareholder w.e.f. October, 2012. It is such change of equity shareholding pattern of the group captive scheme that was real and legal issue to be scrutinized by distribution licensee which naturally had delayed the grant of open access. These queries or clarifications cannot be attributable to the distribution licensee in order to infer that there was arbitrary exercise of power or some malafide or deliberate delay in grant of open access on the part of the distribution licensee.
- iv) For all these reasons the distribution licensee cannot legally be held liable for the delay which actually resulted in the grant of open access.
- v) In case of one more consumer of the appellant, like M/s Viraj Profiles Ltd., the appellant had demanded open access capacity more than the contract demand, such consumers were having with the distribution licensee. Enhancement in contract demand could not be granted by the distribution licensee since the same involved technical feasibility issues, hence we find the allegation against the distribution licensee as completely baseless and unsubstantiated.
- vi) There is no concept of deemed open access either under the Electricity Act 2003 or Electricity Rules 2005.
- vii) This Appellate Tribunal in its judgment dated 18.02.2013, in Appeal No.33 of 2012, in the matter of *M/s Godawari Power & Ispat Ltd. Vs. The Chhattisghar State Electricity Regulatory Commission & Ors.* while dealing with the question of providing relaxation in the norms of captive consumption of at least 51% for

being qualified as captive power plant/CGP on account of *force majeure* conditions namely, on account of collapse of the shed of its steel melting plant leading to shut down for repair and maintenance work for a few months unabling or disabling the CGP to achieve the prescribed requirement of minimum 51% consumption of the total generation clearly held that if anyone of the conditions prescribed in Rule 3 of Electricity Rules 2005 is not fulfilled, the captive power plant/CGP will lose its CGP status and become a generating plant or independent power producer and accordingly the State Commission cannot relax the provisions of Rule 3 of Electricity Rules 2005 under its power to relax. The relevant part of the said judgment dated 18.02.2013 in Appeal No.33 of 2012 (supra), is quoted as under:

**“30. To Sum Up**

- (a) *Rule 3 of Electricity Rules 2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not have any powers to relax the provisions of the Electricity Act, 2005.*
- (b) *In the present case, the Appellant could not satisfy one of the conditions of Rule 3 viz consumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules, 2005. The State Commission does not have any power to relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant’s power plant for captive use.”*

- 16) In view of the above discussions, analysis and interpretation of the Rules, we decide this issue against the appellant. We hold and observe that the State commission is fully and legally justified in passing the Impugned order and there is no infirmity or perversity in the Impugned Order. The State

Commission cannot exercise its power to relax the provisions of Rule 3 of Electricity Rules 2005 and this issue is decided against the appellant. Consequently, the appeal is liable to be dismissed.

**ORDER**

- 17) This appeal, being Appeal No.316 of 2013, is hereby dismissed as being devoid of merits and Impugned Order dated 28.08.2013 passed by MERC in Case No.117 of 2012 is hereby upheld.

No order as to costs.

Pronounced in the open court on this **17<sup>th</sup> day of May, 2016.**

**(T. Munikrishnaiah )  
Technical Member**

**( Justice Surendra Kumar )  
Judicial Member**



**REPORTABLE / ~~NON-REPORTABLE~~**