IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEALNO. 207 OF 2016
& IA NO. 396 OF 2019,

APPEAL NO. 208 OF 2016
& IA NOS. 814 & 815 OF 2020 & IA NO. 395 OF 2019,

APPEAL NO. 219 OF 2016,

APPEAL NO. 220 OF 2016,

APPEALNO. 295 OF 2016
& IA NO. 437 OF 2019

AND

APPEAL NO. 239 OF 2017
& IA NO. 399 OF 2019

Dated: 02nd July 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

APPEAL NO. 207 OF 2016
& IA NO. 396 OF 2019

In the matter of:

M/s Hindalco Industries Limited
Mahan Aluminum Project,
Through Sanjaya Gupta
Assistant Vice President (Electrical)
Mahan Aluminum Project
Resident of B-8, Hindalco Township
Bargawan, Singrauli
Madhya Pradesh .... Appellant(s)

VERSUS

1. **The Madhya Pradesh Electricity Regulatory Commission**
   [Through the Secretary]
   5th Floor, Metro Plaza, Arera Colony,
   Bittan Market,
   Bhopal 462 016

Madhya Pradesh

2. **Additional Director (F&A)—II,**
   Office of the Chief Financial Officer,
   Madhya Pradesh Power Transmission
   Company Ltd, Block No.2 Shakti Bhawan,
   Rampur, Jabalpur 482 008
   Madhya Pradesh

3. **The Joint Director**
   Office of the Chief Financial Officer,
   Madhya Pradesh Power Transmission
   Company Ltd, Block No.2 Shakti Bhawan,
   Rampur, Jabalpur 482 008
   Madhya Pradesh …. Respondents

APPEAL NO. 208 OF 2016

& IA NOS. 814 & 815 OF 2020 & IA NO. 395 OF 2019

In the matter of:

Ultra Tech Cement Limited
having it registered Office at:
Ahura Centre, B-Wing, Second Floor,
Mahakali Caves Road,
Andheri East, Mumbai
Maharashtra …. Appellant

VERSUS

1. **The Madhya Pradesh Electricity Regulatory Commission**
   [Through the Secretary]
   5th Floor, Metro Plaza, Arera Colony,
   Bittan Market, Bhopal 462 016
   Madhya Pradesh

2. **Madhya Pradesh Power Transmission Company Ltd,**
   Block No.2 Shakti Bhawan,
   Rampur, Jabalpur 482 008
   Madhya Pradesh

3. **Additional Director (F&A)—II,**
   Office of the Chief Financial Officer,
   Madhya Pradesh Power Transmission
   Company Ltd, Block No.2 Shakti Bhawan,
   Rampur, Jabalpur 482 008

Madhya Pradesh .... Respondents

Counsel for the Appellant(s) : **Mr. Sanjay Sen, Sr. Adv.**
Mr. Syed Shahid Husain Rizvi
Ms. Mandakini Ghosh

Counsel for the Respondent(s) : **Mr. S Venkatesh**
Mr. Rishub Kapoor
Ms. Mehak Verma for R-1

Mr. M.G. Ramachandran, Sr. Adv
Mr. Shubham Arya
Ms. Ranjitha Ramachandran
Ms. Tanya Sareen
Mr. Siyaram Sharma (Rep.)
for R-2 & R-3

APPEAL NO. 219 OF 2016

In the matter of:

M/s Maral Overseas Limited,
Maral Sarover, V & PO, Khalbujurg,
Distt. Khargone,
Madhya Pradesh .... Appellant

VERSUS

1. **Madhya Pradesh Electricity Regulatory Commission**
   5th Floor, "Metro Plaza", E – 5 Arera Colony,
   Bittan Market, Bhopal – 462 016,
   Madhya Pradesh

2. **Madhya Pradesh Power Transmission Co Limited**
   Shakti Bhawan, Rampur,
   Jabalpur – 482 008,
   Madhya Pradesh .... Respondents

APPEAL NO. 220 OF 2016

In the matter of:

HEG Limited
Mandideep (Near Bhopal),
Distt. Raisen 462 046
Madhya Pradesh .... Appellant

VERSUS

1. **Madhya Pradesh Electricity Regulatory Commission**
   5th Floor, "Metro Plaza", E – 5 Arera Colony,
   Bittan Market, Bhopal – 462 016,
   Madhya Pradesh

2. **Madhya Pradesh Power Transmission Co Limited**
   Shakti Bhawan, Rampur,
   Jabalpur – 482 008,
   Madhya Pradesh .... Respondents

Counsel for the Appellant(s) : **Mr. Sanjay Sen, Sr. Adv.**
Mr. Deepak Biswas
Ms. Mandakini Ghosh
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Counsel for the Respondent(s) : **Mr. Shri Venkatesh**
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Ms. Mehak Verma for R-1

Mr. M.G. Ramachandran, Sr. Adv
Mr. Shubham Arya
Ms. Ranjitha Ramachandran
Ms. Tanya Sareen
Mr. Siyaram Sharma (Rep.) for R-2

APPEALNO. 295 OF 2016

& IA NO. 437 OF 2019

In the matter of:

Ultratech Cement Limited
Having its registered office at:
B-Wing, 2nd Floor, Ahura Centre,
Mahakali Caves Road,
Andheri (East)
Mumbai 400 093 .... Appellant

VERSUS

1. **Madhya Pradesh Electricity Regulatory Commission**
   5th Floor, "Metro Plaza", Arera Colony,
   Bittan Market, Bhopal – 462 016,
   Madhya Pradesh

2. **Madhya Pradesh Power Transmission Company Limited**

Block No. 2, Shakti Bhawan, Rampur,
Jabalpur – 482 008,
Madhya Pradesh
[Through its Chief Financial Officer] …. Respondents

Counsel for the Appellant(s) : **Mr. Sanjay Sen, Sr. Adv.**
Mr. Saurav Agrawal
Mr. Shantanu Agarwal
Ms. Srishti Tripathy
Ms. Akansha Dixit
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Ms. Mehak Verma for R-1

Mr. M.G. Ramachandran, Sr. Adv
Mr. Shubham Arya
Ms. Ranjitha Ramachandran
Ms. Tanya Sareen
Mr. Siyaram Sharma (Rep.) for R-2

APPEAL NO. 239 OF 2017
& IA NO. 399 OF 2019

In the matter of:

M/s Jaiprakash Associates Limited
Having registered office at Secytor-128,
NOIDA
Uttar Pradesh 201 304 ... Appellant

VERSUS

1. **Madhya Pradesh Electricity Regulatory Commission**
   5th Floor, Metro Plaza, Arera Colony, Bittan Market,
   Bhopal – 462 016
   Madhya Pradesh

2. **Madhya Pradesh Power Transmission Company Limited**
   Block No. 2, Shakti Bhawan
   Rampur,
   Jabalpur 482008
   Madhya Pradesh

3. Additional Director (F&A)-II
O/o Chief Financial Officer
Madhya Pradesh Power Transmission Co
Block No.2, Shakti Bhawan
Rampur, Jabalpur 482 008
Madhya Pradesh ….. Respondents

Counsel for the Appellant(s) : **Mr. Sanjay Sen, Sr. Adv.**
Mr. Pawan Upadhyay

Counsel for the Respondent(s) : **Mr. C K Rai for R-1**

Mr. M.G. Ramachandran, Sr. Adv
Mr. Shubham Arya
Ms. Ranjitha Ramachandran
Ms. Tanya Sareen
Mr. Siyaram Sharma (Rep.)
for R-2 & R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This batch of appeals preferred by *Captive Power Generators* ("CPPs") challenges the order dated 31.12.2012 passed by the first respondent Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to variously as "*MPERC*" or "*the State Commission*" or "*the Commission*") in Suo Motu Petition no. 73 of 2012 whereby *Parallel Operation Charges* ("POC") @ Rs. 20/ KVA per month were levied on the capacity of the *Captive Generating Plants* ('CGPs") connected to the grid, after deducting load pertaining to auxiliary consumption.

SUMMARY OF CHALLENGE

2. The appellants raise questions as to propriety of procedure adopted viz. non-consideration of submissions of certain Industries opposing such levy; acceptance of a report of a consultant, Electricity Research & Development Association ("ERDA"), Vadodara, based statedly on

assumptions, it having generalized all CGPs and not considered different industrial processes which have a different load pattern than industries like steel, cement and aluminium; and lack of proper discussion, deliberation or analysis, relying on expert opinion to the contrary. It is contended that the impugned order is illegal and unsustainable since it suffers from the defect of want of quorum, and was passed in gross violation of principles of natural justice, it being non-speaking, arbitrary and whimsical, based on ERDA Report which, *ex-facie*, is premised on fallacious, imaginary and unrealistic assumptions, the conditions precedent for levy of POC as indicated in ERDA Report not fulfilled in respect of the appellants. While conceding that this tribunal in the past has dealt with POC and related issues the appellants submit that the issues that are raised herein are distinct and different, the previous decisions being either *per incuriam* or passed *sub silentio*.

THE BACKGROUND

3. The chronology of events leading to the impugned order and the present appeals may be taken note of.

4. In the year 1991, the Government of Madhya Pradesh issued a Declaration of Industrial Policy for the State of Madhya Pradesh making special provision for encouraging captive generation of electricity by persons desirous of establishing new industries, in view of the fact that electricity generation by Madhya Pradesh State Electricity Board (MPSEB) in the State was deficient and for ensuring adequate and good quality supply of electricity to industries. The policy declaration was given wide publicity by the State Government all over India in order to attract and encourage entrepreneurs from other States to establish industries in Madhya Pradesh in the interest of its industrialization, providing employment, raising taxes and producing goods in the State of Madhya Pradesh.

5. It is stated by the appellants that acting on the said Policy Declaration, they had set up their respective industries and for smooth and continuous operations of the plants, also established Captive Power Plants, the various units whereof were synchronized with the Grid at different points of time. The appellants claim, *inter alia*, that the Plants have been set up with sophisticated machinery, automatic and electronically operated equipment with computer monitoring, the power-intensive processes of manufacture at the factories being continuous and requiring steady, smooth and uninterrupted electricity supply of high tension and considerable quantity, it being intolerable for the plant and machinery and the process of manufacture to suffer breakdowns, power cuts, load shedding, tripping, fluctuations and surge in power supply (generally described as "breakdowns"), such breakdowns exposing the industry not only to loss of production time but also deterioration of the raw material in process and permanent damage to electronically operated plant and machinery.

6. It is stated that in the year 2010, the second respondent (in all except first captioned appeal), Madhya Pradesh Power Transmission Co. Ltd. ("MPPTCL"), Jabalpur had filed a Petition No. 50/2010 before the MPERC for determination of *parallel operation charges* (POC) and the Commission decided that study for determination be conducted by an independent body for which purpose ERDA was chosen. The agency ERDA submitted its Report to MPERC, it being called "*Report on Evaluation of Parallel Operation Charges for MPERC*" (hereinafter "ERDA Report"). The ERDA Report was based on documents gathered and studies carried out on 32 CPPs in total having installed capacity of 805.26 MW. It was concluded in the Report that the grid support charges/parallel operation charges are necessary and it was recommended that the same be recovered from CPPs. The ERDA Report had worked out the POC at the rate of Rs. 53.32 per KVA, recommending

that it be levied on basis of certain technical and financial benefits as derived by the bulk consumers by connecting their plant in parallel with the grid.

7. The impugned order was passed by the Chairperson of MPERC in Suo Motu Petition No. 73/2012 on 31.12.2012 fixing Rs. 20.00 per KVA per month on the capacity of the CPP (after deducting load pertaining to auxiliary consumption) connected to the grid. It is not disputed that another member of the Commission was then in office and the issue was discussed and decided by the Chairperson with him but the judgment was signed by the Chairperson only.

8. The relevant part of the impugned order dated 31.12.2012 reads as under:

> *"5. On considering the submissions of the respondents, the Commission is of the view that:*
> *(a) The parallel operation charges shall not be applicable if the CPPs are not connected with the grid.*
> *(b) The purposes of levying supply affording charges and standby charges are different. These are not related to the parallel operation of the CPPs with the grid.*
> *(c) Parallel operation charges cannot be made a part of transmission charges as these charges cannot be levied on all consumers.*
> *(d) Auxiliary consumption of captive generating plants as a parameter may be deducted from the installed capacity of the plant for computation of parallel operation charges.*
>
> *6. The Commission also finds that the object of the Electricity Act, 2003 is to delicense generation and to freely permit CPPs. In order to promote CPPs and looking to the facility being availed by CPPs from the grid, the Commission has come to the conclusion that it would be appropriate that parallel operation charges be levied at the rate of Rs. 20/- per KVA per month on the capacity of CPP (after deducting*

load pertaining to auxiliary consumption) connected to the grid."

9. It appears that the second and third respondents in first captioned appeal, they being functionaries of the MPPTCL, raised Bills demanding from the appellants payments of Grid Support/Parallel operation charges on the basis of the impugned order dated 31.12.2012 of the MPERC for the period January 2013 to February 2013.

10. Aggrieved by the impugned order of MPERC dated 31.12.2012, and the demand notices issued pursuant thereto, appeals were preferred under Section 41 of the *Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000* – saved by Section 185 of Electricity Act, 2003 - against the impugned order dated 31.12.2012 before the Madhya Pradesh High Court. The High Court entertained the said challenge and by order dated 20.09.2013, inter-alia, directed that:

"Subject to appellant's depositing 50% of the amount under the impugned orders within fifteen days from today, the effect and operation of the impugned orders (Annexures-A/1, A/2 & A/3) shall remain stayed till next date of hearing."

11. The above interim order with some modification continued and the appellants kept on depositing 50% of recurring current charges throughout the pendency of the Appeal before the High Court. Eventually, by order dated 23.05.2016, the High Court ruled that since the constitutional validity of a Regulation was not questioned, it being only the order passed by the State Commission which was assailed, the appropriate remedy was appeal under Section 111 of the Electricity Act to this tribunal. The appeals at hand came to be filed in the wake of such disposal of writ proceedings.

THE CONTENTIONS OF APPELLANTS

12. The prime grounds pressed for consideration to assail the impugned order may be broadly set out as under:

(i) The State Commission has no jurisdiction to impose POC;

(ii) The computation of POC is not founded in statutory principles for tariff determination - not based on *actual interaction* with the grid or on *cost-plus* basis; the support or service given to CGPs by State grid, itself connected to national grid, being not possible;

(iii) The CEC Regulations require the transmission utility to carry out interconnection study and determine the point of interconnection, the focus being on grid technical standards;

(iv) The Central and State Grid Codes do not envisage POC;

(v) The levy of POC on CPPs goes against the core of the Electricity Act, 2003 which while delicensing generation promotes captive generation exempts captive consumers from *cross subsidy surcharge*;

(vi) There is discrimination against CPPs as compared to other generators;

(vii) The levy is arbitrary since *transmission licensee* is revenue neutral entity, it being unjustified since imbalances that affect the State grid are absorbed by the national grid.

13. It is also the contention of the appellants that the impugned order passed by MPERC is vitiated as a new Member of the Commission who had

never heard the parties had decided the matter behind the back of the appellant, the quorum being deficient particularly in view of absence of Member from field of law, the procedure adopted in passing the order offending the basic principles of judicial procedure, the order being a product of predisposed state of mind and, hence, *non est*.

EARLIER DISCOURSE ON PARALLEL OPERATIONS CHARGE

14. In the matter of *Chhattisgarh State Power Distribution Company Limited v. Godawari Power and Ispat Limited* (Appeal No. 120 of 2009) decided on 18.2.2011 by a Full Bench of this tribunal, the subject of *Parallel Operation* was explained as under:

> *"17. The parallel operation is a facility in the nature of a Grid support to the Captive Power Plant. The Captive Power Plant gets the following advantages owing to the parallel operation with the Grid:*
>
> *(i) The fluctuations in the load of CPP are absorbed by the utility grid in the parallel operation mode. This will reduce the stresses on the captive generator and equipments. The CPP can operate his generating units at constant power generation mode irrespective of his load cycle.*
>
> *(ii) Absorption of harmonics.*
>
> *(iii) Negative phase sequence current is generated by unbalance loads. The magnitude of negative phase sequence current is much higher at the point of common coupling than at generator output terminal. This unbalance current normally creates problem of overheating of the generators and other equipments of CPP, if not running in parallel with grid. When they are connected to the grid, the negative phase sequence current flows into the grid and reduces stress on the captive generator.*

(iv) Captive Power Plants have higher fault level support when they are running in parallel with the grid supply. Because of the higher fault level, the voltage drop at load terminal is less when connected with the grid.

(v) The grid provides stability to the load of Captive Power Plant to start heavy loads like HT motors.

(vi) The variation in the voltage and frequency at the time of starting large motors and heavy loads, is minimized in the industry, as the grid supply acts as an infinite bus. The active and reactive power demand due to sudden and fluctuating load is not recorded in the meter.

(vii) The impact created by sudden load throw off and consequent tripping of CPP generator on over speeding is avoided with the grid taking care of the impact.

(viii) The transient surges reduce the life of equipment of the CPP. In some cases, the equipment fails if transient is beyond a limit. If the system is connected to the grid, it absorbs the transient surges. Hence, grid enhances the life of CPP equipments."

15. By an earlier decision dated 12.9.2006 *in Urla Industries Association* v. *CSERC* (Appeal No.99 of 2006), this tribunal had upheld the levy of *Parallel Operation Charges* ("POC") by the State Commission. *The* relevant observations appearing in the said decision are as follows:

"11. Next we shall take up points C & D together, as the discussions overlap each other. The parallel operation is definitely a service that the second respondent renders to all the CPPs like the appellant. It is the contention of the appellant that no charges could be levied or collected for the said service. As rightly pointed out by the Expert who appeared for the second Respondent, the parallel operation is a service which extend support to the system and at the same it causes voltage dip in the system, harmonies, injection, additional reactive power requirement etc. By parallel operation the CPP gains more and hence it is liable to pay the charges for the service.

12. The contention that no charges at all is payable for parallel operation or transmission system cannot be sustained and such a claim is contrary to factual position. There is no escape for CPP to pay charges for parallel operation by which parallel operation the CPP gains while the transmission system of the second respondent is affected apart from the admitted fact the transmission grid is strengthened by the power injected by CPP. Hence the contention that no charges at all is payable by CPP to the second respondent for parallel operation is not acceptable nor such a claim could be sustained.

13. Conceedingly for the past several years, CPPs were paying at the rate of Rs. 16/= per KVA per month and in the absence any scientific data placed or objection by the appellant and other CPPs, the commission just followed the same scale and fixed the same tariff vizRs. 16/= per KVA per month. On a review the commission has slashed the said rate and fixed it at Rs. 10/= per KVA per month. This works out approximately paisa 2 to 3 per unit per month, a negligible rate when compared to services rendered by second respondent. The rates of parallel operation charges so fixed are till the next tariff fixation, which is under progress.

14. It is strongly contended by the learned senior counsel that in the absence of scientific data and particulars the fixation is arbitrary and on the higher side. Per contra the second respondent while contending that the appellant could have very well placed the datas to show the fair rate of charges for such parallel operation.

15. We are informed by either side that the first respondent commission is seized of the very issue and the respondent after study and sample survey has placed required datas, which will enable the Regulatory commission to fix parallel operation charges on a scientific basis and on the materials and datas placed before it."

(emphasis supplied)

16. By judgment rendered in the matter of *Indian Acrylics Ltd.* v. *PSERC* (Appeal no. 86 of 2008 decided on 24.04.2009), this tribunal held thus:

> *"5) Before us it is submitted by Mr. Deepak Sabharwal that the respondent No. 2 had requested the Commission to withdraw the parallel operation charges on the ground, inter alia, that levy of these charges is against the provisions of the Electricity Act, 2003. It is contended by Mr. Sabharwal that if the respondent No. 2 itself says that the levy of these charges is against law then the same must have been against law from the very beginning and therefore the review petition should have been allowed. Having carefully considered the submissions we find that there is no merit in the same. Mr. Sabharwal could not explain to us how the parallel operation charges are against the provisions of the Electricity Act 2003. It may be that the Board submitted a proposal to the Commission to discontinue the levy of parallel operation charges. It is also correct that the Board in its representation submitted inter alia, that levy of these charges were against provisions of the Electricity Act, 2003 (as can be seen from Chapter 6 of the public notice issued by the Commission for determination of ARR and tariff for the year 2006-07 in respect of Punjab State Electricity Board). This, however, does not mean that the Commission or the respondent No. 2 become bound by such a statement in respect of the legal position. Neither the Commission nor the Board is estopped from charging parallel operation charges simply because the Board expressed such an opinion about the legal position of parallel operation charges. The appellant had failed to make out any ground for review. Nor is there any ground to interfere with the impugned order. Accordingly, we have dismissed the appeal."*
>
> (emphasis supplied)

17. Having quoted with approval above-noted observations in judgment dated 12.09.2006 in *Urla Industries Association* v. *CSERC* (supra), the Full Bench in *Chhattisgarh State Power Distribution Company Limited v. Godawari Power and Ispat Limited* (supra) accepted that there was justification for the State Commission to levy *parallel operation charges* observing that:

"*18. … the gain to the Captive Power Plant is quite substantial in case there is grid support. Owing to the above said substantial gains to the Captive Power Plant by operating in parallel with the grid, the parallel operation charges are levied from the Captive Power Plant.*"

18. The findings in *Chhattisgarh State Power Distribution Company Limited v. Godawari Power and Ispat Limited* (supra) were summarized as under:

"*SUMMARY OF OUR FINDINGS:*

26. (1) The 1st Respondent, Godawari Power & Ispat Ltd. is the Captive Power Plant. This plant is being operated in parallel with the grid. The relationship in regard to the parallel operation with the grid is between the Captive Power Plant, the 1st Respondent herein and the Appellant, the Distribution Licensee. This is not a dispute between the Appellant a Distribution Licensee and the Respondent No. 1 as a consumer of the electricity. This is a dispute regarding the levy of parallel operation charges to be levied and collected by the Appellant being a Distribution Licensee from the 1st Respondent, Captive Power Plant which is a generator. Therefore, the State Commission has got the jurisdiction to entertain and adjudicate upon this dispute under Section 86(1)(f) of the Electricity Act, 2003.

(2) The parallel operation charges are payable on the installed capacity of the Captive Power Plant. The Captive Power Plant consists of a number of machines and equipments. Then capacity of Captive Power Plant cannot be considered in isolation of one or two equipments. MVA capacity of generating plant shall be worked out on the basis of designed power factor which is recorded in the nameplate of the generator. From the quantum of the steam generated by the three boilers installed in the premises of the 1st Respondent, only one 10 MW generating plant can run at a time along with the 30 MW power plant. Thus, the effective connectivity of generating plant with the grid is 40 MW and not 60 MW. Therefore, the 1st Respondent should be billed for parallel operation charges for 40 MW only and not for 60 MW."

(emphasis supplied)

19. In the matter of *M/s Shah Alloys Ltd. V. Gujarat Electricity Regulatory Commission and others* (Appeal No. 65 of 2012 decided on 05.11.2012), the issue of Parallel Operation Charges being linked to installed capacity of the Captive Power Plant was raised and this tribunal ruled thus:

> *"8. …The second point to be considered is whether in the event of the POC being found leviable upon the appellant such levy should be on the installed capacity of 41000 KVA or on the alleged derated capacity of 22595 KVA as claimed by the appellant." …*
>
> *"This is a reasoned order which is difficult to be not acceptable. The appellant relies on a letter dated 20.8.2008 which is a reply to the letter of the appellant dated 29.7.2008. This letter of the office of the Chief Electrical Inspector records that the Chartered Engineer certified that the DG Sets were capable of generating electricity of about 40 to 60% and the total derated capacity of the six sets except the two sets discarded earlier worked out at 22595 KVA. This letter concludes with the sentence "The above certificate is issued for the purpose of extension of load from UGVCL only and shall not be used for any other purpose". A close look at the letter shows that the Chief Electrical Inspector addressed this letter to the appellant on the basis of a letter of the Chartered Engineer. The Chief Electrical Inspector gets a derivative knowledge and that is only to the extent that the records revealed that the sets were capable of generating electricity to the extent of 40% to 60%. The Chief Electrical Inspector did not himself or through any of his officer conducted any requisite test for derating. It is not that upon necessary tests it has been found that the engines were not at all able to generate electricity beyond 60%. It is also not clear that the Chartered Engineer who issued the letter on 29.7.2008 himself performed the tests for the purpose of certification about derating. The letter dated 20.8.2008 which is banked upon by the appellant is with reference to the appellant's letter to the Chief Electrical Inspector dated 29.7.2008 and it is not known what was the*

content of that letter dated 29.7.2008. It is only beyond dispute that two DG Sets were discarded as it was verified by the Inspectorate. In the circumstance, the observation of the Commission to the effect that the certificate was issued by the Chartered Engineer on the 'presumption' that the units could generate only 50 to 60% of the installed capacity cannot be assailed to be preposterous because the author of the letter also did not appear to have personally conducted any tests. Presumption cannot be equated with certification. Certification is preceded by all permissible engineering tests which this letter does not reveal. And, delinking cannot be a one way traffic as it requires affirmation from the authority alone which accorded permission for parallel operation. Mr. Sen, learned advocate appearing for the appellant cites a decision of this Tribunal in Appeal no. 120 of 2009 decided on 18.2.2011. The facts and circumstances of the case in that appeal were completely different. A number of issues including the issue on jurisdiction of the Commission was raised in that appeal but the important fact that needs to be recorded here is that it was only upon inspection in that case that it was found that the power cable connections of the two TG Sets were removed and the said TG Sets were found to be out of service and this was not a disputed fact and in such circumstances, the Commission itself came to the opinion that the effective connectivity of the generating plant with the grid would be 40 MW, not 60 MW and this Tribunal also did not disturb the finding, yet holding that parallel operation charges are payable on the installed capacity of the captive power plant."

20. In *Shree Renuka Sugars Limited v. Gujarat Energy Transmission Corporation Limited and Others* (Appeal No. 39 of 2014 decided on 29.9.2015), reported at 2015 SCC OnLine APTEL 11, the matter in issue related to the liability of the appellant to pay Parallel Operation Charges ("POC")/ Grid Support Charges ("GSC") claimed by the respondent Gujarat Energy Transmission Corporation Ltd. ("GETCO") for the captive power plant (generating unit) for sugar refinery (consuming unit) located at the same premises (co-located) enabling the said appellant to draw

electricity for its consuming unit and at the same time have the connectivity with the Grid operated and maintained by GETCO. By the impugned order dated 08.08.2013 the Gujarat State Electricity Commission (GERC) had held that the POC were payable by the appellant. One of the grounds raised was an undertaking to pay POC given by the appellant at the time of taking grid connectivity. That part and the denial of benefit of three-minute integration to certain other industry may not be relevant here. The prime contentions raised were that the impugned order did not recognize the different characteristics of Sugar Refineries cogeneration power plant with utilization of steam from operation in the Sugar Refinery being used to generate electricity, the plant of the said appellant being a Cogeneration plant as compared with various captive power plants considered leading to the order dated 01.06.2011 whereby GERC had enforced POC and further that the Parallel Operation Charges should be limited to the actual load and not to the installed capacity of the Captive Power Plant.

21. The second above-mentioned contention was repelled with reference to the rulings in cases of *M/s Shah Alloys Ltd*. (supra) and *Chhattisgarh State Power Distribution Co. Limited* v. *Godawari Power & Ispat Ltd.* (supra), the following part of the judgment in the Full Bench decision in latter case having been specifically quoted:

> *"23. The parallel operation charges are payable on the installed capacity of the Captive Power Plant. The Captive Power Plant consists of number of machines, equipments of which the steam boiler forms a part. The Captive Power Plant can produce only such a quantum of electricity based on the steam which is dependent on the capacity of the steam boilers installed. Even if the Captive Power Plant has multiple turbine generators for delivering the electricity of a substantially higher quantum of power, in case the boilers providing steam for electricity generation are of capacity less than the sum of capacity required for the turbine generators then the ultimate capacity of the Captive Power Plant will be*

less than the sum of rated capacity of the boilers to provide steam. In other words, the capacity of the Captive Power Plant cannot be considered in isolation of one or two equipments but in a comprehensive manner taking into account the limitations or restrictions of one or two equipments such as boilers providing steam.

24. Considering the capacity of the boilers to provide steam, it will ultimately fed into the turbine generators for the purpose of generation, the State Commission has correctly decided the capacity of Captive Power Plant as 40 MW for levy of parallel operation charges."

22. It was contended that in the case of the said appellant there was a higher quantum of generation of electricity which made operation self-sustained and there was no import of power from the Grid for such operation except for the startup purposes, the appellant having taken separate connection of 2.5 MW for the startup power, the connectivity taken to the Grid system being for export of power and there being no Grid support required for the sustaining the operation of Sugar Refinery. It was held thus:

"*Since power plant of 45 MW of the Appellant is operating in parallel with the Grid and the fact this issue has already been decided earlier by this Tribunal in number of cases of similar nature, Parallel Operation Charges for the entire capacity as decided by the Commission in their order dated 08.08.2013 are in line with Tribunal's earlier judgment and the same is being upheld by this Tribunal.*"

23. The core contention as to inapplicability of POC was rejected with reference to Full Bench decision in *Chhattisgarh State Power Distribution Co. Limited* v. *Godawari Power & Ispat Ltd.* (supra) and the rulings in cases of *Urla Industries Association* (supra) and *Indian Acrylics Ltd.* (supra). Upholding the order of GERC and rejecting the contention this tribunal observed thus:

"…

vi) The Appellant's captive power Plant is co-located with the Sugar Refinery and therefore covered by the decision dated 01.06.2011 of the GERC on levy of Parallel Operation Charges. It cannot be denied that the Appellant Captive Power Plant/co-located units are in operation in parallel with the Grid. The other aspect in the contention raised by the Appellant to be considered is the issue of Captive Power Plant being cogeneration and nature of steam availability and generation in a sugar refinery. The Appellant's submission on the nature of utilisation of steam generated power in Sugar Industry is being different from the other Captive Power Plan and even other types of cogeneration cannot be disputed. The quantum of power generated due to higher quantum of steam required in the Sugar Industry is significantly higher and much in excess of the quantum required for the consuming unit in the Sugar Industry, hence there will be surplus availability of electricity generated. This, however, would not make it outside the Grid support through the parallel operation. The various supports which the unit would derive are listed in the Full Bench decision in Godawari Appeal no. 120 of 2009 which substantially applies to the Appellant.

vii) The Appellant had itself applied for Grid support and had given an unconditional undertaking to pay the Parallel Operation Charges as per the GERC order dated 01.06.2011 and implemented the scheme after the order dated 01.06.2011 of the GERC. The Appellant did not raise any such aspect at that point of time. If there is no Grid support derived by the Appellant it is open to the Appellant to isolate its facilities from getting support and opt for other means to export power to the Grid.

viii) It is also an established fact that the Cogeneration plant though different from CPP so far as the operation is concerned but not different on the aspect of operation in parallel with the Grid."

(emphasis supplied)

24. In *Salasar Steel and Power Limited v. Chhattisgarh State Power Distribution Company Limited and Others* (Appeal No. 72 of 2015 decided by this tribunal on 17.2.2016) reported at 2016 SCC OnLine APTEL 100, the

appellant had installed 15 MW and 65 MW power plant along with 2 × 100 TPD sponge iron manufacturing unit at Raigarh in the State of Chhattisgarh, out of which 4.5 MW was generated through waste heat. Its unit was connected to the 132 KV/220KV Raigarh sub-station through 132 KV dedicated single circuit line for evacuation of power and had been permitted to operate its power plant in parallel with the grid system of Chhattisgarh State Power Distribution Company Limited. By a petition, the said appellant had raised before the Chhattisgarh State Electricity Regulatory Commission (CSERC) a dispute regarding a Supplementary Bill issued by the distribution licensee. The claim of the appellant was partly upheld but the challenge to the methodology adopted for computation of Parallel Operation Charges was repelled. Rejecting the contentions to the contrary, by its order, the CSERC had held that POC and cross subsidy charges (CSS) are for different purposes and may be recovered at the same time for the same period if the Captive Power Plan (CPP) is not fulfilling the criteria for captive status. The prime contentions in appeal were that once the entity does not qualify as CPP, it becomes an independent power plant and, hence, there would not be any justification for recovery of any POC for that period. It was also argued that CSS is a compensatory charge paid to the distribution licensee as a consequence of a consumer going out of distribution licensee's ambit, it being meant for meeting the loss caused due to exit of a consumer i.e. loss caused on account of (i) ability to cross subsidize the vulnerable sections of the society, as well as (ii) recovery of fixed costs that the licensee might have incurred as part of its obligation to supply electricity to that consumer (stranded cost). The appellant submitted that the exit of a consumer is, however, exempted from payment of CSS, if such supply is from CPP to its consumer. On the loss of captive status, it was argued, the distribution licensee is levying the CSS because the consumer is no longer having captive status. The plea was that since POC is for the grid support, for the

use of system i.e. “grid support”, the consumer would have compensated either by paying POC or CSS. It was noted that the Chhattisgarh State Electricity Regulatory Commission (CSERC) had defined *Parallel operation* by its order dated 13.10.2009 as under:

> *“The parallel operation is any activity where one electrical system operates with the connectivity to another system in similar operating conditions. The CPPs opt for parallel operation to seek safety, security and reliability of operation with the support of a much larger and stable system as afforded by the grid.”*

25. It was also noted that the activity of *parallel operation* undertaken by CPPs involves injection of shock, pollution and disturbance in the system of the State leading to disadvantages to a distribution utility, which were enumerated as under:

> *“(1) Load fluctuations of captive consumer are passed on to the utility's system thereby the efficiency of utility's system may be affected, which may also impact on utility's other consumers.*
>
> *(2) In case of an ungrounded (or grounded through resistance) system supply, fault on interconnecting line (consumer's side) results in interruption of system. For single phase to round fault which are 80 to 85% of the short circuit fault level, the grounding of the system is achieved through the neutral or step down transformer of the utility, when the generator runs in parallel with the utility's grid. Thus supply is likely to cause damage to the terminal equipments at utility's sub-stations and line insulators, as voltage on the other two healthy phases rise beyond the limit, under such conditions.*
>
> *(3) The utility has to sustain the impact of highly fluctuating peak loads like that of arc furnace, rolling mill, etc. for which it does not get any return on the capital invested to create system reserve.*

(4) The variation in reactive power requirement increases the system loses and lowering of the voltage profile. Utility has to bear the cost of such effects.

(5) The lower voltage profile and fluctuations affect the service to the neighboring consumers due to deterioration in quality of supply, thus resulting in revenue loss to the utility.

(6) Non-recording of high fluctuating/sudden active and reactive demand by the meter results in financial losses."

26. The appellant in the matter of *Salasar Steel and Power Limited v. Chhattisgarh State Power Distribution Company Limited and Others* (supra) articulated its submissions as under:

"*… To compensate the distribution utility for the disadvantages caused to its system as enumerated above, it has been considered appropriate to levy a charge on the CPPs for burdening the system of Respondent No. 1 in the course of stabilization and optimizing their own system by such CPPs. Such levy is in the form of POC for Grid Support. These parallel operation charges are defined in the State Commission's Regulation from time to time.*

16. … the liability of payment of cross subsidy surcharge occurs when power is transmitted by means of open access under the provisions of Section 42(2) of the Electricity Act, 2003. However, the fourth proviso to Section 42(2) of the Electricity Act, 2003 provides that such surcharge is not leviable in case of open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use. For qualifying as a captive generating plant, not less than 51% of the aggregate electricity generated in such plant, determined on annual basis, must be consumed for captive use and in the event such captive consumption is less than 51% of the aggregate electricity generated on annual basis, the entire electricity generated is to be treated as if it is a supply of electricity by a generating company. There could be a situation in a given year a CPP which is running in parallel with the grid and is availing open access without any requirement of payment of cross subsidy surcharge is found at the end of the year to have not qualified as CPP on

account of captive consumption less than 51% of the total generation, the CPP becomes liable to pay cross subsidy surcharge to the area distribution licensee with respect to power transmitted through open access in that year. Notwithstanding, this situation, the generating plant as a CPP has in any case been running in parallel with the grid of the Respondent No. 1—distribution licensee during the year and thus causing shocks, pollution and disturbances in its system so that its liability to pay POC to the Respondent No. 1 continues irrespective of its loss of captive status at the end of that year and in such a case generator operating as CPP during the year and ceasing to be eligible for the status of CPP at the end of the year, becomes liable to pay both cross subsidy surcharge as also POC to the Respondent No. 1.

18. … the cross subsidy surcharge is a compensatory charge and it does not depend upon use of distribution licensee's lines. It is a charge to pay the compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would have taken the quantum of power from the distribution licensee and as a result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy surcharge for subsidizing other vulnerable categories of consumers …"

27. In the judgment in *Sesa Sterlite* v. *Orissa Electricity Regulatory Commission* [(2014) 8 SCC 444] dealing with the subject of open access and cross-subsidy surcharge (CSS), the Supreme Court had observed thus:

" …
(2) Open access and Cross-Subsidy Surcharge (CSS)
23. Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression "open access" has been defined in the Act to mean:
"the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or

consumer or a person engaged in generation in accordance with the regulations specified by the appropriate Commission".

24. The Act mandates that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination. This would facilitate sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.

25. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.

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

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

27. The issue of open access surcharge is very crucial and implementation of the provision of open access

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

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

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:

4. (vi)(a) current level of cross-subsidy to be gradually phased out along with cross-subsidies; and

(b) obligation to supply."

30. Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution

licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross-subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee."

28. Taking note of above ruling on open access and CSS in *Sesa Sterlite* v. *Orissa Electricity Regulatory Commission* (supra), this tribunal in the judgment in *Salasar Steel and Power Limited v. Chhattisgarh State Power Distribution Company Limited and Others* (supra) concluded that the CSS is payable by the consumer if it has not availed the supply from the Distribution Licensee of the area in question and, thus, the appellant having failed to qualify as CPP was liable to pay CSS in addition to POC. It was held that though during the period under dispute, the appellant could not qualify as CPP for drawing the Grid Support of the licensee for generation in parallel mode, POC was payable as per the prevailing rates to compensate the utility for the disturbance, shocks, distortion etc. caused to its system by virtue of CPP operating in parallel with the system of the utility. Further, it was concluded that POC and CSS are for different purpose and as such could

be recovered at the same time for the same period, if the CPP is not fulfilling the criteria to qualify for captive status. It was also observed that:

> *"It is not open to the Appellant that on its requirement of attaining captive status by meeting the specified criteria which has been granted since the time it was sought, but due to annualized captive consumption being less than that specified for meeting the captive status for some period, it should not be considered captive for that period and POC paid by it for that period should be refunded. This plea of the Appellant is not acceptable since the Respondents' system did take into consideration even during the period under dispute for catering to the requisite grid support to the generating station of the Appellant considering it as captive plant as has been considered for the prior period of operation of the Appellant. As even during the period under dispute, the Appellant's plant has in any case run in parallel with the system of the Respondent No. 1, the Appellant is liable to pay POC for period under question to the Respondent No. 1.*
>
> *…*
>
> *It is upto the Appellant if it considers that it would not have captive consumption to the specified threshold for meeting captive status in future it could get it generating plant categorized as non-captive generating station and in that case after obtaining the statutory clearance, it would not have to pay parallel operation charges."*

29. We may now deal with the contentions of the appellants in the appeals at hand.

NO AUTHORITY IN LAW FOR LEVY OF POC BY STATE COMMISSION?

30. It is the argument of the appellants that neither the Electricity Act, 2003, nor the *Madhya Pradesh Vidyut Sudhar Adhiniyam*, 2000 nor the Regulations framed thereunder expressly recognize or provide recovery of Parallel Operation Charges from Captive Generating Plants.

31. The learned counsel for the appellants submitted that the Appropriate Commission under the Electricity Act has the power to determine tariff in terms of the provisions contained therein. Except where tariff is determined through competitive bidding as per terms envisaged under Section 63 of the Act, tariff is determined on a cost-plus approach in terms envisaged in Sections 61, 62, 64 and 86 (1)(a) and (b). Further, the Appropriate Commission also frames tariff regulations from time to time (in terms envisaged under Section 61 read with 181 of the Act) on the basis of which various components of tariff is determined. Neither the parent statute nor the regulations framed thereunder envisage levy of Parallel Operation Charges. It was argued that once tariff is determined in terms of the statute and the regulations, there is no unrecovered amount that requires levy of further charges. It was pointed out that the licensee operating in a cost plus (Section 62) regime is a revenue neutral body and as such cannot have a claim beyond the tariff that is determined from time to time.

32. The counsel argued that the term “levy” is wider in its import than the term “assessment” and may include both “imposition” of a tax or a charge as well as assessment. It is trite that tax or a charge cannot be imposed or levied without authority of law [Article 265 of the Constitution of India]. It has been held that “law” in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority. Both the levy as well as the collection must be authorized by law. [*Asstt. Collector, Central Excise v National Tobacco Co. Ltd*, (1972) 2 SCC 560; *CIT v McDowell & Co Ltd.*, (2009) 10 SCC 755].

33. It appears that in the petition from which *suo motu* proceedings arose, the jurisdiction of the State Commission had been invoked with reference to Sub-Section 1(b) of Section 86 of the Electricity Act, 2003 and the *M.P. Electricity Regulatory Commission (Power Purchase and Other Matters with respect to Conventional Fuel based Captive Power Plants) Regulations,*

2006 (hereinafter, "the Power Purchase Regulations, 2006"). Regulation 2.4 of the Power Purchase Regulations, 2006 mandates the charge to be levied on CPP and, *inter alia*, states as follows:

> "*For the CPPs covered under these Regulations, the CPP Holders shall pay all charges specified in these regulations and any other charges as specified by the Commission from time to time.*"

34. It is not disputed that Regulation 1.5 of the abovesaid Regulations states that a power plant shall be identified as a CPP only if it satisfies the conditions contained in clause 3(1)(a) and 3(1)(b) of the Electricity Rules, 2005. It appears that the State Commission asserts that in terms of provisions contained in Sections 62, 86(1)(a) & (i) read with Section 181(3) of the Electricity Act, clause 3(1)(a) and 3(1)(b) of the Electricity Rules, 2005 notified by the Ministry of Power, Government of India, on 8th June 2005 and Regulation 2.4 read with Regulation 1.5 of the Power Purchase Regulations, 2006, it is vested with the power to levy such POC charges as it deems fit on such CPPs as are grid connected.

35. The appellants contest the above position of the Commission arguing that the very basis or justification for levy of POC is contrary to the core scheme of the Electricity Act, 2003.

36. It is argued by appellants that by the Electricity Act, 2003, the generation of electricity as an activity, captive or otherwise, has been expressly delicensed and as such the Respondent Commission does not have the power to determine tariff of a company except when a generating company is selling power to a distribution licensee. It is conceded that the generating company has to pay the transmission and wheeling charges when it uses transmission and wheeling assets of the transmission and distribution licensees and, in this context, reference is made to following

observations of the Supreme Court in Tata Power Company Ltd versus Reliance Energy Limited and others, (2009) 16 SCC 659:

> "*109. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency, terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply the need of the distributing agency vis-à-vis the consumer, keeping in view its long term need are not found to be reasonable, approval may not be granted.*"

37. The provision contained in Section 86 of Electricity Act, 2003, to the extent relevant here may be extracted as under:

> "*86. Functions of State Commission (1) The State Commission shall discharge the following functions, namely:--*
>
> *(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*
>
> *PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*
>
> *(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

…

(g) levy fee for the purposes of this Act;

…

(k) discharge such other functions as may be assigned to it under this Act.

…"

38. Referring to clause (b) of Section 86(1), quoted above, the appellants argued that its perusal shows that it is applicable only in case of procurement of power by the State Discom from generating companies for the supply of power within the State, the clause not speaking about regulating procurement of power by captive user from Captive Generating Plant ("CGP") installed for self-consumption. It is argued that the relevant provisions relating to conduct of generating company are contained only in Sections 7, 9 10 and 49 of the Electricity Act, 2003.

39. It has been argued that the Power Purchase Regulations, 2006 were enacted only for regulating the surplus power generated from the CGP (to utilize the surplus energy of CPP) and purchase of the same by distribution licensee, reference being made to the *object* as set out thus:

> "*No.2305 –MPERC-2006. In exercise of the powers conferred by Sub-Section (b) of Section 86 of the Electricity Act 2003 (36 of 2003) and all powers enabling it in that behalf, the Madhya Pradesh Electricity Regulatory Commission hereby makes the following Regulations, to harness the surplus generation capacity of captive power units and to reduce peak time shortages in the system*".

40. It is argued that that in existing arrangements between the appellants engaged in Captive Generation and the distribution licensees there is no element of Sale or Purchase of electricity. According to the appellants, the Captive users can be broadly classified into two categories viz.:

> (a) Where the captive generating plant and the captive user is situated in the same premises or where captive users receive supply of electricity through a Dedicated Transmission Line i.e., where no transmission and / or wheeling of energy (on a licenced network) takes place for such captive use; and
> (b) Where the captive generating plant and the users are situated at two different locations i.e., where transmission or wheeling of energy (on a licenced network) takes place for captive consumption.

41. It has been submitted that the transport of power from CGP to its captive user does not by any stretch constitute "supply" of power as defined under Section 2(70) of the Electricity Act, 2003 since there is no element of sale or 'supply' in either of the above categories.

42. The appellants submit that Section 62(1) of Electricity Act authorizes the State Commission to "*determine the tariff in accordance with the provisions of this Act for … supply of electricity by a generating company to a distribution licensee*". Similarly, referring to Section 86(1)(a), it is pointed out that the function assigned to the State Commission is to "*determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State*", it being

subject to proviso that "*where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers*".

43. The provision contained in Section 42 of Electricity Act, to the extent germane may also be noted:

> "*42. Duties of distribution licensee and open access.— (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*
>
> *(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints:*
>
> *Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:*
>
> *Provided further that such surcharge shall be utilised to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee:*
>
> *Provided also that such surcharge and cross-subsidies shall be progressively reduced in the manner as may be specified by the State Commission:*
>
> *Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:*
>
> *...*
>
> *(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified*

by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

…"

44. It is well accepted that *open access* is the most important feature of the Electricity Act. Under *open access* regime, distribution companies and eligible consumers have freedom to buy electricity from generating companies or trading licensees of their choice and correspondingly, generating companies have freedom to sell [*PTC India Ltd.* v. *Central Electricity Regulatory Commission*, (2010) 4 SCC 603]. It is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the definition of Section 2(15) [*Sesa Sterlite Ltd.* v. *Orissa Electricity Regulatory Commission* (supra)]. As also already noted, the Supreme Court ruled in *Sesa Sterlite Ltd.* (supra) that Cross-Subsidy Surcharge (CSS) payable by the consumer of electricity to distribution licensee of the area where such consumer opts to avail power supply through open access from someone other than CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumer. *A fortiori*, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross-subsidy surcharge under the Act. Such surcharge is meant to compensate the distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee. The law, thus, balances the right of the consumers to procure power from a

source of his choice and the legitimate claims or interests of the existing licensees. It was further held that Single unit SEZ utilising electricity for its own consumption drawing electricity from an independent power producer and not from open access network of distribution licensee is a “consumer” liable to pay cross-subsidy charges even though it may be a “deemed distribution licensee”.

45. We are of the considered opinion that the State Electricity Regulatory Commissions have power under the provisions to regulate and determine the tariff in case of supply of electricity by a generating company to a distribution licensee and generation, supply, transmission and wheeling of electricity, wholesale, bulk or retain as the case may be within the State. The levy of POC does not represent the price of electricity for sale to Discom by the CGP. In the event of CGP using transmission system of Distribution Licensee through Open Access for carrying out electricity to the destination of its use (Captive User), wheeling/transmission charges are attracted and become applicable. No doubt the law restricts the jurisdiction to determine and levy “wheeling charges and surcharge thereon”. But it is not correct to argue that since CGPs are exempted from surcharges under the fourth proviso in Section 42(2) of the Electricity Act, 2003, the levy of POC is impermissible or that the levy of POC amounts to circumventing the exemption-provision vis-à-vis surcharge. Both have different objectives and purposes.

46. It is the thrust of the arguments of the appellant that if the CGPs are to be encouraged for reducing burden on SEBs/Discoms and freeing up generation and transmission capacities, the levy of POC is against the legislative intent. It is argued that under Section 42, It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

47. It is the argument of the appellant that the previous rulings on the subject as referred to above – including *Urla Industries*(supra), *Indian Acrylic* (supra), *Chhatisgarh State Power Distribution Company Limited* (supra), *Renuka Sugar Ltd.* (supra), and *Salasar Steel Power Ltd.* (supra) – made only general observations and did not decide the issue of jurisdiction to levy POC and cannot be treated as binding precedent they being *per incuriam* or rendered *sub-silentio*. In support of the plea for such judgments to be ignored reliance is placed on law on precedents as expounded in *A.R.Antulay v R.S.Nayak (1988) 2 SCC 602; State of U.P. v Synthetics & Chemicals Ltd,(1991) 4 SCC 139*; *Subhash Chandra v Delhi Subordinate Services Selection Boad, (2009) 15 SCC 458; M.P.Rural Road Development Authority v L.G.Chaudhary Engineers & Contractors (2012) 3 SCC* 495; and *State v Rattan Lal Arora (2004) 4 SCC 590*.

48. Crucially, on 29.11.2019, Hon'ble Supreme Court decided a batch of appeals by a judgment reported as *Transmission Corporation of Andhra Pradesh Limited v. Rain Calcining Limited & Others* 2019 SCC OnLine SC 1537. The challenge was to the decision of High Court concerning the question of levy of wheeling charges by the appellant - Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) and also the competence to levy the grid support charges. The legislative measures that were considered included Andhra Pradesh Electricity Reforms Act, 1998 (the Reforms Act, 1998) and the Electricity Act, 2003. The Andhra Pradesh State Electricity Regulatory Commission (APSERC) held that grid support charges would be payable at the rate of 50 percent of prevailing demand charges on the differential of CPP capacity and CMD. The High Court, by the impugned decision, had set aside the order passed by the Commission. The challenge was upheld by the Supreme Court and the order of APSERC restored. Some parts of said judgment may be quoted as under:

> " …

12. … the question involves as to grid support charges, which are levied on the HT consumers, who have rated Contracted Maximum Demand (CMD) and Captive Power Plant (CPP) capacity to meet their demands. When private Generators came into existence, these consumers derated CMD from the APTRANSCO network and obtained the remaining demand from private Generators (these Generators are respondents in wheeling charges batches). After such deration, the service of grid support became a component for which APTRANSCO was required to be compensated as CPPs running in parallel obtains benefits to keep the system and grid up and running, it is important to invest and maintain the system periodically and the grid support cannot be given free to a nexus of third party private Generators and HT consumer. The significant benefit which a CPP gets is in case of outage of CPP generator power is drawn from the grid, and in case of tripping, the entire load is transferred on to the grid. Such disturbance is catered by way of grid support and equipment installed by the APTRANSCO/DISCOM and involves investment through public exchequer.

13. The grid support charges are not governed by any Government Order or Incentive Scheme of the Government prior to Reforms Act, 1998, or after that. The grid code is the basis for the levy of the grid support charges, which came to be approved by APERC on 26.5.2001. By way of levy of grid support charges, there is no restriction whatsoever on the installation of additional CPPs. The additional CPPs put an additional load on the grid, and corresponding charges are paid towards grid support. There is no embargo for setting up additional new CPPs. In case of expansion of industry, additional duty for additional units have to be paid as additional CPPs tantamount to additional burden on grid and which further obtains additional service from the grid, thus grid support charge is levied after taking into account all sorts of supply agreements from DISCOMs/Third Party Generators. The grid acts as a cushion/big buffer when the generation from CPP is idled due to sudden outage in the load, thereby mitigating the forced tripping of the CPP, and this support is known as grid support and CPPs running in parallel are known as running with Parallel Grid Support.

…

47. A Constitution Bench of this Court in PTC India Ltd. v. Central Electricity Regulatory Commission (supra), has held that tariff fixation under the Electricity Act, 2003, is a legislative function in its character. Section 178 of the said Act deals with the making of Regulation by the Central Commission under the authority of subordinate legislation. The same is broader than section 79(1), which enumerated the regulatory function of the Central Commission in specified areas. A regulation under section 178, as a part of the regulatory framework, intervenes and even overrides the existing contracts between the regulated entities since it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.
48. This court further observed that in the absence of regulation, the Commission has the power of fixation of the tariff. It is not dependent upon the framing of the regulation.

> *"25. The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of the tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for the supply of electricity by a generating company to a distribution licensee or transmission of electricity or wheeling of electricity or retail sale of electricity.*
> *26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff following the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in*

character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62, and 64, indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination

…

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court, which we have discussed hereinafter. For example, under Section 79(1)(g), the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

66. <u>While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application</u>. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not bypassing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep

the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

…

69. The High Court could not have interfered with the findings on merits taken by the experts without entering into the various aspects considered by the Commission. Thus, the finding on merits as to the determination of charges being illegal and improper in any manner, cannot be said to be sustainable. The High Court has not gone into various reasons, and the details considered by the Commission and once the expert body has determined specific tariffs, it is not for the courts to interfere ordinarily in such matters. We find the determination to be proper and do not suffer from any infirmity or illegality. The Commission has made an elaborate discussion for arriving at the figure mentioned above. The recovery network charges, tariff structure, and the question of wheeling charges in cash or kind have also been considered. Various relevant factors have been taken into consideration. The nature of the arrangement between APTRANCO and DISCOMS and inter se DISCOMS has been considered while deciding issue No. 4.

…

70. The use of the system cannot be isolated from losses in the system as they form an integral part of the system. All persons using the system should bear the system losses, whether technical or non-technical. Incidentally, the terms of a licence issued by APTRANSCO and DISCOMS specifically refer to deliver such electricity, adjust losses of electricity to a designated point. Technical losses in the system to be taken into account as these are also an integral part of the system. It is an integrated system where the electricity is supplied on displacement basis rather than direct conveyance of the particular electricity which is generated, the technical losses up to the voltage level at which the electricity is delivered along cannot be measured. The technical losses of the total system need to be taken into account as it is impossible to determine from which source electricity is being supplied to which particular customer. The electricity from all sources gets combined in the system and loses its identity. As investment in the system has also been made, it was evident that requisite charges have to be paid.

IN RE: GRID SUPPORT CHARGES

71. With respect to Grid Support Charges, it has been conceded by the learned counsel for the parties that the decision in the aforesaid batch of matters as to wheeling charges has to govern grid support charges as we have upheld the order of the Commission with respect to wheeling charges, the order of the High Court has to be set aside.

72. Any Government Order or Incentive Scheme does not govern the Grid Support Charges. Grid Code is the basis for levy of the Grid Support Charges, which came to be approved by the Commission on 26.5.2001. The same is also reflected in the impugned order. Thus, in case of installation of another CPP, that would be an additional load on the grid, and there is no embargo for setting up additional grid CPP in the form of expansion as grid acts as cushioning. The Grid Support Charges can be levied, and the order dated 8.2.2002 of the Commission is, thus on the parity of the reasonings, has to be upheld considering the provisions of Section 21(3) of the Reforms Act, 1998. Under section 11 read with section 26 of the Reforms Act, 1998, all fixed charges under the distribution and Grid Support Charges are leviable only at the instance of a distribution company, and because of the discussion above, the Commission has the powers to determine it. In the agreements also there is a power where the Board could have fixed the Grid Support Charge unilaterally, but because of Reforms Act, 1998 came to be enacted, the application was filed in the Commission. After that, the Commission has passed the order in accordance with the law. We find no fault in the same. Thus, the order of the Commission concerning the Grid Support Charges has to be upheld. The judgment and order of the High Court are liable to be set aside concerning wheeling charges as well as Grid Support Charges."

(emphasis supplied)

49. It is the submission of the appellants that the above judgment of the Supreme Court is also passed *sub-silentio*, based on concession, and hence not a binding precedent. It is argued that the judgment was given in view of the provisions then existing A. P. Electricity Reforms Act, 1998, much prior to coming into force of the Electricity Act, 2003 whereas after the enactment

of the Electricity Act, the entire scenario has changed and emphasis is to promote captive generation. The submission is that the judgment did not take into account the Electricity Policy, 2005, The Tariff Policy, 2006 and Statement of Objects and reasons of the Electricity Act, 2003. It is pointed out that under the provisions of the Electricity Act, 2003 the power to levy wheeling charges has been specifically provided under Section 86 but grid support charges have been not been provided. The plea is that the grid code is the basis for the levy of the grid support charges, which came to be approved by APERC on 26.05.2001. The appellants contend that it is after analyzing the provisions of the Reforms Act that the Supreme Court came to the conclusion that the Commission has the power to fix wheeling charges but on the *Grid Support Charges* the issue of jurisdiction was decided on the concession of the parties and, hence, *sub-silentio*.

50. Arguing on the strength of *Nagar Mahapalika, Varanasi v Durga Das*, AIR (1968) SC 1119; *Ahmedabad Urban development Authority vs Sharda Kumar*, (1992) 3 SCC 286; *National Mineral Development Corporation Ltd v State of M.P*, (2004) 6 SCC 281; and *Mathuram Agarwal v State of M.P*, (1999) 8 SCC 667, it is submitted by the appellants that the levy of POC is without authority of, or justification in, law. It is argued that the Grid Code and the Distribution Code do not envisage any charges in respect of maintenance of the grid. It is also submitted that a transmission and distribution licenses are statutorily bound for the maintenance and upkeep of the grid and cannot claim that these duties are in the nature of services for which they ought to be compensated.

51. Placing reliance on *PTC India Ltd v CERC (2010) 4 SCC 603* and *Shrisht Dhawan (Smt.) v. Shaw Brothers, (1992)1 SCC 534*, it is submitted that the Electricity Act is "*an exhaustive code on all matters concerning electricity*", whereby generation of electricity as an activity has been expressly de-licensed, the State Commission has been given a limited

jurisdiction qua a generating company, there being no power vested to levy of a charge which is not sanctioned by the statute, there being no inherent power, it being impermissible for the SERC to assume jurisdiction if the provisions of the legislation (Electricity Act, 2003) do not provide for it. It is their plea that levy of POC is an impermissible attempt to introduce regulations through the back-door without the power to regulate generation of electricity.

52. We find no substance in above line of arguments of the appellants. In our considered opinion, the material aspects relating to the Parallel Operation Charges have been duly considered and decided by the previous decisions noted earlier, particularly the Supreme Court ruling in *Transmission Corporation of Andhra Pradesh Limited v. Rain Calcining Limited & Others* (supra) and the full bench decision of this tribunal in *Chhattisgarh State Power Distribution Company Limited* (supra). The power, jurisdiction and authority of law on the part of the SERC to impose *parallel operation charges* has never been in doubt. This is why in all the previous challenges to such levy against CPPs or CGPs or as to the rate the line of arguments taken by the appellants were never even urged. It is inconceivable that such levy would have been approved by various regulatory commissions or upheld in appeal by this tribunal or in further challenge by appeal by Hon'ble Supreme Court without being satisfied as to the legality of such levy or competence of the regulatory authority to do so.

53. It is not correct to seek the judgment of the Supreme Court in *Transmission Corporation of Andhra Pradesh Limited v. Rain Calcining Limited & Others* (supra) to be ignored because there is a mention of the concession given by the party opposing such levy as to the jurisdiction of the regulatory authority to impose grid support charges. The concession is recorded with reference to the decision earlier taken on the issue of wheeling charges, both being inter-linked. The conclusions reached vis-à-vis

the wheeling charges and POC based on overall scheme not only of the AP Reforms Act but also the Electricity Act, *inter alia*, with aid of "*test of general application*" applied in the case of *PTC* (supra) leave no doubt in our mind that the ruling in *Transmission Corporation of Andhra Pradesh Limited v. Rain Calcining Limited & Others* (supra) is sufficient to reject the challenge by the appellants to the power, jurisdiction and authority of MPERC to levy POC against the CPPs.

54. In our considered view, the very premise of the challenge by the appellants based on parity with *tariff* is fallacious. The POC is not part of the tariff regime, nor a tax on the activity of generation, but payment for services rendered by the grid, it being covered, *inter alia*, by the authorization in Power Purchase Regulations, similar to (but not same as) transmission or wheeling charges paid for use of the systems of the transmission licensee. The objective set out in the preamble to the notification promulgating Power Purchase Regulations cannot be the only criterion for its full import to be understood. No doubt, there is no sale or purchase of electricity between the CPPs and the transmission licensee by reason only of grid connectivity. But there is an element of service provided by the grid, the POC being meant to consequently compensate the transmission licensee. The legislative aim of promotion of CGPs does not mean they are entitled as of right to unrestricted or free use of transmission systems of the licensee. The transmission licensee exists, operates and maintains its transmission network for the larger interest of the electricity industry and is not providing charity. It must receive compensation from those who use its network particularly if such use adds to its obligations of maintaining an efficient system. As observed by Supreme Court in *Transmission Corporation of Andhra Pradesh Limited v. Rain Calcining Limited & Others* (supra), the "*use of the system cannot be isolated from losses in the system as they form an integral part of the system*"

and that all "*persons using the system should bear the system losses, whether technical or non-technical*".

55. We conclude that having regard to the authoritative decisions passed earlier and in the light of the nature of Grid support rendered by Parallel Operation to the Captive Power Plants, the challenge brought by the appellants to the authority or the jurisdiction of the State Commission to levy parallel operation charges is patently erroneous and is liable to be rejected. We hold accordingly.

IMPUGNED ORDER VITIATED BY PRESENCE OF NEW MEMBER?

56. It is the argument of the appellants that the impugned order is vitiated on the ground that a Member of the Commission who had never heard the parties had decided the matter behind their back, the procedure adopted in passing the order offending basic principles of judicial procedure rendering it *non est*.

57. The chronology of events leading to passing of the impugned order is highlighted by the appellants. The MPPTCL had filed the Petition No 50/2010 before MPERC in the matter of determination of parallel operation charges in case of intra-state generating units in the State of M.P. on 13.07.2010. By order dated 10.09.2010, the MPERC directed that a study for determination of parallel operation charges on intra-state power generating plants be conducted and awarding a contract to ERDA for providing consultancy services for evaluation of parallel operation charges. The report was submitted by ERDA in April 2012 leading to issuance by MPERC on 26.05.2012 of the first public notice inviting comments on the ERDA Report by 20.06.2012. A public hearing in the matter was conducted on 10.07.2012 at the office of MPERC, Bhopal in which a number of stakeholders appeared and submitted their comments. Thereafter, the MPERC registered the Suo

Motu Petition No 73/2012 for determination of parallel operation charges (POC) on CPP operating in parallel with the State Grid in view of study conducted by ERDA and on 05.10.2012, the MPERC issued second public notice making available report of ERDA on Commission's website and asking for comments on the same Report by 30.10.2012. Meanwhile, on 26.10.2012, one of the Members (Eco) who had participated in the first public hearing had demitted office. On 06.11.2012, a public hearing was held which was attended and presided over by the Chairperson of MPERC alone. On 11.12.2012, one more member joined the Commission making it a two-member body. It is stated that on 29.12.2012, the matter was discussed by the Chairperson with the new Member who had not participated in the hearing. The impugned order was passed on 31.12.2012 though it having been signed only by the Chairperson.

58. It is stated that the MPERC had claimed that the impugned order was passed by a quorum of two, this rendering it a decision-making process that was held behind the back of the appellant as no opportunity to present the case before the new member was given. Reliance is placed on *Ramkrushna v Kisan* AIR 1971 Bomb 305; *Mukhtiar Singh v State of Punjab* (1995) 1 SCC 760; *Gullapalli Nageswara Rao & ors v A.P.S.R.T.C & anr* 1959 Supp (1) SCR 319:AIR 1959 SC 308; *Rashid Javed v State of U.P* (2010) 7 SCC 781; and *Union of India v Shiv Raj* (2014) 6 SCC 564 to submit that the procedure adopted violates the principles of natural justice, the person (a Member) who also heard not having decided (and having demitted office), a person (new Member) who never heard having participated in decision making process. Reliance is also placed on judgment dated 04.10.2016 of this tribunal in the matter of *Global Energy Private Limited v. Karnataka Electricity Regulatory Commission* (Appeal no 233 of 2016).

59. We find no substance in above arguments. The Member who was holding office at the time of public hearing did not render judgment. But then,

he having demitted office before time for decision came, nothing can turn on this. The new Member who joined later may have been part of some internal discussion but he did not sign the impugned order. Therefore, it cannot be said that a Mmeber who had not heard had decided. Mere discussion with him by the Chairperson would not be a good ground to infer prejudice.

60. We, thus, reject the captioned ground of challenge.

CORAM NON JUDICE?

61. The appellants argue that the impugned order passed by MPERC is null and void for want of quorum. It is submitted that the MPERC is a three member Commission constituted under the provisions of *MP Vidyut Sudhar Adhiniyam, 2000* – saved by virtue of sub section (3) of Section 185 of the Electricity Act, 2003, they being not inconsistent rather complimentary - and as per Section 11 (3) of the *MP Vidyut Sudhar Adhiniyam, 2000* read with Clause 2(h) and Clause 3(6) of the MPERC (Conduct of Business) Regulations, 2004, a quorum of two is necessary for the proceedings of the commission of two, the impugned order having been passed by the Chairman alone, the views of the other member also holding office at the time not reflected. Reliance is placed on ruling in *BSES Ltd v Tata Power Co Ltd (2004) 1 SCC 195* whereby the remand of a matter by the High Court due to improper constitution of the forum was upheld. It is pointed out that the provision of Section 82(4) r/w 92 of the Electricity Act, 2003 also envisages a State Commission to have more than one member. It is argued that the impugned order having been passed by a Single member when the Commission at the relevant time comprised of two members, is not in accordance with law and, hence, the impugned order is a nullity and the proceeding before the State Commission are *coram non judice* and consequently liable to be set aside.

62. It is also argued that the provisions of Sections 84(2), 92, 94, 113, 142, 146 of the Electricity Act, 2003 envisage that the State Commission while exercising powers under Section 61 or 62 or 86 of the Act, discharges judicial functions and exercises judicial power of the State and, therefore, it must be manned by at least one judicial member, reliance being placed on *T.N Generation & Distribution Corpn Ltd v PPN Power Generating Co (P) Ltd* (2014) 11 SCC 53. According to the appellants, the MPERC was not constituted in accordance with law and the impugned order having been passed without any judicial member, is *non est* and the proceeding before the State Commission are *coram non judice* and, therefore, liable to be set aside.

63. It is not disputed that Regulation 3(6) of *Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004* provides that the quorum for the meeting of the Commission shall be two. Regulation 20 (1) of the said Regulations provides that the "*Commission shall pass orders on the petition and the Members of the Commission, who heard the matter, shall sign the orders.*"

64. But then, the respondents point out the saving clause in Section 93 of the Electricity Act, 2003 which is noted and commented upon in the judgment mentioned hereinafter. The chronology of events has to be borne in mind. The *suo-motu* petition was registered for determination of parallel operation charges. The comments were invited till 30.10.2012. The Members (Eco) left the Commission on 26.10.2012. It cannot be ignored that at the time of the hearing of the matter relating to the POC on 06.11.2012, the constitution of the State Commission consisted only the Chairman. The two posts of the Members were lying vacant. One of the Members of the State Commission joined thereafter on 11.12.2012 but the said member was not there at the time of the public hearing conducted in the matter on 06.11.2012. In view of

the above, it was appropriate for the Chairman only to sign the Order in accordance with the provisions of the Electricity Act, 2003.

65. In *Amausi Industries Association v. Uttar Pradesh Electricity Regulatory Commission and Others* (Appeal nos. 239-241 and 243 of 2012 decided on 28.11.2013) as under:

> "42*. The similar issue relating to signing of the Tariff order only by two members came-up before this Tribunal in Appeal No.240/10 in Faridabad Industry Association Vs Haryana Commission. In this case, the public hearing was held in the presence of all the three members of the State Commission. However, one of the Members of the State Commission demitted the office during the period and the final orders were issued by the remaining two Members. This was questioned. This Tribunal has given the findings on this issue which are as follows:*
>
> > *"11. The sixth issue is regarding validity of the impugned order as it is not signed by the third Member who had heard the petition along with other Members when the representations of the objectors were considered by the State Commission on 18.2.2010.*
>
> *11.1. According to the learned counsel for the appellant, the general principle of natural justice requires that all the persons who heard the matter are required to decide the matter. One of the Members who have heard the petition retired on 24.2.2010. According to Section 93 of the Act, no act or proceeding of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the Constitution of the Commission.*
>
> *11.2. The learned counsel for the respondents 2 and 3 stated that the objection by the appellants regarding quorum of the State Commission is untenable in view of the provisions of Section 93 of the Act. He also referred to Judgment in the matter of Iswar Chandra Vs. S. Sinha (1972) 3 SCC 383, wherein the Hon'ble Supreme Court has held as under:*
>
> > *"Where there is no rule or regulation or any other provision for fixing the quorum, the presence of the majority of members would constitute it as valid*

meeting & matters constitute it, as valid meeting, & matters considered there cannot be held to be invalid".

11.3. We notice that at the time of public hearing on 18.2.2010, three Members of the State Commission heard the objections filed by the consumers and various other groups. However, the order was passed on 13.9.2010. In the meantime, one of the Members retired on 24.2.2010, therefore, the order was signed by the Chairperson and remaining one Member. In this connection, Section 93 of the Act is reproduced below:

"93. Vacancies, etc., not to invalidate proceedings - No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission".

11.4. We do not find any force in the arguments of the learned counsel for the appellants that the general principle of natural justice would be applicable in this case. It has been held by the Hon'ble Supreme Court in the PTC case that the Electricity Act, 2003 is a complete Code. Therefore, in this case Section 93 of the Act will apply. Accordingly, we hold that the impugned order is valid"

43. As pointed out by this Tribunal, in the above judgment, the impugned order in that Appeal was upheld. Section 93 of the Act would not allow the Act or proceedings of the Commission invalidated merely because there is a ground of existence of any vacancy or defect in the constitution of the appropriate Commission. The ratio of this case would squarely apply to the present case also.

44. Consequently, we have to hold that there is no irregularity in the procedure adopted by the surviving two members in signing the tariff order that too after the Chairman's appointment was set aside by the Hon'ble Supreme Court. Accordingly, this issue is decided."

66. The view we are taking on the subject is reinforced by the ruling of the High Court of Judicature for Rajasthan, Jaipur Bench (Division Bench) in

Ambuja Cements Limited v. Rajasthan Electricity Regulatory Commission and connected matter (Civil Writ Petition No. 2772 of 2012 – decided on 31.8.2012) reported as 2012 ELR (Raj) 1146, the relevant part reading thus:

> *"Coming to submission as to quorum of Regulatory Commission and its consequence on validity of framing of Regulations, submission is that hearing was done by two members and thereafter, at the time of finalizing Regulations of 2007 only one member did it. In our opinion, submission has no merit. Section 82(4) of the Act of 2003 provides that the State Commission shall consist of not more than three Members including the Chairperson. With the single member in office, obviously the State Commission shall function with that single member. Section 93 of the Act of 2003 clearly provides that no act or proceeding of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission. Due to superannuation of Chairperson and one Member, the Regulatory Commission has to be manned by one person. The quorum depends upon the number of members in office. The member of the Commission includes the Chairperson of such Commission also. In view of the specific provisions contained in Section 93, the impugned Regulation of 2007 do not suffer from any defect including quorum or jurisdiction. It was open to Shri K.L. Vyas to frame the Regulations. The submission is baseless and it is rejected."*

67. The saving clause in Section 93 of Electricity Act is in the nature of a provision described as "*Ganga clause*" by Supreme Court in In *B.K. Srinivasan and Ors. v. State of Karnataka and Ors.* [AIR 1987 SC 1059 : (1987)1 SCC 658], the Supreme Court had addressed issues concerning interpretation of a State legislation named *Mysore Town and Country Planning Act, 1961*. The said Act contained a clause (Section 76J) titled

'*Validation of acts and proceedings*" similar to Section 93 at hand. It was held thus:

> "*The High Court was of the view that such defect as there was in regard to publication of the Plan was cured by Section 76J, the Omnibus Curative clause to which we earlier made a reference as the 'Ganga' clause. Provisions similar to Section 76J are found in several modern Acts and their object is to put beyond challenge defects of Constitution of statutory bodies and defects of procedure which have not led to any substantial prejudice. We are inclined to agree with the High Court that a defective publication which has otherwise served its purpose is not sufficient to render illegal what is published and that such defect is cured by Section 76J. The High Court relied on the two decisions of this Court Bangalore Woollon, Cotton and Silk Mills Co. Ltd. Bangalore v. Corporation of the City of Bangalore MANU/SC/0093/1961 : [1961]3SCR707 and Municipal Board, Sitapur v. Prayag Narain Saigal & Firm Moosaram Bhagwandas MANU/SC/0343/1969 : [1969]3SCR387. In the first case objection was raised to the imposition of octroi duty on the ground that there was failure to notify the final resolution of the imposition of the tax in the Government Gazette as required by Section 98(2) of the City of Bangalore Municipal Corporation Act. A Constitution Bench of the Court held that the failure to publish the final resolution in the Official Gazette was cured by Section 38(l)(b) of the Act which provided that no act done or proceeding taken under the Act shall be questioned merely on the ground of any defect or irregularity in such act or proceeding, not affecting the merits of the case. The Court said that the resolution had been published in the newspapers and was communicated to those affected and failure to publish the resolution did not affect the merits of its imposition and failure to notify the resolution in the Gazette was not fatal to the legality of the imposition. In the second case it was held that the non-publication of a special resolution imposing a tax was a mere irregularity, since the inhabitants had no right to object to special resolutions and had otherwise clear notice of the imposition of the tax. It is true that both these cases relate to non-publication of a resolution regarding imposition of a tax where the imposition of a tax was*

otherwise well known to the public. In the present case the situation may not be the same but there certainly was an effort to bring the Plan and regulations to the notice of the public by giving notice of the Plan in the Official Gazette. Non-publication of the Plan in the Official Gazette was therefore a curable defect capable of being cured by Section 76J. It is here that the failure of the appellants to plead want of publication or want to knowledge in the first instance assumes importance. In the answer to the Writ Petitions, the appellants took up the substantial plea that they had complied with the requirements of the Outline Development Plan and the Regulations but not that they had no knowledge of any such requirement. It can safely be said that the defect or irregularity did not affect the merits of the case."

(emphasis supplied)

68. As in the case of *T.N Generation & Distribution Corpn Ltd v PPN Power Generating Co (P) Ltd* (supra), no objection having been taken in the proceedings before the Chairperson without a Member from the field of law having been appointed, it is too late in the day for the appellants to be allowed to contend as above. Pertinenet to add here that in *State of Gujarat & Others Vs. Utility Users' Welfare Association & Others* [2018 (6) SCC 21], the Supreme Court ruled in the context of Electricity Act that "*Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so*" and that "*It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge*", it being mandatory that "*in any adjudicatory function of the State Commission … for a member having the aforesaid legal expertise to be a member of the*

Bench" but even while issuing directions about the filling up of next vacancy clarified that the "*judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time*". In our view, this is complete answer to the objections raised by the appellants.

69. In the circumstances prevailing at the relevant points of time, the challenge to the quorum of the State Commission which passed the impugned order is misconceived and is, thus, rejected.

IS IMPUGNED ORDER PRODUCT OF PREDISPOSITION?

70. It is the plea of the appellants that the impugned order is a product of pre-judged and pre-decided mind and hence grossly violative of principles of natural justice. Reliance is placed on rulings in *Manak Lal v Prem Chand Singhvi* AIR 1957 SC 425; *State of W.B.* v. *Shivananda Pathak*, (1998) 5 SCC 513; *Rattan Lal Sharma vs Managing Committee*, (1993) 4 SCC 10; *A.U.Kureshi v HC of Gujarat*, (2009) 11 SCC 84; *Mohd Yunus Khan v State of U.P*, (2010) 10 SCC 539; *Rajender Kumar Kundra v Delhi Administration*, AIR (1984) SC 1805; and State of UP & Ors. V Renusagar Power Co. & Ors., 1988 SCC 59 to argue that there has been non-application of mind, bias on account of preconceived opinion having prevailed reflecting failure to act judicially, rendering the entire proceedings void, a defect that cannot be cured.

71. It is the argument of the appellants that a perusal of the Report of ERDA shows that the Commission had already decided to levy parallel operation charges and that the Report was called for only to justify the said decision and to determine the rate of parallel operation charges (POC). Reference is made to the preface of the Report stating that "*MPERC assigned ERDA to carry out the techno-economic study to evaluate and*

recommend the parallel operation charges.."; the report defining the scope of work by stating that "*(t)he objective of the study is to evaluate the parallel operation charges to be levied from CPPs connected to the grid....ERDA has carried out the study as per the scope of the work as per LOA...*"; adding that that "*Madhya Pradesh Regulatory Commission (MPERC) has decided to evaluate parallel operation charges for Captive power plants (CPP) located across the state of Madhya Pradesh....*"; the affidavit dated 10.01.2014 filed before High Court stating, *inter alia*, that "*… the consumers with CPP must contribute some reasonable charge in the form of POC", the "Power quality parameters method considers the lump sum charges as 10% and 25% depending on the quantum of pollution*", the "*quantum of pollution may vary from time to time depending on the operation of loads*" and that "*… the Commission is of the view that as recommended by the ERDA, evaluation of Parallel Operation Charges by Base MVA method seems to be technically sound and justified and this method is most suitable for both utility as well as CPPS..*" Based on this, it is submitted that the Commission had already made up its mind to levy parallel operation charges, its views having been incorporated in the Report itself, the subsequent invitation for comments on ERDA Report from the stakeholders being an empty formality.

72. It is also an argument of the appellants that the ERDA report was prepared in their absence and the same was accepted erroneously by the MPERC behind their back. Interestingly, it is also stated that ERDA submitted its Report in April, 2012 on the basis of documents it had gathered, working out the said charges at the rate of Rs. 53.32 per KVA, at a point of time when the appellant was being commissioned, their industry (Bauxite) not having been chosen for study purposes.

73. We find no merit or substance in any of the above arguments. If the appellants had not even become operational at the relevant point of time and had concededly not participated in the public hearing they cannot say that

the proceedings were held behind their back. The way ERDA report puts the background cannot bind the Commission. The fact that the Commission invited objections and held public hearing more than once leaves no scope for argument that it is a case of predisposition. The argument is thus repelled.

CPPs DISCRIMINATED AGAINST?

74. It is the contention of the appellants that the impugned order levying POC against CPPs is discriminatory.

75. It is pointed out that the National Electricity Policy, 2005, National Tariff Policy, 2006, and the provisions of the Electricity Act, 2003, particularly Section 9, read with section 7, 10, 42, 61,62,79 & 86 of the Electricity Act seek to promote Captive Generation Plants by according to them additional benefits. It is argued that levy of parallel operation charge goes contrary to the very core object of the Electricity Act, 2003 which promotes captive generation of electricity.

76. The appellants refer to the decision rendered on 27.03.2019 of this tribunal in the matter of *M/S JSW Steel Ltd v MERC & anr* (Appeal No 311 of 2018) whereby, while quashing the additional surcharge levied by the State Commission on the Captive users of Group Captive Power Plants, the predominant emphasis of law on promotion of captive generation was noted, the following observations vis-à-vis the non-obstante clause in Section 9 and its controlling effect on other provisions of the Electricity Act being relied upon:

> "*44. Section 9 of the Act starts with a non-obstante clause, as indicated above. Reading of Section 42 in its entirety and in particular Section 42(2), 42(4) and Section 9 of the Act, it is crystal clear that sub-section (4) of Section 42 does not override or control the applicability of Section 9, except to the extent provided under Section 9 itself. Section 9 is in*

two paras – 9(1) and 9(2). There are provisos to Section 9(1). Apparently, in terms of Section 9(1), a person which includes an association of persons or cooperative society may construct, maintain or operate a captive generating plant and have dedicated transmission line. The first proviso to Section 9(1) says, the supply of electricity from such captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company..."

"45. Section 9(2) of the Act creates or vests a positive right to a person who has constructed a captive generating plant to have the right to open access for the purpose of carrying electricity from his generating plant to the destination of his use. The first proviso to Section 9(2) refers to availability of adequate transmission facilities. It would mean that the right to have open access for the purpose of carrying electricity is subject to availability of adequate transmission facilities. Except this condition of availability of transmission facilities, we do not find any other condition which is imposed in terms Section 9(2) of the Act."

"46. The first proviso to Section 9(1) of the Act deals with supply of Electricity from captive generating plant through the grid, which has to be regulated in the same manner as a generating station of a generating company. We do not find the words 'open access' in the first proviso to Section 9(1). In other words, it would mean that the proviso refers to compliance of technical standards of connectivity to the grid and nothing beyond that."

77. It is submitted by appellants that the statute (Electricity Act) does not make any discrimination between a Generating Company and a Captive Generating Plant for the purpose of Grid connectivity and operations. It instead expressly provides certain additional benefits to a captive power plant.

78. The appellants submit that the SERC having determined the transmission or wheeling charges in terms of the provisions of the statute and regulations framed thereunder (cost-plus approach), all costs incurred

by the transmission licensee or distribution licensee for transmission and wheeling of electricity stand recovered and there is no further scope for levy of any other charge on the basis of an alleged support that "*the grid is providing to a captive generating plants*", there being no proof of any actual loss being suffered by the grid. It is pointed out that in a meshed network, the State grid is connected to the National grid, each supporting the other, all grid-connected entities being required to maintain technical and operational standards, specified by the CEA and the grid codes (Central and State). It is submitted that it is fallacious to conclude that by parallel operation the CPP gains more, this being without any legal or factual basis. The prime argument is that there cannot be a basis to discriminate a load centre based generating company from CGP, for the physics of electrical interaction will not change when there is consumer load in the vicinity. The ownership pattern and the purpose of supply cannot be the basis of levy or discriminate a CGP from a generating company which is not a CGP but also operates in parallel with the grid.

79. The appellants seek rejection of the ERDA report arguing that it is based on insufficient data and wrong assumptions. They submit that the hypothesis is factually wrong, not supported by any data from all operational Captive Generating Plants (CGPs), when the Commission accepts the view of ERDA that certain loads like furnaces generate harmonics and if the CPP is connected in parallel with the grid, it will inject harmonics into the grid and may be less severe. The conclusion that the grid provides support by offering reactive power support to the plant is also questioned stating that the plants have an operational capacitor banks/reactive compensation equipment that provides a reactive power compensation (inject/absorb), it being claimed that in certain instances of operation, the plant could be injecting reactive power to the Utility's network helping in stabilizing or improving voltage profile at point of common coupling. It appears that the ERDA report while dealing with

voltage fluctuations proceeds on the assumption that the power system of utilities is normally considered as constant voltage systems. This, as per the appellants, is incorrect. Contrarily, it is submitted that here have been many instances of Plant tripping because of grid failures and delay in replacing the faulty CT/PT and transmission line breaker by the Utility.

80. Whilst conceding the fact that the interconnection at higher voltage level improves the fault level at point of common coupling (viz. interconnection point), it is argued by the appellants that it is equally important to note that CGPs would have to make significant investments to ensure interconnections at EHV level, similar benefits in any case being available to all Generating Stations (State, IPP), it not being specific dispensation to CGPs. It is submitted that Connectivity Regulations, 2007, MP State Grid Code, MP Supply Code Regulations, 2004 govern and guide the interconnection requirements of the "Requester" universally.

81. It is submitted that the impugned order was rendered, on generic basis on all CPP connected with the grid, without resorting to the statutory provisions which explicitly provide for the procedure to be taken by the Utility in case pollution is injected in the grid by any CPP when connected with the grid.

82. The appellants place reliance on the result of a Study of 220 KV System for their plant sponsored by some of them and undertaken by Power Research and Development Consultants Private Limited (`PRDC'). They argue, on the strength of the report of the said study (hereinafter referred to as "the PRDC report"), issued recently and placed for consideration for the first time in these appeals in 2019, that there cannot be a discrimination between a generating company or generating station and a captive generating plant except for the purposes of giving certain additional benefits to a captive generating plant. To do so, they argue, is contrary to section 7 and the technical standards prescribed by the Central Electricity Authority

(CEA), which do not recognize any special conditions of grid-connectivity for Captive Generating Plants. It is also their contention that the grid support is incapable of quantification for the reason that without a generating plant there cannot be an active grid. They argue that cost of grid operations is recovered primarily through transmission or wheeling charges for power that is transmitted by generators and utilized or drawn by distribution licensees or consumers, at various points in the grid and that to additionally suggest that there is a support that is given to captive generators by the grid is without any legal or factual basis. The grid interacts with the generator and the support is given to each other depending on various factors. Grid operates in a dynamic environment. The contention is that it is impossible to identify and monetize the support to a particular category of grid user (i.e. Captive Generating Plant).

83. The second respondent Madhya Pradesh Power Transmission Company Limited ('MPPTCL'), on the other hand, explains that it owns, operates and maintains the transmission system in the State of Madhya Pradesh, the intra-state Transmission System. The term 'transmission lines' has been defined in Section 2 (72) of the Electricity Act, 2003 as meaning High Pressure Cables and Overhead Lines transmitting electricity from a generating station to another generating station or a sub-station together with the associated facilities. The transmission system forms the essential part of the power system or the grid system in the State. The grid has been defined in Section 2 (32) as meaning High Voltage Backbone System of inter-connected transmission lines, sub-station and generating plants. The grid system maintained in the State of Madhya Pradesh which consists of High Voltage Backbone Transmission System for transmission of electricity generated at different generating stations to the distribution licensees and thereafter for retail sale and supply to general body of consumers in the State. The entire quantum of energy is injected into the system and, thus,

energizes the entire system with high capacity of electricity. The users can then take the energy available in the system, as and when they need electricity. The system is expected to be always maintained in readiness for all users to consume electricity.

84. It has been submitted by the respondents that the entity establishing a Captive Power Plant (CPP) has the option of either operating it in isolation or with connectivity to the grid system. The choice is entirely of the person establishing the CPP, the latter rendering the plant, at the option of CGP operator, in parallel operation with the grid, affording it to derive significant and manifold advantages which have already been recognized and acknowledged by judicial pronouncements noted at some length earlier and which include availability of *start-up power, improved Plant Load Factor (PLF), maintenance of frequency, continuity of supply, avoiding adverse impact of reactive power, absorption of harmonic* etc.

85. It is submitted by the respondents that a Captive Power Plant takes the advantage of the strength of the Grid or Supply system. They point out that while the CPP of the appellant is of the maximum capacity of 900 MW, the total MW maintained in the State Grid of Madhya Pradesh is in the range of 15000 MW. The State Grid is integrated with the Western Regional Grid in the range of 1,10,000 MW, the Captive Power Plant gets the benefit of Grid support of the Regional Grid. Thus, the State Grid operating as a backbone is of far greater capacity to absorb the disturbances and provide good support to the Captive Power Plants. The State Utilities compensate the Regional Grid fully. This factor, we agree, justifies that the State Utilities also be compensated by all users of the State Grid.

86. The Base MVA method was recommended by ERDA and, in absence of any other expert view, was adopted by the State Commission. It is the submission of the respondent MPPTCL that, unlike the two alternative methods - viz. (i) Power Quality parameters and (ii) Size of largest

motor/interconnecting transformers of the Captive Power Plant - the Base MVA method is founded on fault level support available at point of common coupling. It is argued that fault level is the core factor of the service provided by the Utility to CPPs in terms of voltage regulation, stability and absorbing the load variation, which depends on fault level of grid and fault level contributed by Captive Power Plant generator. Due to higher fault level at the point of common coupling, the flow of power pollutants like harmonics, negative phase sequence current etc. are absorbed by Grid on account of low impendence path of Grid compared to that of CPP generators. The method adopted, it is stated, takes into consideration the base MVA support taken from the Grid as well as Base MVA support given to Grid. This method considers the mutual advantages gained out of Parallel Operation by CPPs and the utility. CPP generator is able to operate at constant power mode operation (with very good PLF), when run parallel with Grid. The grid takes care for the variation in the load demand of the CPP.

87. It is an admitted fact that at the time when the matter was under consideration before the Commission, the appellants did not participate. It is their explanation that they had no occasion to do so since they were yet to be commissioned. Be that as it may, it is conceded that the Commission had invited objections to the proposal based on ERDA report, considered them by public hearings and then passed the impugned order. No study report or expert opinion contrary to the ERDA report was shared with the Commission prior to the decision adopting the recommendation for levy of POC by the above-mentioned method though at the same time reducing the rate to a level much lower than computed by ERDA. It is not fair to criticize the impugned order because the Commission reduced the rate of POC at Rs 20/KVA on the capacity of the Captive Power Plants. The intent was to keep the burden as low as possible, allow sufficient cushion and reduction and give adjustment for auxiliary consumption. Though we do not wish to

preclude the possibility of differential treatment being considered for industries having CPPs based on such factors as are raised by the appellants in future, we generally agree that the determination of POC with universal applicable to all the industries is simpler method and cannot be questioned by arguments which are in nature of hindsight, they not having been raised before the Commission.

88. It is not open to the appellants to challenge the Order dated 31.12.2012 based on the study report of PRDC filed seven years thereafter before this tribunal because it is a material not shared with the State Commission. As is fairly conceded by the respondent MPPTCL, the appellants would have the liberty to rely on such report (of PRDC) before the State Commission in the proceedings for determination of the POC in future, as and when occasion arises, the State Commission being within its jurisdiction to take an appropriate view at such stage in regard to the issues raised in the said report after hearing all stakeholders including MPPTCL.

89. We are of the view that the State Commission, by its Order dated 31.12.2012, has duly considered such objections as were raised against the proposal of levy of POC, taking into account the report of ERDA. There is nothing discriminatory in the impugned order against the CPPs. As observed in previous ruling on the subject, the CPPs have chosen to have grid connectivity. Quite apparently, the objective being such connectivity being sought and taken is to avail of the advantages it brings. It is not fair to be given such services by the transmission utility without being in readiness to correspondingly compensate.

90. The view taken by the Commission is found to be a balanced one, it having decided to reduce the rate for POC from Rs 53.32 per KVA per month as recommended by the ERDA to Rs 20/- per KVA per month on the installed capacity of the Captive Power Plants expressly justifying this with reference

to the objective to promote the CPPs, even deducting the load pertaining to the auxiliary consumption.

91. In these facts and circumstances the arguments of non-application of mind or arbitrary or discriminatory action do not impress us. The same are rejected.

TO CONCLUDE

92. For the foregoing reasons, we find no merit in the appeals which are resultantly dismissed. The pending applications are rendered infructuous and stand disposed of accordingly.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 02nd DAY OF JULY, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member