No./N/140/141/142/143/144/145 of 2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 03.12.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

1. OP No. 64/2020

BETWEEN:

Athani Sugars Limited,
A Company Registered under the
provisions of the Companies Act, 1956,
having its Corporate Office at
"Shiv Pavilion" II Floor, Near Ram Mandir,
Sangli-Miraj Road, SANGLI – 416 416. **… Petitioner**

(Represented by its Authorised Signatory
Sri Yogesh Shrimant Patil, Executive Director through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Hubli Electricity Supply Company Limited,
A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Navanagar, Hubballi 580 025. **… Respondent**

(Represented by its Managing Director through
Advocate Sri Shahbaaz Husain, Precinct Legal)

2. OP No.65/2020

BETWEEN:

Godavari Biorefinaries Limited,
A Company Registered under the
provisions of the Companies Act, 1956,
having its Registered Office at
Somaiya Bhavan, 45/47, M.G. Road,
Fort, Mumbai-400 001. **… Petitioner**

(Represented by its Authorised Signatory
Sri G. Suryaprakash Rao, General Manager through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Hubli Electricity Supply Company Limited,

A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Navanagar, Hubballi 580 025. **… Respondent**

(Represented by its Managing Director
through Advocate Sri Shahbaaz Husain, Precinct Legal)

3. OP No.66/2020

BETWEEN:

Hiranyakeshi Sahakari Sakkare – Karkhane Niyamit,
A Company Registered under the
provisions of the Companies Act, 1956,
having its Registered Office at
Niyamit Sankeshwar, Hukkeri,
Belagavi-591 314. **… Petitioner**

(Represented by its Managing Director through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Hubli Electricity Supply Company Limited,
A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Navanagar, Hubballi 580 025. **… Respondent**

(Represented by its Managing Director through
Advocate Sri Shahbaaz Husain, Precinct Legal)

4. OP No.67/2020

BETWEEN:

Nandi Sahakari Sakkare Karkhane Niyamit,
A Co-operative Society Registered
under the provisions of the
Karnataka Co-operative Societies Act,1959,
having its Registered Office at
Krishna Nagar, Hosur Post,
Vijayapura District-587 117. **… Petitioner**

(Represented by its Managing Director through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Hubli Electricity Supply company Limited,
A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Navanagar, Hubballi 580 025. **… Respondent**

(Represented by its Managing Director through
Advocate Sri Shahbaaz Husain, Precinct Legal)

5. OP No.68/2020

BETWEEN:

The Ugar Sugar Works Limited,
A Company Registered under the
provisions of the Companies Act, 1956,
having its Registered Office at
Mahaveer Nagar, Sangli,
Maharashtra-416 416. **… Petitioner**

(Represented by its Authorised Signatory
Sri Vinay Arvind Deshpande, Liason Officer through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Hubli Electricity Supply Company Limited,
A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Navanagar, Hubballi 580 025. **… Respondent**

(Represented by its Managing Director through
Advocate Sri Shahbaaz Husain, Precinct Legal)

6. OP No.69/2020

BETWEEN:

The Ugar Sugar Works Limited,
A Company Registered under the
provisions of the Companies Act, 1956,
having its Registered Office at
Mahaveer Nagar, Sangli,
Maharashtra-416 416. **… Petitioner**

(Represented by its Authorised Signatory
Sri Vinay Arvind Deshpande, Liason Officer through
Advocate Sri Shridhar Prabhu for Navayana Law Offices)

AND

Gulbarga Electricity Supply Company Limited,
A Company Registered under the
provisions of Companies Act, 1956
having its Registered Office at
Station Road, Kalburgi-585 102. **… Respondent**

(Represented by its Managing Director through
Advocate Sri Shahbaaz Husain, Precinct Legal)

O R D E R S

I. Brief background to the current Petitions.

1. The Petitioners mentioned supra have filed the current Petition inter alia requesting direction seeking parity in terms of incentives and concessions accorded to the Solar Power Projects, especially in terms of the exemption from payment of Cross Subsidy Surcharge (CSS) and to consequently quash all upto date demands made by Respondents.

2. The petitioner at Sl.No.1 above had earlier filed a writ petition bearing No.23098 of 2019 before the Hon'ble High Court of Karnataka praying to quash the Tariff Order 2014 dated 12th May 2014 passed by the KERC in so far as it relates to levy of CSS upon Inter-State Open Access Transactions.

3. The petitioner at Sl.No.2 above had earlier filed a writ petition bearing No.23909 of 2018 before the Hon'ble High Court of Karnataka praying to quash the CSS levied by HESCOM vide letter dated 10.03.2017, 18.03.2017 and 16.03.2018.

4. The petitioner at Sl.No.3 above had earlier filed a writ petition bearing No.4505 of 2017 before the Hon'ble High Court of Karnataka praying to quash the CSS levied by HESCOM vide letter dated 13.01.2017, and etc.

5. The petitioner at Sl.No.4 above had earlier filed a writ petition bearing No.8644 of 2017 before the Hon'ble High Court of Karnataka praying to quash the CSS levied by HESCOM vide letter dated 17.02.2017.

6. The petitioner at Sl.No.5 above had earlier filed a writ petition bearing No.11467 of 2019 before the Hon'ble High Court of Karnataka praying to declare that the CSS determined by the KERC in Tariff Order, 2018 are not applicable to the Petitioner and etc. The above Petitioner had filed another Writ Petition bearing No: 1274 of 2017 before the Hon'ble High Court of Karnataka praying to quash the CSS levied by HESCOM vide its letter dated, 28.12.2016 and etc.

7. The Petitioner at Sl. No. 6, had not filed any Writ Petition before the Hon'ble High Court against GESCOM in the matter.

8. The Writ Petitions mentioned Supra were disposed of by the Hon'ble High Court of Karnataka on 04.11.2020, consequent to the submissions made by the Advocates for the Petitioners as well as the Respondents to relegate the matter to the KERC, in the wake of Order passed by the Hon'ble High Court in W.Ps. No. 36427-478 / 2018 on 29.01.2020. Accordingly, the Writ Petitions were disposed of granting liberty to the

Petitioners to approach the KERC and the Respondents were directed not to take any coercive action.

9. In the above background the Petitioners 1 to 6 mentioned Supra have filed the current Petitions before this Commission praying for the following in common:

(i) Call for records;

(ii) Issue a declaration that Respondent is not authorised to collect Cross Subsidy Surcharge under the Electricity Act, 2003 or under any of the Orders or regulations passed thereunder; (this prayer is not included in case of Petitioner No.6).

(iii) Issue an Order or Direction that from April, 2013 onwards, the Petitioner is legally entitled to the same level of concessions and preference as extended to the Solar Power Projects in exempting Cross Subsidy Surcharge (CSS); and consequently, be pleased to:

(iv) (a) Quash and set aside the Demand Letter dated 17th October; 2020 demanding a sum of Rs.60,07,343/- (Rupees Sixty Lakh Seven Thousand Three Hundred Forty – Three Only) as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A and also to quash all earlier demands that have merged into this demand; (in case of Petitioner No.1).

(iv) (b)Quash and set aside the Demand Letter bearing No. MGP /AEE/SA/REV/HT/3745-47 dated 18th March, 2017 demanding a sum of Rs.9,73,71,689/- (Rupees Nine Crore Seventy-Three Lakh Seventy-One Thousand Six Hundred Eighty-Nine Only) as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A. (in case of Petitioner No.2)

(iv) (c)Quash and Set aside the Demand Letter bearing No. AEE(Ele)/AAO/SA/EHT/1295 dated 13th January, 2017 demanding a sum of Rs.1,19,72,620/- (Rupees One Crore Nineteen Lakh Seventy-Two Thousand Six Hundred Twenty Only) as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A. (in case of Petitioner No.3)

(iv) (d) Quash and set aside the Demand Letter dated 17th February, 2017 demanding a sum of Rs.1,47,68,256/- (Rupees One Crore Forty-Seven Lakh Sixty-Eight Thousand Two Hundred Fifty-Six Only) purportedly as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A. (in case of Petitioner No.4)

(iv) (e) Quash and set aside the Demand Letter bearing No. AEE/UGR/HT/2096-2014 dated 09th October, 2017 demanding a sum of Rs.9,73,71,689/- (Rupees Nine Crore Seventy-Three Lakh Seventy-One Thousand Six Hundred Eighty-Nine Only) as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A. (in case of Petitioner No.5)

(iv) (f) Quash and set aside the Demand Letter bearing No. GESCOM/CE(CP)/EE(PTC)/AO/AAO/2016-17/26089-97 dated 24th August, 2016 demanding a sum of Rs.2,83,49,821/- (Rupees Two Crore Eighty-Three Lakh Forty-Nine Thousand Eight Hundred Twenty-One Only) as Cross Subsidy Surcharge from the Petitioner, produced as Annexure-A. (in case of Petitioner No.6)

(v) Pass such other and incidental orders including an order as to the cost, as may be appropriate under the facts and circumstances of the present case;

10. The Petitioners have also requested for an interim prayer to stay the operation of the Respondents letter demanding CSS mentioned in Para 9 (iv) above, pending final adjudication of the current Petition.

11. The Commission heard the matter on 21.01.2021, 06.04.2021, 01.06.2021, 29.06.2021, 06.07.2021, 10.08.2021, 14.09.2021 and 07.10.2021 and reserved for Orders on 07.10.2021. The Commission notes that, the facts of the case and the grounds raised are similar in nature in all the above petitions and decides to pass a common Order. Further, to avoid repetition of facts and grounds raised in the Petitions, the Commission in the following Paragraphs has considered the facts and grounds presented in OP No. 64 of 2020. Also, the statement of objections and the additional submissions made by the Respondents is similar and hence, re-produced once.

II. Submissions made by the Petitioners.

The submissions made in the Petitions are similar in nature and the major contentions raised by the Petitioners praying for not to levy CSS, are as follows:

A. The Licence issued to the Respondents are not renewed and therefore not Valid.

1. The Karnataka Electricity Regulatory Commission (KERC) is constituted under section -3 of the Karnataka Electricity Reforms Act, 1999 by issuing a Government Order ("GO") bearing No. DE3 PSR 99(1) dated

28th August, 1999. Thereafter, by another GO dated 06th October, 1999, the State of Karnataka appointed a Chairperson, two members and a Secretary to KERC.

2. As per section 14 of the Act, with effect from 01st August, 1999 the erstwhile Karnataka Electricity Board (KEB) ceased to exist and the Karnataka Power Transmission Corporation Limited (KPTCL) was formed to look after Transmission and Distribution in the State and VVNL (Visweshwaraiah Vidyuth Nigama Limited) was constituted to look after the generating stations which was under the control of erstwhile KEB. While the generation, transmission and distribution functions were unbundled, the tariff determination and certain adjudicatory powers vested with the State Government came to be vested with the KERC.

3. Thereafter, Karnataka Power Transmission Corporation Limited (KPTCL), wrote a letter No. KPTCL/B36/5704/1/2000-2001/510 dt.26.06.2000 to KERC stating that under Sub-Section (1) of Section 27B of the Indian Electricity Act, 1910 (the "IE Act") and as notified by the Government of Karnataka, KPTCL is an STU with a statutory duty and power to undertake intra State Transmission of energy and other matters relating thereto as defined under Section 27B of the IE Act and also under Section 55 of the Electricity (Supply Act) 1948 (the "ES Act"). Also, KPTCL has been designated by the Karnataka Electricity Reform Act, 1999, (KER Act) as the principal company to carry out transmission and is responsible for the extra high voltage transmission system operation.

As long as KPTCL is a STU, the law does not require KPTCL to obtain a transmission licence from the KERC. It is only other companies that need a licence.

4. In response to this letter, KERC decided to hold a hearing and issued notice to the KPTCL on 04th July, 2000 pointing out the following:

    a. KPTCL, after being notified as STU by the State Government vide notification dated 28.1.2000, in its letter dated 11.2.2000, had placed the provisional licence issued by the Government to KPTCL for Transmission and Bulk Supply before the Commission for grant of a permanent licence to carry on the business of, inter alia, Transmission and bulk supply of Electricity within the State of Karnataka.

    b. However, in letter dated 26.6.2000, KPTCL wanted the provisional licence to be processed as an application for grant of Bulk Supply, Distribution and Retail Supply licence only.

5. After the hearing held on 21st July, 2000, KERC passed a detailed order dated 16th August, 2000 inter alia holding as follows:

    KPTCL's stand that the Transmission Business of the KPTCL does not require a Licence from the KERC is rejected for all the reasons specified above. KPTCL is directed to immediately take steps to apply for and obtain a Transmission Licence under the KER Act, 1999, from the KERC so as to cover the business of Transmission being carried on by it.

6. Thereafter, KPTCL wrote a letter bearing No.KPTCL/B-36/T/5704/T/1/495-503 dated 20.5.2002 informing KERC that four (4) Distribution Companies have been set up by the Government of Karnataka in terms of the approval granted in Order DE 69 PSR 2001 dt. 15.2.2002, in order to carry on the duties of Retail Supply in various areas in the State of Karnataka by taking away the said duty from KPTCL. Therefore, in the wake of this, KPTCL requested KERC to assign that part of the Supply Licence held by them as relates to Retail Supply to these four Companies in their respective areas of Supply.

7. KERC agreed with this request of KPTCL and passed a detailed order dated 29th May, 2002 titled "Application of KPTCL for assigning Retail Supply Licence to the new Distribution Companies set up in terms of Government's Electricity Sector Reform Policy" inter alia holding that the assignment of Licence shall come in to effect from 01.06.2002 or the date on which the assignee companies file with the Commission their consent to the assignment of licence subject to the conditions laid down in that order, whichever is later. Some of the conditions imposed in this letter were as under:

    a. The licences so issued were valid for a period of 3 months from the date of their coming in to force. Well before the expiry of this period, the Distribution Companies were directed to make application for issue of regular licence, duly following the procedure therefor.

b. Detailed commercial arrangements for the separation of the Retail Supply Business and the independent operation of the Retail Supply Licensees shall be finalized and submitted to the Commission for approval, wherever necessary, latest by 01.08.2002.

8. Thereafter, ESCOMs filed their application to the Commission for issue of regular licences on the dates indicated below suggesting certain modifications to the existing licence conditions:

a. Hubli Electricity Supply Company Ltd (HESCOM): 19-07-2002.
b. Gulbarga Electricity Supply Company Ltd (GESCOM): 20-8-2002.
c. Bangalore Electricity Supply Company Ltd (BESCOM): 21-8-2002.
d. Mangalore Electricity Supply Company Ltd (MESCOM): 29-8-2002.

9. In response thereto, KERC passed an Order dated 28th January, 2003 granting the licence to the Respondent and other DISCOMs, wherein the following aspect was clearly mentioned as regards the tenure of licence:

"*The objectors have pleaded that in these circumstances, the licence to HESCOM should not be issued on a permanent basis but may be issued for a shorter period of say six months to one/two years and that the licence can be renewed from time to time after duly reviewing the performance of the company so that it will act as a good control mechanism to improve the efficiency of the company.*

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Para 10. Regarding the period of the licence, the Commission pointed out that the licence sought by the Company is for a period of 15 years and is not a permanent licence as stated by some of the objectors. The Commission also pointed out that new schemes or new initiatives taken up by the company may require 2 to 3 years for its completion / implementation to yield the required results and therefore, it may not be advisable to give licence for a very short period, but it should be at-least for a period of 3 to 5 years. The Commission asked Sri Naganand, Advocate, during the hearing, to state whether the licence for a shorter duration of less than 15 years can be considered in view of the objections. Sri Naganand stated that the Commission may consider instead of 15 years, a shorter duration for issue of licence. He further stated that at-least a reasonable period should be considered as the Company is in the transition stage.

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Para13. Taking into consideration all the aspects and after detailed examination, the Commission hereby grants Distribution and Retail Supply Licence to all the four ESCOMs for a period of 5 (Five) years as appended to this order vide Annex-8 to Annex.11.

10. The Licence granted to HESCOM for the initial period of 5-years expired on 28th January, 2008. In the meantime, KERC issued a specific regulation viz., KERC (Licensing) Regulations, 2004. As per Regulation 3

therein, Grant of licence is not required in certain cases, in so far as any person who is deemed to be a licensee under the proviso to section 14 of the Act, shall not be required to apply and obtain a licence under the Act.

11. Relying on the orders of the Hon'ble Appellate Tribunal for Electricity and the Apex Court's ruling in Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission and Others: (2014) 8 SCC 444, petitioners have submitted that the deemed Licensees who are not required to obtain Licence under the KERC (Licensing) Regulations, 2004 are only Damodar Valley Corporation and the State Government. All other entities are required to obtain licence. It is precisely, therefore, that all ESCOMS were granted Licence only upon making an Application to that effect. Furthermore, the Regulation do not specify any exemption from renewal for the Licence already granted. Hence, the HESCOM's Licence due for renewal ought to have been renewed in January, 2008 viz, five years from January 2003. Even without formal renewal or fresh grant, KERC has been determining tariff for the ESCOMs by passing Tariff Orders and all these orders have no effect much less a binding effect as per law.

B. Exempting CSS to Solar Projects and Levying the same on Petitioners amounts to Discrimination

1. In the year 2013, HESCOM gave a tariff proposal to KERC for the levy of CSS of 87 paise per unit for HT-2a, 220 paise per unit for HT-2b and 40

paise per unit for HT-4 categories, which is worked out as the difference between average cost of supply and the revenue demand for the relevant HT consumers. KERC issued an order dated 6th May 2013. However, the KERC approved the CSS as follows:

Paise/unit

Voltage Level	HT 2 (a)	HT 2(b)	HT 4	HT 5
66 kV and above	64	208	2	296
HT level 11 kV and 33 kV	31	174	0	262

2. The CSS so fixed was uniformly applicable to all Consumers irrespective of their sourcing of power. However, the Commission decided to apply a rebate of 50 paise per unit subject to a maximum of Rs.50 per installation per month for use of solar water heaters. Thus, the consumer with solar water heaters installed were preferred over the consumers with installations of other forms of renewable energy sources.

3. As per Section 62 (4) of the Act, no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. However, the KERC, on 10th October, 2013 passed an Order titled "Determination of Tariff for grid interactive solar power plants including rooftop and small solar photo voltaic power plants" (the "2013 Order") in which it was held inter alia as follows:

As noticed above, the Commission under Section 86(1) (e) of the Electricity Act, 2003 has a mandate to promote the RE generation by providing suitable measures for connectivity and sale of electricity (emphasis supplied). Therefore, as a promotional measure, considering the high cost of generation of Solar power and to enable Solar Power generators to sell the electricity generated in the market, the Commission decides not to levy any Wheeling and Banking charges, or Cross-Subsidy Surcharge on the Solar generation who sell electricity on open access within the State.

4. On 12th May, 2014, the KERC passed Tariff Order, 2014, wherein Wheeling, Banking and Cross Subsidy Surcharge were fixed by the Commission as follows:

Paise/unit

Voltage Level	HT 2 (a)	HT 2(b)	HT 2 (c)	HT 5
66 kV and above	42	173	101	476
HT level 11 kV and 33 kV	7	138	65	440

5. In this Tariff Order, 2014, the KERC specifically held that the wheeling charges and cross subsidy surcharge determined in this order shall supersede the charges determined earlier and are applicable to all open access/wheeling transactions in the area coming under HESCOM. Thus, the exemption granted to the Solar projects vide 2013 Order titled "Determination of Tariff for grid interactive solar power plants including rooftop and small solar photo voltaic power plants"

came to be superseded and negatived by Tariff Order, 2014 dated 12th May, 2014.

6. Hence, on 18th August, 2014 i.e., within one year from the passing of the Tariff Order, 2014, KERC passed yet another Order titled "wheeling charges, Banking charges and Cross Subsidy Surcharge for Solar Power Generators", wherein it was held inter alia, as follows:

> *"All Solar power generators in the State achieving Commercial operation date (CoD) between 1st April 2013 and 31st March 2018 and selling power to consumers within the State on open access or wheeling shall be exempted from payment of wheeling and banking charges and cross subsidy surcharge for a period of ten years from the date of commissioning. This is also applicable for captive Solar power plants for self-consumption within the State."*

7. Thereafter, within the same financial year, the KERC passed Tariff Order, 2015 dated 02nd March, 2015, wherein it was held thus:

> *"Regarding the Solar energy based projects, the Commission vide Order dated 18.08.2014 has exempted Solar projects in the State achieving Commercial Operation Date between 1st April 2013 and 31st April 2018 and selling power to consumers within the State on Open Access/Wheeling from payment of Wheeling and Banking charges and Cross subsidy surcharge for a period of 10 years from the date of commissioning and is made applicable to captive Solar plants for Self-consumption within the State. Thus, the cross subsidy surcharge for Solar-power projects as per the said Order is continued. The wheeling charges and cross subsidy surcharge determined in*

this order are applicable to all open access/wheeling transactions in the area coming under HESCOM."

8. Thus, only Solar Power Projects were exempted from the levy of CSS but the Cogen projects like the petitioners continued to be levied with the CSS, at par with other conventional Power projects. This treatment continued for the subsequent years as well. In the Tariff Order, 2016 – dated 30th March, 2016 and in Tariff Order, 2017 – dated 11th April, 2017 and Tariff Order, 2018 dated 14th May, 2018 and also in Tariff Order, 2019 dated 20th May, 2019, it is consistently and very identically held thus:

"The cross subsidy surcharge determined in this order shall be applicable to all open access/wheeling transactions in the area coming under HESCOM. However, the above CSS shall not be applicable to captive generating plant for carrying electricity to the destination of his own use and for those renewable energy generators who have been exempted from CSS by the specific orders of the Commission."

9. It is submitted that one Kare Power Resources Private Limited approached the Hon'ble High Court of Karnataka in W.P No. 36427/2018. The Hon'ble High Court in its judgement dated 29th January, 2020 remanded back the matter to this Hon'ble Commission specifically directing it to hear the petitioner with regard Tariff Order, 2018. This Hon'ble Commission has issued Public Notice in the matter and seems to be hearing some of the stakeholders in those matters specifically with regard to Paragraph No. 6.8 of Tariff Order, 2018.

10. Thereafter, the Hon'ble High Court has disposed of the Petition filed by the present Petitioners (Excluding Petitioner-6) and some other similarly situated Cogen Power Projects by its common Order in WP No 11467 of 2019 and connected matters vide Common Order dated 04th November, 2020.

11. As per section 86(1) (e) of the Electricity Act, 2003, KERC has been vested with the function of promoting co-generation and generation of electricity from renewable sources of energy. Thus, is it evidence that co-generation and renewable energy have been treated at par with each other. All solar projects have been exempted from payment of CSS. There is no provision under law to sub-categorize various sources, exempt one category from payment of CSS. Therefore, the Petitioners are subjected to hostile discrimination.

12. In Tariff Orders passed by the KERC, it is stated that CSS shall not be applicable to captive generating plant for carrying electricity to the destination of his own use and for those renewable energy generators who have been exempted from CSS by the specific orders of the KERC. Except this category there is no provision in the Act to exempt payment of CSS from any other category. However, KERC has exempted payment of CSS from the consumers availing power under the solar power projects from 2014. Thus, even presuming that Petitioners, though is liable to pay CSS, it is hostile discrimination against

the Petitioners to charge CSS, as all renewable and cogeneration plants have to receive the same promotional measure.

13. KERC vide Order dated 10th October, 2013 initially exempted the consumers sourcing power from the solar projects from payment of cross subsidy surcharge and thereafter, by another order dated 18th August, 2014 has exempted Solar projects achieving Commercial Operation Date between 01st April, 2013 and 31st April, 2018 and selling power to consumers within the State on Open Access/wheeling from payment of wheeling and Banking charges and Cross Subsidy surcharge for a period of 10 years from the date of commissioning. Thus, the cross-subsidy surcharge for solar power projects as per the said Order has continued from 10th October, 2013 onwards up to this date.

14. The Hon'ble KERC has exempted cross subsidy on the consumers sourcing from solar based power projects. Therefore, levying cross subsidy on consumers such as Petitioners is discriminatory and in violation of inter alia Articles 14 and 19 of the Constitution of India besides being ultra vires the Act.

15. There is no provision to exempt Wheeling & Banking charge and CSS. However, it seems to have been done by the Commission deriving powers under the Act as a special measure under section 86(1) (e) of the Electricity Act,2003, read with Regulation 2(1) of the KERC (Procurement of Energy from Renewable Energy Sources) Regulations,

2011 (the "Regulations"). As per the Regulation 2 (i) of the aforesaid Regulations, the Cogen Projects come within the definition of the 'Renewable Source of Energy' along with solar, mini-hydel etc. Thus, the obligation as per the Act as well as the Regulations is uniform across all renewable. Hence, the Petitioners being a Cogen cannot be discriminated.

16. Because the Petitioners' project generates power to utilize it on captive basis during the bagasse season viz., October to March. Only for the remaining months of a year, for its consumption requirements (for the purpose of maintenance or operating Distilleries etc.,) the Petitioners has to have to depend either on the power from Distribution Licensees or the Open Access power. The quantum of imports for O&M are miniscule and are only for the purpose of their own consumption and not for third party sales to the consumers of ESCOMs. In contrast, the Solar Projects wheel power all throughout the year. So, the economic impact of CSS on the Distribution Companies is higher for Solar projects than for the Cogen.

17. The KERC exempts all consumers who source power from the solar projects commissioned from 01st April, 2013 and 31st April, 2018. There is no explanation in the Tariff Order why a specific period is prescribed when the Act makes no such distinction.

18. If KERC exempts any class of consumers from the levy of CSS, it means, KERC has fixed lower tariff for a class of consumers. The Act does not empower KERC to vary tariff for the consumers if they source power from a particular source which are commissioned in a particular year. In other words, it is a tariff subsidy granted to such consumers. As per section 65 of the Act, If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62 of the Act, The State Government shall notwithstanding any direction which may be given under section 108 of the Electricity Act, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government.

19. It is a fact that due to exempting CSS from Solar Projects results in loss to the DISCOMs. This loss is not absorbed but passed on to consumers. It is not met by the State Government but is cross subsidized by Cogen Projects among other consumers. Thus, in the CSS levied from Cogen Projects, there is a component of loss caused by CSS exemption. As per the statutory mandate as per the Act, Cogen and Renewable projects are to be treated at par. However, in effect, the Cogen Projects, forever are cross subsidising the loss caused by consumers

supposedly sourcing power from solar projects commissioned from 2013-18. No power is vested with the Commission to make Cogen projects to bear the loss caused by exempting the Solar Projects. At best, this has to be compensated by the State and that too in advance in accordance with section 65 of the Act. It is submitted that the levy of CSS is aimed at compensating the DISCOMs.

20. Almost all the Tariff Orders seek to determine the CSS as per a formula prescribed under the Tariff Policy. The formula makes no mention of the project cost of source of power generation. In fact, the only relevant factor for determination of CSS is the cost of power purchase and cost of distribution or wheeling by the Distribution Company. Hence, the project cost of either solar projects or Cogen Projects is hardly a criterion for either levy or exemption of CSS. Even otherwise, the cost of establishment of a project cannot be the basis for exempting CSS from a consumer sourcing power from such project. There is no mechanism to ascertain what is the cost of each Solar project commissioned from 2013-18. At any rate, the project cost cannot be identical or even comparable. Hence, exemptions to the Solar Projects from cross subsidy, ought to have exempted the Petitioners as well.

21. Because due to the select preference and hostile discrimination, if any consumer sources power from the Solar Projects commissioned between 2013-18, such consumer is exempted but not if sourced from

Cogen. Thus, the cost of CSS adds on to the cost of power sale or to the power imported for O&M and allied purposes. The Tariff Orders or any other orders of the Commission make no mention of why only solar projects are exempted to the exclusion of the Cogen. It is submitted that presuming without admitting that KERC has every power to exempt CSS from Solar Projects, the same should have been extended to the Cogen Projects too.

22. CSS is paid by Cogen projects on two types of transaction: i.e. when Cogen Projects import power for O&M and when Cogen projects sell power to their consumers. However, unlike Cogen Projects, the Solar Projects don't import power under Open Access; they merely sell power to third parties when CSS becomes applicable. Such levy of CSS during third party sale is exempted under the 2013, 2014 Orders and Tariff Order, 2018. The actual beneficiaries under such exemption are Open Access Consumers of Solar Project. However, if Petitioners Projects are exempted by CSS, the actual and direct beneficiaries would have been the Cogen project whose power import would have become CSS free, which is the mandate of the Act. The mandate under section 86 is for promotion of Renewable Source of Energy including the Cogen Projects and not for Consumers and that too Non-Exclusive. Selective promotion of solar consumers is hostile discrimination and hence, bad in law.

C. Applicability of CERC Regulations Vs. KERC Regulations

1. The Petitioners company (the "Petitioner") are bagasse-based co-generation Power Project. As part of its integrated operations, the bagasse (crushed sugarcane) is utilized by the Petitioners for generation of electricity in its bagasse- based cogeneration power project. In order to operate its integrated industrial complex, the Petitioners requires to import or purchase electricity. The Petitioners, in addition to sourcing of power under PPA, imports energy by availing Inter State Open Access though Inter State energy exchange platform called Indian Energy Exchange (IEX), a licensee of the Central Electricity Regulatory Commission (CERC). The procedure for the import of energy from Inter State is governed by the provisions of a central legislation called the Electricity Act, 2003 (the "Act") and is regulated by the regulations framed by the Inter State /Central regulator viz., Central Electricity Regulatory Commission (CERC).

2. The term "Surcharge" has not been defined in the Act, however, the Act refers to the term surcharge at Sections 38,39,40,42,86,178 & 181. It is pertinent to submit that on perusal of the scheme of the Act it is clearly evident that surcharge can be determined either by KERC or CERC depending on the nature of particular transaction.

3. As can be seen from the CERC's Regulations supra, an Inter-State Open transaction any import or export is charged on the specific basis.

a. The scheduled energy (energy contracted under a Power Purchase Agreement, IEX transaction or trading transaction) is charged as per the terms of the respective contracts.

b. Unscheduled energy is charged unscheduled Interchange charges (UI charges) under the CERC Regulations.

c. All other charges are determined under the CERC Regulations.

d. There is no scope or provision to levy KERC determined charges much less to levy CSS. Further there is no incidence of CSS on the energy imported through IEX because the CERC Regulations do not provide for the same. In any case, the petitioners does not use any distribution network of the Respondent for import. Therefore, there is no incidence of wheeling charges; consequently, there is no provision for the levy of CSS.

4. To specify the terms and conditions of Intra State Open Access, the KERC has made its set of regulations, which are applicable to the Intra State Open Access transactions. And similarly, to specify Inter State Open Access, CERC has made its own set of regulations. Both of them operate in their respective domains. In this particular case, the Petitioners has always sourced power from the Inter State Open Access by complying with all the applicable CERC Regulation.

5. As per Section 42 the Cross Subsidy Surcharge (CSS) can be levied by a distribution licensee in case the open access introduced by State Commission. As per third proviso to Section 42(2) of the Act, surcharge and cross subsidy had to be eliminated. However, the Central Government by enacting the Act No.26/2007 taking effect from

15th June, 2007, omitted the words "and eliminated" and thus the present statutory mandate is to progressively reduce the surcharge and cross subsidy. In terms of this mandate KERC brought down the level of CSS to zero in its tariff orders dated 02nd November, 2009. Further, the zero-surcharge mandate was continued in the KERC's orders dated 07th December, 2010 and 28th October, 2011. However, having reduced the surcharge progressively as per the mandate of the Act and brought it down to zero within 6 years from the enactment of the Act, KERC has no jurisdiction or authority to again increase it to alarming levels in the subsequent years.

D. Not a Consumer of ESCOMs (specifically not a temporary consumer) & Not connected to Distribution system.

1. The Petitioners were not a consumer as it did not have any RR Number. The classification of the consumers into various categories viz., HT 2 (A), HT 5 etc., is governed by the regulations and orders passed by the KERC.

2. It is an undisputed fact that during the period in respect of which the Respondent issued the impugned demand letter, the Petitioners had been procuring power drawn power from IEX, a licensee of CERC under a PPA with an entity in the IEX who was purchasing the electricity for and on behalf of the Petitioners as Petitioner's Broker. This is not trading within the meaning of Section 2(71) of the Act. The term 'trading' is a licensed activity defined under Section 2(71) of the Act,

meaning purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly. There is marked difference between the power trading and transacting power through a broker by making purchases and sales on one's behalf. The Petitioners were not purchasing power from any licensees under the Act.

3. At the said time, the petitioners' premises (the generating station and sugar factory which consume electricity) are not connected with the works of the Respondent. The Respondent, even if presumed without admitted to be a licensee, is licensed to operate and maintain distribution lines viz. 11 kV and below. However, the Petitioners are drawing and supplying power at 110 kV, which is a transmission voltage, that too, through a dedicated transmission line installed and owned by the Petitioners.

4. As per Condition No.5.6 of the Karnataka Electricity Regulatory Commission (Conditions of Licence for ESCOMs) Regulations, 2004 (hereinafter referred to as 'COL') a licensee shall provide open access to its Distribution System to any person as required under Section 42(2) of the Act and receive Wheeling charges and /or surcharge as specified by KERC. This clearly means that Wheeling Charges and Surcharge is paid on the Wheeling Charge in case Open Access is provided to the Distribution System.

5. As per clause 1.3 of the Licence of the Respondent. "Distribution System" is defined to mean

> *"Any system consisting mainly of cables, service lines and overhead lines, electrical plant and meters having design voltage of 33 KV and under. The Distribution System shall not include any part of the Transmission System except the terminal equipment used for the supply of electricity to extra high voltage (66 KV and above) Consumers"*

6. It is submitted that the Petitioners are sourcing power under HT / EHT Transmission Lines. It is submitted that under the provisions of the Conditions of Supply of the Distribution Licensee of the State of Karnataka (hereinafter referred to as 'CoS') there was no provision wherein HT/EHT consumers could apply for temporary supply. It is only after the amendment brought about to the CoS (Fifth Amendment), 2016 vide notification dated 22nd November, 2016 that for the first time HT/EHT consumers viz. loads of 50 KW/67 HP were allowed to apply for temporary power supply under the amended clause 12.02 of the CoS.

7. The Petitioners were a cogeneration based generating company and not a consumer of the Respondent. Petitioner-1 was supplying power under PPA from 01.12.2014 to 30.04.2015. Subsequently, only from the year 2018, the Petitioner-1 has signed a medium-term Power Purchase Agreement (PPA) dated 18th January 2018 with the Respondent No.1 and other ESCOMs for supplying the power generated from its

Cogeneration based power project. It was only then that an RR number and tariff categorization could have been assigned to the consumer. However, this Power Supply Agreement has to be distinguished from a power Supply Agreement to be executed by a Registered Consumer bearing Revenue Register Number (RR No) pursuant to the sanction of power and tariff categorization as per the provisions of the Conditions of Supply of distribution Licensees of the State of Karnataka (CoS). The Petitioners, not being a consumer of the Respondent has neither been sanctioned power supply nor assigned with any tariff category. The Petitioners is neither a permanent nor temporary consumer of the Respondent.

8. This being the case, vide the Impugned Demand Notice, along with the Import bill for the month of April 2019, the Respondent raised a demand to the petitioner-1 for a sum of Rs.58,20,542/- (Rupees Fifty-Eight Lakh Twenty Thousand Five Hundred and Forty-Two only) for the period from 1st June 2014 to 31st November 2014 purportedly towards the levy of "Cross Subsidy charges". Earlier, Respondent, HESCOM had written to the Petitioner-1 vide letter No. ATN/EEE/AEE(O)/TA-1/F-64A/2014-15/3807-11 dated 22.07.2014 regarding Cross Subsidy Surcharge for categories HT-2a and HT2-b, even though these categories were not in existence at the same time. Also, a number of letters have been issued by the Respondent to the Petitioner-1 thereafter, citing various and often contradictory reasons for levying

the CSS. The Petitioner-1 replied to these earlier letters inter alia vide letter No. ASL/cogen/2653/2015-15 dated 22.11.2014 wherein the Petitioner-1 informed the Respondent that it was neither a consumer of the distribution licensee, nor was it using any distribution network of any distribution company. The petitioner was, therefore, not liable to pay any cross-subsidy surcharge. Acknowledging the said letter, the Respondent vide letter No. UGR/AEE/REV/HT/3178-80 dated 17-01-2015 had sought clarifications from the petitioner, which the Petitioner-1 had provided.

9. However, even before the Petitioner-1 could provide the requisitioned clarification, the Respondent issued another demand letter No. HESCOM/GM(T)/EE(PTC)/14-15 dated 29-01-2015. The Respondent, in its reply to the Petitioner's aforesaid letter dated 22-11-2014 vide letter No.HESCOM/GM(T)/EE-4/AO/14-15/cys-25692 dated 29-11-2014 (stated as follows in respect of Independent Power Producers (IPP):

> "…*1) When an IPP is under Open Access and draws Power from HESCOM, the IPP has to pay UI charges and back up charges to SLDC.*
>
> *2) When an IPP is under non Open Access and draws power from KPTCL /HESCOM grid, then the IPP has to pay Import Bill Energy charges to HESCOM under HT-5 (Temporary) tariff.*
>
> *3) When an IPP is under non Open Access period and draws power from source other than HESCOM (say*

from IEX /PXIL), the IPP has to pay cross subsidy charges to HESCOM as per Tariff Order 2014…

Therefore… Though you have not drawn power from KPTCL/HESCOM, still you are treated as temporary consumer… in present case you are billed as per para 3…"

10. It is, therefore, an admitted fact that the impugned demands, more particularly the aforesaid demand letter dated 29th November, 2014, the Respondent states that CSS has been levied deeming the Petitioners as a temporary consumer. There is no explanation in the Impugned Demand Notice as to how the Petitioners can be deemed as one of the consumers and can be automatically deemed as Temporary Consumers and cross subsidy applicable to the HT-5 Temporary Consumers can be levied on the Petitioners.

11. Without prejudice to the fact that Petitioners are not liable to pay CSS under no circumstances, it is submitted that when there was no provision for HT consumer to apply for temporary supply until 22nd November, 2016, there is no way in which the Respondent could have treated the Petitioners as a temporary consumer. Hence, CSS is not applicable to the Petitioners under any category, least of all under temporary category.

12. The very fact that the KERC has determined the CSS for each consumer category viz., HT 2A, HT2B etc. goes to show that an entity

liable for payment of CSS should be an existing consumer classified under any of the existing categories. No consumer/Generator such as the Petitioners has any liability to pay CSS.

13. The concept of cross subsidy operates at two levels - at first level when the State Commission determines the tariff for various category of consumers, it so structures the tariff that the richer sections cross subsidize the poorer section. At the second level the open access consumers are permitted by the State Commission to pay the CSS as specified by the State Commission by way of regulations. Both these cross subsidies are not applicable in the case of the Petitioners since the Petitioners were not a consumer of respondent HESCOM for the period for which the CSS is sought to be levied.

14. For the period for which the CSS is sought to be levied.

a. The Petitioners were not supplied with electricity for his own use by any licensee under the Act:

b. The Petitioners have not even applied for any permission from State Electricity Regulatory Commission to receive electricity from any person since the Petitioners were availing Inter State Open Access governed by the CERC's regulations.

c. The Petitioner's premises were not connected with the works of the Respondent Licensee for the purpose of receiving electricity from them and the Petitioners are not a consumer of any licensee much less the Respondent - HESCOM.

d. In fact, the Petitioners supplies and receives power through a dedicated transmission line constructed and presently owned by the petitioners at its own cost, as mandated under section 10, without utilizing any of the Respondent's works.

15. Thus, the Petitioners are not a consumer of the Respondent within the framework of the Act, more importantly within the ambit of Section 42 of the Act. Therefore, the Petitioner is not liable to pay additional surcharge/ cross subsidy surcharge under Section 42(4) of the Act viz., the charging section under the Act.

E. No wheeling –No surcharge:

1. Section 42(4) makes it very clear that surcharge has to be specified (which is defined to mean specified by way of a regulation) in case the State Commission permits a consumer to receive supply of electricity from a person other than the distribution licensee of his area of supply. As per Section 42(4) of the Act, where a State Electricity Regulatory Commission permits a consumer to receive supply of electricity from a person other than a Distribution Licensee of his area of supply. Such consumers shall be liable to pay an additional surcharge on the charges of Wheeling, as may be specified by the State Commission, to meet fixed cost of such Distribution Licensee arising out of his obligation to supply.

2. In the present case the open access is providing by Central Commission and not by State Commission. The surcharge is always paid on the charges of wheeling as the very name suggests – surcharge stands for an additional or extra charge or payment. It is a super added charge, a charge over and above the usual or current dues. i.e., surcharge cannot be levied independently, it has to be added on a charge.

3. The concept and meaning of surcharge, read together with section 42 of the Act clearly goes to show that the surcharge can be levied only upon levy of wheeling charge and not independently. In the present case the Respondent – HESCOM cannot levy surcharge because it cannot levy wheeling charge as the petitioners have not used the network of the Respondent – HESCOM at all.

F. Grounds raised by the petitioners:

1. Re: No Licence – No CSS

   The CSS can be levied by a Distribution Licensee. HESCOM does not hold a valid Licence from the KERC. The KERC does not get jurisdiction to pass any orders much less Tariff Orders and determine any Tariff if HESCOM is not a licensee. Furthermore, HESCOM doesn't have any right to collect any tariff unless it has a valid licence and therefore, all demand raised are illegal, bad in law and liable to be quashed.

2. Re: Hostile Discrimination

    1. Because the Kare Power's case was disposed of by the Hon'ble High Court in January, 2020. However, even in the Tariff Order, 2020 passed in November, 2020, the Commission continues to discriminate the Solar vs. Non-Solar Renewable Projects by exempting Solar projects alone from the levy of CSS.

    2. Exempting the consumers of solar power projects from cross subsidy surcharge, the 2nd Respondent has engaged in hostile discrimination, which is a clear violation of Articles 14 and 19 of the Constitution of India. Sub classification by promoting only solar at the cost of others and particularly the other renewable sources, is illegal, untenable and ultra vires the Act.

    3. Because KERC in all its Tariff Orders, impugned here in has exempted the levy of CSS on Solar Projects. Per contra, under the Impugned Tariff Orders, the Petitioners, a Cogeneration based power project, imports power it is liable to pay CSS. This is nothing but hostile discrimination.

3. Re: Limitation

    The demands by the Respondent are barred by Law of Limitation, as greater part of Respondents' demands pertain to a period more than three years.

4. Re: Vague

It is submitted that there is no rationale for imposing the cross-subsidy surcharge at the rates indicated by the Respondent which are applicable to the consumers under temporary tariff. When the Petitioners are not a consumer at all, there is no question of applying temporary tariff or any other tariff for imposing of cross subsidy.

5. Re: No consumer and No CSS

The cross-subsidy surcharge can be levied only on a consumer registered with the Respondent – HESCOM and at any rate on a consumer who is utilizing the network of the Respondent –HESCOM. In the present petition/case, for the period in question, the Petitioners are neither a consumer nor utilizing the network of the Respondent – HESCOM.

(i) The Petitioners are not a consumer of the Respondent within the meaning of Section 2 (15) of the Act, as the Petitioners are not supplied with electricity for his own use by the Respondent's Licensee. In fact, the Petitioners themselves supply and receive power through a dedicated transmission line constructed by the Petitioners at their own cost without utilizing any of the Respondent's works.

(ii) Because in order to qualify as a consumer of the Respondent the Petitioners or any other consumer has to follow the procedure prescribed under the CoS, execute a Power Supply Agreement pursuant to the prescribed procedure in clause 12 of the CoS. For the period in question, the

Petitioners were neither a temporary or permanent consumer of the Respondent. Hence, CSS is not applicable to the Petitioners under any category, least of all under temporary category.

(iii) Because the very fact that the KERC has determined the CSS for each consumer category viz HT 2A, HT2B, HT5 etc. goes to show that an entity liable for payment of CSS should be an existing consumer classified under any of the existing categories.

(iv) Because the rationale of imposing of cross subsidy is that the fixed cost to the Respondent should be compensated when an existing consumer walks out of the ambit of the Respondent's licensee. In this case, the Petitioners are a generator hence, there is no question of registering with the Respondent for power supply as the Petitioners themselves generates power.

6. Re: Intra vs Inter: KERC vs. CERC Regulations

i. The Open Access Regulation framed by KERC under Section 42 are applicable for Intra-State Open Access transactions. The Karnataka Electricity Regulatory Commission can charge CSS only on the intra state transactions because it has no jurisdiction over the Inter State transactions. As per the CERC Open Access Regulations, CSS cannot be levied.

ii. Petitioners for residual part of energy depend on IEX platforms. No transmission or distribution infrastructure is created by the Respondent for the petitioners and therefore no loss to respondents. Levy of CSS on generators defeats the very purpose and object of the Act.

iii. There is no incidence of CSS on UI charges or energy imported through IEX, because CERC Regulations do not provide for the same.

iv. The Petitioners while availing power under Inter-State Open Access is regulated by the provisions of the Regulations framed by CERC. Therefore, KERC has no power to charge CSS. No doubt the Petitioners have to pay the transmission charges for availing the Inter-State Open Access through the Transmission Line belonging to KPTCL. However, this payment is made because there is enabling provision in the CERC Regulation and not because KERC is competent to levy transmission charge under Inter-State Open Access.

7. Re: Merits of CSS

i. KERC never determined voltage-wise and consumer category wise CSS at all. KERC never initiated a study to validate the sale at each of the voltage level and indicate to cross subsidy levels at each of the voltage levels. Without undertaking such an exercise KERC has no jurisdiction to levy CSS.

ii. The Appellate Tribunal for Electricity (APTEL) in the case of the Fortune Five Hydel Projects Private Limited in Appeal No.259/2016 has set aside the two tariff orders of KERC viz. dated 2nd March, 2015, and 30th March, 2016 and the matter has been remitted back to KERC to dispose of within 6 months. Once the two tariff orders of KERC have been set aside, in view of the Wrongful determination of CSS, there will be a cascading impact on the CSS for the future years. Therefore, the entire tariff determination from the year 2014 has to be revised and re-visited by KERC.

iii. The Commission has not framed the regulations progressively reducing the CSS. Hence, in the absence of the regulations, the CSS determined in the Tariff Orders is illegal and untenable.

iv. The Respondent HESCOM cannot levy CSS without first specifying as to the element of cross subsidy. Hence, the Tariff Orders determining the CSS on all open access transactions is illegal.

v. Because tariff policy lays down that the amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so erroneous that it eliminates competition which is intended to be fostered in generation and supply of power directly to consumers through open access.

vi. Having reduced the surcharge progressively as per the mandate of the Act, and reduced to zero in six years from the enactment of Act, KERC has no jurisdiction or authority to again increase CSS.

8. Re: HESCOM's Failure to Explain the Levy

The Respondent has failed to explain whether the CSS is for open access or non - open access. This in itself is sufficient to demonstrate that the actions of the Respondent suffer from non-application of mind and are patently arbitrary and unreasonable.

9. Re: Without Prejudice to the Above Arguments

In arguendo, assuming - without conceding – for the sake of argument, that the Respondent has indeed levied CSS for non-Open

Access period – if there was no open access, then this means that the petitioners were in fact not drawing any power and if the Petitioners was not drawing any power, then there could have been no application of any charge or cess, so the Respondent's case fails even if the logic sought to be supplied by the said Respondent is relied upon.

10. Re: Court Fee

The present Petition is in the nature of the Objection to the Tariff Petitions or Tariff Orders. Hence, this Hon'ble Commission is already conducting a public hearing in the matter of levy of CSS in the wake of remanded matter of Kare Power. KERC has not collected any Court Fee in that matter. Hence, no court fee, therefore, is collectable in this matter as well as the same is disposed of on the same lines. Further, exemption or rejection of exemption from CSS under these proceedings as well will have an impact of amending the 2013, 2014 and all other Tariff Orders passed upto date; hence, will have impact on all generators and consumers under Open Access. Hence, no court fee is payable under this Petition.

11. Licensee has no objection:

It can be deduced that there is no legal objection or economic hardship if CSS is exempted for Cogen/solar projects, as ESCOMs have not challenged the tariff orders exempting CSS to solar. Petitioners pay

wheeling charges and also CSS, putting the petitioners to lot of hardship.

III. Statement of objections by Respondents:

The Respondents filed their statement of objections on 28.06.2021. The main submissions made are as follows:

1. The above Petition filed by the Petitioners is devoid of any merits and the same needs to be dismissed in-limne. The Respondent hereby, save and except those which are specifically admitted hereunder, denies and disputes all the interpretations, claims and averments of the Petitioner. The Respondent craves the indulgence of this Commission to reply to the contentions of the Petitioner under the following heads:

a. Petitioner is not a Consumer

i. The Petitioner has repeatedly contended that it is not a consumer within the ambit of Section 42 of the Electricity Act, 2003 (hereinafter referred to as "EA") and therefore, Section 42(2) does not apply to the Petitioner. The Petitioner has averred that it is not a consumer of the Distribution Licensee as it has no Revenue Register Number (hereinafter referred to as "RR Number") assigned to it nor does it have any Contract Demand from the Respondent.

ii. The aforesaid averments of the Petitioner are wholly misconceived, untenable, and contrary to the provisions of the Electricity Act. Section 42 of the EA lays down the

duties of the Distribution Licensees and inter alia provides for Payment of CSS by Open Access Consumers as determined by this Hon'ble Commission. The relevant clause of the Section is extracted as hereunder:

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

A bare perusal of the extracted clause makes it clear that any consumer who is permitted to avail open access shall pay CSS and does not by any means state that such consumer has to be a consumer of the Distribution Licensee. The said Section merely provides for the payment of CSS by a consumer of electricity and any inference to the contrary goes against the EA.

iii. The word consumer, for all purposes, shall mean consumer under Section 2 (15) of EA. The EA under Section 2 (15) defines consumer as under:

> *"2 (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person*

engaged in the business of supplying electricity to the public under this Act or another law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"

The above definition states that for any person to be categorized as a consumer, the consumer shall:

i. Receive electricity by a licensee;
ii. Or by a government;
iii. Or by any other person engaged in the supply of Electricity.

Wherefore it is clear that as long as the consumer is receiving electricity from any person engaged in the supply of Electricity, he shall be classified as a consumer. In the instant matter; the Petitioner has admittedly procured energy from Indian Electricity Exchange (hereinafter referred to as "IEX"), which is engaged in the business of supply of electricity and hence cannot escape the definition of consumer under Section 2(15) of EA. The Petitioner has pleaded for such exclusion only to unlawfully exempt itself from payment of CSS as per the provision of EA.

iv. Section 42(2) is unequivocal in requiring payment of CSS as a precondition for open access; therefore, it is sine qua non to pay CSS for being allowed to avail open access. The only condition imposed for payment of CSS is availing open access. In the instant case, admittedly, the Petitioner has availed open access and is thus, bound to

pay CSS to the Respondent in order to compensate the Cross Subsidies of the Respondent.

v. Primary objective of Cross subsidy is to compensate for the supply of subsidized energy by the Distribution Licensee. Such cross-subsidies are levied on the HT consumers of the Distribution Licensee. In the event, such consumers opt for open access, the Distribution Licensees miss out on cross-subsidies that would have been paid by such consumers under HT tariff. Therefore, in order to compensate such cross-subsidies, a surcharge is levied on the consumers availing Open Access in the form of CSS. The above reasoning of levy of CSS makes it indisputably clear that any consumer availing open access shall pay CSS to compensate the cross-subsidies of the Distribution Licensee within whose jurisdiction such consumer avails electricity.

vi. The contention of the Petitioner that only those consumers who have a Contract Demand or RR Number with the Distribution Licensee are required to pay CSS, does not hold any water in light of the clarifications issued by this Commission in Bidadi Industrial Association vs. Bangalore Electricity Supply Company Ltd., Complaint No. 5/2017 (hereinafter referred to as "Bidadi Case"). This Commission, in the said order, has classified open access consumers into three heads: Exclusive Consumer, Existing Consumer and Captive Consumer. The Captive Consumer is one who avails power from its own generating unit, subject to adherence with the Electricity Rules. The Exclusive Consumer refers to a consumer who sources its entire demand of electricity under Open

Access and has no power supply agreement with the Distribution Licensee. An Existing (Non-Exclusive) Consumer is one who has a power supply agreement and Contract Demand with the Distribution Licensee and also avails open access. While the Existing Consumer draws power from the Distribution Licensee and under open access, the Exclusive Consumer solely draws power under OA without being a consumer of the Distribution Licensee. This Commission in the said order has recognized exclusive consumer, who is not a consumer of the Distribution Licensee, to be an OA consumer under Section 42 of the EA. The Commission at para 9(g) has laid down as follows:

"9(a) …..

(g) The last proviso to sub-section (2) of Section 42 of the Electricity Act, 2003, provides for Open Access, subject to such Regulation as may be framed by the Commission to all the consumers who require a supply of electricity, where the maximum power to be made available at any time exceeds one megawatt. Such entitlement for Open Access can be availed even by an 'Exclusive Consumer' who has no Contract Demand with the ESCOM. The 'Existing Consumer' availing of the Open Access is not prohibited from relinquishing the Contract Demand with the ESCOM, wholly or in part. Hence, an 'Existing Consumer' availing of the Open Access can become an 'Exclusive Consumer' by relinquishing the Contract Demand with the ESCOM, wholly or in part. There is no obligation to compulsorily supply power to such 'Exclusive Consumer' in excess of the Contract Demand with the ESCOM. For this reason,

the National Tariff Policy casts a duty upon the ESCOM to make a standby arrangement in the event of outages of the generators supplying to an 'Existing Consumer' having a Contract Demand under the universal supply obligation, though such consumer opts for the Open Access."

vii. In the instant case, the Petitioner, when it had no Power Supply Agreement with the Respondent, shall be categorized as an Exclusive Consumer who avails power under Open Access. The Petitioner being an Exclusive OA Consumer shall pay CSS under Section 42 of the EA for the reason that Section 42 makes no distinction between Exclusive and Existing Consumer for the purpose of levy of CSS.

viii. It is important to note that Section 42 under the fourth proviso provides an exemption to the Captive Consumer from payment of CSS. The exemption from levy of CSS to Captive Consumers is provided under the EA and by not extending such exemption to any other consumers, the EA has expressly stipulated the levy of CSS on the Existing and the Exclusive open access consumers. The said Section and the provisos are conspicuous in omitting any exemption for exclusive open access consumers. Wherefore, under Section 42(2), the Primary objective behind CSS and the rulings of this Commission in Bidadi case, make it a trite position that the Petitioner who was an Exclusive OA Consumer shall pay CSS as determined by this Commission.

b. Consumer being HT5 Consumer for the purpose of CSS

i. The Petitioner has averred that it is not a consumer much less a HT-5 consumer, therefore, the levy of CSS by considering the Petitioner to be HT-5 consumer is erroneous in law. Such contention is hereby denied as false and legally untenable.

ii. This Commission in Bidadi Case has noted that a consumer availing open access without availing Contract Demand with the Distribution Licensee shall be considered for all purposes a temporary consumer of the Distribution Licensee in light of the fact that the Distribution Licensee is obligated to arrange for backup supply. The Commission further clarified that clause 11(vii) of OA Regulations, 2004, provides for payment of Temporary Tariff to the Distribution Licensees by the OA consumers who have no contract Demand with the Distribution Licensee. Thus, in line with the obligation cast on the Respondent under Section 42 to supply backup power to exclusive open access consumers and the clarifications issued by this Commission in the Bidadi Case, the Petitioner has been classified as a temporary consumer and is billed accordingly.

c. Petitioner is liable to pay CSS regardless of using ESCOM's infrastructure:

i. The Petitioner has also contended that he is not a consumer on account of not being connected with the works of the Respondent Licensee, and CSS must not be levied on the Petitioner. The Petitioner has further averred that it supplies and receives power through a dedicated transmission line constructed at its own cost.

ii. Such contention of the Petitioner is false and erroneous as the imposition of CSS is not dependent upon the Petitioner's works being connected to that of the ESCOM's. The fact that the Petitioner has chosen to avail open access and not procure power through the ESCOM is the basis for levy of CSS. Regardless of the network of the ESCOM being utilized, the Petitioner is bound to pay CSS as a compensation to the ESCOM.

iii. The Hon'ble Electricity Appellant Tribunal in Kalyani Steels Ltd. vs KPTCL & Others. Appeal No.28 of 2005, has held that:

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

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

iv. The Hon'ble Supreme Court of India in M/s. Sesa Sterlite Ltd vs Orissa Electricity Regulatory has held that:

"28. 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 nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open

access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiorari, 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."

v. Wherefore, utilizing the network of the ESCOM is not a prerequisite for levy of CSS.

d. Hostile discrimination

i. The Petitioner has contended that the Commission has provided differential treatment in its Tariff Order dated 14.05.2018 to the solar producers by exempting the

consumers of solar generators from the imposition of CSS as opposed to other renewable energy generators. The said Tariff Order was challenged before the High Court of Karnataka in WP No. 36427/2018 (Kare Power v. KERC and Ors.). The Hon'ble High Court remanded the matter to this Hon'ble Commission to reconsider the preferential treatment accorded to the solar producers after hearing the concerned stake holders. At the outset it is pertinent to state that the High Court of Karnataka upheld the power of the State Commission to promote renewable energy sources depending upon the availability and cost of power generation from such sources. The Petitioner has erroneously contended that such classification is discriminatory under Article 14 of the Constitution of India whereas the Hon'ble High Court has explicitly held that such classification is not discriminatory.

ii. Para 6.8 of the Tariff Order dated 14.05.2018 accords special treatment to the solar generator and exempts the solar power consumers from paying CSS. As per the directions of the Hon'ble High Court, this Commission reconsidered para 6.8 of the Order in N/136 of 2020. This Commission has upheld Para 6.8 of the Tariff to hold that exemption of CSS on consumers sourcing power from solar based power projects but levying CSS on renewable energy projects other than the solar based projects is not discriminatory.

iii. It is an inherent power of the Commission under Section 86(1) (e) to accord such preferential treatment for the reason stated hereunder:

a) The Hon'ble High Court in its said Order has noted that this Hon'ble Commission has the powers to classify renewable energy power producers for the purpose of levying CSS or exemption thereof.

b) The Petitioner has stated that the cost of its energy stands inflated on account of Cross Subsidy Surcharge (CSS) levied by this Hon'ble Commission and consequentially, the producers of the bagasse-based energy, such as the Petitioner are losing out to Solar Power Generators in competition. The foregoing averment of the Petitioner, is a make-believe concept and is highly misleading and has no legal basis whatsoever in terms of the general principles of competition.

c) The solar, bagasse-based producer or any other non-conventional energy producers are entirely different fields of energy, independent of each other. The said fields are incomparable when it comes to their respective tariffs as the various parameters involved in determination of tariff are vastly different in these fields. The capital cost and operation and maintenance expenditure involved in the Solar projects is much higher than that of the other NCE projects resulting in a higher tariff for Solar projects. Traditionally, the cost of solar energy is much higher than the cost of other NCE. Wherefore, there is no level playing field for solar and other NCE projects, which can give rise to competition. This being the case, the competition cannot be a factor between the other NCE and the solar energy for competition is usually

between the products having similar cost of production in the same sphere.

d) Furthermore, the Solar tariff in FY 2017 was at Rs.4.36/Unit compared to a lower bagasse-based cogeneration tariff of Rs.3.14/unit. Wherefore, in light of the higher tariff for solar producers and low quantities of solar energy being produced in the State of Karnataka, this Commission was justified in exempting the Solar producers from CSS and levy the same on other sources of energy.

e) Supply of electricity being one of the primary objectives of the Electricity Act, 2003, it is imperative for the Government and this Hon'ble Commission to promote generation of electricity from different sources to cater to the demand as the demand far outweighs the supply of electricity. Keeping the objective of the said Act and the factual circumstances in mind, the incentives have been provided to Solar Generators with the intention of procuring more electricity. Such classification in furtherance of the objective of the Electricity Act is in compliance with the Article 14 of the Constitution of India and the same cannot be challenged.

f) Moreover, as provided under the Constitution of India, equality is not treating un-equals equally. Hence, the Petitioner has no basis to import the provisions of solar energy to bagasse –based power plants. On the contrary, disallowing cross subsidy surcharge will defeat competition and put ESCOMs is a position of weakness. Cross subsidy, when imposed on the

ESCOMs for supplying energy to HT and Commercial Consumers, the same ought to be imposed on the energy supplied under OA by way of cross subsidy surcharge in order to ensure competition and not prejudice any of the parties.

e. HESCOM has renewed its Distribution and Supply License:

i. Petitioner has averred that the Respondent has not renewed its distribution and supply licence. Such averment is vehemently denied as false in toto. The distribution and retail supply license to HESCOM is granted by KERC vide its Order No. R/03/02 dated 28-01-2003. It is pertinent to note that the Respondent has been paying the license fee every year as per the Karnataka Electricity Regulatory Commission (Fee) Regulation, 2016. The averment of the petitioner is highly misleading and must be dismissed at the very outset. The proof of renewal of license is produced as Annexure R1.

f. CERC Regulations are applicable to the instant case:

i. The Petitioner contends that the relevant CERC Regulations are applicable to the instant matter as the Petitioner has availed inter-state open access and all inter-State open access transactions are within the ambit of the CERC. Such contention of the Petitioner is denied in toto as the KERC (Terms and Conditions of Open Access) Regulations, 2006 apply to the instant case. The said Regulation state that they shall apply to open access customers for use of intra state transmission system/s and or distribution system/s of the licensees in the state, including such system/s which are incidental to the

inter-state transmission of electricity. Wherefore, procurement of power by the Petitioner from the Respondent No.1 is incidental to the inter-state transmission of electricity and is covered by the KERC (Terms and Conditions for Open Access) Regulations, 2006.

ii. The CERC in Petition No.216/MP/2015 has held that if a consumer avails inter-state open access, it does not exempt the petitioner from paying CSS as per the State Electricity Regulatory Commission. The relevant extract is produced hereunder:

> *"The two provisions cover different fields, one relates to levy of surcharge for use of the transmission system of the CTU, whereas other concerns levy of surcharge for the distribution network of the distribution licensee. In other words, even though this Commission has not specified the surcharge payable by a consumer for use of the CTU's transmission system it does not absolve the consumer who has been permitted open access by the State Commission of the liability to pay the Cross Subsidy Surcharge specified under Section 42(2)."*

iii. Several SERC's in their Open Access Regulation have stated that if a consumer avails interstate open access, the consumer is liable to pay CSS to the respective DISCOM as per the State Open Access Regulations.

iv. The Petitioner has at various points contended that, the KERC's Order on the cross subsidy surcharge will not be applicable on the Petitioner as it is governed by the CERC Open Access Regulations. Such ground is hereby denied as

false and contrary to the provisions of the Act. The said section provides for collection of cross subsidy surcharges by the distribution licensee within whose jurisdiction the open access consumer in situated without distinguishing between the intrastate or inter-state transaction of such consumer.

v. The Petitioners have lost sight of the purpose/objective behind the concept of cross subsidy surcharge, which is to compensate for subsidized energy supplied to the poorer and agricultural section of the society. The HT consumers of the Electricity Supply Companies (ESCOMs) are charged higher than the other consumers with the objective of neutralizing the subsidized supply of power to the weaker sections of the society. When such consumers avail open access, the ESCOMs miss out on collection of higher tariff from such consumers and will have to bear such subsidy on their own, causing grave adverse financial impact on the ESCOMs. Wherefore, to account for non-receipt of higher tariff from HT open access consumers, the Act as well the KERC has introduced the concept of Cross Subsidy Surcharge; the interstate transactions have no impact on the same as long as the consumer is availing open access. Whether the consumer is availing power from a generator located within a state or from outside the state doesn't in any way affect the fact the distribution licensee in whose jurisdiction the consumer is located is not being paid the higher HT tariff and the same needs to be compensated with Cross Subsidy Surcharge.

vi. Wherefore, it is abundantly clear that the KERC tariff order of the Respondent imposing Cross Subsidy Surcharge on all

the consumers situated within the jurisdiction of the Respondent is binding on the instant set of facts and the Petitioner is bound to pay the same.

vii. Submitting a copy of the Central Electricity Regulatory Commission(CERC) statement of reasons dated 02-01-2019 in the matter of CERC (Open Access in inter-state Transmission) (fifth Amendment), 2018, it is stated that CERC has held that CSS will not be included in the CERC regulations for the same falls in the exclusive jurisdiction of the State Commission.

WHEREFORE in the light of the above grounds taken by the Respondent, the respondents requested this to dismiss the above petition in the interest of justice and equity.

IV. The Respondents have made the additional submissions to counter the stand of the Petitioner on issue of whether the Respondent is a distribution licensee or not, on 13.09.2021as follows:

1. One of the contentions raised by the Petitioner is that the Respondent has not renewed its Distribution and Supply License. Such averment is vehemently denied as false in toto.

2. The Respondent has placed the sequence of events in the grant of license by this Commission in paras 4 to7, which are facts and therefore not reproduced to avoid repetition.

3. The Respondent was appropriately granted a license by this Commission and no specific procedure was laid down by this Commission or any law in force for the renewal of this license.

4. This Commission, thereafter, raised a demand against the ESCOMs for payment of fee for the renewal of the said license. The Respondent accordingly made the demanded payments and the license stood duly renewed. The demand for payment of renewal fee was made every year and this Respondent has been vigilant and paying the fee in a timely manner. The copy of the recent payment made towards renewal of license is attached along with the Statement of Objections as Annexure R1 for the kind perusal of this Commission.

5. Therefore, it is humbly submitted that at no point has this Commission cancelled / suspended the license of the Respondent and the Respondent has been adhering to the conditions of this Commission and remitting a fee towards renewal of the said license. The conduct of the Respondent in paying the fee and the acceptance of the same by this Commission leads to the inference that the license of the Respondent is proper and subsisting and the contention of the Petitioner ought to be rejected.

6. The above submissions are unequivocal in establishing that there has been a deemed renewal of the license of this Respondent by this Commission.

7. It is submitted that, without prejudice to the above submissions, after this Commission granted license to the ESCOMs, the Commission issued a new regulation on licensing, specifically for the ESCOMs, i.e.,

The Karnataka State Electricity Commission (Condition to License to ESCOMs) Regulations, 2004, dated 28.04.2004. Under the said regulations, this Commission noted that the license granted to the ESCOMs vide Order dated 28.01.2003, was done under the provisions of the KER Act. The Commission noted that the new Electricity Act, 2003 provided that these ESCOMs became deemed distribution licensees under the first and fourth provisos to Section 14 to the Act. This Commission also noted that as per Section 16 of the Act, all Licensee covered under the first to fifth provisos to Section 14 of the Electricity Act, were to be given specific or general conditions by this Commission within one year from the appointed date. Under these regulations, this Commission has specified under Clause 19 that, the Commission may, at any time after complying with the requirements of Section 19 of the Electricity Act, revoke the license by 3 months' notice in writing. Section 19 of the Electricity Act specifically speaks about the revocation of license.

8. It is pertinent to note that the Karnataka Electricity Regulatory Commission (Licensing) Regulations, 2004, have also been enacted for the grant of license to those persons who are not deemed licensees under the provisos to Section 14. Thus, from the above submission, it is evident that the license granted to the ESCOMs continue to be valid unless and until it is specifically revoked by this Commission by

adhering to the procedure set forth in the Karnataka State Electricity Commission (Condition of License to ESCOMs) Regulation, 2004.

9. It is submitted that the Respondent has been in compliance with all the provisions under the KERC (Condition of License to ESCOMs) Regulations, 2004 and Section 19 of the Electricity Act. Therefore, the license of the Respondent is valid and subsisting.

10. Without prejudice to the above submissions, the Respondent further submits that it is a deemed licensee under Section 14 of the Electricity Act. As mentioned above, the ESCOMs have been recognized as deemed licensees by this Commission under Section 14 of the Electricity Act.

11. The respondent extracting Section 14 of the Act, has submitted that the Respondent falls under the 5th proviso to Section 14 of the Electricity Act, 2003. The Respondent is a company that is directly created by the Government of Karnataka and undertakes the function of distribution of electricity in the State. Therefore, the Respondent is a deemed licensee under the Electricity Act and is only required to adhere to the conditions set forth by this Hon'ble Commission.

12. The third proviso to Section 14 of the Electricity Act, specifically states that if the Appropriate Government undertakes transmission or distribution of electricity then such Appropriate Government shall be

a deemed licensee and shall not be required to obtain a license under the Act.

13. It is humbly submitted that in order for a body to be recognized as a Government, it needs to be considered as State under Article 12 of the Indian Constitution. A plethora of cases has been decided by the Hon'ble Supreme Court that has recognized Government Companies as "State" within the meaning of Article 12. The Respondent in this regard has relied on the Hon'ble Supreme Court's judgement in the landmark case of Ajay Hasia v.Khalid Mujib, (1981) 1 SCCF 722 and Ramana Dayaram Shetty v. International Airport Authority of India & Ors., (1979) 3 SCC 489.

14. It is pertinent to note that "Appropriate Government" has been defined under the Electricity Act, as follows:

Section 2(5): "Appropriate Government" means, -

(a) The Central Government, -

(i) In respect of a generating company wholly or partly owned by it;

(ii) In relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways; airports, telegraphs, broadcasting stations and any works of defense, dockyard, nuclear power installation;

(iii) In respect of National Load Despatch Centre; and Regional Load Despatch Centre;

(iv) In relation to any works or electric installation belonging to it or under its control;

(b) In any other case, the State Government, having jurisdiction under this Act;

15. It is humbly submitted that the definition of Appropriate Government under the Electricity Act and the settled stand on government companies falling under State under Article 12 of the Indian Constitution, need to be read in tandem with each other and this leads to the conclusion that the Respondent and all other ESCOMs fall within the scope of Appropriate Government under the third proviso to Section 14 and as such are deemed licensees that do not need to obtain a license under the Electricity Act.

16. It is humbly submitted that the Respondent has been operating as the Distribution Company for the past 19 years. The Respondent has had a valid and subsisting license. Without prejudice to the above submissions, the Respondent submits that the Petitioner cannot question the license of the Respondent on the ground that it is barred by limitation.

17. It is pertinent to mention that the Petitioner has been communicating with the Respondent as far back as 2014. During this time, the Petitioner has not raised any dispute on the operation of the Respondent and even entered into a PPA with this Respondent dated 18.01.2018.

Wherefore, it is clear that Petitioner has acquiesced to the fact that the Respondent is a licensee of this Commission.

Therefore, for the reasons stated above and in the light of Statement of Objections filed on behalf of the Respondent, the Respondent prayed that this Commission to dismiss the Petition in the interest of justice and equity.

V. We have heard the arguments and the submissions made by the learned counsels for the parties. From the facts of the case and the submissions made by the parties, the following issues would arise, for our consideration:

Issue No.1: Whether the Petitioners hold a valid license or not?

Issue No.2: Whether the petitioner is discriminated by not granting the preference as extended to the Solar power projects in exempting payment of CSS?

Issue No.3: Whether the Petitioners are liable to pay Cross Subsidy Surcharge (CSS) and if so under which category?

Issue No.4: Whether the demand letters issued by the Respondents claiming CSS from the Petitioners is to be set aside?

Issue No.5: What Order?

VI. After considering the submissions of the parties and the pleadings and material on record, our findings on the above issues are as follows:

Issue No.1: Whether the Petitioners hold a valid license or not?

i. The Petitioners have contended that the license issued to the Respondents have expired in the year 2008 and ought to have been renewed. In this regard, the Petitioner referring to the decision of the Hon'ble Supreme Court in Civil Appeal No. 5479 of 2013 in the case of M/s. Sesa Sterlite Ltd Vs. Orissa Electricity Regulatory Commission and Others, has argued that except DVC and Governments, all other entities have to specifically obtain licence.

ii. The Commission notes that, in the case referred to by the Petitioners the Hon'ble Supreme Court at para 43 has decided as follows:

> *"43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However, with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of SEZ Act which envisages several units being set up in a SEZ area. This is evident from a collective reading of the various provisions of the SEZ Act*

viz. Section 2 (g) (j) (za) (zc), Section 3,4,11,12,13 an15. There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the appellant may be rare. The Notification dated 03.03.2010 providing for the Developer of SEZ being deemed as a Distribution Licensee was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a developer like the Appellant who has established the SEZ only for itself."

iii. From the above decision it is noted that in the case before the Hon'ble Supreme Court, the matter pertains to SEZ and the SEZ was utilizing the electricity for itself and was not supplying the power to consumers. Whereas the Respondents are not SEZ and are supplying electricity to consumers in their area of supply. Thus, the facts in the present case are different from the judgement cited of the Hon'ble Supreme Court and the Petitioners' reliance on the above order of the Hon'ble Supreme Court does not hold water. Further, after enactment of the Electricity Act, 2003, the Commission has issued KARNATAKA ELECTRICITY REGULATORY COMMISSION (CONDITIONS OF LICENCE FOR ESCOMs) REGULATIONS, 2004, Wherein the Respondents are considered as deemed licensee under Section 14 of the Electricity Act 2003. The above Regulations of the Commission is not challenged for Ultra Vires of the EA 2003, regarding the deemed status of licence and has reached finality. Thus, any license issued under Section 14 of the

Act, including the deemed licence, as far as validity of licence is concerned, is governed by Section 15(8) of the Act, which is reproduced below:

> *"15(8). A licence shall continue to be in force for a period of twenty-five years unless such licence is revoked."*

In view of the above deemed licensee status, the Respondents' licence, as per Section 15 (8) of the EA 2003, will be in force for a period of 25 years unless it is revoked. As submitted by the Respondents, the Respondents are paying the Annual License fee and as on date the Commission has not revoked the license issued to the Respondents, which further substantiate the validity of the Respondents' licence.

iv. Alternately the Commission has looked into the argument put forth by the Respondents. The Respondent relying upon the decision of the Hon'ble Supreme Court in the case of Ajay Hasia Vs. Khalid Mujib, (1981) 1SCC 722 has argued that the Respondent and all other ESCOMs fall within the scope of appropriate Government under the third proviso to the Section 14 and as such are deemed licensees that do not need to obtain a license under the Electricity Act.

The Commission notes the following relevant paragraphs of the Hon'ble Supreme Court's Order:

> *"Para 8. We may point out that this very question as to when a corporation can be regarded as an 'authority' within the meaning of Art. 12 arose for consideration before this Court in*

R.D. Shetty v. The International Airport Authority of India & Ores. There, in a unanimous judgment of three Judges delivered by one of us (Bhagwati,J) this Court pointed out:

> *"So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and sub-sequent resolutions on Industrial policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel but the instrumentality or agency of the corporation was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government*

> *acting through instrumentality or agency of corporations should equally be subject to the same limitations."*

The Court then addressed itself to the question as to how to determine whether a corporation is acting as an instrumentality or agency of the Government and dealing with that question, observed:

> *"A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is manage by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition there should be a certain amount of direct control exercised by Government and, if so what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions*

immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government though this consideration also may not be determinative, because even whether the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of government and those which are not."

The Court then proceeded to indicate the different tests, apart from ownership of the entire share capital:

" . . . . if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government. . . . . It may therefore be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would

afford some indication of the corporation being impregnated with governmental character . . . .. . But a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation a State action-Vide Sukhdev v. Bhagatram (1975) 3 SCR 619 at 658. So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State……

There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed. Vide Arthur S. Miller: "The Constitutional Law of the Security State" (10) Stanford Law Review 620 at 664)." "It may be noted that besides the so-called traditional functions, the modern state operates as multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., In Sukhdev v. Bhagatram (supra) where the learned Judge said that "institutions engaged in matters of high public interest of performing public functions are by

> *virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions."*

The court however proceeded to point out with reference to the last functional test:

> *". . . . . the decisions show that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between governmental functions and non-governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social statics has no place. The contract is rather between governmental activities which are private and private activities which are governmental. (Mathew, J. Sukhdev v. Bhagatram (supra) at p.652). But the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference.".*

These observations of the court in the International Airport Authority's case (supra) have our full approval.

"*Para 9. The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows:*

(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor . . . . . whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article12.

Para10. We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this court in the U.P. Warehousing Corporation v. Vijay Narain and the observations made by the learned Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.

Para 11. We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is

created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government Company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.

Para 12. It is also necessary to add that merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is limited in its application only to Part III and by virtue of Article 36, to Part IV; it does not extend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the

purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. That is why the decisions of this Court in S.L. Aggarwal v. Hindustan Steel Ltd. and other cases involving the applicability of Article 311 have no relevance to the issue before us."

v. In the background of the above decision of the Hon'ble Supreme Court, the Commission notes that:

- The Respondent ESCOMs are Registered Companies under the Companies Act, 1956.
- Have a Board of Directors appointed by the Government.
- 100% of the equity is held by the State Government.
- ESCOMs are distributing and supplying the electricity which is the back bone of the economy and serves the public interest at large.
- The State Government is providing considerable amount subsidy to ESCOMs for the supplying electricity to the irrigation pump sets as a policy. In addition, the State Government is providing grants for carrying out certain capital works like Niranthara Jyothi Scheme, Ganga Kalyan Scheme etc- and also infusing additional equity as and when required for improving the net -worth of ESCOMs.

In view of the above, read with the decision of the Hon'ble Supreme Court mentioned Supra, the Commission is of the view that the Respondent ESCOMs are instrumentality of the State Government and hence under Article 12 of the Constitution can be considered as 'State' for the purpose of licence. Also, the ESCOMs are remitting the annual licence fees in terms of the Licensing Conditions specified

under KERC (Conditions of License for ESCOMs) Regulations, 2004. Therefore, in terms of the third proviso to Section 14, ESCOMs are not required to obtain license separately under the Electricity Act, 2003.

In view of the above discussions, the question of renewal of licence by the Respondents at this point of time does not arise and the above Issue regarding validity of licence is answered accordingly.

VII. Issue No.2: Whether the petitioner is discriminated by not granting the preference as extended to the Solar power projects in exempting payment of CSS? And

Issue No.3: Whether the Petitioners are liable to pay Cross Subsidy Surcharge (CSS) and if so under which category?

We have clubbed the issue No.2 & issue No.3, as they are interrelated.

1. On the above issues, this Commission in the case of M/s Kare Power Resources Private Limited Vs South Indian Sugar Mills Association & Ors., in case No.N/136/2019 has passed a detailed order dated 16.02.2021 consequent to the Order of the Hon'ble High Court of Karnataka dated, 29.01.2020 in the Writ Petition Nos. 36427-36428 of 2018. The abstract of the order is produced in the following paragraphs:

   i) The Commission noted that, the above issue of discrimination was raised by the Petitioners before the Hon'ble High Court and the Court has held as under:

   "Para 5 (VI) As to whether the Act enables classification of renewable energy producers, inter se:

The next contention of the petitioners that, in the scheme of the Act, there does not exist any power to discriminate between the renewable energy projects inter se, they being a homogeneous class, again is bit difficult to countenance; true it may be, that Section 42 of the Act prohibits levying cross subsidy surcharge on captive generating plants; but there is no such interdiction against providing exemptions from the levy of the kind in favour of non-captive renewable energy projects; in fact, section 86 (1) (e) of the Act enables the Commission to take measures for promotion of renewable energy sources depending upon the availability and cost of power generation from such sources; thus, it cannot be gainsaid that no such power avails in the Scheme of the Act for making classification amongst the non-conventional energy producers; accepting the contention of the petitioner as to non-existence of power for making classification runs repugnant to the object and scheme of the Act and therefore, as of necessity, such power needs to be conceded to the Commissions."

In view of the above decision of the Hon'ble High Court, the Commission depending upon the availability and cost of generation, can make classification amongst the non-conventional energy producers. Accordingly, the Commission held that the contention of the Petitioners/ Respondent-1 is untenable.

ii) The Hon'ble High Court at page 17 in para VII) (c), referring to sub- paragraphs a, b and c of the Commission's Order dated, 18.08.2014, has observed that the Commission in the above Order

has explained as to why only the solar power projects need to be promoted in the State by granting incentives. However, the Hon'ble High Court has noted that, 'what disadvantage the respondent Commission would have been put to, had the petitioners too were given an opportunity to come out with their versions, is not forthcoming;'. In view of the above, the Hon'ble High Court observed that the Commission before acting upon the aforementioned factor should have taken the version of the non-solar energy producers to make the decision- making process fair and reasonable.

Accordingly, the Hon'ble High Court directed this Commission to review the paragraph No: 6.8 of the impugned Order dated, 14.05.2018 to the extent the same denies benefits to the non-solar energy producers, after hearing all the stakeholders.

In view of the above, as directed by the Hon'ble High Court of Karnataka, one more opportunity was given to the petitioners to substantiate their stand.

iii) The Commission also noted that, though the Petitioners/Respondent1 have stated that, the levy of CSS is a huge hindrance for sustenance of mini-hydel and co-generation power projects, the Petitioners/ Respondent-1 have not substantiated the same in terms of facts and figures relating to their generation and the costs incurred from time to time. The

Petitioners/Respondent-1 have only relied on the contention that, under the Electricity Act, all RE sources are classified as one category and that there is no provision in the Act to exempt any RE source from payment of wheeling and banking charges and CSS. This contention has not been accepted by the Hon'ble High Court.

iv) Regarding, the CSS and the exemption extended to the solar power projects the Commission in the above order expressed the following views:

a) Section 42 of the Electricity Act, 2003 specifically prohibits levying Cross Subsidy Surcharge (CSS) on captive generating plants. However, there is no restriction for providing exemption of CSS to non-captive Renewable sources of energy (RE Sources), as a measure of promotion, as the Commission is mandated under Section 86 (1) (e) of the Act, to promote RE Sources depending upon the availability and the cost of generation from such sources. The Power of the Commission to differentiate RE sources based on availability and cost of generation has been up held by the Hon'ble High Court of Karnataka also, in the writ petition filed by the Petitioners.

b) The contention of the Petitioners / Respondent-1 that the Cross subsidy is an element of Tariff and exempting the same implies that the Commission has fixed lower Tariff for a class of consumers sourcing power from a particular source and such reduction has to be compensated by providing subsidy by the Government, is incorrect.

As per Section 62 (1) of the Act, the Commission has to determine the Tariff for supply of Electricity by generating company to a distribution licensee, transmission of Electricity, wheeling of electricity and retail sale of electricity and does not include CSS. Thus, CSS which is separately dealt in Section 42 of the Act, is a surcharge and not a Tariff, as contended by the Petitioners / Respondent-1. Further, depending upon the paying capacity, certain consumers pay tariff above the average cost of supply, cross subsidising other consumers like agricultural pump sets, who have lower paying capacity. The cross-subsidy level depends upon the Tariff determined for a particular category of consumer and the Commission has not waived cross subsidy to any cross- subsidising consumer. On the other hand, the cross-subsidy surcharge as envisaged in the Act, has to be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee, which is determined based on the formula specified in the Tariff Policy. Thus, the cross subsidy in the retail supply tariff and the CSS for open access consumers are calculated differently and are not the same. The CSS partly compensate the distribution licensee for the loss of cross subsidy on account of consumers seeking open access / wheeling. Thus, the above contention is answered accordingly.

c) The contention of the Petitioners / Respondent-1 that, the Commission has not mentioned in any of its Orders the reason for exempting few solar power projects from payments of CSS and for prescribing specified period for exemption, is not correct.

The Hon'ble High Court itself has observed at page 17 under para VII) (c), referring to sub-paragraphs a, b and c of the Commission's Order dated, 18.08.2014, that the Commission in the above Order has explained as to why only the solar power

projects need to be promoted in the State by granting incentives. Thus, the above contention is answered accordingly.

d) The Petitioners/Respondent-1 have contended that the CSS has to be levied on consumers, whereas in the WBA the Commission passes the burden to generators.

The Commission notes that, as per the Article 5.1 of the WBA (2nd Para), only in case of default by consumers, the generator is liable to pay the open access charges like CSS etc. Generally, if such charges are paid by the generators, the generators would include the same in the Tariff charged by them to their consumers to whom they wheel energy. Thus, the above contention is answered accordingly.

e) The Petitioners / Respondent-1 have contended that the formula for computing the CSS does not include the project cost of either solar projects or the Petitioners' / Respondent-1's projects and therefore, cannot be a criterion to levy CSS.

The Commission had noted that, the formula on CSS and its interpretation has been a matter of contention before the Hon'ble ATE in several cases (Appeal No. 181/2015, Appeal No. 178/2011 to name a few) and the Commission has also passed Orders in Case No. 76/15, 27/16 and 98/16 consequent direction issued by the Hon'ble ATE in Appeal Nos. 259/16, 270/15 and 386/17, wherein the CSS formula is upheld. Thus, the contention raised by the Petitioners / Respondent-1 regarding the CSS formula, which is a settled issue, is not tenable.

f) The contention of the Petitioners / Respondent-1 that, when generation plants are connected to the transmission system and there is no need to pay CSS as there are no wheeling

charges involved, is also not true.

The Commission noted that the Hon'ble Supreme Court of India in CIVIL APPEAL NO. 5479 of 2013 (M/s. Sesa Sterlite Ltd..... Appellant(s) Vs. Orissa Electricity Regulatory Commission and Others....Respondent(s) in Order dated, 25.04.2014) has held as follows in the Paras mentioned below:

"20. ----------

(1) Special Feature of the 2003 Act

21. ----------

(2) Open Access and CSS

22. ----------

23. ----------

24. ----------

(3) CSS: Its Rationale

25. ----------

26. ----------

27. 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 authorized to frame open access in distribution in phases with surcharge for:

(a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and

(b) obligation to supply.

28. 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 nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low-end consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiorari, 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."

In view of the above said Order of the Hon'ble Supreme Court of India, the Commission held that the CSS has to be paid by

the consumers to the area distribution licensee to compensate such licensee for the loss of cross subsidy an account of consumer opting for open access and procuring power from source other than the area distribution licensee, even if such licensees' network is not used. Therefore, the contention raised by the Petitioners / Respondent-1 regarding the CSS does not hold water.

g. The Commission also noted that the Petitioners / Respondent-1 except raising legal issues which are discussed in the previous paragraphs, have not furnished any analysis with facts and figures to substantiate their claim that payment of CSS is a hindrance for sustenance of Petitioners'/Respondent-1's projects and to show that the Petitioners/Respondent-1 are facing competitive disadvantage. In the absence of such data, question of extending the benefits to the Petitioners'/Respondent-1's projects does not arise.

h. Meanwhile, as noted by the Hon'ble High Court of Karnataka in its Order dated, 29.01.2020, whether solar and other RE sources are on the same pedestal or not needs to be established in terms of availability and cost of generation, as equality enshrined in Article- 14 of the Constitution of India, is not treating un-equals equally but it is the other way round. Referring to the Judgement of the Hon'ble Supreme Court in UP Power Corporation Ltd., Vs. Ayodya Prasad Mishra (in Civil Appeal No. 670 of 2008, Order dated 11.09.2008) , the Commission observed that , the Hon'ble Supreme Court has held that treating of un-equals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution.

i. In view of the above, whether, solar power projects stand on a different pedestal vis-à-vis other RE power projects for exempting them from payment of CSS, has to be established in terms of availability and cost of generation considering the circumstances and facts prevailing at the point of time of passing the order dated, 18.08.2014.

j. On the above issue the Commission has elaborately discussed in the KARE order and noted that, when the Commission passed orders exempting solar RE Projects from CSS and other charges, the cost of generation from solar power projects were considerably higher as compared to other RE sources, which necessitated extension of concessions by way of exemption of Wheeling & Banking charges and Cross Subsidy Surcharges. Thus, the decision of the Commission to extend the concession to the solar projects considering the cost of solar generation is also fully justified. Therefore, solar power projects cannot be treated as equals with other RE power projects and treating solar projects differently from other RE Sources for the purpose of levying CSS is a well-reasoned decision in order to promote the solar power generation and the same cannot be termed as discriminatory. It is worthwhile to note that the Government of India has waived Inter-State transmission charges for wheeling of power from solar and wind power projects as a promotional measure, which can't be termed as discriminatory. Further, the Tariff Policy-2016 dated, 28.01.2016, specifies a solar specific RPO vis-à-vis other RE Sources. The target installed capacity by the year FY22, envisaged by Government of India for solar is 100 GW, whereas for all other RE sources put together is 75 GW. Thus, even at the National Level, the solar projects are being treated differently in comparison with the other RE Sources,

which, is a reasonable classification. The classification is an intelligible differentia which distinguishes solar power projects from other RE power projects in terms of availability and costs and also serves the objective of meeting the target of 100 GW of solar power pan India basis, in terms of the International commitment made by India for protection of environment.

In view of the above, the Commission held that concession extended to the solar power projects by the Commission, vide Commission's order dated, 10.10.203/18.08.2014, keeping in view the availability and cost of generation is totally justified.

k. The Commission also noted that, the Petitioners, having agreed to pay the charges determined by the Commission from time to time as per Article 5.1 of the wheeling & banking agreement dated 03.07.2015, by entering into Wheeling & Banking Agreement, now can't go back on the agreement, on the pretext of discrimination.

In view of the above, the contention of the Petitioners/Respondent- 1 that, the exemption of CSS on consumers sourcing power from solar based power projects but levying cross subsidy on Mini Hydro Projects, is highly discriminatory, was rejected.

v. This Commission in the case of of M/s Kare Power Resources Private Limited Vs. South Indian Sugar Mills Association & Ors, on 16.02.2021 in case No./N/136/2019 has held as under:

"In view of the discussions supra, the exemption of Cross Subsidy Surcharge (CSS) and other charges, granted to consumers sourcing power from solar

based power projects as extended by the order dated 18.08.2014 is upheld by the Commission and the contention of the Petitioners/ Respondent-1 that levying cross subsidy surcharge on Mini-Hydel and other RE sources, is discriminatory, is dismissed.."

vi. The decision of the Commission mentioned supra squarely applies for the present case also. In the light of the above irrespective of whether a person is consumer of the area distribution licensee or not, is connected to the distribution system/network of the licensee or not, as long as such person sources electricity from any person other than the distribution licensee of the area, such person is liable to pay CSS.

vii. In view of the above, the contentions of the Petitioners that they are not consumers of respondents, they are not connected to respondent's distribution system, no wheeling-no CSS, the issue of discrimination, CSS cannot be imposed on generators, Commission has not framed Regulations and all other contentions raised by the petitioners regarding levy of CSS is hereby rejected.

2. Regarding the Contention of petitioner that, KERC Regulations are not applicable for inter-state transactions, the Commissions views are discussed below:

In this context the submission made by the respondents are self – explanatory and valid. CERC itself has decided that, even though it has not specified surcharge for use of CTU's system, it does not

absolve the consumer who has been permitted OA by State Commission of the liability to pay the CSS specified under section 42(2) of the EA, 2003.

Therefore, the petitioners' contention that KERC regulations levying CSS is not applicable to the petitioners, as the power procured by them come under the purview of CERC, does not hold water.

3. The next point that has to be considered, is regarding the category under which the Petitioners have to pay the CSS.

   a. On the above issue, the Respondent ESCOMs, have relied on the Commission's order dated, 24.10.2017, in the Bidadi case in complaint No. 5 of 2017. The relevant portion of the said order is reproduced below:

> *"9 (g) The last proviso to sub-Section (2) of Section 42 of the Electricity Act, 2003 provides for Open Access, subject to such Regulations as may be framed by the Commission to all the consumers who require a supply of electricity, where the maximum power to be made available at any time exceeds one megawatt. Such entitlement for Open Access can be availed even by an 'Exclusive Consumer' who has no Contract Demand with the ESCOM. The 'Existing Consumer' availing of the Open Access is not prohibited from relinquishing the Contract Demand with the ESCOM, wholly or in part. Hence, an 'Existing Consumer' availing of the Open Access can become an 'Exclusive Consumer' by relinquishing the Contract Demand with the ESCOM, wholly or in part. There is no obligation to compulsorily supply power to such 'Exclusive Consumers' in excess of the*

Contract Demand with the ESCOM. For this reason, the National Tariff Policy casts a duty upon the ESCOM to make a standby arrangement in the event of outages of the generators supplying to an 'Exclusive Consumer' or in the case of failure of contracted supply under the Open Access. As already noted, the ESCOM has a duty to supply power to an 'Existing Consumer' having a Contract Demand under the universal supply obligation, though such consumer opts for the Open Access.

(h) For the above reasons, we are of considered view that, in case of the existing consumers, they can avail of a part of their demand on open access, while continuing to be a consumer of the Distribution Licensee. This would further lead to the conclusion that, the supply of power over and above the Open Access quantum by the Distribution Licensee to the existing consumers, who avail of Open Access, would amount to supply of energy to its consumers on normal tariff under Contract Demand. In the case of the 'Existing Consumers', the demand charge payable represents the charge for the standby arrangement and the energy charge payable represents the charge for consumption of energy. Therefore, any supply of power to an 'Existing Consumer' over and above the Open Access quantum is to be charged at the normal tariff. This conclusion is irresistible from the different provisions of the Electricity Act, 2003.

(j) The obligation to supply energy under the provisions of the 'standby arrangement' and

charging the tariff for the temporary connection would arise only in the case of the 'Exclusive Consumers' availing of the Open Access. In other words, a consumer having no Contract Demand with the Distribution Licensee is required to pay the tariff for the temporary connection for the energy supplied under the 'standby arrangement', as directed in the National Tariff Policy."

b. From the above it is noted that for the standby arrangement provided by ESCOMs, temporary tariff is applicable as per tariff policy. Per se the order does not classify the exclusive consumers under HT temporary category and only for the purpose of payment of standby charges, HT temporary tariff is levied. Therefore, the reliance of the Respondent ESCOMs on the above case does not hold water.

c. The CSS as per the Tariff policy is the difference between the tariff payable by the relevant category of consumers, including reflecting the Renewable Purchase Obligation and the cost of supply of electricity by the distribution licensee to consumers of the applicable class. Therefore, the amount of CSS payable depends upon the category of consumer i.e., whether the consumer is an industry or commercial etc.,. The Commission is of the view that to categorize an exclusive consumer for the purpose of CSS, the test would be under which category such consumer would fall if he had procured power from the licensee. In the present case the Petitioners are co-generation power plants who generate power as a part of sugar industry to optimize the energy requirements. In addition to the above power from co-generation plants, the sugar industry would procure power from the licensee of the area and / or through

open access to meet additional power requirement, if any. Thus, the main purpose of utilizing the electricity by the Petitioners is for the sugar plant, which is an industry. Thus, the Petitioners would have been classified under HT-2(a)category had they procured power from the Respondents. Therefore, the Commission is of the view that CSS applicable to HT-2(a) category has to be levied for the Petitioners for procuring power under Open Access to meet the power requirement of its sugar industry and associated activates (molasses, press mud etc,) carried out within the premises of such sugar industry.

d. In view of the above, the Commission decides that the Petitioners have to pay the CSS applicable to HT-2 (a) category and accordingly the Respondents are directed to revise the demand raised on the Petitioners.

In view of the above discussion, the issues No. 2 & 3 are answered accordingly.

VIII. **Issue No.4:** Whether the demand letters issued by the Respondents claiming CSS from the Petitioners is to be set aside?

The Petitioners have requested the Commission to set aside the demand raised by the Respondents. As the Commission has decided to levy CSS at HT-2(a) tariff, the demand raised by Respondents needs to be revised accordingly.

Regarding the Petitioners' contention that the demand raised by Respondents are barred by law of limitations, the Commission notes the following:

a. Petitioner-1 has submitted at Annexure A, correspondence of HESCOM dated 17.10.2020 enclosing a bill dated 15.09.2020. While in the letter the amount of CSS claimed is Rs.60,07,343/-, the amount indicated in the bill is Rs.58,52,648/-. Also it is not clear for which period the CSS is claimed, as year-wise break up is not furnished.

b. Petitioner-2 has submitted at Annexure A, correspondence of HESCOM dated 16.03.2018 claiming CSS of Rs.59,095,383/- for the period from June-2013 to Nov-2016(calculation sheet indicates from May 2013). In the said letter earlier correspondence made in 2017 is referred to. However, it is not clear as to whether HESCOM had made any correspondence prior to 2017.

c. Petitioner-3 has submitted at Annexure A, correspondence of HESCOM dated 13.01.2017 claiming CSS of Rs.11972620.47/- for the period from July-2013 to October-2016. In the said letter earlier correspondence made in 2016 is referred to. However, it is not clear as to whether HESCOM had made any correspondence prior to 2016.

d. Petitioner-4 has submitted at Annexure A, correspondence of HESCOM dated 17.02.2017 claiming CSS of Rs.14768256/- for the period from June-2015 to October-2016. In the said letter earlier correspondence made in 2016 is referred to. However, it is not clear as to whether HESCOM had made any correspondence prior to 2016.

e. Petitioner-5 has submitted at Annexure A, correspondence of HESCOM dated 09.10.2017 claiming CSS of Rs.97371689/- for the period from May-2014 to September-2017. In the said letter earlier correspondence made in 2016 is referred to. However, it is not

clear as to whether HESCOM had made any correspondence prior to 2016.

f. Petitioner-6 has submitted at Annexure A, correspondence of HESCOM dated 24.08.2016 claiming CSS of Rs.28349821/- for the period from July-2011 to April-2016. In the said letter earlier correspondence made in 2016 is referred to. However, it is not clear as to whether HESCOM had made any correspondence prior to 2016.

The year wise details of CSS furnished does not clearly indicate as to, when the CSS became due and when it was claimed by ESCOMs. In the absence of the above information, the Commission is unable to consider the prayer of the Petitioner regarding limitation.

In view of the above, the issue No.4 is answered accordingly.

IX. Court fee:

a. The Petitioners have requested not to levy court fee. The KERC(Fee) Regulations,2016 specify as under:

"3. Fee:

(i) (a) Every petition, application, complaint shall be made to the Commission along with payment of stipulated fee specified in these Regulations. Several persons having similar but separate and distinct interest or cause of action in the subject matter of controversy involving

common questions of law and facts may file a common petition but each Petitioner shall pay separate fee.

XXXXXXX

(iii) The Commission may in appropriate cases, by order in writing waive or reduce the amount of fee payable under these Regulations."

b. The Commission in case of Kare Power has not levied court fees. Considering the request of the Petitioners and exercising the powers conferred under Regulation 3(iii) of KERC(Fee) Regulations,2016, the Commission decides to waive the court fees to the Petitioners.

X. <u>Issue No.5:</u> What Order?

For the foregoing reasons, we pass the following:

<u>ORDER</u>

1. The contention of the Petitioners that levying CSS to the Petitioners vis. a vis Solar Power projects, is discriminatory and all other contention raised in this regard, is dismissed. The Petitioners are directed to pay CSS as determined by the Commission in its Tariff Orders;
2. The Petitioners shall pay the CSS applicable to HT-2 (a) category and accordingly the Respondents are directed to revise the demand raised on the Petitioners; and
3. The Court fee is waived for all the Petitioners.

4. The original order be kept in OP No64/2020 and the copies of it be kept in OP No.65/2020, OP No.66/2020, OP No.67/2020, OP No.68 and OP No.69/2020.

Accordingly, the Petitions are disposed of.

Sd/-	Sd/-	Sd/-
(SHAMBHU DAYAL MEENA)	(H.M.MANJUNATHA)	(M.D.RAVI)
Chairman	Member	Member