

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 216/MP/2015**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri A.K. Singhal, Member**

**Shri A. S. Bakshi, Member**

**Dr. M.K. Iyer, Member**

**Date of Hearing: 5.5.2016**

**Date of Order : 6.7.2016**

**In the matter of**

A petition under Section 79 (1) (f) of the Electricity Act, 2003.

**And**

**In the matter of**

Essar Steel India Ltd  
Hazira, Surat

Petitioner

Vs

Dakshin Gujrat Vij Company Ltd  
Nana Varchha Road,  
Kopadara,  
Surat – 395 006

Respondent

**Parties Present:**

Shri C.S.Vaidyanathan, Senior Advocate, ESIL

Shri Vikrant Pachnanda, Advocate, ESIL

Ms. Neeha Nagpal, Advocate, ESIL

Shri M.G.Ramachandran, Advocate, DGVL

Ms. Ranjitha Ramachandran, Advocate, DGVL

**ORDER**

The present petition has been filed under clause (f) of subsection (1) of Section 79 of the Electricity Act praying for the following reliefs, namely:

- “i. Declare that the levy of Cross Subsidy Surcharge by the Respondent on the Petitioner, is illegal as the same is in violation of Section 38(2)(d)(ii) of the Electricity Act 2003 read with Rule 6 of the Electricity Rules, 2005 and accordingly set-aside all the invoices raised by the Respondent on the Petitioner towards the levy of Cross-Subsidy Charges; and*
- ii. Direct refund of the amount of Cross subsidy charges collected by the Respondent from the Petitioner [as calculated in Annexure P-25] between the between April 2014 to March 2015 along with interest @ 18% per annum; and*
- iii. Without prejudice and in the alternative, declare that the levy of cross-subsidy charges in any case will be permissible and legal only to the extent of the available capacity of the State transmission utility; and/or*
- iv. Pass such other order[s], as this Hon’ble Commission may deem fit and proper in the facts and circumstances of the case.”*

2. The petitioner has set up the steel plant at Hazira, Surat in the State of Gujarat. The petitioner signed a Power Supply Agreement dated 14.10.2009 with the respondent for drawing power for its consumption through the Gujarat State network. The average power requirement of the petitioner’s steel plant is stated to be up to 850 MW, with peak demand of 1050 MW. To meet its power requirement, the petitioner entered into the Power Purchase Agreement dated 24.7.2007 (**PPA**) with its sister concern, Essar Power Madhya Pradesh Limited (**Essar Power**), having a power plant (2 X 600 MW) in the State of Madhya Pradesh, for supply of 682 MW power. One unit of 600 MW of the power plant is stated to have been commercially operative since 29.4.2013. Essar Power, the generating company, has been granted Long-Term Open Access (**LTA**) by the Central Transmission Utility (**CTU**) for supply of power to the petitioner. The petitioner was granted connectivity by the CTU on the condition that the petitioner would

be connected to the inter-State transmission system in radial mode and it would have to get disconnected from the Gujarat State transmission system.

3. The petitioner approached the Western Regional Load Despatch Centre (**WRLDC**) requesting for (a) transfer of load control area jurisdiction of the petitioner from the SLDC Gujarat to the WRLDC; (b) grant of status of a Regional Entity for using Open Access power; and (c) for treating the petitioner as direct UI pool member of the Western Region. The WRLDC, however, did not accede to the petitioner's requests stating that there was no provision in the Grid Code to provide for transfer of load control area from the SLDC to the RLDC. The WRLDC, however, informed the petitioner that it would schedule the power to the petitioner being procured under the LTA through Gujarat, treating the petitioner as an embedded entity in the State. The WRLDC advised the petitioner to seek clarifications from this Commission on the issues raised since it involved interpretation of the regulations of this Commission.

4. Based on the advice of the WRLDC, the petitioner filed a petition, being Petition No 245/MP/2012 wherein the petitioner sought direction to WRLDC to transfer its load control area jurisdiction from the SLDC, Gujarat to the WRLDC, and prayed to be granted the status of a Regional Entity under the Grid Code for the purpose of scheduling of power and unscheduled interchange accounting. The petitioner further requested this Commission to lay down guidelines for addressing such situations in future. The petition was disposed of by this Commission vide order dated 8.6.2013. This Commission granted the petitioner's prayer for shifting of the load control area jurisdiction from the SLDC Gujarat to the WRLDC after disconnection of the petitioner from the State

transmission system. This Commission directed that the petitioner be granted the status of a Regional Entity of the Western Regional Grid. The other directions issued in the said order dated 8.6.2013 need specific mention as they are relevant for the present purpose, namely:

“49. ....

*(j) M/s. ESSAR steel Ltd shall remain liable to pay all applicable cross subsidy charges including surcharge and other charges, if any, applicable under the provisions of the 2003 Act and as per the provisions of the regulations of State Regulatory Commission. Necessary metering arrangement shall be in accordance with the arrangement as already agreed to between ESIL and DGVCL.*

*(k) The issue of dues of DGVCL needs to be sorted out by DGVCL and ESIL bilaterally.”*

5. Certain other incidental directions were also issued with which we are presently not concerned. This Commission’s order dated 8.6.2013 has acquired finality since no further proceedings seem to have been taken by any of the parties.

6. Pursuant to the order dated 8.6.2013, the WRLDC vide its letter dated 19.6.2013 **(Annexure P 9)** granted the status of the Regional Entity to the petitioner. The petitioner has stated that after obtaining ‘No Objection’ from the respondent it was disconnected from the State transmission system on 23.6.2013. Thereafter, the petitioner gave notice dated 25.6.2013 **(Annexure P 14)** to the respondent for termination of the Power Supply Agreement dated 14.10.2009. The respondent in its letter dated 29.6.2013 **(Annexure P 16)** informed the petitioner that the Power Supply Agreement would be terminated with effect from 1.9.2013.

7. Relying upon this Commission’s direction at para 49 (j), extracted above, the respondent filed a petition, Petition No 112/2014, **(Annexure P 22)** before this

Commission under clause (c) of subsection (1) of Section 79 of the Electricity Act alleging that it had been regularly raising bills for the Cross Subsidy Surcharge since June 2013 but the petitioner had not made any payments. The respondent stated that till 30.4.2014 an amount of ₹107.65 crore was outstanding. In the petition, the respondent sought direction to the petitioner to immediately pay the outstanding amount of ₹107.65 crore and thereafter pay the monthly bills regularly in future. The respondent also prayed for direction to the WRLDC to get its consent before issuing NOC for open access to the petitioner and in the event of non-payment of the dues, the respondent would have the right to withdraw the open access permission already granted. The prayers made by the respondent in the petition before this Commission are extracted below:

- “a. Direct Essar to immediately pay outstanding amount of the cross-subsidy surcharge of Rs. 107.65 crores due as on 30.4.2014;*
- b. Direct Essar to pay the monthly bills of cross subsidy surcharge being raised by the petitioner on Essar regularly;*
- c. Direct WRPC to get consent of the petitioner before issuing NOC for open access in Essar and in the event of non-payment, the petitioner would have the right to withdraw the open access permission granted to Essar;*
- d. Pass such other order (s) as deemed appropriate in the facts of the case.”*

8. The petitioner in its preliminary reply (**Annexure P 23**) opposed the maintainability of the petition filed by the respondent (Petition No. 112/2014) *inter alia* on the ground that the dispute relating to payment of the Cross Subsidy Surcharge was pending before the Gujarat Electricity Regulatory Commission (**the Gujarat Commission**) in Petition No 1420/2014 filed by the petitioner and the Gujarat Commission was the competent authority to decide the issue of payment of the Cross

Subsidy Surcharge. The petitioner further stated that the petition filed by the respondent under clause (c) of subsection (1) of Section 79 of the Electricity Act was not maintainable since the dispute was not concerned with inter-State transmission of electricity. On the basis of an application filed, this Commission in the order dated 22.7.2015 (**Annexure P 24**) allowed the respondent to withdraw the petition.

9. The petitioner is stated to have objected to billing of the Cross Subsidy Surcharge by the respondent. In its letter dated 27.7.2015 (**Annexure P 25**) the petitioner requested the respondent to revise and cancel the bills amounting to ₹257.94 crore pertaining to the period June 2013 to June 2015 and also refund the cross subsidy amounting to ₹100.91 crore already paid. However, the respondent in its letter dated 3.8.2015 (**Annexure P 26**) raised the fresh bill for ₹13,97,82,800/- for the month of July 2015. Thereafter, the respondent raised another bill dated 2.9.2015 for the month of August 2015. Since the dispute has not been resolved, the petitioner has filed the present petition.

10. According to the petitioner, in terms of Section 38 (2) (d) (ii) of Electricity Act 2003 read with Rule 6 of the Electricity Rules, 2005 the power to specify the surcharge for use of the transmission system owned by the CTU on payment of the transmission charges and a surcharge thereon is vested in this Commission. It has been pointed out that this Commission has not specified the surcharge payable for use of the inter-State transmission system of the CTU. The petitioner has urged that the respondent is not competent to raise bills for the Cross Subsidy Surcharge. The petitioner has stated that though it is physically located within area of supply of the respondent, it has not been

utilizing the distribution or transmission network in the State of Gujarat since 23.6.2013, after disconnection from the STU network and connection with the CTU's 400 kV transmission line. The petitioner has stated that it was compelled to seek disconnection/transfer from the Gujarat network since the surplus capacity for transfer of power to meet its entire demand was not available on the State network. The petitioner has stated that power used by it is drawn from its captive power plant through the dedicated tie-line within its complex and through the 400 kV transmission line of the CTU. Since the petitioner is not a consumer of the respondent nor is it using the State's transmission system, the respondent is not obligated to keep available the capacity for power supply to the petitioner and in the circumstances, the question of levy of the Cross Subsidy Surcharge on the petitioner by the respondent does not arise.

11. The respondent has filed its reply. The respondent has stated that the Cross Subsidy Surcharge is payable when the consumer draws power supply from a source other than the distribution licensee of his area, by availing the open access. In this regard reliance has been placed on the judgments of the Hon'ble Supreme Court in **Sesa Sterlite Ltd Vs Orissa Electricity Regulatory Commission** [(2014) 8 SCC 444] and the Hon'ble Appellate Tribunal in **Chhattisgarh State Power Distribution company Ltd Vs Aryan Coal Beneficiaries Pvt Ltd** [2010 ELR (APTEL) 476]. The respondent has stated that the petitioner was its consumer who is presently availing power supply generated by Essar Power in the State of Madhya Pradesh after obtaining LTA. Therefore, the petitioner is liable to pay the Cross Subsidy Surcharge determined by the Gujarat Commission. Accordingly, the respondent has stated that the petitioner has been billed for the Cross Subsidy Surcharge determined by the Gujarat

Commission in accordance with sub-section (2) of Section 42 of the Electricity Act. The respondent has submitted that this Commission in the order dated 8.6.2013 in Petition No. 245/MP/2012 had directed the petitioner to pay all applicable subsidy charges as per the provisions of the regulations specified by the Gujarat Commission. It has been stated by the respondent that under Rule 6 of the Electricity Rules, 2005, the amount of Cross Subsidy Surcharge, the manner of payment and utilization has to be specified by this Commission in accordance with the amount, the manner of payment and utilization determined by the Gujarat Commission under Section 42 (2) of the Electricity Act. It has been submitted that as per proviso of Section 38 (2) (d) (ii) of the Electricity Act, the surcharge is to be utilized for the purpose of meeting the requirement of current level cross subsidy. The respondent has urged that the present petition is not maintainable before this Commission in view of pendency of the petition before the Gujarat Commission for similar relief.

12. We have heard the learned counsel for the parties. We have carefully considered the submissions made at the Bar and have also perused the documents available on record.

13. The petition has been filed under clause (f) of subsection (1) of Section 79 of the Electricity Act, which reads as under:

***“79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-***

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating*

*companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*(c) to regulate the inter-State transmission of electricity ;*

*(d) to determine tariff for inter-State transmission of electricity;*  
.....

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”*

14. From clause (f) of subsection (1) of Section 79 it is noticed that this Commission has jurisdiction to adjudicate disputes involving the generating companies or the transmission licensees. Thus, the first condition for invoking jurisdiction of this Commission is that the dispute should involve the generating company or the transmission licensee. In the present case, the parties to the litigation are neither the generating company nor the transmission licensee. The petitioner is engaged in the business of manufacture of steel and other related activities whereas the respondent who raised the bills for the Cross Subsidy Surcharge is the distribution licensee. Therefore, the foremost condition for invoking clause (f) of subsection (1) of Section 79 is not satisfied.

15. From clause (f) of subsection (1) of Section 79, it is further seen that the dispute raised before this Commission has to be in regard to matters connected with clauses (a) to (d) of subsection (1). As seen from the above extracts of subsection (1) of Section 79, clauses (a) and (b) relate to regulation of tariff of the generating companies, clause (c) relates to regulation of inter-State transmission of electricity and clause (d) relates to determination of tariff for inter-State transmission of electricity. Apparently, the dispute does not relate to tariff, whether of the generating company or the inter-State

transmission licensee. The dispute relates to recovery of the Cross Subsidy Surcharge. By no stretch of imagination, the dispute can be said to be related to regulation of inter-State transmission of electricity falling under clause (c) of subsection (1) of Section 79. In fact, it is the petitioner's own understanding that the dispute arising out the respondent's demand for the Cross Subsidy Surcharge does not involve regulation of inter-State transmission of electricity. In the petition (Petition No 112/2014) filed by the respondent before this Commission under clause (c) of subsection (1) of Section 79 seeking directions to the petitioner to immediately pay the outstanding amount of ₹107.65 crore and pay the monthly bills regularly in future, the petitioner in its preliminary reply dated 13.8.2014 (**Annexure P 23**) submitted as under:

“2. It is submitted that the present Petition filed by the Petitioner is not maintainable u/s 79 (1) (c) r/w Section 142 of the Electricity Act, 2003. It is submitted that Section 79 (1) (c) provides for the adjudication of dispute relating to interstate transmission of electricity. The present petition has been filed by the Petitioner for direction against respondent no. 1 to pay the outstanding amount of cross subsidy surcharge. The present petition is, therefore, not maintainable u/s 79 of the Act and, therefore, deserves to be dismissed.”

16. In view of the above discussion, the dispute neither involves the generating company or the transmission licensee nor is it in relation to any matter falling in clauses (a) to (d). Accordingly, the present petition is clearly outside the scope of clause (f) of subsection (1) of Section 79 of the Electricity Act.

17. The matter can be viewed from another angle. The petitioner had filed Petition No 1240/2014 before the Gujarat Commission, “seeking adjudication of the dispute between the parties with respect to the wrongful levy of cross-subsidy surcharge for the captive use of 600 MW (Unit-1) of Essar Power MP Limited (“**EPMPL**”) by Dakshin

Gujarat Vij Company Limited (**DGVCL**), Respondent no. 2 herein, in terms of Section 42 (2) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 no cross-subsidy charges can be levied on the captive use of the Power as such captive use is exempted. In spite of the clear provisions made under the Act and the Rules framed thereunder, the DGVCL has levied cross-subsidy charges on the captive use of 600 MW (Unit 1). The said levy is therefore illegal and contrary to the provisions of the Act.”

18. In the above petition, the petitioner made the following prayers:

“37. in the facts and circumstances mentioned hereinabove, ESIL prays that this Hon’ble Commission may be pleased to:

- (A) To admit and allow the present petition;
- (B) To declare that EPML Power Plant and its units are captive generating plants of ESIL and use of the electricity by ESIL is for captive use;
- (C) To declare that the respondents have no authority to decide the cross subsidy surcharge;
- (D) Quash and set aside the cross subsidy bills raised by Dakshin Gujarat Vij Company Limited upon Essar Steel India Limited in respect of 600 MW (Unit-1) of Essar MP Power Limited;
- (E) Declare that Essar Steel India Limited is exempted from payment of cross-subsidy surcharge in respect of 600 MW (Unit-1) of Essar Power MP Limited;
- (F) Pass such other or further orders as may be deemed proper in the facts and circumstances of the case.”

19. In the preliminary reply in Petition No 112/2012 ibid also, the petitioner *inter alia* stated that the issue of payment of the Cross Subsidy Surcharge is to be decided by the

Gujarat Commission. The stand taken by the petitioner in its preliminary reply was as under:

- “5. *It is submitted that this Hon’ble Commission passed an order dated 08.06.2013 in Petition No 245/MP/2012, wherein the respondent no. 1 company had prayed for a direction against WRLDC to transfer load control area jurisdiction of ESL from SLDC Gujarat to WRLDC, Mumbai. This Hon’ble Commission has passed several directions in the aforesaid order dated 08.06.2013. It is submitted that one of the directions passed by this Hon’ble Commission was that respondent no. 1 company shall be liable to pay all applicable cross subsidy charges including surcharge and other charges, if any, applicable under the Regulations of the State Regulatory Commission. It is, therefore, submitted that the issue as to the payment of cross subsidy charges has to be decided by State Regulatory Commission i.e. GERC.” (Emphasis added)*
- “8. *It is, therefore, clear from the aforesaid observations of this Hon’ble Commission that the appropriate Forum for determining the issue as to the payment of cross subsidy surcharge would be Hon’ble GERC. Hence the present petition filed by the Petitioner is no maintainable in law and deserves to be dismissed.” (Emphasis added)*
- “13. *It is reiterated that it is the Hon’ble GERC which is a competent Authority to decide issue as to payment of cross subsidy charges as per prevailing laws and regulations. The said petition is pending for hearing and adjudication before the Hon’ble GERC. The present Petition, therefore, deserves to be dismissed. The Hon’ble GERC is the Competent Authority under the Electricity Act, 2003 in light of following:*
- (i) .....
  - (ii) *The Hon’ble GERC has in its Order dated 13.06.2014 in Petition No 1240 of 2014 has held that it has the jurisdiction to adjudicate the present dispute.*
  - (iii) *Under Section 79 of the Electricity Act, this Hon’ble Commission can adjudicate inter-state disputes, and the present dispute does not fall in that category.*

*For reasons mentioned above, there is threshold bar under the Electricity Act, 2003 for this Hon’ble Commission to entertain the misconceived Petition, seeking illegal reliefs. Since the same issue*

*is pending for adjudication before the Hon'ble Gujarat High Court, this Hon'ble Commission ought not to proceed as this would preempt the majesty of the rule of law as it would lead to the violation of this Hon'ble Commission's Order dated 08.06.2013. Any relief granted in this Petition would amount to seeking an advanced ruling on sub-judice matter under adjudication.*

13. *In view of the aforesaid submissions, more particularly the fact that the issue is sub-judice before the Hon'ble GERC and since there has been no violation of the order dated 08.06.2013, as alleged by the Petitioner, the present Petition deserves to be dismissed. The Company reserves its right to file a detailed Affidavit-in-reply on merits, if required."*

20. It has thus been the consistent stand of the petitioner in the petition (Petition No 1420/2014) filed before the Gujarat Commission as also in the reply filed before this Commission in Petition No 112/2014 that the dispute relating to payment of the Cross Subsidy Surcharge is within the jurisdiction of the Gujarat Commission. Based on the stand taken by the petitioner in Petition No 112/2014, the respondent withdrew the petition filed before this Commission. The petitioner cannot now turnaround and raise a dispute before this Commission against the respondent's claim for the Cross Subsidy Surcharge.

21. In Petition No 1420/2014 filed by the petitioner before the Gujarat Commission, the Gujarat Commission in its order dated 13.6.2014 held that since the dispute involved levy of the Cross Subsidy Surcharge, it was within the jurisdiction of that Commission. The relevant para of the Gujarat Commission's order is as under:

*"3.1 According to above decision of the CERC, levy of cross subsidy surcharge is subject to the provisions/regulations of the State Commission. As such, any dispute regarding levy of the cross subsidy surcharge is within the Commission's jurisdiction. Hence, it is binding to the parties. Hence, the present petition fall in the Commission jurisdiction and we admit the same."*

22. The above order was passed on the petition filed by the petitioner before the Gujarat Commission. The petitioner relied upon this order in its preliminary reply filed in Petition No 112/2014. Yet, in the teeth of the order of the Gujarat Commission, the petitioner filed the present petition before this Commission on 8.9.2015, praying for the identical reliefs as sought before the Gujarat Commission. The fact of the matter is that this Commission in the order dated 8.6.2013 has already decided that the petitioner was liable to pay all applicable cross subsidy charges including surcharge and other charges, if any, applicable under the provisions of the Electricity Act and as per the provisions of the regulations of the Gujarat Commission. In the light of these facts, in our considered view the present petition is clear abuse of the process of law and that the petitioner has attempted to resort to the forum-shopping. We strongly condemn this approach of the petitioner.

23. Learned senior counsel for the petitioner sought to distinguish between the issues raised before the Gujarat Commission and the issues raised in the present petition. Learned Senior counsel explained that the issue before the Gujarat Commission was whether the power plant of Essar Power was captive power plant of the petitioner and use of electricity by the petitioner was the captive use and whether the Cross Subsidy Surcharge levied by the Gujarat Commission under subsection (2) of Section 42 of the Electricity Act was payable by the petitioner for such captive use. The issues in the petition before the Gujarat Commission were raised on the assumption that the Cross Subsidy Surcharge was not applicable for using captive power. Learned senior counsel stated that the present petition raises the question of payment of the Cross Subsidy Surcharge for use of the transmission line of the CTU for conveyance of

power from another State for consumption in the State of Gujarat by availing open access, without using the State transmission lines.

24. Learned counsel for the respondent stated that in the rejoinder to the respondent's reply in Petition No 245/MP/2012, the petitioner specifically agreed to pay cross subsidiary charges. Learned counsel submitted that the petitioner's liability to the Cross Subsidy Surcharge was irrespective of whether or not it was connected to the State network. According to learned counsel for the respondent, the petitioner was bound by the conditions set forth in the order dated 8.6.2013 subject to which it was transferred from the load control area jurisdiction of the SLDC Gujarat to the load control area jurisdiction of the WRLDC and was granted the status of the Regional Entity, which stipulated that the petitioner would remain liable to pay all applicable cross subsidy charges including surcharge and other charges, if any, applicable under the provisions of the Electricity Act and as per the provisions of the regulations of the Gujarat Commission. Learned counsel pointed out that the premises of the petitioner were connected with the network of DGVCL and accordingly, the petitioner continued to be its consumer within the scope of Section 2 (15) of the Electricity Act. Learned counsel argued that the reason for enacting Rule 6 was that the consumer was liable to pay the Cross Subsidy Surcharge specified under Section 42 (2). It was argued by the learned counsel that if this Commission independently specifies the Cross Subsidy Surcharge under Section 38 (2) (d) (ii), this would lead to imposition of two charges, one by this Commission and other by the State Commission. It was the submission of the learned counsel that the Cross Subsidy Surcharge under Section 42 (2) is decided

State-wise, as it depends on state specific elements, but this Commission would not be able to determine the Cross Subsidy Surcharge for each State.

25. Before we deal with the issue relating to levy of surcharge under Section 38 (2) (d) (ii), we may point out that the petitioner has raised the captive use of power generated at Essar Power in the present petition as well. The petitioner has stated that it is being supplied power from its captive power plant located in the State of Madhya Pradesh and is therefore not liable for payment of the Cross Subsidy Surcharge, as under:

*“6. It is submitted that the Petitioner is not utilizing the State Distribution/ Transmission network w.e.f. 23.06.2013 i.e. after disconnection from STU network and connection with the CTU 400 KV line. The power used in the Petitioner’s complex is from its captive power plant procured through the dedicated tie-line within its complex and through the 400 KV transmission line which is the Central Transmission Utility (CTU) grid. Hence the Petitioner is not a consumer of the STU and as such the Respondent is not obligated under the provisions of the Electricity Act, 2003 to keep available capacity of power supply for the Petitioner, should the Petitioner require or demand such power from the Respondent. Thus, even though the Petitioner is physically situated in the same location as the Respondent but it does not have any connection or association with the Respondent. Therefore, the question of levy of Cross Subsidy Surcharge on the Petitioner by the Respondent does not arise. The Petitioner has ceased to be a state entity and is now regional entity.”*

26. The above averment of the petitioner has been disputed by the respondent in its reply to para (f) of the Brief Facts as under:

*“..... Essar Steel had filed Petition No. 1420 of 2013 before the State Commission challenging the levy of cross subsidy surcharge on the wrong plea that Essar Steel is the captive user of the electricity generated at Essar Power MP limited and therefore not liable to pay cross subsidy surcharge,  
”*

27. The plea of captive use of power has been taken by the petitioner relying on the various provisions of the Electricity Act under which a captive user is exempt from payment of the Cross Subsidy Surcharge. The material available on record, including the averments of the petitioner, suggest that the petitioner has entered into the PPA with Essar Power for sale and purchase of electricity. The petitioner and Essar Power though sister concerns, belonging to the same Group, have been incorporated under the Companies Act. It is trite law that the companies incorporated under the Companies Act, even those having the relationship of the holding and subsidiary companies, are the separate legal entities in the eyes of law. The petitioner and Essar Power which enjoy separate legal status, independent of each other, have entered into a commercial arrangement for sale and purchase of electricity under a formal arrangement by executing the PPA. The petitioner is engaged in the business of manufacturing of steel and for furtherance of its business objective it purchases power from Essar Power on commercial terms. Accordingly, the petitioner and Essar Power cannot be said to be single entity. For this reason, supply of power by Essar Power to the petitioner on commercial terms cannot be treated as captive use by the petitioner.

28. According to the learned senior counsel, the petitioner was the user of the transmission system of the CTU. He urged that the present petition has been filed since this Commission had not specified the Cross Subsidy Surcharge under Section 38 (2) (d) (ii) of the Electricity Act. It was submitted that the State Commission did not have the power and authority to levy the Cross Subsidy Surcharge under Section 38 (2) (d) (ii) and the power and authority vests exclusively under this Commission. Learned senior counsel submitted that even though Rule 6 of the Electricity Rules, 2005 declares that

the Cross Subsidy Surcharge specified by this Commission should be in accordance with the surcharge levied by the State Commission, yet the requirement of specifying the Cross Subsidy Surcharge by this Commission under Section 38 (2) (d) (ii) cannot be dispensed with. Based on the above submissions, the learned senior counsel submitted that the petitioner did not have any liability to pay the Cross Subsidy Surcharge billed by the respondent.

29. We have considered the submission of the learned senior counsel of the petitioner and the learned counsel for the respondent. Section 38 (2) (d) provides as under:

*“(2) The functions of the Central Transmission Utility shall be –*

*(d) to provide non-discriminatory open access to its transmission system for use by-*

*(i) any licensee or generating company on payment of the transmission charges; or*

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

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

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

*Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission:*

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

30. Subsection (2) of Section 38 of the Electricity Act prescribes the functions of the CTU. Under clause (d) of subsection (2), the CTU is mandated to provide non-discriminatory open access for use by (i) the licensee and generating company and (ii) the consumer who has been provided open access by the State Commission under subsection (2) of Section 42 of the Electricity Act. When open access is availed by the licensee or the generating company under sub-clause (i) it has to pay only the transmission charges.

31. Under sub-clause (ii) of clause (d) *ibid*, open access provided to the consumer on the CTU's transmission system is subject to such consumer paying the transmission charges and the surcharge specified by this Commission. First proviso to sub-clause (ii) further lays down that the surcharge levied by this Commission is to be utilised for meeting the requirement of current level cross-subsidy. It was argued by the learned counsel for the respondent that the Cross Subsidy Surcharge leviable by this Commission under Section 38 (2) (d) (ii) is the same as the Cross Subsidy Surcharge levied under Section 42 (2) by the State Commission. Learned counsel pointed out that separate Cross Subsidy Surcharge is not to be specified by this Commission since otherwise the consumer would be subjected to double surcharge, one specified by the State Commission and other by this Commission. We do find this submission of the learned counsel to be acceptable. The Parliament has made a separate provision for levy of surcharge by this Commission under Section 38 (2) (d) (ii). In case it is accepted that the Cross Subsidy Surcharge to be specified by this Commission is the same as levied by the State Commission, as has been argued by the learned counsel for the respondent, Section 38 (2) (d) (ii) would be rendered redundant and otiose.

32. In terms of the first proviso to sub-clause (ii) of clause (d), surcharge to be levied by this Commission under sub-clause (ii) is to be used to meet the requirement of “current level cross-subsidy”. The “current level cross-subsidy” refers to cross subsidy for the transmission of the CTU as Section 38 in its entirety concerns the CTU. The tariff of the transmission system of the CTU is being determined by this Commission under subsection (2) of Section 62 read with clause (d) of subsection (1) of Section 79 of the Electricity Act. The tariff for the transmission system of the CTU currently does not have any element of cross subsidy. Therefore, this Commission has not specified the surcharge under Section 38 (2) (d) (ii). We may, however, add that Section 38 (2) (d) (ii) and Section 42 (2) of the Electricity Act are mutually exclusive. 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).

33. During the course of hearings, the learned counsel for the parties extensively referred to Rule 6 of the Electricity Rules, which is extracted below:

***"6. The surcharge under section 38.-The surcharge on transmission charges under section 38, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge to be specified by the Central Commission under sub-clause (ii) of clause (d) of sub-section (2) of section 38 shall be in accordance with surcharge on the charges for wheeling, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge as may be specified by the Appropriate Commission of the State in which the consumer is located under sub-section (2) of Section 42 of the Act."***

34. Rule 6 of the Electricity Rules prescribes the guidelines to be taken into account by this Commission while specifying the Cross Subsidy Surcharge under Section 38 (2) (d) (ii) of the Electricity Act. For the present since surcharge has not been specified by this Commission, the guidelines in Rule 6 do not come into operation.

35. Determination and levy of cross subsidy surcharge is a condition precedent for grant of permission by the State Commission to avail open access under sub-section (2) of Section 42 of the Act. This Commission has allowed supply of power by Essar Power to the petitioner through the transmission system of CTU after taking note of the submission of the petitioner to pay the cross subsidy surcharge to DGVCL. This Commission has also categorically stated in the order dated 8.6.2013 in Petition No. 145/MP/2013 that the petitioner would be required to pay the cross subsidy surcharge determined by the State Commission. Therefore, the petitioner cannot seek a review of the said order dated 8.6.2013 in the garb of its contention that the cross subsidy surcharge has to be determined by this Commission in terms of Section 38 (d) (ii) of the Act.

36. In our view, the dispute raised falls within the jurisdiction of the Gujarat Commission before whom a petition already filed by the petitioner is pending.

37. For all the aforesaid reasons, the present petition is hereby dismissed.

**Sd/-**  
**(Dr. M. K. Iyer)**  
**Member**

**sd/-**  
**(A. S. Bakshi)**  
**Member**

**sd-**  
**(A.K. Singhal)**  
**Member**

**sd/-**  
**(Gireesh B. Pradhan)**  
**Chairperson**