Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 344 of 2019

Case of Indorama Synthetics (India) Limited seeking revocation of Demand Notice for recovery of Cross Subsidy Surcharge and the Additional Surcharge dated 15 November 2019 and Disconnection Notice dated 3 December, 2019 issued by MSEDCL.

Coram

I.M. Bohari, Member

Mukesh Khullar, Member

Indorama Synthetics (India) Limited. .....Petitioner

V/s

Maharashtra State Electricity Distribution Co. Ltd.

Maharashtra State Load Despatch Centre .....Respondents

Appearance:

For the Petitioner : Shri Vikram Nankani (Sr. Counsel)

For the Respondent No.1 : Shri Harinder Toor (Counsel)

For the Respondent No.2 : Mrs R.B. Malgonde (Rep.)

ORDER

Dated: 31 December, 2019

1. Indorama Synthetics (India) Ltd. (**IRSL**) has filed this Case dated 23 December, 2019 seeking revocation of the Demand Notice of Rs. 22.96 Cr. issued by Maharashtra State Electricity

Distribution Co. Ltd. (**MSEDCL**) towards Cross Subsidy Surcharge (**CSS**) from March 2018 till October 2019, Additional Surcharge (**ASC**) from November 2016 till October 2019 and seeking revocation of disconnection Notice dated 3, December, 2019 (**Disconnection Notice**) issued by MSEDCL for recovery of the aforesaid charges. IRSL has cited Section 86 (1) (a) of the Electricity Act, 2003 (**EA**) and Regulation 32 of MERC (Distribution Open Access) Regulations, 2016 (**DOA Regulations**) and MERC(Transmission Open Access) Regulations, 2016 (**TOA Regulations**) seeking relief for the prayers made in the Case. IRSL is also seeking direction against MSEDCL for sanction of its Contract Demand (**CD**) as per its Application dated 21 September, 2019 without insisting on payment of the dues towards CSS and ASC and with all benefits under the Special Vidharbha Package incentive scheme, the Textile Policy and all other benefits as may be available to IRSL under these schemes/packages.

2. IRSL's main prayers are as under:

a. hold and declare that the demand of CSS and Additional Surcharge by and under the Demand Notice dated 15.11.2019 and the disconnection notice dated 3.12.2019 issued by Respondent No.1 pursuant to the wrongful demand as being illegal and contrary to the provisions of the said Act, Open Access Regulations, 2016, the Supply Code and the Textile Policy;

b. direct Respondent No. 1 to immediately sanction the contract demand in accordance with Petitioner's application dated 21.09.2019 without insisting on payment of the alleged dues towards CSS and Additional Surcharge and with all benefits under the Special Vidharbha Package incentive scheme, the Textile Policy and all other benefits as may be available to the Petitioners under the present schemes/packages;

c. pending final hearing and decision in the present Petition, the Respondents be restrained from taking any steps in furtherance of the demand notice dated 15.11.2019 and the disconnection notice dated 3.12.2019;

d. Ad-interim relief in terms of prayer clause c above

3. The Petition states as under:

3.1 IRSL is the largest textile manufacturing unit in the Vidarbha region of Maharashtra.

3.2 IRSL has a captive coal fired power generating plant having capacity of 40 MW and also has a captive power diesel generating plant having capacity of 31 MW. Additionally, it has requisite permission/clearance to draw power upto 50 MVA from Open Access (which includes power from third parties) (as a full Transmission Open Access user) and the same is drawn by IRSL as per its requirement.

3.3 IRSL is connected to 220 kV transmission network of the State Transmission Utility (**STU**), Maharashtra State Electricity Transmission Co. Ltd. (**MSETCL**), from which it has the ability of drawing power from the State Grid.

3.4 IRSL is entitled to avail open access upto 50 MVA upon payment of OA charges including CSS. IRSL has been paying Central and State Transmission Charges other than basic energy charges as and when power is drawn by IRSL. IRSL is availing open access under the TOA Regulations.

3.5 Currently, IRSL does not maintain any CD with MSEDCL and an application for grant of CD is pending with MSEDCL.

3.6 MSEDCL is illegally refusing to process IRSL's application dated 21 September, 2019 for sanction of CD for 37 MVA till clearance of alleged dues of Rs. 22.96 Cr. towards CSS for the period from March 2018 to October 2019 and ASC for the period from November 2016 to October 2019. By threatening disconnection under Section 56(1) of the EA, MSEDCL is violating its universal supply obligations under Section 43 of the EA. Also, MSEDCL is violating the Regulation 3.1 and 3.4 of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 (**Supply Code Regulations**).

3.7 The Regulation 14.6 of the TOA Regulations provides that a Consumer who has a supply contract with a Distribution Licensee but is connected to the Intra-State Transmission System (**InSTS**) shall be liable to pay CSS and ASC as applicable.

3.8 Regulation 14.6 (b) of the DOA Regulations provides that wheeling charges shall not be applicable in case a Consumer or Generating Station is connected to the Transmission System directly or using dedicated lines owned by the Consumer or Generating Station. IRSL is connected directly to 220 kV system of STU/MSETCL. Therefore, no part of distribution system and associated facilities is being used by IRSL for drawing power through STU, from injecting point to IRSL's plant. Accordingly, in terms of Regulation 14.6 (b) read with Section 42 (4) of EA, the payment of ASC on the charges of wheeling would not arise at all.

3.9 Since IRSL is not liable to pay wheeling charges, the question of payment of ASC on wheeling charges does not arise.

3.10 ASC is levied on open access consumers by MSEDCL under Section 42(4) of EA and Regulation 14.8 of the DOA Regulations. Both provisions recognize that the Distribution Licensee is entitled to receive ASC on charges of wheeling in addition to wheeling charges. The aforementioned Regulation states that ASC shall become applicable, only if obligation of supply in terms of Power Purchase Agreement continues to be stranded or there is unavoidable obligation of the distribution licensee to bear fixed costs consequent to such commitments. ASC is determined by the concerned State Commission to meet the fixed cost (stranded cost) of power for the Distribution Licensee arising out of its unavoidable obligation to supply. In the present Case, historically, MSEDCL is not supplying any power to IRSL. IRSL is not an embedded consumer with MSEDCL. Therefore, MSEDCL's power is not getting 'stranded' due to IRSL. Accordingly, no ASC is liable to be levied IRSL.

3.11 Further, from a bare reading of the provisions contained in Section 42(4) of EA read with Regulation 14.8 of the Open Access Regulations, it is clear that the ASC is only applicable

on the open access consumers, maintaining contracted demand with the Distribution Licensee, i.e. consumers availing open access while remaining an embedded consumer of the Distribution Licensee. In the present Case, from 2015 onwards, IRSL has been self-reliant availing power through transmission open access. MSEDCL has not had any obligation to supply power to IRSL from 2015 onwards. Therefore, there is no power that is being stranded for IRSL due to IRSL's open access power consumption. Accordingly, no claim for ASC is made out under Section 42(4) of EA.

3.12 In its Judgment dated 20 November 2015 in Appeal No. 84 of 2015, the Hon'ble ATE has held as follows:

"*28. ... ... In the present case, no part of distribution system and associated facilities of the Appellants is sought to be used by the Respondent No. 2 for transmission of power through CTU, from injecting point to the Respondent No. 2's plant. Therefore, as per definition under Section 2(76) of the Electricity Act, 2003, Respondent No.2 is not liable to pay wheeling charges on Additional Surcharge for the open access. In terms of Section 42 of the Electricity Act, 2003, the payment of Additional Surcharge on the charges of wheeling would not arise at all*."

3.13 The aforesaid judgment was challenged before the Hon'ble Supreme Court in Civil Appeal No. 504 of 2016. However, the Hon'ble Supreme Court by an Order dated 29 January 2019 dismissed the Civil Appeal by, upholding the Judgment passed by the Hon'ble ATE.

3.14 Further, based on application(s) made by IRSL, MSLDC, from time to time, has granted Open Access to IRSL. IRSL from FY 2015 onwards, has made timely payments of CSS of Rs. 19.51 Cr. IRSL has never been asked by MSEDCL to pay any ASC and hence never made any payments towards wheeling charges and ASC as it is not using MSEDCL's distribution network.

3.15 The Textile Policy notified and issued by Government of Maharashtra (**GoM**) on 17 February, 2018 granted inter alia a number of concessions to textile units including exemption to textile units availing OA from payment of CSS. The relevant provision of the Textile Policy in respect of grant of exemption from CSS is as below**:**

"*7.11 Electricity Concessions*

7.11.1 Cross subsidy on open access will not be levied for textile units.

7.11.2 The State Government's Energy Department will not levy charges other than "transmission charges" on projects using non-conventional sources (solar, wind, etc.) of energy.

7.11.3 A subsidy of Rs. 3 per unit will be given to co-operative spinning mills for a period of 3 years. Within this period of 3 years the units will set up non-conventional power projects to fulfil their power needs. The restriction of 1 MW is removed from the net metering scheme. The subsidy of Rs. 3 per unit will not be applicable to open access. The subsidy will be reviewed every year and will be reduced to keep the overall annual subsidy burden within Rs. 150 crore.

7.11.4 A subsidy of Rs. 2 per unit will be given to power looms using power above 200 HP.

7.11.5 Subsidy given to power loom units using less than 27 HP, 27 to 200 HP and more than 200 HP, will similarly be applicable to garment, knitting and hosiery units.

7.11.6 A subsidy of Rs 2 per unit will be given to spinning mills (except co-operative spinning mills), processing units and all other textile units which are using more than 107 HP power.

7.11.7 It is observed that the electricity rates for units using upto 27 HP are more than the rates applicable for units using 27 to 107 HP. Necessary action will be taken to eliminate this disparity.

7.11.8 When any unit is simultaneously using conventional and non-conventional power, the use of both the power sources will be taken into consideration to decide the load factor.

7.11.9 A committee comprising the Director General, Maharashtra Energy Development Agency (MEDA) and the Director Textile will be set up to finalize the subsidy required for setting up of co-operative spinning mills on solar power within three years."

3.16 In order to avail benefits under the aforesaid GoM Textile Policy, IRSL wrote to MSLDC, being the nodal authority for raising of bills, informing that henceforth IRSL being a textile unit will not be liable to pay CSS and claimed refund for CSS paid in February 2018 (for the period between 17 February, 2018 to 28 February, 2018). MSLDC vide its letter dated 20 March, 2018 sought advice from MSEDCL regarding IRSL's liability for CSS. It appears that despite several reminders, MSEDCL failed to respond to MSLDC's letter. MSLDC pursuant to IRSL's letter dated 17 March, 2018 ceased to levy CSS from IRSL. IRSL had made payments of CSS till February 2018 pursuant to periodic bills raised by MSLDC. Since March 2018, MSLDC acting in furtherance of the Textile Policy decision of the GoM did not raise any bills in respect of CSS nor demand any payment in respect thereof from IRSL**.** The conduct of MSLDC clearly evidences that all Parties acted on the basis that no CSS was payable by IRSL pursuant to the Textile Policy decision in force since 15 February 2018.

3.17 Thereafter, IRSL on 21 September, 2019, applied to MSEDCL for sanction of 37 MVA CD with connected load of 99999 kW for the power supply to its textile manufacturing unit at Butibori in Maharashtra. It was confirmed that IRSL was desirous of stopping supply from its Captive Power Plant (CPP) of 71 MW capacity in order to avail incentives on power tariff sanctioned through special package for Vidarbha Region and additional subsidy which was/is available under the Textile Policy.

3.18 On 8 November, 2019, in good faith, IRSL even undertook to clear any genuine/legal dues pending as per applicable Rules and Regulations. In the event immediate electricity supply

as requested is granted to IRSL, it will eliminate use of polluting fossil fuel to the tune of approx. 3.50 lakh ton per annum. Not only it will be environmentally beneficial, but also result in improving MSEDCL's cash flow by approx. Rs. 216 Cr. per annum.

3.19 On 4 November, 2019, MSLDC wrote to MSEDCL stating that under OA Regulations, it was no longer responsible for collecting CSS from IRSL and MSEDCL should take necessary action regarding CSS due from IRSL.

3.20 Despite IRSL's undertaking, MSEDCL vide letter dated 8 November 2019 informed that ASC was payable by IRSL for the period November 2016 to October 2019 and CSS was payable for the period March 2018 to October 2019. The said letter also stated that after payment of all dues of CSS and ASC which were supposed to be billed by MSLDC, the load/CD sanction to IRSL will be given by MSEDCL.

3.21 The said letter also stated that MSEDCL by a purported email dated 31 May, 2018 had informed MSLDC to continue to levy CSS on IRSL. The said letter also seeks to rely upon GoM's GR dated 21 December, 2018 to inter alia state that the benefits of the Textile Policy are not available to OA users. It is evident that having acted on the understanding that no CSS was payable by IRSL from February 2018 onwards pursuant to the Textile Policy, the Respondents are now attempting to arm twist IRSL into payment of purported dues that are not legally recoverable. The above is clearly an afterthought and an attempt to take advantage of the fact that an Application for sanction of CD is now pending before MSEDCL. The Respondents have not raised any demands on IRSL in respect of the purported CSS and ASC. The Respondents have for the first time after IRSL made the Application for CD purported to raise the illegal demand on IRSL with a view to take undue advantage of the situation and extort monies from IRSL.

3.22 MSEDCL vide its letter 15 November, 2019 directed IRSL to clear allegedly pending total dues of Rs. 22.96 Cr. within 15 days. (Rs. 14.01 Cr. towards ASC for the period November 2016- October 2019 and Rs. 8.95 Cr. towards CSS for the period March 2018 to October 2019.

3.23 IRSL vide its letter dated 20 November, 2019 disputed the demand of Rs. 22.96 Cr. of MSEDCL. Further, IRSL stated that it is not liable to pay CSS as per the clause 7.11.1 of the GoM's Textile Policy and hence MSEDCL's demand is baseless. Regarding the ASC, IRSL stated that it is an OA consumer directly connected to 220 KV system of MSETCL. Hence, there is no question of payment of ASC as per Section 42(4) of the EA read with Regulation 14.8 and 14.6 of the DOA Regulations, 2016 and Judgment dated 20 November, 2015 passed by the Hon'ble Appellate Tribunal for Electricity (**ATE**) in Appeal No. 84 of 2015 which was confirmed by the Hon'ble Supreme Court in Civil Appeal No. 504 of 2016.

3.24 The representatives of IRSL also met with the Director (Commercial) and Chief Engineer Commercial of MSEDCL on 14 November 2019 and 15 November 2019 to apprise them of the inapplicability of CSS and ASC. However,, MSEDCL unlawfully served a disconnection notice dated 3.12.2019 under Section 56 (1) of the EA on IRSL due to alleged outstanding dues of CSS and ASC. Section 56(1) of EA can only be invoked when

any charges are due in respect of supply, transmission, distribution or wheeling charges. As explained above IRSL is not liable to pay wheeling charges or ASC or CSS and has at all times been paying Transmission Charges and admittedly there are no dues towards Transmission Charges. Hence, MSEDCL's notice under Section 56 is unlawful.

3.25 IRSL further approached MSEDCL on 9 December 2019 asking for withdrawal of the Disconnection Notice dated 3 December 2019 as it is not liable to pay CSS or ASC on wheeling charges.

3.26 MSEDCL has also refused to take any action vis-à-vis IRSL's Application dated 21 September 2019 for CD of 37 MVA with connected load of 99999 kW for the power supply to its textile manufacturing unit at Butibori in Maharashtra. MSEDCL is refusing to grant connected load to IRSL till clearance of alleged dues of approx. Rs. 22.96 Cr. MSEDCL can only recover dues as authorized under the EA and the Regulations issued thereunder. MSEDCL is acting in contravention to Regulation 3.1 and 3.4 of the Supply Code Regulations by attempting to recover dues in the form of CSS and ASC which do not accrue to IRSL. MSEDCL is also failing to perform its universal supply obligations under Section 43 of the EA. MSEDCL is obligated to supply power to the Petitioner on request and cannot withhold supply over illegal levies imposed on the Petitioner.

3.27 IRSL filed a Writ Petition before the Hon'ble High Court Judicature at Bombay, Bombay Bench (B) as it was also seeking directions against the GoM for continued implementation of the Textile Policy. However, pursuant to a statement made by MSEDCL's Advocate, the High Court directed IRSL to approach the Commission for all reliefs.

3.28 Pursuant to the filing of the Writ Petition, MSEDCL responded to IRSL's letters dated 20 November 2019 and 9 December 2019. IRSL by its letter dated 17 December 2019 responded to the said letters inter alia stating that since the matter was sub-judice, IRSL were presently not responding to the letter.

3.29 Therefore, Demand Notice dated 15 November, 2019 and Disconnection Notice dated 3 December, 2019 are illegal as MSEDCL is arbitrarily raising demand on IRSL towards ASC, when the same is ex-facie not applicable to IRSL and not liable to pay.

3.30 IRSL acted in furtherance of the Textile Policy and has already consumed 56.62 MUs of electricity for the period from March 2018 to October 2019 and IRSL having altered its position irreversibly on the basis of representation made by the State Government that no CSS was payable for consumption of power under open access, the Respondents cannot now be permitted to reverse its position. The doctrine of promissory estoppel will apply and the State and the Respondents having made a representation through the Textile Policy, based on which IRSL has altered his position, is now duty bound to implement said Policy and ensure that IRSL gets the benefit of exclusion provided in paragraph 7.11.1 therein.

3.31 Respondents have from March 2018 implemented the Textile Policy in as much as there was no demand towards CSS in the bills raised by the Respondents. The sudden reluctance

in continued implementation of the Textile Policy, at a time when IRSL applies for sanction of 37MVA CD/load is arbitrary and without application of mind.

3.32 MSEDCL's conduct is contrary to the principle of promissory estoppel. The GoM in exercise of its power under Article 162 of The Constitution of India notified the Textile Policy consequent to which IRSL altered its position and decided to withdraw more power from the State's transmission network as opposed to captive generation. Hence, now IRSL having acted on the promise of the State cannot be left in the lurch. MSEDCL further ignored that RISL had a legitimate expectation of exemption from CSS considering the same was provided expressly in the Textile Policy notified by the GoM. MSEDCL has ignored that the principle of promissory estoppel prevents it from now raising invoices for CSS on IRSL.

3.33 Further, the Hon'ble Supreme Court of India in the matter of State of Punjab v. Nestle India Ltd., reported in (2004) 6 SCC 465, held as under:

> *" 47. The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event readjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet.*
>
> *48. In the case before us, the power in the State Government to grant exemption under the Act is coupled with the word "may" — signifying the discretionary nature of the power. We are of the view that the State Government's refusal to exercise its discretion to issue the necessary notification "abolishing" or exempting the tax on milk was not reasonably exercised for the same reasons that we have upheld the plea of promissory estoppel raised by the respondents. We, therefore, have no hesitation in affirming the decision of the High Court and dismissing the appeals without costs."*

3.34 In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, reported in (2007) 5 SCC 447 at page 495, it was held by the Hon'ble Supreme Court that:

> *"133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and did not take away the same expressly or by necessary implication, the*

principles of legitimate expectation of a substantive benefit may be held to be applicable.

3.35 Further, even MSLDC was informed by IRSL regarding the CSS exemption as mentioned in Textile Policy. MSEDCL and MSLDC have not objected to IRSL's refusal to pay CSS under the Textile Policy. However, now MSEDCL is arbitrarily asking IRSL to pay CSS when IRSL has actively reduced consumption from its Captive Plant.

3.36 MSEDCL should also bear in mind that the State Government has issued the Textile Policy keeping in mind the importance of the textile industry to the state economy. The textile industry is the second largest employment generating sector after agriculture. The present policy is aimed as a stimulus to the textile industry intended to generate employment and double agricultural income. Therefore, in the event, there is any impediment in continuing to implement the Textile Policy, instead of burdening the open access user of electricity, MSEDCL should directly address the issue with the State Government and Ministry of Power.

3.37 Under the Act, the State Government is fully empowered to issue policy directives, that are in public interest. These directions have to be carried out in its entirety. The failure to do so violates the provisions of the said Act.

3.38 Since MSEDCL is an entity owned and controlled by the Government of Maharashtra, it cannot take a stand contrary to the policy notified by the State Government.

3.39 Without prejudice to the aforesaid, MSEDCL is illegally seeking to claim dues contrary to Section 56(2) of the EA. The said Section clearly provides that "Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer under this Section shall be recoverable after the period of two years from the date when such sum become first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity". MSEDCL is purporting to claim dues from November 2016, which is beyond the period of 2 years, pertinently the said amount was not shown as arrears in any bills raised on IRSL and is as such not recoverable.

3.40 IRSL has no other alternate remedy available to it in the facts and circumstances of the present case for the reliefs prayed for in the Case. In the aforesaid circumstances, and for all the reasons stated hereinabove, IRSL is entitled to all the reliefs sought by it in the present Case.

3.41 IRSL has good case on merits and hence it is just, necessary and in the interest of justice that pending the hearing and final disposal of the Case, MSEDCL be restrained from acting upon or taking any steps in furtherance of the Demand Notice dated 15 November, 2019 and the Disconnection Notice dated 3 December, 2019. In the event, the power supply to IRSL is disconnected, grave loss and inconvenience will be occasioned to it. The balance of convenience is in favour of IRSL and grave harm and prejudice would be caused to IRSL in the event the aforesaid Demand Notice and Disconnection Notice are not stayed.

4. MSEDCL Reply dated 27 December, 2019 stated as under:

4.1 The Prayers for interim/ad-interim reliefs made by IRSL is devoid of any merit and needs to be rejected by the Commission. The onus to prove the three basic ingredients mandatory for grant of an ad-interim relief, is on IRSL which are as under:

(a) Prima Facie Case;

(b) Balance of Convenience;

(c) Irreparable Loss.

4.2 IRSL has not been able to satisfy the above stated three mandatory ingredients in its entire Case, so as to enable it to avail any interim/ad-interim stay. The Commission while granting any interim/ad-interim stay has to consider the above three mandatory ingredients along with another major aspect i.e *"the enormity of losses and hardships to MSEDCL likely to result from grant of any interim order"*.

4.3 Without prejudice to the above, in case the Commission comes to a conclusion that interim/ad-interim stay needs to be provided in favor of IRSL, then the Commission may consider not to grant any blanket ad-interim stay in financial matters and put appropriate conditions before any interim/ad-interim Order is passed so as to protect the interest of MSEDCL.

4.4 The reliance placed by IRSL on the Judgment passed by the ATE in Appeal No. 84 of 2015 to support its Case on the issue of levy of ASC is incorrect to avail any interim/ad-interim stay. In the matter decided in the aforesaid ATE Judgment, the Respondent No. 2 (M/s Essar Steel India Ltd.) was utilizing Open Access from private generator through CTU's network and was completely isolated from the State's network. This is not a position in case of IRSL.

4.5 The issue of CSS for the financial year 2018-2019 is dependent on interpretation and adjudication of the GoM's Textile Policy 2018-2023 as well as GoM's Resolution dated 21 December, 2018 wherein various directives for implementation of Textile Policy 2018-23 were issued. Hence, as on date, it cannot be stated by IRSL that balance of convenience is in its favor.

4.6 Further, Section 56 of EA, needs to be enforced by the Commission in the present matter and IRSL should be directed to deposit the sum of money in accordance with this provision to avail any relief as prayed for in Prayers (b) and (c).

4.7 IRSL is availing power to the tune of 50 MVA under Third Party Open Access and as such it is liable for payment of CSS and ASC as per directives of the Commission in MYT Order dated 3 November, 2016 in Case No. 48 of 2016.

4.8 IRSL being a State Pooled OA consumer, the CSS and ASC charges were supposed to be levied by MSLDC. Subsequently, in view of GoM's Textile Policy 2018-23 dated 15

February, 2018, MSLDC vide letter dated 20 March, 2018 sought clarification as to whether CSS would be applicable to IRSL or otherwise.

4.9 The GoM had declared State Textile Policy 2018-23, however, the detailed directives through Government Notifications or Resolutions were awaited. Hence, MSEDCL, vide email dated 31 May, 2019, has informed MSLDC to continue levying CSS to IRSL till directives are received in said matter.

4.10 Upon receipt of MSLDC's letter dated 4 November, 2019, it was observed that the CSS for the period from March 2018 to October 2019 and ASC for the period from November 2016 to October 2019 has not been levied and recovered from IRSL. Hence, MSEDCL, vide letter dated 8.11.2019 informed MSLDC to levy and recover CSS & ASC to IRSL.

4.11 The GoM has issued GR dated 21.12.2018 wherein various directives for implementation of State Textile Policy 2018-23 were issued. In the said GR dated 21.12.2018, the clause regarding exemption of Open Access consumers from levy of CSS is not mentioned.

4.12 The financial impact on MSEDCL due to subsidies granted by GoM in Textile Policy is being paid by GoM. MSEDCL can submit the claim for the above subsidies before GoM on the basis of Government Resolution (GR). Since exemption of CSS is not mentioned in GR, the same will not be paid by GoM to MSEDCL. Hence, IRSL has to pay the CSS to MSEDCL.

4.13 IRSL has contended that being an EHV consumer, it is not liable to pay ASC. On this contention, it is submitted that MSEDCL has contracted capacity which is stranded due to increase in Open Access transactions. The ASC is approved and being levied as a compensatory amount payable towards the fixed cost of stranded power resulting from approved power purchase contracts.

4.14 The Commission in MYT Tariff Order for MSEDCL in Case No. 48 of 2016 has approved ASC and relevant extract is as follows:

B] Applicability of Additional Surcharge:

…….

> *Further, as per Regulation 14.8 of the DOA Regulations, 2016, Additional Surcharge shall be applicable to all consumers who have availed OA to receive supply from a source other than the Distribution Licensee to which they are connected. No exemption or specific dispensation has been provided in the case of RE-based transactions as far as levy of Additional Surcharge is concerned. No such exemption is provided for such transactions in the EA, 2003 either. Therefore, the OA consumers/users sourcing power from RE Generating Plants come squarely within the purview of Section 42 (4) of the EA, 2003 and are liable to pay Additional Surcharge.*

C] Methodology for determination of Additional Surcharge:

……

……..

In view of the above, the Commission has approved the Additional Surcharge of Rs. 1.11 per unit to be applicable with effect from 1 November, 2016. The Additional Surcharge determined through this Order shall be applicable until revised through further Orders. The Commission shall re-determine the Additional Surcharge for the last two years of the Control Period at the time of the MTR, based on actual data of stranded capacity, the approved fixed cost of such stranded capacity, and the OA volume over the yearly period.

4.15 The Commission, through the above Order, has approved levy of ASC to all the consumers under Open Access without any discrimination on basis of voltage level.

4.16 IRSL's contention that it is an EHV consumer and directly connected to Transmission System and hence ASC is not applicable, is incorrect. In normal course, such consumers are billed by MSEDCL in its License Area and accordingly the Generation Capacities for them are also contracted by MSEDCL. Hence, in case of such consumers like IRSL opting for Open Access, there will be stranded capacities, and this makes them liable for payment of ASC as per Regulations/Order.

4.17 IRSL has applied for sanction of CD and same is kept on hold in view of pending payments towards ASC and CSS.

4.18 In view of the above, the present Petition should be dismissed.

5. At the hearing held on 27 December 2019:

5.1. The Advocate for IRSL reiterated the submissions as made out in the Petition and stated that:

i. There are essentially two issues raised under the present Petition. One is regarding levy of CSS and second is regarding levy of ASC.

ii. As regards to the levy of CSS, there is a Textile Policy issued by the GoM dated 15 February, 2018 which exempts IRSL from levy of CSS. MSEDCL needs to follow this Textile Policy.

iii. IRSL has surrendered its CD with MSEDCL being a full Transmission Open Access Consumer on 2 June 2015. IRSL has paid CSS till February 2018 and subsequently, it has not paid the same as per the Textile Policy of the GoM.

iv. Vide letter 17 March 2018, IRSL approached MSLDC stating that as per the Textile Policy, CSS is not applicable to it. MSLDC referred the matter of levy of CSS to MSEDCL and sought its opinion. However, MSEDCL has not responded to MSLDC.

v. As regards to the levy of ASC, MSEDCL has raised the demand of ASC from November 2016 onwards till October 2019 for the first time on 15 November 2019. In

accordance with the Regulation 14.8 of OA Regulations, ASC is applicable on the wheeling charges. As per Regulation 14.6 (b), IRSL being an EHV consumer, is not required to pay wheeling charges and hence it is exempted to pay ASC. Hence, demand of ASC by MSEDCL is not sustainable.

vi. The Order passed by the Commission in Case No. 58 of 2017 in HPCL matter held that Tata Power Company (the Distribution Licensee therein) was not entitled to levy the wheeling charges and the wheeling losses on the supply of electricity through open access to HPCL (OA consumer therein) which was directly connected to the 110 KV transmission line of Tata Power Company.

vii. As per Section 56 of EA, MSEDCL cannot claim recovery of any amount beyond a period of two years and that too without showing as recoverable under the issued to MSEDCL.

viii. CSS is not applicable to it till the Textile Policy is amended by the Government of Maharashtra. The Textile Policy of Government of Maharashtra exempting CSS is enforceable and it is not cancelled till it is withdrawn.

5.2. MSEDCL has contended about its stranded capacities, but MSEDCL has to manage its power purchase contracts and IRSL has no role in the same.Advocate for MSEDCL stated that:

i. IRSL has not come up with any certificate from a competent authority that it is entitled to the exemption for levy of CSS under GoM's Textile Policy.

ii. Textile Policy has been issued by the GoM and not issued by MSEDCL. Further the Textile Policy has not attained finality. As mentioned, in the clause No. 12 and 13 of the Policy, no fund has been established and there is separate resolution and guidelines to implement the policy which has been issued by the GoM.

iii. The issue to be decided is as to whether or not under the said Policy, the GoM can exempt CSS in accordance with the provisions of EA.

iv. CSS and ASC are to be levied by MSEDCL in accordance with the Orders passed by the Commission and these Orders are not set aside by any higher Court.

v. The Textile Policy issued by the GoM is not as per the Law and clause 1(c) of the subsequent GR issued on 21 December 2018 by the GoM does not specify the exemption of CSS for OA Consumer.

vi. Promissory estoppel for Textile Policy should be taken against GoM and not against MSEDCL.

vii. The Commission's Order dated 3 November 2016 in Case No. 48 of 2016 (Multi Year Tariff Order of MSEDCL for 2016-17 to 2019-20) has directed MSEDCL to levy the ASC on all Open Access Consumers excluding Captive users. MSEDCL is seeking to

implement these Orders and it has no authority to go contrary to this Order till same is set aside by the Hon'ble ATE.

viii. TOA and DOA Regulations are issued simultaneously as they are inter-related and construed together.

ix. DOA Regulations 1.2, 14.1 and 14.7 and 14.8 clearly state that the ASC is applicable on OA transactions and there is no exemption except for captive users.

x. There is no direction to the Commission under Section 108 of EA for exemption of CSS.

6. IRSL filed its written submission on 30 December 2019 re-iterating its earlier submissions and mainly stated as under on the following three issues:

6.1. **Petitioner is not liable to pay Cross Subsidy Surcharge ("CSS")**

i. MSEDCL has sought to contend that the Textile Policy is not applicable to IRSL. It is submitted that IRSL is clearly covered under clause 4.2 and 4.15 of the Textile Policy. Further the Government has on 16 March 2018 issued a clarification circular which *inter alia* states that in clause 4.15 of the Textile Policy "*Polyester/Polyester Staple Fibre (PSF)/Polyester Yarn/Partially Oriented Polyester Yarn (POY)/Draw Texturized Polyester Yarn (DTY)/Fully Drawn Polyester Yarn (FDY)/Polyester Chips*" have also been included. Therefore, there cannot be any doubt that IRSL is covered by the Policy. Even assuming without admitting MSEDCL's stand, clause 4 of the Textile Policy is an inclusive clause and also lists the following category of units which would be covered by the policy: "*4.21 Other units of textile industry not mentioned herein."*

ii. Further, MSEDCL has sought to rely on provisions of the EA and contended that MSEDCL is bound to act in consonance with the statute regardless of any other circumstances. In this regard, MSEDCL has sought to rely on the decision of the Apex Court in ITC Bhadrachalam Paperboards Vs. Mandal Revenue officer 1996 6 SCC 634 to say that a promissory estoppel cannot be enforced to exempt a party from a statutory mandate. IRSL states that the said judgement has been referred by the Hon'ble Supreme Court in State of Punjab v. Nestle which has been relied upon by IRSL. In Paras 42 to 45 of the Nestle case, the Hon'ble Supreme Court has discussed the ITC Badhrachalam case at length and held in para 45 and 46 that:

> *"45. None of these decisions have been considered in ITC Bhadrachalam Paperboards V. Mandal Revenue Officer (supra) except for a brief reference to Chandrasekhara Aiyar, J's judgment which was explained away as not being an authority for the proposition that even where the Government has to and can act only under and in accordance with a statute an act done by the Government in violation thereof can be treated as a presentation to found a plea of promissory estoppel. But that is exactly what the learned Judge had said.*
>
> *46. In any event judicial discipline requires us to follow the decision of the larger Bench. The facts in the present case are similar to those of prevailing in Godfrey*

Philips (supra). There too, as we have noted earlier, the statutory provisions require exemption to be granted by notification. Nevertheless, the Court having found that the essential pre-requisites for the operation of promissory estoppel had been established, directed the issuance of the exemption notification."

iii. MSEDCL has also sought to contend that the Textile Policy has been issued by the State of Maharashtra and since the State Government is not a party before the Commission, no directions can be passed as regards the implementation of the Textile Policy. Such an argument on behalf of MSEDCL is contrary to the stand taken by the Ld. Advocate of MSEDCL before the Hon'ble High Court in IRSL's Writ Petition (where the State was made a party) that under Regulation 32, all and any dispute can be decided by Commission. MSEDCL had stated therein that the Commission will and has the power to hear IRSL's case even though it relates to implementation of the State Policy. Further, the Respondents are state-owned undertakings and as such cannot take the shelter of this argument.

iv. MSEDCL's reliance on the Hon'ble Supreme Court's decision in M/s. Sesa Sterlite Ltd Vs. Orissa Electricity Regulatory Comm. & Ors is also misplaced as in that case, there was no Policy issued by the State Government exempting payment from CSS.

6.2. **Additional Surcharge**

i. MSEDCL's reliance upon the Tariff order of the Commission and contention that MSEDCL is implementing the same is once again erroneous. The Tariff Order only determines the Additional Surcharge to be payable in case it is applicable. It is the IRSL's case that the Additional Surcharge is not payable by IRSL and hence the question of applicability of the Tariff Order on IRSL does not arise. In any event and without prejudice, the Tariff Order is dated November 2016 and admittedly, MSEDCL has even thereafter, not levied or charged any amounts towards either wheeling charges or ASC upon IRSL. Respondent therefore cannot now take shelter of the Tariff Order as they themselves did not ley any additional surcharge since November 2016 till November 2019.

6.3. **IRSL's Application for sanctioning Contract Demand**

i. By holding the IRSL hostage over alleged dues that are wrongfully being demanded, MSEDCL is acting in violation of Regulation 3.1 and 3.4 of the Supply Code Regulations and is also failing to perform its universal supply obligations under Section 43 of the EA.

7. MSEDCL filed its written submission on 30 December 2019 re-iterating its earlier submissions and mainly stated as under on following two issues:

I] Cross Subsidy Surcharge: -

7.1. Vide E-mail dated 31 May 2018, MSEDCL replied to MSLDC asking it to keep on recovering CSS from IRSL as there are various issues like applicability of the Textile Policy to IRSL and further instructions from GoM for exemption of CSS or grant of

subsidy are yet to be received. Hence, till further instructions from GoM MSLDC is required to charge CSS as per the Commission's Regulation. However, MSLDC for no reason stopped levying CSS to IRSL from March 2018.

7.2. Subsequently GoM has issued a GR dated 21 December 2018 in connection with the GoM Textile Policy 2018-23 clarifying the terms for giving concessions in Electricity Tariff rates. As per the GoM GR dated 21.12.2018 –

i. Clause 1 (c) - The electricity tariff concession of Rs 3/- shall not be applicable to open access consumer.

ii. Clause 2 (1) -To get the electricity tariff concession the concerned textile unit has to apply online on the web site of Director (Textile),

iii. Clause 3 (2) - For deciding eligibility of the applicant for electricity tariff concession, a Committee has to be formed under the Chairmanship of Director (Textile) comprising representative of Textile department and Chief Engineer level officer of MSEDCL. The said committee has to decide the eligibility of the applicant and to inform MSEDCL accordingly.

iv. Clause 3 (4) & (5)- The Energy Department of GoM will compensate MSEDCL for the expenses incurred towards the tariff concession as per the provision in section 65 of EA 2003.

7.3. The Clause 2 and 3 of GoM's GR dated 21 December 2018 state the conditions and procedure for disbursement of the electricity Tariff concession. Accordingly, the beneficiary has to apply online on the web site of Director (Textile). After scrutiny of application, the said committee will inform MSEDCL accordingly. MSEDCL, after getting eligibility of the applicant, will process the application for passing on the concessional electricity Tariff to the eligible consumer. IRSL has not submitted documentary proof of such Application nor the committee has communicated to MSEDCL as to whether IRSL is eligible or not.

7.4. EA is Central Statute enacted by Parliament/Union Government which can neither be rendered nugatory/otiose nor overridden by any general policy of State Government.

7.5. MSEDCL is formed under Companies Act and is a separate legal entity and therefore cannot be equated with State Government.

7.6. The reliance placed by IRSL on Nestle case for pleading Promissory Estoppel against MSEDCL is completely illegal and illogical due to identity of MSEDCL being separate and distinct from the State Government.

7.7. On the other hand, as per Hon'ble Supreme Court Order dated 9 September, 1996 in ITC Bhadrachalam Paperboards case, unless and until the provision for compensation as per Section 65 and 108 of EA is complied by State Govt, IRSL cannot plead Promissory Estoppel which is against Statute. Moreover, though IRSL is relying on alleged policy, GoM is not made party before the Commission.

II] Additional Surcharge:

7.8. ASC was inadvertently remained to be levied by MSLDC or by MSEDCL as the same was not quantified. MSEDCL is seeking to recover it.

7.9. As per EA, the concept of ASC on charges of wheeling of electricity and its applicability is provided for in Sections 42 (3) & (4). The wheeling is defined in Section 2 (76) of EA 2003 as :

"wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62."

7.10. Hon Supreme Court has dealt with the rationale of CSS and ASC in its Order of M/s Sesa Sterlite Ltd case in Civil Appeal No 5479 of 2013. The Para No 22 to 28 particularly deal with open access and CSS/ASC.

7.11. Though IRSL is connected to the transmission network, it is liable to pay additional surcharge to meet the fixed cost of the distribution licensee arising out of its obligation to supply. Moreover, in pursuance of Regulation 18.4 of the DOA Regulations, 2016, recovery of a part of fixed cost towards the stranded capacity arising from the power purchase obligation through levy of Additional Surcharge from OA consumers is necessary.

7.12. Both TOA Regulations and DOA Regulations are not independent but interrelated and complimentary to each other which can be seen from conjoint reading of Regulations 1.2 and 14.1(b) of TOA Regulations and Regulations 1.2, 2.1(20) r/w 2.1(29) 8.8, 14.7, 14.8 and 28 of DOA Regulations.

7.13. MSEDCL has levied ASC to all the consumers connected on transmission network and availing open access. The list of such consumers is annexed with its submissions. Therefore, there is no discrimination against IRSL.

7.14. The claim of MSEDCL for CSS and ASC also is well within time and/ or limitation period even under Section 56 of the EA, as the same was quantified and crystallized for the first time in the Demand Notice/ Bill issued on 15 November 2019. In this regard, reliance is placed on the Full Bench Decision dated 12 March, 2019 of High Court in W.P. No 10764 of 2011 and batch.

7.15. IRSL is not exempted from levy of CSS and ASC in accordance with EA and Regulations framed by the Commission thereunder.

Commission's Analysis and Ruling

8. Under the present Case, IRSL has sought relief against MSEDCL's demand of CSS for the period from March 2018 to October, 2019 and ASC for the period from November, 2016 to October, 2019 vide Demand Notice dated 15 November, 2019 and subsequent

Disconnection Notice dated 3 December, 2019 on account of non-payment of these charges. As per IRSL, it is not entitled to pay these charges considering the Textile Policy dated 15 February 2018 issued by the GoM and considering the fact that it is connected to EHV Network of MSETCL/STU. IRSL has also sought direction to MSEDCL for sanctioning its CD, the request for which was made vide its Application dated 21 September 2019, without insisting on payment of the aforesaid wrongful past dues towards CSS and ASC as claimed by MSEDCL.

9. Several grounds/contentions have been raised by IRSL and MSEDCL which have been recorded in the earlier part of this Order. Based on these grounds/contentions, the Commission has framed the following issues for its consideration:

Issue 1: - Whether IRSL is exempted from levy of CSS in view of the Government of Maharashtra's Textile Policy and the Commission's Open Access Regulations?

10. On this issue, IRSL contends that the Textile Policy issued by the GoM on 15 February 2018 has granted various concessions to Textile Units including exemption to CSS on Open Access. Being an entity owned and controlled by the GoM , MSEDCL cannot take a stand contrary to the Policy notified by the State Government.

11. Under the Act, the State Government is fully empowered to issue Policy directives that are in public interest. These directions have to be implemented in its entirety. The failure to do so violates the provisions of the said Act.

12. In reply, MSEDCL states that GoM has notified its Textile Policy conveying broad contour of its intention and by subsequent GR issued on 21 December 2018 it has not specified any exemption of CSS for OA Consumer and also the detailed directives were still awaited. Accordingly, MSEDCL has informed MSLDC to continue to levy of CSS from IRSL till the directives are received. However, from MSLDC's letter dated 4 November 2019, it was observed that CSS and ASC had still not been recovered from IRSL.

13. The GoM has issued GR dated 21 December 2018 wherein various directives for implementation of State Textile Policy 2018-23 were issued. In the said GR, the Clause regarding exemption of OA consumers from levy of CSS is not mentioned. And hence, subsidies granted by GoM in Textile Policy will not be paid by GoM to MSEDCL and therefore IRSL has to pay these charges to MSEDCL. Further, MSEDCL contends that neither IRSL has submitted any documentary proof of its entitlement as required under the Clause 2 and 3 of the GR dated 21 December 2018 issued by GoM nor the Committee constituted thereunder has communicated to MSEDCL as to whether IRSL is eligible or not to avail the subsidy.

14. The Commission notes that it is a fact that the Textile Policy issued by the GoM states that CSS on Open Access will be exempted for Textile Units. The relevant para in the policy is:

" ***7.11 Electricity Concessions***

7.11.1 ***Cross subsidy on open access will not be levied for textile units.*** *…"*

However, Clause No. 12 and 13 of the Textile Policy specify the details of operationalisation of the said policy. At Clause No. 12 of the Policy states that Textile Development fund will be created to provide funds for government equity and State subsidies. Further Clause No. 13 of the Policy states that resolutions and guidelines will be separately issued for implementation purpose. The relevant extract is reproduced below:

"12. Textile Development Fund will be created to provide funds for government equity, State subsidies as well as for branding and marketing. This fund will be generated through the sale of land of Empress Mill and Nagur Weavers' Co-operative Spinning Mill, funds raised through privatization of spinning mills, government equity returned by the co-operative spinning mills as wells as 50% of the CSR funds provided by the textile units.

13. ***Government Resolutions and guidelines will be separately issued by the respective departments for implementation of the schemes covered under this Textile Policy."***

15. Thus, it can be seen that in absence of establishment of necessary Textile Development Fund as envisaged under the Policy and detailed Resolutions and Guidelines necessary for implementation of the Policy, IRSL's insistence on waiver/exemption of CSS as per Textile Policy is pre-mature. It is seen from the MSEDCL's email to Chief Engineer (MSLDC) dated 31 May, 2018 that MSEDCL has in fact, highlighted that there were various issues like applicability of Policy to IRSL, absence of further notification/instructions from the Energy Dept. of GoM , lack of clarity on the grant of subsidy to MSEDCL etc. and therefore MSEDCL advised MSLDC to continue to levy the CSS till receipt of further instructions from the GoM . It was further stated by MSEDCL that on receipt of the instructions from the GoM and subsidy towards CSS, the CSS collected from IRSL could be refunded as per the Section 65 of EA. Ideally, MSLDC should have acted on this issue as per MSEDCL's suggestions of continuing to levy CSS from March 2018 as the stand taken by MSEDCL on this issue is consistent with the provisions of EA.

16. The Commission further notes that vide GR dated 21 December 2018, the GoM has stipulated the detailed mechanism for implementation of the Textile Policy for providing the Electricity Concessions as mentioned in the Textile Policy. Vide the aforesaid GR, various terms and conditions for implementation of Textile Policy have been stipulated alongwith the detailed procedure to be followed for providing the Electricity Concessions to the Textile Units. However, the said GR does not specify the methodology and the financial mechanism for granting and operationalising the policy with regards to concession regarding exemption to Textile Units availing Open Access for payment of CSS. Thus, as on date as well, there is no guideline and financial mechanism to decide the entitlement of IRSL for getting CSS waiver/exemption for OA.

17. Sub-section (2), (3) and (4) of Section 42 of EA provides that open access shall be introduced in phases by the State Commission, having due regard to factors like cross subsidies etc. Such surcharge shall be utilized to meet current level of cross-subsidy and shall be progressively reduced and eliminated. If any person whose premises are situated

within area of supply of a distribution licensee, requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may by notice require the distribution licensee for wheeling such electricity in accordance with the regulations made by the State Commission and the duties of such distribution licensee in respect of such supply shall be those of a common carrier providing non-discriminatory open access to its distribution system. Further, "Wheeling" has been defined in Section 2(76) of the EA.

" 2.

> *(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;*

It is quite clear that wheeling as defined under Section 2 (76) of EA cannot take place unless a distribution licensee provides open access to his Consumers situated in its area for meeting current level of cross-subsidy. Thus, there cannot be wheeling *de hors* open access so as to enable the Open Access Consumer to use the distribution or transmission system to wheel power without seeking open access. Further, the definition of open access in Section 2(47) of EA makes it abundantly clear that it has to be in accordance with the regulations specified by the appropriate Commission.

18. The Commission finds that in accordance with above provisions read with Section 181 of the EA it has framed Open Access Regulations for use of Transmission and Distribution System by eligible Open Access Consumer. The conjoint reading of its Open Access Regulations 2016 clearly shows that Consumer situated within the area of Distribution Licensee who has been granted open access shall be liable to pay CSS as may be determined by the Commission except to a person who has established a captive generating plant in respect of his own consumption. Relevant provisions of the Regulations are as under:

"

14.7. Cross Subsidy Surcharge

a. A Consumer of a Distribution Licensee who has been granted Open Access, or a Consumer situated within the area of supply of a Distribution Licensee and/or receiving supply from a Generating Company using a dedicated transmission line, shall be liable to pay such Cross-Subsidy Surcharge as may be determined by the Commission:

Provided that such Surcharge shall not be levied in case Open Access is provided to a person who has established a captive generating plant, in respect of his own captive generation, for carrying the electricity to a destination of his own use.

b. The Cross-Subsidy Surcharge determined on a per Unit basis shall be payable on a monthly basis by the Open Access Consumer on the actual energy drawn at the consumption end during the month through Open Access.

c. The amount of Cross-Subsidy Surcharge shall be paid to the Distribution Licensee to whose Distribution System the Consumer is connected:

Provided that, in case of two Distribution Licensees supplying in the same area, the Licensee from whom the Consumer was availing supply shall be paid the Cross-Subsidy Surcharge.

d. The Cross-Subsidy Surcharge payable to the Distribution Licensee by a Consumer shall be as determined by the Commission in the Tariff Order in respect of the Distribution Licensee or any other applicable Order:

Provided that, in case the Open Access Consumer or Licensee, as the case may be, purchases power from a Renewable Source of energy, the Cross-Subsidy Surcharge shall be as determined by the Commission.

19. Accordingly, the Commission in its MYT Order dated 3 November 2016 in Case No. 48 of 2016 has worked out the various components of CSS formulae based on the approved values for the 3rd Control Period (FY 2016-17 to FY2019-20) and computed the consumer category-wise CSS for the 3rd Control Period payable by Open Access Consumers situated within the area of MSEDCL.

20. Section 62 of EA confers the power upon Commission to determine the tariff. Section 65 of EA enables the State Government to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62. Section 65 of the EA is relevant in this matter which reads as follows:

*"**Section 65. (Provision of subsidy by State Government):***

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, the State Government shall, notwithstanding any direction which may be given under section 108, 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:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

21. Section 108 of EA deals with the power to issue directions by the State Government, which reads as under:

"

Section 108. (Directions by State Government): ----

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. The section stipulates that the Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing.

……..."

22. The ATE in its judgement dated 31.1.2011 in Appeal No. 41,42 and 43 of 2011 has ruled as under:

"Summary of our findings:

62. (1) The State Commission is independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Commission in the matter of determination of tariff. The State Government may give any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission, which has statutory duty to perform, either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff."

23. The conjoint reading of **Para 21 and 22 above** makes it clear that under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in 108 of EA that the direction (subject to the observation of the ATE, at **Para 22 above**) issued in the public interest shall be binding upon the Commission.

24. The Commission is of the opinion that the Textile Policy decision of GoM dated 15 February, 2018 is the intention of GoM to extend the benefit of the exemption of CSS to Textile Industries category consumers. This policy had clearly specified at Clause 12 and 13 about the further actions to be taken for implementing the same. Accordingly, the GoM vide GR dated 21 December 2018 has notified the details partially for implementation of decision of GoM dated 15 February, 2018 but the same is silent about extending the subsidy under Section 65, to these consumers.

25. The Commission in its Order dated 3 November 2016 itself has determined the CSS tariff under Section 62 of EA which is applicable to Open Access Consumers situated in the area of MSEDCL. Pursuant to the decision of the GoM about Textile Industry, the matter of providing subsidy under Section 65 (as referred in Clause 12 and 13 of the Textile Policy issues on 15 February, 2018) was clearly the prerogative of the State Government. Thus if there is no GR from GoM for granting subsidy Section 65 in lieu of CSS, it is not possible for MSEDCL to implement this exemption.

26. In view of the aforesaid discussions, the Commission does not find any merit in the claims of IRSL that the Textile Policy directly entitles them for CSS exemption and hence the Commission thinks it fits to rule that the Demand Notice issued by MSEDCL is legal/valid.

Issue 2:- Whether ASC is applicable to IRSL being an EHV consumer connected to InSTS?

27. IRSL contends that it is connected directly to the 220 KV system of STU/MSETCL as a part of InSTS. Therefore, no part of distribution system and associated facilities is being used by IRSL for drawing/wheeling power through STU, from injecting point to IRSL's plant. Regulation 14.6 (b) of the DOA Regulations provides that wheeling charges shall not be applicable in case a Consumer or Generating Station is connected to the Transmission System directly. Since IRSL is not liable to pay wheeling charges, the question of payment of ASC on wheeling charges does not arise.

28. In this context, it is relevant to examine the Clause 5.8.3 of the National Electricity Policy notified by the Ministry of Power, Govt. of India, which reads as under.

"5.8.3...

An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. ..."

29. National Tariff Policy, 2016 which outlines the broad objective of wheeling charges and ASC reads as under :

> *"8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."*

30. As can be seen above, while wheeling charge is levied for recovery of Network related fixed cost due to use of the Distribution Network by an Open Access consumer for availing the power under Open Access, the ASC helps the Distribution Licensee to meet out its obligation towards existing power purchase commitments which may become stranded on account of Open Access. Hence, these charges (Wheeling charges and ASC) are meant for independent purposes.

31. Further, the conjoint reading of provision 2(76) of EA and Regulation 14.6, 14.8 and 28 of DOA Regulations also makes it clear that levy of ASC is independent of wheeling charges. These Provisions and Regulations read as under:

"*2.*

(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

14.6. Wheeling Charge

a. An Open Access Consumer, Generating Station or Licensee, as the case may be, using a Distribution System shall pay to the Distribution Licensee such Wheeling Charges, on the basis of actual energy drawal at the consumption end, as may be determined under the Regulations of the Commission governing Multi-Year Tariff;

b. ***Wheeling Charges shall not be applicable in case a Consumer or Generating Station is connected to the Transmission System directly or using dedicated lines owned by the Consumer or Generating Station****."*

……..

14.8. ***Additional Surcharge---***

a. An Open Access Consumer receiving supply of electricity from a person other than the Distribution Licensee of his area of supply shall pay to the Distribution Licensee an Additional Surcharge ***on the charges of wheeling*** *and Cross-Subsidy Surcharge to meet the fixed cost of such Distribution Licensee arising out of its obligation to supply, as provided in sub-section (4) of Section 42 of the Act.*

…….

d. The Commission shall determine the category-wise Additional Surcharge to be recovered by the Distribution Licensee from an Open Access Consumer, based on the following principles:

i. The cost must have been incurred by or be expected, with reasonable certainty, to be incurred by the Distribution Licensee on account of such Consumer; and

ii. The cost has not been or cannot be recovered from such Consumer, or from other Consumers who have been given supply from the same assets or facilities, through Wheeling Charges, stand-by charges or other charges approved by the Commission:

Provided that such Additional Surcharge shall be applicable to all Consumers who have availed Open Access to receive supply from a source other than the Distribution Licensee to which they are connected.

……

28. Obligation of Transmission Licensee

Where the Consumer, Generating Station or Licensee, as the case may be, having been granted Open Access under these Regulations, ***obtains supply of electricity from a connection to the Intra-State Transmission System of a Transmission Licensee and the Distribution System of the Distribution Licensee is not used for such supply, the provisions of the Commission's Regulations governing Transmission Open Access shall be applicable:***

Provided that Cross-Subsidy Surcharge and Additional Surcharge as may be applicable shall be payable if the Open Access Consumer is located within the area of supply of the Distribution Licensee.

32. In light of the above, the Commission is of the view that there is no merit in IRSL's contentions that it is not liable for payment of ASC as no wheeling charges are being levied.

33. IRSL further contends that ASC is levied on open access consumers by MSEDCL under Section 42(4) of EA and Regulation 14.8 of the DOA Regulations. Both provisions recognize that the Distribution Licensee is entitled to receive ASC on charges of wheeling in addition to wheeling charges. The aforementioned Regulation also states that ASC shall become applicable, only if obligation of supply in terms of Power Purchase Agreement continues to be stranded or there is unavoidable obligation of the Distribution Licensee to bear fixed costs consequent to such commitments. ASC is determined by the concerned State Commission to meet the fixed cost (stranded cost) of power for the Distribution Licensee arising out of its' unavoidable obligation to supply. In the present Case, since 2015 MSEDCL is not supplying any power to IRSL. IRSL is not an embedded consumer with MSEDCL. Therefore, MSEDCL's power is not getting 'stranded' due to IRSL. Accordingly, no ASC is liable to be levied on IRSL.

34. IRSL further contends that from a bare reading of the provisions contained in Section 42(4) of EA read with Regulation 14.8 of the Open Access Regulations, it is clear that the ASC is only applicable on the open access consumers, maintaining contracted demand with the Distribution Licensee, i.e. consumers availing open access while remaining an embedded consumer of the Distribution Licensee. In the present case, from 2015 onwards, IRSL has been self-reliant availing power through transmission open access. MSEDCL has not had any obligation to supply power to IRSL from 2015 onwards. Therefore, there is no power that is being stranded for IRSL due to IRSL's open access power consumption. Accordingly, no claim for ASC is made out under Section 42(4) of EA.

35. On these contentions, the Commission notes that prior to becoming a full Open Access consumer in June, 2015, IRSL had a contract demand of 7 MVA with MSEDCL and therefore IRSL's statement is not correct when it states that historically, MSEDCL has not been supplying any power to IRSL and that IRSL is not an embedded consumer of MSEDCL. Further as mentioned by IRSL itself that ASC is determined by the concerned

State Commission to meet the fixed cost (stranded cost) of power for the Distribution Licensee arising out of its unavoidable obligation to supply. The Commission notes that on one hand IRSL is requesting MSEDCL to process its Application for sanctioning of 37 MVA CD and repeatedly stating that the MSEDCL is required to adhere to Universal Supply Obligations under Section 43 of EA , on the other hand, it is opposing to levy ASC by MSEDCL which arises out of MSEDCL's unavoidable obligation to supply.

36. Further, the impact of increased Open Access transactions on MSEDCL's obligations towards its existing Power Purchase Contracts was established in the Case No. 48 of 2016 and the Commission has allowed MSEDCL to recover the ASC from all Open Access consumers except CPP. Hence, the demand of MSEDCL for recovery of ASC from IRSL is justified.

37. IRSL has further contended that in its Judgment dated 20 November, 2015 in Appeal No. 84 of 2015, the ATE has held that no wheeling charges and additional charges are payable if no part of distribution system and associated facilities of the Distribution Licensee is used and that this Judgment has been upheld by the Hon'ble Supreme Court.

38. On this contention, the Commission is of view that context of the aforesaid Judgment passed by the ATE is different since the Open Access consumer therein had opted to source power from private generator on long term basis by obtaining Open Access from CTU and not in the Intra-State Transmission Network. Since the consumer therein had become a regional entity, it was not within the jurisdiction of the State Commission and State Commission's Regulations were not applicable for those transactions. Same is not the case here. In the present case, IRSL continues to be connected to the State's network covered by State Commission's regulatory framework and further it is pursuing its application for CD so as to become a consumer of MSEDCL once again. As per DOA and TOA Regulations it would be binding on IRSL to pay the ASC.

39. The Commission further notes that the reliance of IRSL on the Commission's Order dated 12 March, 2018 in Case No. 58 of 2017 is incorrect as in the said proceeding the issue of applicability of wheeling charges of TPC-D to the Open Access consumer therein (HPCL) has been adjudicated. In the present matter, it is not the case of MSEDCL that IRSL is required to pay the wheeling charges, rather the issue of entitlement of ASC only is being considered by the Commission.

40. The Commission further notes that vide its written submissions, MSEDCL has confirmed that ASC is being levied to all Open Access consumers connected to Transmission Network and there is no discrimination against IRSL. MSEDCL has also attached list of such consumers to whom ASC is levied from November 2016 including Group Captive.

41. In light of the above, the Commission is of the view that IRSL is required to pay the ASC to MSEDCL determined by the Commission in its Order dated 3 November 2016.

Issue 3:- Whether the principle of promissory estoppel shall prevent MSEDCL from raising invoices for CSS on IRSL?

42. On this issue, IRSL states that it acted in furtherance of the Textile Policy and has already consumed 56.62 MUs of electricity from March 2018 to October 2019. IRSL having altered his position irreversibly on the basis of the policy of the State Government that no CSS was payable for consumption of power under open access, the Respondents cannot now be permitted to reverse its position. The doctrine of promissory estoppel will apply as the State Government and the Respondents having declared a concession by way of exemption of CSS on open access consumers under the Textile Policy, based on which IRSL acted upon it and has altered its position, State Government and MSEDCL are now duty bound to implement the said Policy and ensure that IRSL gets the benefit of exemption provided in paragraph 7.11.1 of the Policy. MSEDCL's conduct is contrary to the principle of promissory estoppel as it is raising invoices for CSS on IRSL. IRSL quoted the Hon'ble Supreme Court's Judgment (Punjab vs. Nestle India Ltd. reported in (2004) 6 SCC 465). Also, it quoted the Judgment in Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & ETIO reported in (2007).

43. The Commission notes that the doctrine of promissory estoppel contended by IRSL has to be seen in proper perspective. It is true that MSEDCL is an entity owned and controlled by the Government of Maharashtra and it is expected to follow the policy notified by the State Government. However, at the same time, it cannot be denied that MSEDCL is a Distribution Licensee being regulated by the Commission under the EA through various Regulations and Orders issued by the Commission. Under the EA, MSEDCL is not allowed to show undue preference to any person or class of persons or discriminate against any person or class of persons. In any case, the Policy/GR of GoM dated 21.12.2018 does not have any express provision that the OA consumer (IRSL in this case) is entitled to subsidy under Section 65 of EA in lieu of exemption of CSS for OA consumers.

44. The Commission further finds that Hon'ble Apex Court in the matter of Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd. [1983 (3) SCC 379] had referred to Motilal Padampat Sugar Mills Co. Ltd. vs. State of U.P. & Ors. [1979 (2) SCC 409] and observed as under:

"The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and ***unequivocal promise which is intended to create legal relations*** *or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it,* ***if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not****."*

The ratio of the above aforesaid case is not applicable in the instant case as the GoM has not extended any assurance by its conduct much less unequivocal one for MSEDCL to act upon it.

45. In view of the above, IRSL's submissions on the issue of promissory estoppel are not tenable to get the relief sought in the present Case.

Issue 4: - Whether the Demand Notice dated 15 November 2019 and the Disconnection Notice dated 3 December 2019 issued by MSEDCL are illegal?

46. IRSL contends that Section 56(1) of EA can only be invoked when any charges are due in respect of supply, transmission, distribution or wheeling charges. IRSL is not liable to pay wheeling charges or ASC or CSS and has at all times been paying Transmission Charges and admittedly there are no dues towards Transmission Charges. Hence, MSEDCL's Notice under Section 56 is unlawful.

47. In view of the contention, it is relevant to examine the Section 56 of EA which reads as follows:

> *"**Section 56. (Disconnection of supply in default of payment): --** (1) **Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him,** the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:*

48. Thus, as per the aforementioned provision, the Distribution Licensees are entitled to issue Disconnection Notices for recovery of any charge for electricity or any sum other than a charge for electricity. Further, as held earlier on Issue No. 1 and Issue No. 2, IRSL is required to pay the CSS and ASC to MSEDCL. In view of these circumstances, MSEDCL is entitled to issue Disconnection Notice under Section 56 of EA to IRSL for recovery of dues regarding CSS and ASC raised in its Demand Notice dated 15 November 2019.

49. IRSL has contended that since March 2018, MSLDC acting in furtherance of the Textile Policy decision of the GoM did not raise any bills in respect of CSS nor demanded any payment in respect thereof from IRSL. Also, MSEDCL, for the first time and that too when IRSL made the Application dated 21 September 2019, has purportedly raised the illegal demand of ASC on IRSL.

50. It is further submitted by IRSL that MSEDCL is illegally seeking to claim its dues contrary to Section 56(2) of the said Act. The said section clearly provides that "Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer under this section shall be recoverable after the period of two years from the date when such sum become first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity. MSEDCL is purporting to claim dues from November 2016, which is beyond the period of 2 years, pertinently the said amount was not shown as arrears in any bills raised on IRSL and is as such not recoverable.

51. On these contentions, the Commission finds that since March 2018, MSLDC has not levied CSS on IRSL and it had sought advice from MSEDCL for levy of CSS in view of IRSL's request letter for exemption of CSS. Also, it is seen from the records that bills for ASC for the period November 2016 to October 2019 have been raised by MSEDCL for the first time in November 2019. Since these dues pertain to past period, it is relevant to examine the Section 56(2) of EA and verify whether the claims made by MSEDCL fits into the provision or not. The Section 56(2) of EA reads as follows:

> *"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer,* ***under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity****.*

52. As can been seen from above provision, it can be concluded that the claims towards CSS can be made by MSEDCL since the same pertain to a period within two years period from March 2018. However, as regards ASC, it is observed that claims for the month of November, 2016 to November, 2017 has become time-barred in terms of the provision of Section 56(2) of EA. MSEDCL cannot raise ASC pertaining to this period. Thus, to that extent, MSEDCL is not entitled to raise bills prior to a period of two years. MSEDCL is entitled to recover ASC only for the period December, 2017 to October, 2019 as this period is within the two years' duration as per Section 56 (2) of EA. The Commission thinks it fit to direct MSEDCL to revise Demand Notice to that extent.

53. The Commission notes that IRSL would be required to pay a substantial amount since the same has accumulated for last two years. IRSL may find it difficult to pay the same immediately and at one go. IRSL would also be prejudicially affected if its Application dated 21 September, 2019 before MSEDCL is kept pending till the recovery of entire amount. Commission finds that Regulation 15.7 of Supply Code Regulations 2005 allows MSEDCL at its discretion to allow IRSL the facility of payment of arrears by way of instalments provided that it shall not affect the liability of IRSL to pay interest and additional charges for delayed payment as per relevant Orders of the Commission until all arrears have been cleared. **However, considering the present circumstances, MSEDCL should allow IRSL to pay 10% of the revised Demand Notice to be issued by MSEDCL (as directed in the previous Para) and after receipt of the aforesaid amount, MSEDCL shall immediately process the Application filed by IRSL for sanction of CD as per provisions of Supply Code Regulations 2005. Rest of the amount towards CSS and ASC shall be paid by IRSL in six equal monthly instalments without any interest thereon.**

54. It would not be out of context to record observations about the manner in which both MSLDC and MSEDCL have acted in the entire episode. Inspite of email dated 31 May, 2018 from MSEDCL advising MSLDC to continue to raise the bills for recovery of CSS from IRSL, MSLDC stopping levy of CSS on IRSL. Further, vide the Order in Case No. 48 of 2016, the Commission allowed MSEDCL to recover ASC from Open Access consumers. However, only in the month of November, 2019 after receipt of Application

for sanction of CD from IRSL, MSEDCL levied ASC through its Demand Notice. Both MSEDCL and MSLDC seem to be lethargic working in unco-ordinated manner while dealing especially with the subsidising consumers. Therefore, the Commission deems it fit to intervene and grants relief by way of instalments and waiver of interest amount.

55. Hence, the following Order.

ORDER

1. The Case No. 344 of 2019 is partly allowed .

2. Maharashtra State Electricity Distribution Co. Ltd. is directed to revise its Demand Notice by including the amount towards Cross Subsidy Surcharge from March 2018 till October 2019 and Additional Surcharge from December 2017 till October 2019 as per rulings on Issue No.4 Para 52.

3. **Indorama Synthetics (India) Ltd. is directed to pay 10% of the amount as part payment out of the total amount as shown in the revised Demand Notice within 15 Days of the receipt of revised Demand Notice from Maharashtra State Electricity Distribution Co. Ltd.**

4. **Maharashtra State Electricity Distribution Co. Ltd. shall process the Application of Indorama Synthetics (India) Ltd. for sanctioning CD, immediately on receipt of the above part-payment as per Para (3) above from Indorama Synthetics (India) Ltd.**

5. **Indorama Synthetics (India) Ltd. shall pay rest of the amount as per the revised Demand Notice in six equal monthly installments after payment of partial amount as mentioned in Para (3) above. No interest shall be payable by Indorama Synthetics (India) Ltd. on this amount.**

6. **While considering the sanction of CD, the observations in this Order and pendency of arrears shall in no way prejudice the applicable Regulations notified by the Commission.**

Sd/-	**Sd/-**
(Mukesh Khullar)	**(I.M. Bohari)**
Member	**Member**

(Abhijit Deshpande)
Secretary