

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 151/MP/2016

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member**

Date of Order: 6th of November, 2018

In the matter of

Petition under Section 79 (1) (c) read with Sections 142 and 146 of the Electricity Act, 2003 regarding non-compliance of the order dated 8.6.2013 in Petition No. 245/MP/ 2012 and for consequent directions.

**And
In the matter of**

Dakshin Gujarat Vij Company Limited,
Kaporda Char Rasta,
Nana Varchha Road,
Surat-395 006

....Petitioner

Vs.

- 1) Essar Steel India Limited
Hazira, Surat-394 270
Gujarat
- 2) Western Regional Load Despatch Centre
(Power System Operation Corporation Limited)
F-3, MIDC Area, Marol
Andheri (East)
Mumbai-400 093
- 3) Power Grid Corporation of India Limited
Plot No.2, Saudamini
Near IFFCO Chowk, Leisure Valley Road
Sector-29
Gurgaon
Haryana-122 002
- 4) Gujarat Energy Transmission Corporation Limited
Sardar Patel, Vidyut Bhawan, Race Course
Vadodara-390 007

.....Respondents

Parties Present:

- 1) Shri M.G. Ramachandran, Advocate, DGVCL
- 2) Ms. Ranjeetha Ramachandran, Advocate, DGVCL
- 3) Shri Shatrajit Bangerje, Advocate, Resolution Professional
- 4) Ms. Neha Nagpal, Advocate, Resolution Professional
- 5) Shri Mahesh Agarwal, Advocate, Resolution Professional
- 6) Shri Arshit, Advocate, Resolution Professional

ORDER

The Petitioner, Dakshin Gujarat Vij Company Limited (DGVCL), has filed the present petition under Section 79(1)(c) read with Section 142 and 143 of the Electricity Act, 2003 (the Act) seeking the following prayers:

- “(a) Recall the permission granted in the order dated 8.6.2013 passed by the Commission in Petition No. 245/ MP/2012 granting connectivity to the inter-State transmission network of Powergrid Corporation of India for the premises of the Essar Steel and also the regional entity status to Essar Steel on account of violation on the part of Essar Steel on the conditions of due payment of cross subsidy to DGVCL;
- (b) Direct Powergrid and WRLDC not to entertain any application for grant of open access or otherwise allow any scheduling or despatch to Essar Steel till the outstanding amount towards cross subsidy surcharge are duly paid to DGVCL;
- (c) Direct WRLDC to get consent of DGVCL before issuing NOC for open access to Essar Steel and in the event of non-payment, the Petitioner would have the right to withdraw the open access permission granted to Essar Steel;
- (d) Initiate proceedings against Essar Steel and its directors and officials under Section 142 of the Electricity Act, 2003 for the failure on the part of Essar Steel to comply with the order dated 8.6.2013 passed by the Commission;
- (e) Direct the filing of the complaint in the appropriate court as per Section 146 of the Electricity Act, 2003 for deliberate and willful default and with the intent not to obey the order dated 8.6.2013; and
- (f) Award cost of the present proceedings.”

Background of the Case:

2. Essar Steel India Limited (ESIL/Respondent No.1) has a steel manufacturing facility at Hazira in the State of Gujarat with a capacity of 10 million tonnes per annum. The steel plant has six Electric Arc Furnaces of 100 MW to 120 MW capacity each and

seven smaller size Ladle Furnace of 15 MW to 20 MW capacity each. The total power requirement of Essar Steel is up to 850 MW average power and 1050 MW peak power. To meet its power requirement, Essar Steel was procuring power from its sister concern, Essar Power Madhya Pradesh Limited (EPMPL) located in Madhya Pradesh and had entered into a power purchase agreement for sale and purchase of 700 MW power. Further, EPMPL was granted Long Term Open Access for supply of power to Essar Steel by Central Transmission Utility. Essar Steel was also granted connectivity by Central Transmission Utility subject to the condition that Essar Steel would be connected to the inter-State transmission system through a radial mode and would have to get itself disconnected from the State Transmission Utility of Gujarat. ESIL approached Western Regional Load Despatch Centre vide its letter dated 12.10.2012 requesting for (a) transfer of load control area jurisdiction of ESIL from SLDC Gujarat to WRLDC, Mumbai; (b) grant of status of a regional entity for the purpose of using Open Access power; and (c) for treating ESIL as direct UI pool member. As WRLDC did not consider the above requests, Respondent No.1 filed Petition No.245/MP/2012 with the prayer for issue of direction to WRLDC to transfer the load control area jurisdiction of ESIL from SLDC, Gujarat to WRLDC, Mumbai and to grant ESIL the status of a regional entity under the Grid Code for the purpose of scheduling of power and accounting of unscheduled interchange. The Commission in its order dated 8.6.2013 decided the following:

“49. In the light of the above discussion and after considering the views of Central Electricity Authority, the following directions are issued for compliance by all concerned:

- (a) The load control area jurisdiction of ESIL shall be shifted from Gujarat SLDC to WRLDC, Mumbai after disconnection of ESIL from Gujarat Transmission system;
- (b) ESIL shall be granted status of a Regional Entity of Western Regional Grid.

(c) Scheduling and Energy accounting of ESIL shall be carried out by WRLDC in accordance with the prevailing Regulations.

(d) All telemetry, voice and data communication in accordance with the IEGC shall be provided by ESIL to the satisfaction of WRLDC before commencement of scheduling of ESIL.

(e) ESIL shall comply with various provisions of Connectivity Regulations, Grid Code, UI Regulations and other relevant regulations of the Commission and maintain its drawal as per schedule. 61

(f) All instructions of WRLDC shall be complied with by ESIL in accordance with the 2003 Act and Grid Code and any instance of non-compliance by ESIL would be viewed seriously and dealt with in accordance with law.

(g) RLDC may like to satisfy itself about the effectiveness of the system of load shedding scheme in case of Generator outage and suggest suitable operational protocol to the petitioner to make this system responsive for safer grid operation. Petitioner shall provide necessary arrangements at its own cost.

(h) ESIL shall be granted status of Designated ISTS Customer (DIC) and since it is connected at 400 kV node of CTU network and not connected with state system, it will be considered as a separate (drawal) zone in accordance with the principles adopted for generating stations directly connected at 400 kV ISTS under the Sharing Regulations as amended from time to time. Till computation of POC charges for next application period, Gujarat Withdrawal Zone charges and losses shall be applied in case of ESIL.

(i) Staff of the commission shall process the case for necessary amendment to the Grid Code to clarify the position of bulk consumers which are connected only to inter-State transmission system and the major portion of its long term power is coming from a generator located outside the state in which bulk consumer is located.

(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.”

3. Respondent No.1/ESIL filed Petition No. 1420/2014 before Gujarat Electricity Regulatory Commission (hereinafter referred to as “GERC”) seeking adjudication of the dispute with DGVCL alleging wrongful levy of cross-subsidy surcharge for the captive use of 600 MW (Unit-1) of Essar Power MP Limited (“EPMPL”) by DGVCL and for a declaration that the ESIL is not liable to pay the cross subsidy surcharge. GERC vide its

order dated 13.6.2014 in Petition No. 1420/2014 held that the dispute regarding cross subsidy surcharge falls within its jurisdiction.

“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 falls in the Commission jurisdiction and we admit the same.”

4. The Petitioner filed Petition No. 112/2014 before this Commission under clause (c) of sub-section (1) of Section 79 of the Electricity Act alleging default in payment of Cross Subsidy Surcharge since June, 2013 on the part of Respondent No.1/ESIL which had accumulated to Rs.107.65 crores as on April 2014. The Petitioner had sought direction to the Respondent No.1 to immediately pay the outstanding amount and also for direction to WRLDC to get DGVCL’s consent before issuing NOC for open access to the Respondent No.1 and in the event of non-payment of the dues, the Petitioner would have the right to withdraw the open access permission already granted. Respondent No.1 in its preliminary submission contested the maintainability of the said petition on the ground that the dispute relating to payment of the Cross Subsidy Surcharge was pending before GERC in Petition No 1420/2014 filed by the petitioner and GERC was the competent authority to decide the issue of payment of the Cross Subsidy Surcharge. However, the Petitioner vide its affidavit dated 14.7.2015 sought to withdraw the Petition stating as under:

“2. I say that based on the information available with the Petitioner and advice received, the Petitioner wishes to withdraw the present petition without prejudice to its rights to approach this Commission in accordance with law.”

The Commission in the order dated 22.7.2015 disposed of the petition as withdrawn.

5. Respondent No.1/ESIL filed Petition No. 216/MP/2016 before this Commission seeking a declaration that the levy of Cross Subsidy Surcharge by the Petitioner on ESIL/Respondent No.1 is illegal being in violation of Section 38(2)(d)(ii) of the Act read with Rule 6 of the Electricity Rules, 2005 which provided that grant of open access to a consumer by CTU to its network would be subject to payment of cross subsidy surcharge as determined by the Central Commission. The Commission in its order dated 6.7.2016 in Petition No. 216/MP/2015 held that cross subsidy surcharge payable by Respondent No.1 shall be as determined by GERC.

6. GERC vide its order dated 30.8.2016 in IA Nos. 7 of 2014 and 3 of 2016 in Petition No. 1420/2014 observed as under:

“6.11. Further, the issue of CSS payable by ESIL on the units purchased from sources other than EPMP is also disputed by ESIL stating that it is not liable to pay CSS under the provisions of Section 38 (2) (d) (ii) of the Electricity Act, 2003 and it has filed a petition in this regard which is pending for registration and hearing before the Commission. Therefore, it is premature to pass any order in this regard. We clarify that there is no stay granted by the Commission on the recovery of the amount of CSS claimed by DGVCL and GUVNL from ESIL. They are at liberty to take necessary action for recovery of the said amount as per the provisions of the Electricity Act, 2003.

6.12. We clarify that DGVCL and GUVNL are not barred from taking necessary action against ESIL for non-payment of the outstanding CSS amount by approaching the appropriate forum including WRLDC who have given permission for open access as a regional entity.”

7. ESIL also filed Petition No. 1601 of 2016 before GERC stating that it is not liable to pay cross subsidiary surcharge. Both the Petitions are pending for disposal by GERC.

8. The Petitioner approached WRLDC for denial of open access to the Respondent No. 1/ESIL in the light of the observation of GERC in Para 6.11 of the order dated 30.8.2016 as quoted in Para 6 above. Since WRLDC declined to deny the open access to

Respondent No. 1/ESIL in the absence of express direction of this Commission, the Petitioner has filed the present petition.

Submission of the Petitioner

9. The Petitioner has submitted that the Commission issued the order dated 8.6.2013 with conditions stipulated therein in regard to the due payment of cross subsidy surcharge and other surcharges specifically considering the fact that ESIL would no longer be connected with the intra-State transmission network. ESIL has abused the process of this Commission by representing that it would pay the cross subsidy surcharge and thereby induced DGVCL and other Gujarat Utilities to agree to the direct connectivity and grant of regional status to ESIL. On 15.5.2014, ESIL filed a Petition, being No. 1420 of 2014 before GERC alleging that out of the electricity sourced by ESIL through open access, a certain quantum is sourced from Essar Mahan for captive use and is not subject to payment of Cross subsidy Surcharge. Since ESIL obtained certain interim directions, it did not pay the cross subsidy surcharge. Subsequently, DGVCL filed IA in the said Petition No. 1420 of 2014. GERC vide its order dated 8.8.2016 in the IA clarified that there is no interim order operating and granted liberty to the Petitioner herein to take action as necessary for recovery of the cross subsidy surcharge amounts due and payable by ESIL. The Petitioner has submitted that ESIL cannot be allowed to take advantage of the order dated 8.6.2013 in a manner to cause adverse financial impact on the Petitioner and the consumers in the licensee area of DGVCL in the State of Gujarat. The Petitioner has submitted that since ESIL is not paying the cross subsidy surcharge, it should be subjected to the following consequences:

- (a) The order dated 8.6.2013 having been passed granting connectivity to the CTU network and further status of regional entity being allowed to ESIL, subject to specific condition of due payment of cross subsidy amount to DGVCL, the connectivity and regional entity status should be withdrawn forthwith and ESIL should be reverted back to the position as was applicable prior to the order dated 8.6.2013;
- (b) WRLDC be directed to not grant open access to ESIL without the issuance of NOC by DGVCL;
- (c) ESIL, having deliberately violated the directions contained in the order dated 8.6.2013 and is continuing to act in breach of the same, for every day of default in the payment of cross subsidy amount proceedings are to be initiated against ESIL under Section 142 of the Act; and
- (d) ESIL having obtained the order dated 8.6.2013 of connectivity and regional entity status by falsely representing to make due payment of cross subsidy surcharge, the Commission may direct complaint to be filed under Section 146 of the Act for initiation of appropriate criminal proceedings against the directors and concerned officers of ESIL.

Submission of the Respondent No. 1(ESIL)

10. The Respondent No. 1 in its preliminary reply dated 26.11.2016 has opposed the maintainability of the petition on the ground that issue of applicability of cross subsidy surcharge is *sub-judice* before GERC in Petition Nos. 1420/2014 and 1601/2016.

Respondent No. 1 has submitted that the Petition filed by the Petitioner under clause (c) of sub-section (1) of Section 79 of the Act seeking recall of the order dated 8.6.2013 on the ground that the ESIL is not paying cross subsidy surcharge is not maintainable as the said section pertains to regulating the inter-State transmission of electricity. ESIL has submitted that the Petitioner is indulging in forum shopping and is seeking similar reliefs before this Commission which are already pending before GERC which heard petition and reserved its judgment on 28.9.2017. ESIL has submitted that each and every relief sought by the Petitioner from this Commission in the present petition is directly and substantially connected with the question, whether ESIL in the facts and circumstances, is liable to pay cross subsidy surcharge to the Petitioner.

11. During the course of hearing on 21.8.2018, learned counsel for Interim Resolution Professional submitted that the lenders of ESIL have filed petitions against ESIL under the Insolvency Bankruptcy Code, 2016 for the commencement of Insolvency Resolution Proceedings before the National Company Law Tribunal, Ahmedabad. Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC Code), prohibits the institution or continuation of suits or any legal proceedings against a corporate debtor including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority. Learned counsel submitted that the Petitioner has also filed its claim before the interim Resolution Professional, which is pending adjudication. Learned counsel submitted that if the present proceeding is kept in abeyance till the moratorium proceeding is over, the interest of the Petitioner would not be prejudiced. Since, the issue of cross subsidy surcharge is pending before the GERC, any change in the present status quo would prejudice the interest of the parties.

12. Learned counsel for the Petitioner submitted that the moratorium proceedings only bar the recovery of the money from the corporate debtor. It does not bar the payment of the money for the services enjoyed during the moratorium proceedings. Learned counsel submitted that the present proceeding is not hit by embargo under Section 14 of the IBC.

13. Both the Petitioner and Respondent No. 1 were directed to file the written submissions which have since been filed.

14. The Petitioner in its written submission has submitted as under:

(a) ESIL which was an embedded consumer of the Petitioner and connected to GETCO intra-State transmission system sought direct connectivity to PGCIL on the assurance of payment of cross subsidy surcharge. The Petitioner had agreed to the direct connectivity only on the basis of specific condition imposed in the order dated 8.6.2013 of the payment of cross subsidy surcharge. However, ESIL cannot now be permitted to reprobate on the liability to pay cross subsidy surcharge.

(b) If ESIL had not agreed to pay the cross subsidy surcharge, the Petitioner would not have agreed to the direct connectivity and in any event, the Commission would not have permitted the direct connectivity to the system of PGCIL.

(c) The orders of the Gujarat Commission establish that the obligations of ESIL to pay the cross subsidy surcharge. However, ESIL has failed to make the payment in this regard. Therefore, the Petitioner is entitled to take necessary steps in view of such failure.

- (d) The Commission in its order dated 8.6.2013 granted permission to ESIL to connect directly to the PGCIL's system and granted status of regional entity on the basis of the submission of ESIL that it shall pay the cross subsidy surcharge. If the said condition was not acceptable to ESIL, then the permission for connectivity and regional entity status can no longer be sustained.
- (e) The Commission has power under Section 79 (1) (c) of the Act to recall or revoke the order dated 8.6.2013 passed under same said Section. Section 79 (1) (c) provides for regulation of inter-State transmission of electricity and such power includes powers to modify, vary, recall and revoke and permissions earlier granted if there is violation of terms and conditions on the basis of which permission was granted. In support, the Petitioner has relied upon the Hon`ble Supreme Court judgment in State of UP and other Vs. Maharaja Sharmander Prasad Singh and other [(1989) 2 SCC 505].
- (f) It is frivolous on the part of ESIL to claim that the cross subsidy surcharge is not applicable to ESIL by reason of the expression 'if any' used in para 49 (j) of the order dated 8.6.2013. The term 'if any' refers to the other charges and not the cross subsidy surcharge.
- (g) During the period from 8.6.2013 till May 2015, ESIL did not raise any objection to its liability to pay cross subsidy charge on sourcing of electricity from other than Essar Mahan project. ESIL vide its letter dated 11.4.2014 informed WRLDC that it is paying cross subsidy surcharge and undertook that all dues towards the same would be paid.

(h) ESIL is confusing the matter of recovery of cross subsidy surcharge with that or the stranded capacity of the Petitioner which is a matter of additional charge under Section 42 (4) of the Act and an issue presently pending before the Supreme Court in Civil Appeal No. 504 of 2016.

15. Respondent No. 1 in its written submission dated 12.9.2018 has submitted as under:

(a) When the matter was taken up on 21.8.2018, it was brought to the notice of the Commission that Corporate Insolvency Resolution Process (CIRP) has been initiated against Respondent No. 1 and Mr. Satish Kumar Gupta, Resolution Professional has been appointed for Respondent No.1 by the NCLT, Ahmadabad vide order dated 2.8.2017. As per the said order of NCLT, a moratorium was imposed starting from the date of order till the conclusion of CIRP. It was specifically submitted by Respondent No. 1 that in view of the order of admission initiating CIRP and further declaration of moratorium under Section 14 of the IBC by NCLT, the present proceedings should be kept in abeyance till the period of moratorium is lifted.

(b) The Petitioner has already filed the following claim of Rs. 5882.28 crore before the Resolution Professional under the IBC and now stopped from agitating the same grievance before this Commission:

- (i) Cross Subsidy Surcharge - Rs. 1136.08 crore
- (ii) Additional Surcharge- Rs. 665.92 crore

- (iii) Breach of minutes of meeting dated 1.2.2010-Rs. 4047 crore
- (iv) Electricity Duty on demand charges-Rs. 33.27 crore
- (v) Total amount claimed – Rs. 5882.28 crore

In view of the submission of the Petitioner to CIRP, the Petitioner is estopped from agitating the same grievance before this Commission.

(c) ESIL started paying cross subsidy surcharge to the Petitioner in terms of the Commission`s order dated 8.6.2016. However, after ESIL came to know that CERC has not determined the rate of cross subsidy surcharge as applicable to it and that the liability of ESIL to pay cross subsidy surcharge is limited to the extent of the transmission capacity available in the STU line. Therefore, ESIL sought refund of cross subsidy surcharge of Rs. 100 crore already paid to the Petitioner. Since, the Petitioner rejected the aboverequest, ESIL filed Petition No. 216/MP/2016 before CERC. The Commission in its order dated 6.7.2016 held that the dispute regarding cross subsidy surcharge falls within the jurisdiction of the GERC.

(d) Section 14 of the IBC and NCLT order dated 2.8.2017 indicate that the moratorium declared by NCLT prohibits institution of proceedings or continuation of pending proceedings against the corporate debtor i.e. ESIL, involving assessment and/or recovery of money, among other things from ESIL during moratorium period. In view of the moratorium declared by NCLT, any act to collect, assess or recover a claim against ESIL that arose before the commencement of the resolution process under IBC have been prohibited as per the provision of Section 14. Therefore, it is

just, proper and necessary for this Commission to stay the proceedings before the completion of the CIRP against Respondent No. 1. Respondent No. 1 has relied upon the judgments of Hon`ble Supreme Court in Civil Appeal No. 16929 of 2017 (Alchemist Asset Reconstruction Company Ltd. Vs. HotalGaudavan Pvt. Ltd. and ors.) and Arbitration Civil No. 18/2016 (China First Metallurgical Group Cp. Ltd. Vs. Electro Steels Ltd.) in this regard. In the light of the judgments of the Supreme Court, the Commission may stay the present proceedings till the CIRP is pending.

(e) The Petitioner is indulging a forum shopping since it has sought similar reliefs in Petition No. 1601 of 2016 before GERC in which order has been reserved by GERC on 28.9.2017.

(f) Switching ESIL back to State Grid as prayed by the Petitioner would mean that it would be restricted in transmission of power and hence adversely affect production. It would severely impact Respondent No. 1 as a going concern thus defeating the whole objective of the IBC and it will also impact the resolution plan that has been submitted by the resolution applicants. Further, Section 60 (5) of IBC provides that NCLT has the jurisdiction to grant relief on payment of cross subsidy surcharge. Section 60 (5) of the IBC corresponds to Section 446 (1) of the Companies Act. The Hon`ble Supreme judgment in HariharNath and Ors Vs. State Bank of India and Ors [(2006) 4SCC457] has held that the winding up court has to decide whether it will let the suit/proceedings to continue in the court where it is pending or it will itself adjudicate the suit/proceedings.

(g) Cross subsidy charges are not applicable and payable by Respondent No. 1 and for this reason, Respondent No. 1 has filed Petition Nos. 1420/2011 and 1601/2011 before GERC challenging the levy of cross subsidy surcharge on it. Where there is no direction in the matters, it is inconceivable that there can be any punishment for breach of it. For this reason, the Petition under Section 142 of the Act is not maintainable.

Analysis and Decision:

16. We have considered the submissions of the Petitioner and Respondent No.1. Based on the pleadings and submissions of the parties, the following issues arise for our consideration:

(a) **Issue No.1:** Whether the Petition is maintainable before the Commission in view of the (i) pendency of the Petitions before GERC with regard to Cross Subsidy Surcharge, and (ii) commencement of the Insolvency Proceedings before National Company Law Tribunal?

(b) **Issue No.2:** Whether any direction could be issued on the prayers of the Petitioner?

Issue No.1: Whether the Petition is maintainable before the Commission in view of the (i) pendency of the Petitions before GERC with regard to Cross Subsidy Surcharge, and (ii) commencement of the Insolvency Proceedings before National Company Law Tribunal?

(A) Maintainability on account of pendency of Petitions before GERC

17. The first preliminary objection on maintainability raised by Respondent No.1/ESIL is on account of the pendency of Petition Nos. 1420/2014 and 1601/2016 before GERC in

which the issue of cross subsidy surcharge is sub-judice. Respondent No.1 has submitted that since the Petitioner has sought a direction for payment of cross-subsidy surcharge, the Petitioner cannot pursue the same issue before two forums. On the other hand, the Petitioner has submitted that the pendency of the proceedings before GERC does not affect the present proceedings as GERC vide its order dated 8.8.2016 has specifically clarified that there is no interim order operating and has further granted liberty to the Petitioner to take action as necessary for recovery of the cross subsidy surcharge amount. The Petitioner has submitted that as on date, Respondent No.1 is liable to pay the cross subsidy surcharge and its contention on the applicability of cross subsidy surcharge cannot be considered in the present proceedings.

18. The genesis of the liability of Respondent No.1 for payment of the cross subsidy surcharge can be traced back to the proceedings before the Commission in Petition No.245/MP/2012 wherein the issue of grant of direct ISTS connectivity and regional entity status to ESIL were being considered. It is not disputed that ESIL is a consumer in terms of the provisions of the Act. It was connected to the distribution system of DGVCL prior to grant of direct connectivity to ISTS. When a consumer seeks supply of power from a source other than the distribution company in whose area of supply it is located, it is required to pay cross subsidy surcharge and other surcharge as determined under section 42 of the Act. During the proceedings of Petition No.245/MP/2012, this issue was specifically raised by GUVNL and DGVCL. GUVNL in its affidavit dated 18.1.2013 and 1.4.2013 specifically raised the issue of cross subsidy surcharge which has been recorded in para 8(b) of the order dated 8.6.2013 as under:

“(b).....In addition, the Petitioner should be required to pay the cross subsidy surcharge and other charges relating to DGVCL for consumption of electricity sourced from Essar Power and EPMPL as per the applicable provisions of the 2003 Act.”

Further, DGVCL in its affidavits dated 17.1.2013 and 15.4.2013 also submitted as under with regard to cross-subsidy surcharge which was recorded in para 9(b) of the order dated 8.6.2013 as under:

“(b)The Petitioner being in the area of operation of DGVCL, is also required to pay cross subsidy surcharge to DGVCL for the supply taken by the Petitioner from third parties as recorded at the meter at the CTU inter-connection network.”

The Petitioner in its rejoinder confirmed its liability to pay the cross subsidy surcharge which has been recorded in para 10(d) of the order dated 8.6.2013 as under:

“(d).....The Petitioner has further confirmed to pay the cross subsidy surcharge and other related charges to the distribution companies in terms of the applicable rules and regulations.....”

The Commission after considering the above submissions and examining the statutory provisions came to the following conclusion:

“19.....When a consumer is directly connected to the ISTS, its scheduling and energy accounting has to be done by the concerned RLDC under Section 28(3)(a) of the 2003 Act and such consumer is liable to comply with the directions of the RLDC under Section 28(3) of the Act and pay the surcharge specified by the State Commission under Section 42 of the 2003 Act.”

The Commission in para 49(j) of the order dated 8.6.2013 in Petition No.245/MP/2012 issued the following directions:

“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.”

19. From the above discussion, it is crystal clear that as per the order dated 8.6.2013 in Petition No.245/MP/2012, Respondent No.1 is liable to pay the applicable cross subsidy surcharge and other charges to DGVCL as per the provisions of the Act and Regulations of the GERC.

20. It is pertinent to note that the Petitioner in its submission dated 2.1.2017 has stated as under:

“25. During the period from 08.06.2013 till May 2015 Essar Steel did not raise any objection to its liability to pay cross subsidy charge on sourcing of electricity from other than Essar Mahan project. In fact Essar Steel admitted its liability to pay and did make payment of cross subsidy charge for the period upto March 2015. In the letter dated 11.04.2014 to WRLDC, Essar Steel stated that it is paying cross subsidy surcharge (with some delay) and further undertook that all dues towards cross subsidy surcharge would be paid. Essar Steel had consistently in its letters to DGVCL admitted its liability to pay cross subsidy surcharge. The claim made by Essar Steel on this count is clearly an afterthought and an attempt to delay the payment of cross subsidy amount to DGVCL.”

It is noticed from the documents placed on record that Respondent No.1/ESIL vide its letters dated 11.5.2014, 22.7.2014, 10.10.2014, 24.11.2014, 25.12.2014, 13.1.2015, 20.2.2015, and 7.5.2015 has accepted the liability to pay the cross-subsidy surcharge except the amount payable towards cross subsidy imposed upon the power that is consumed by ESIL’s captive unit in Mahan. Respondent No.1/ESIL filed Petition No. 1420 of 2014 before GERC in May 2014 stating as under:

"1. By way of the present petition, Essar Steel India Limited ("**ESIL**") i.e. the Petitioner herein, invokes the jurisdiction of this Hon'ble Commission herein under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as "**the Electricity Act**") 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 EssarPower 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, 205. Under the provisions of the Electricity Act, 2003 and the Electricity Rules, 205 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. Annexed hereto and marked as **Annexure-I (Colly)** are copies of the cross-subsidy bills raised by DGVCL upon ESIL and the chart computed by ESIL."

Thus, in Petition No.1420 of 2014, Respondent No.1/ESIL only raised the limited issue of liability to pay cross subsidy surcharge for procurement of power from Essar Power Mahaan power plant in Madhya Pradesh on the basis that the said plant was a captive power plant and as such no cross subsidy surcharge is payable for such captive consumption. Respondent No.1/ESIL did not raise any issue with regard to liability for cross subsidy surcharge for consumption of power other than from its captive source.

21. Respondent No.1/ESIL approached this Commission through Petition No.216/MP/2015 seeking a declaration that the levy of Cross Subsidy Surcharge by the Petitioner on ESIL/Respondent No.1 is illegal being in violation of Section 38(2)(d)(ii) of the Act read with Rule 6 of the Electricity Rules, 2005 which provided that grant of open access to a consumer by CTU to its network would be subject to payment of cross subsidy surcharge as determined by this Commission. The Commission in its order dated 6.7.2016 in Petition No. 216/MP/2015 filed by Respondent No.1 further clarified as under:

"20. It has thus been the consistent stand of the petitioner in the petition (Petition No1420/2014) 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 turn around and raise a dispute before this Commission against the respondent's claim for the Cross Subsidy Surcharge.

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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.245/MP/2012 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.”

22. Thus the factual and legal position is abundantly clear that the Respondent No.1/ESIL is obliged to pay cross subsidy surcharge to DGVCL consequent to its direct connectivity to ISTS and grant of regional status. As discussed above, Respondent No.1/ESIL was paying the cross subsidy surcharge for its non-captive consumption and the cross subsidy surcharge was disputed before GERC in Petition No.1420 of 2014. Respondent No.1/ESIL filed Petition No. 1601 of 2016 before GERC contending that the cross subsidy surcharge is not payable even for non-captive open access. In our view, this is a fresh cause of action and unless GERC grants a stay or decided in favour of Respondent No.1/ESIL, liability for cross subsidy surcharge continues to be on the Respondent No.1. As per the documents on record, no stay has been granted by GERC in Petition No.1601/2016. However, GERC in order dated 30.8.2016 in IA Nos. 7 of 2014 and 3 of 2016 in Petition No. 1420 of 2014 had decided as under:

“6.11. Further, the issue of CSS payable by ESIL on the units purchased from sources other than EPMP is also disputed by ESIL stating that it is not liable to pay CSS under the provisions of Section 38 (2) (d) (ii) of the Electricity Act, 2003 and it has filed a petition in this regard which is pending for registration and hearing before the Commission. Therefore, it is premature to pass any order in this regard. We clarify that there is no stay granted by the Commission on the recovery of the amount of CSS claimed by DGVCL and GUVNL from ESIL. They are at liberty to take necessary action for recovery of the said amount as per the provisions of the Electricity Act, 2003.

6.12. We clarify that DGVCL and GUVNL are not barred from taking necessary action against ESIL for non-payment of the outstanding CSS amount by approaching the

appropriate forum including WRLDC who have given permission for open access as a regional entity.”

23. In our view, the Petition No. 1420 of 2014 and 1601 of 2016 filed by Respondent No.1/ESIL cannot stand on the way of maintainability of the present petition before this Commission. Firstly, the facts of the Petition No.1420 of 2014 are different since they pertain to applicability of cross subsidy surcharge for the power sourced from the captive plant. Secondly, there is no stay on the recovery of cross subsidy surcharge by GERC. On the other hand, GERC has clarified that DGVCL and GUVNL are not debarred from taking necessary action against ESIL for non-payment of outstanding cross subsidy surcharge by approaching appropriate forums. Thirdly, there is no stay in the Petition No.1601/2016 where the liability of ESIL for payment of cross subsidy surcharge for power from non-captive sources has been raised. In the absence of any stay by GERC for recovery of cross subsidy surcharge, Respondent No.1 has a continued liability to pay the cross subsidy surcharge to DGVCL from the date of grant of regional entity status in terms of the Commission’s order dated 8.6.2013 in Petition No.245/MP/2012 and clarificatory order dated 6.7.2016 in Petition No. 216/MP/2015. In our view, the present petition which has been filed for enforcement of the order dated 8.6.2013 in Petition No.245/MP/2012 is maintainable.

B. Commencement of the Insolvency Proceedings before National Company Law Tribunal

24. Petitions were filed by Corporate Debtors against ESIL under Section 7 of Insolvency Bankruptcy Code, 2016 (IBC) for commencement of Insolvency Resolution Proceedings and appointment of Interim Resolution Professional [‘IPR’], before the National Company Law Tribunal, Ahmedabad. The Adjudicating Authority, NCLT,

Ahmedabad vide order dated 2.8.2017 appointed Satish Kumar Gupta, c/o Alberz and Marshal India Pvt. Ltd as IPR and directed a moratorium on pending suits or proceedings against Essar Steel India Ltd in terms of Section 14[1] [a] of IBC. Relevant part of the order is extracted as under:

“36. This Adjudicating Authority hereby declare moratorium under Section 13(l)(a) of the Code prohibiting the following as laid down in Section 14 of the Code;

(a) the institution of suits or continuation of pending suits or proceedings against, the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(i) The moratorium order in respect of (a), (b), (c) and (d) above shall not apply to the transactions notified by the Central Government.

(ii) However, the order of moratorium shall not apply in respect of supply of essential goods or services to Corporate Debtor.

(iii) The applicant SBI shall also make public announcement about initiation of 'Corporate Insolvency Resolution Process', as required by Section 13(l)(b) of the Code and call for submission of claims under section 15 of the code.

37. This order of moratorium shall be in force from the date of order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14.”

25. Respondent No.1/ESIL has submitted that in view of the Moratorium under Section 14 the IBC imposed as above, the proceedings before the Commission should be kept in abeyance till the conclusion of CIRP. The Petitioner has further submitted that the Petitioner has already filed its claims before the Resolution Professional under the IBC

and therefore is estopped from agitating the same grievance before this Commission. Respondent No.1 has further submitted that as prayed by the Petitioner in the present petition, switching Respondent No. 1 back to State Grid would mean that it would be restricted in transmission of power and hence adversely affect production which would severely impact Respondent No. 1 as a going concern, thus defeating the whole objective of the IBC and impacting the resolution plan that has been submitted by the resolution applicants.

26. The Petitioner has denied that the present proceedings are affected by the moratorium. The Petitioner has submitted that there is no mandate under the Insolvency and Bankruptcy Code that a corporate debtor be allowed to use the moratorium to violate conditions of consents, permissions, etc. without any consequences. The Petitioner has submitted that in the present case, the Petitioner is not seeking a recovery of money but is praying for recall of permissions granted due to non-compliance with the conditions of permission. The Petitioner has submitted that only exception under the Insolvency and Bankruptcy Code is for essential services such as electricity which cannot be disconnected under Section 14 (2) of the Code. The Petitioner has submitted that even assuming but not admitting that open access can be regarded as essential services which cannot be disconnected, the same does not allow ESIL to enjoy the service without making atleast the current payment. Even if dues are not paid, the current dues have to be paid to enjoy the essential services. In this regard, the Petitioner has relied upon the judgment of National Company Law Appellate Tribunal in Company Appeal No. (AT) (Insolvency) No. 334 of 2017 in Dakshin Gujarat Vij Company Limited Vs. ABG Shipyard Ltd. and Another and has submitted that even essential services are not required to be

provided if the current charges are not being paid by the corporate debtor such as ESIL. If even essential services are not required to be provided without payment of charges, there can be no issue of non-essential services being provided without payment of all charges.

27. Moratorium has been imposed on the Corporate Debtor under Section 14(1)(a) of the IBC which is extracted as under:

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

28. The Hon'ble High Court of Delhi in its judgment dated 11.12.2017 in OMP (Comm) No. 397 of 2016 (Power Grid Corporation of India Limited Vs. Joyti Structures Ltd.) has held that the moratorium applies to debt recovery action or execution of a decree. Relevant portion of the said judgment is extracted as under:

“14. Hence for following reasons, I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., (a) “proceedings” do not mean “all proceedings”;(b) moratorium under section 14(1)(a) of the Code is intended to prohibit debt recovery actions against the assets of corporate debtor; (c) continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the Code; (d) term “including” is clarificatory of the scope and ambit of the term “proceedings”;(e) the term “proceeding” would be restricted to the nature of action that follows it, i.e. debt recovery action against assets of the corporate debtor; (f) the use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phrase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability; (g) the Arbitration Act draws a distinction between proceedings under section 34(i.e. objections to the award) and under section 36(i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).”

29. A close scrutiny of the order of the Hon'ble High Court of Delhi in PGCIL case supra would reveal that Hon'ble High Court has made a distinction between Section 34 and Section 36 of the Arbitration and Reconciliation Act, 1996 for the purpose of applicability of Section 14(1)(a) of the Insolvency and Bankruptcy Code. Hon'ble High Court has decided that Section 14(1)(a) is not applicable in case of Section 34 which pertains to filing of objections against the arbitration award. However, after the objections are filed and determined under Section 34, the party moves closer to execution of the proceedings under Section 36 of the Arbitration and Conciliation Act. Hon'ble High Court

has held that enforceability of the award against the debtor will attract Section 14(1)(a) of the Code.

30. The Commission has already decided in orders dated 8.6.2013 and 6.7.2016 in Petition Nos. 245/MP/2012 and 216/MP/2016 respectively that ESIL is liable to pay the cross subsidy surcharge to DGVCL consequent to its disconnection from the area of operation of DGVCL and connection to ISTS and grant of status of Regional Entity. Petition Nos.1402 of 2014 and 1601 of 2016 are pending before the GERC. While in Petition No.1402 of 2014, the liability for cross subsidy surcharge in respect of supply from captive source has been challenged, in Petition No.1601/2016, the liability for cross subsidy surcharge from non-captive source has been challenged. Both petitions are pending before GERC, there are no stay. The Respondent No.1 has the liability to pay the cross subsidy surcharge in terms of the Commission's orders dated 8.6.2013 and 6.7.2016 in Petition Nos. 245/MP/2012 and 216/MP/2016 respectively. Thus, there is no fresh determination of liability of Respondent No.1 towards cross subsidy surcharge in the present petition.

31. The Petitioner has filed the present petition for termination of the Regional Entity status of ESIL Steel and initiation of the proceedings against ESIL for non-compliance of the Commission's direction dated 8.6.2013, and directions to PGCIL and WRLDC not to grant open access unless the cross subsidy surcharges are paid. In other words, the Petitioner is seeking execution of the cross subsidy surcharges against ESIL through initiation of appropriate proceedings including withdrawal of regional entity status which would prevent the Essar Steel to take power to its steel facility through ISTS and consequently, affect its source of revenue. Further, the Petitioner has sought initiation of

proceedings under Section 142 of the Act which not only provides for penalty for non-compliance of the order of the Commission but also imposition of recurring penalty till the order is complied with and also proceedings under section 146 of the Act. The prayers are in the nature of enforcement of the orders of the Commission and therefore, are analogous to Section 36 of the Arbitration and Conciliation Act. The prayers are affected by the moratorium under Section 14(1)(a) of the Insolvency and Bankruptcy Code. Therefore, the Commission cannot deal with the prayers of the Petitioner in the present petition during the pendency of the insolvency proceedings before NCLT and Resolution Professional.

Issue No.2: Whether any direction could be issued on the prayers of the Petitioner?

32. Since there is moratorium on continuation of pending suits or proceedings during the pendency of the matter before NCLT under section 14(1)(a) of IBC, we are constrained to issue any directions on the prayers of the Petitioner. However, under Section 60(5) of the IBC, a corporate person can approach NCLT for appropriate directions. Section 60(5) of the IBC is relevant which is extracted as under:

“(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain and dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

It is on record that the Petitioner has already filed its claims before the Resolution Professional. Therefore, the Petitioner, if so advised, has the liberty to approach the NCLT for appropriate directions with regard to its claims including the current cross subsidy surcharge against the Respondent No.1. If any grievance with regard to cross subsidy surcharge survives after the conclusion of CIRP, the Petitioner may approach the Appropriate Commission in accordance with law.

33. The Petition No. 151/MP/2016 is disposed of in terms of the above.

Sd/-

(Dr. M. K. Iyer)
Member

Sd/-

(P.K. Pujari)
Chairperson