

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: **Shri. Preman Dinaraj, Chairman**

183/D(T)/2020/KSERC/

- In the matter of : Review Petition filed by Southern Railway against order dated 12.12.2019 in OP No 31/2019 in the matter of direction to Kerala State Electricity Board Limited to issue No Objection Certificate for availing open access
- Petitioner Electrical : Southern Railway, represented by the Chief Distribution Engineer.
- Petitioner represented by : 1. Shri. Pulkit Agarwal, Counsel
2. Shri. V Venkatasubramnaian, Chief Electrical Distribution Engineer
3. Shri. Rajnish Goyal / GM/ REMCL
4. Shri, J Jyothiraman, SSE/SR
- Respondent : 1. Kerala State Electricity Board Limited
2. SLDC of Kerala
- Respondents represented by : 1. Sri. K.P. Pradeep, Chief Engineer (Transmission- System Operation), SLDC, Kalamassery, KSEBL
2. Sri. K. G. P. Nampoothiri, EE, TRAC, KSEBL
3. Smt. Latha S.V, AEE, TRAC, KSEBL
3. Smt. Gertrude K G, AEE, SLDC, KSEBL

Order dated 26.06.2020

1. Southern Railway filed a review petition on 31.01.2020, before the Commission against order dated 12.12.2019 in OP No 31/2019 in the matter of No Objection Certificate for open access to Railways, with the following prayers:
 - (i) *Admit the instant Review Petition;*

- (ii) *Direct the Respondents to allow open access facility to the petitioner on payment of the charges applicable to the open access customer (Deemed Distribution Licensee) and not as an open access consumer.*
- (iii) *Direct that the Petitioner as a Open Access Customer is not liable to pay cross subsidy charge and / or additional surcharge being a deemed Distribution Licensee.*
- (iv) *Condone any inadvertent omissions/errors/shortcomings and permit Southern Railway to add/change/modify/alter this filing and make further submissions as may be required at a future date.*
- (v) *Pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.*

2. The summary of the issues raised in the review petition are:

- (i) Indian Railway is a deemed distribution licensee under third proviso to Section 14 of the Electricity Act 2003. Railways are authorized under Railways Act, 1989 to distribute electricity and authorized to purchase energy from any source. This has been considered and decided by CERC in its order dated 5.11.2015 in Petition No 197/MP/2015.
- (ii) The Commission while issuing the order dated 12.12.2019 has issued orders requiring the petitioner to pay open access charges as an open access consumer which is patently wrong and contrary to the settled principles of law. Railways is to be treated as a distribution licensee and not as a consumer of another distribution licensee in the area.
- (iii) The cross subsidy surcharge is leviable in terms of the provisions of Section 42(2) read with Section 38(2)(d)(ii), Section 39(2)(d)(ii) and 40 (c)(ii) only when the open access is sought for the conveyance of electricity to a consumer. There is no imposition of cross subsidy surcharge when the conveyance of electricity is through open access to a licensee.
- (iv) There is no provision for applicability of cross subsidy surcharge (CSS) on a licensee / deemed licensee. The intent of CSS is on a consumer who consumes power from a source other than the distribution licensee of the area. When a distribution licensee of the said area itself is procuring power using the network of another transmission licensee and not distributing electricity for retail supply to the consumers in the licensed area of any other distribution licensee, there cannot be any CSS. The petitioner in the present case, is availing power through Open Access at its Traction Substations as a deemed licensee and not as a consumer of any other distribution licensee.
- (v) The Commission in its order dated 12.12.2019 on one hand has recognized the status of the petitioner as a Deemed Licensee and on the other has directed for payment of Open Access Charges by the Petitioner as a Open Access Consumer. It is reiterated that the Petitioner after initialization of procurement of power as a Deemed Licensee through Open Access shall cease to be a consumer of the State Discoms and as such shall have to be treated as an 'Open

Access Customer". Further, the Petitioner cannot be treated as a Deemed Licensee as well as a Consumer at the same time and for the same activity, i.e., procurement of power through open access as a Licensee. For the forgoing, it is submitted that the observation / directions issued by the Hon'ble Commission in its order dated 12.12.2019 are self contradictory and for this reason also, the order dated 12.12.2019 is required to be reviewed by the Hon'ble Commission in regard to payment of Open Access Charges by the Petitioner.

- (vi) Thus the petitioner is liable to pay wheeling and transmission charges, scheduling and system operation charges, DSM charges and reactive energy charges and not liable to pay any cross subsidy surcharge or additional surcharge (AS).

3. KSEB Ltd on 04.06.2020 submitted its comments on the review petition filed by M/s Southern Railway and its summary is given below.

(1) The Review petition is not maintainable in view of the following.

(a) The petition filed by the petitioner is in the nature of a 'review petition' for reviewing the order dated 12-12-2019 in OP 31/2019.

(b) It is submitted that review under Civil Procedure Code is permissible only on the following grounds. (a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when decree or order was passed. (b) Some mistake or error apparent on the face of the record.

(c) There has been no discovery of new and important matter since the issue of the order dated 12-12-2019. Further, the argument raised by the petitioner cannot be treated as an error apparent in the order of Hon'ble Commission,

(d) In view of the above, it is submitted that the instant petition is not maintainable and it is humbly requested that the petition may be dismissed.

(2) Without prejudice to the maintainability of the petition, KSEB submitted the following on the issues raised in the review petition dated 12.12.2019.

(i) Hon'ble Supreme Court vide its order dated 25-4-2014 of Hon'ble Supreme Court in Civil Appeal No. 5479 of 2013 (M/s. Sesa Sterlite Ltd vs Orissa Electricity Regulatory Commission) has ordered that a deemed distribution licensee cannot avoid payment of Cross subsidy surcharge. The extract of the order dated 25-4-2014 of Hon'ble Supreme Court in Civil Appeal No. 5479 of 2013 (M/s. Sesa Sterlite Ltd vs Orissa Electricity Regulatory Commission) is submitted below:

"49. As correctly indicated by the State Commission, the definition of term "distribution licensee" as enumerated under [Section 2\(17\)](#) of Electricity Act, 2003, emphasizes upon the distribution licensee to operate and maintain a

*distribution system and supply of power to the consumers. Considering the definition of 'supply' in [Section 2\(70\)](#), the supply here means sale of electricity to consumers. **By merely being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence at all since admittedly, the entire power purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.***

*50. **An entity which utilizes the entire quantum of electricity for its own consumption and does not have any other consumers, cannot, by such a notification, be deemed to be distribution licensee, even by a legal fiction.** By virtue of the legal fiction created by the notification dated 3.03.2010, the Developer of SEZ notified under the SEZ Act, who distributes electricity can be deemed to be a distribution licensee. Thus, this legal fiction cannot go further and make a person who does not distribute electricity to the consumers as to distribution licensee. Therefore there is no merit in the contention of the Appellant.*

*43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. **However with this, it only gets exemption from specifically applying for licence under [Section 14](#) of the Act. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity.** That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of SEZ Act which envisages several units being set up in a SEZ area. This is evident from a collective reading of the various provisions of the SEZ Act viz. [Section 2\(q\)\(i\)\(za\)\(zc\)](#), [Section 3](#), [4](#), [11](#), [12](#), [13](#) and [15](#). There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the Appellant may be rare. The Notification dated 03.03.2010 providing for the "Developer" of SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself.*

*44. **Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this Appeal which is accordingly dismissed.***

Thus, as per the judgment of Hon'ble Supreme Court, the status of 'deemed distribution licensee' for Railways is only to get exemption from specifically applying for license under Section 14 of the Electricity Act, 2003. This does not exempt them from paying open access charges and other charges as stipulated in the Open Access Regulations of Hon'ble Commission.

- (ii) As per the order of the Hon'ble High Court of Chattisgarh dated 11.02.2020 in WP(c) No. 1084 of 2017, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross-subsidy surcharge under the Act.
- (iii) The petitioner vide paragraph J of the petition has stated that once it starts availing power through open access, it shall cease to be a consumer of the distribution licensee. This statement of the petitioner is not correct. Traction Substation in the State of Kerala, is at present an EHT consumer of KSEBL availing supply at 110KV having 13 supply points with a total contract demand of 107MVA. However, Railways has requested for NOC for only 35MW of open access. Therefore, the statement that it will cease to be a consumer of KSEBL is not correct.
- (iv) KSEB Ltd further submitted that, as per the Section 2 (15) of the Electricity Act, 2003, a 'consumer' is defined as:

“any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purposes of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.”

- (v) Cross subsidy surcharge for Railways has been ordered by other SERCs also. Rajasthan SERC has vide order dated 23-4-2019 in Petition no. RERC-1452/19 has ordered that Railways are liable to pay cross subsidy surcharge. The relevant paragraph of the order is extracted below.

“38. In Commission view, by merely being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of distribution licensee to any person. Further, Section 2(17) of Electricity Act, 2003, emphasizes upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers. In the present case Railways does not supply to any consumer but uses power for its own use. 39. Therefore, in view of judgment passed by Hon'ble Supreme Court in case of Sesa Sterlite case and facts of the

case, Commission is of the view that Respondent is liable to pay open access charges i.e. cross subsidy surcharge and additional surcharge to Petitioner.”

- (vi) The CSS existing in some of the States are submitted below.

State	Rs/unit	Remarks
Telangana	1.49	Order dtd.27-3-2018
AP	1.45 (SPDCL)	2020-21
Punjab	1.03	Order dtd.19-4-2018
Karnataka	1.57	Tariff order 2018
Tamilnadu	1.54	Order dtd.11-8-2017
Madhya Pradesh	1.11	Tariff order for 2018-19
Gujarat	1.47	Tariff order dated 31-3-2018
Haryana	0.58	Tariff order dated 11-7-2017
Rajasthan	1.70	2019-20

- (vii) Therefore, it is submitted that there is no error in the order of Hon'ble Commission and therefore it is requested that the review petition may be dismissed.

4. The Commission conducted admissibility hearing on the petition on 8.6.2020. Adv. Pulkit Agarwal presented the petition on behalf of Southern Railway. Smt. Latha S.V, AEE presented the counter argument on behalf of the respondent KSEB Ltd and Smt Getrude, AEE on behalf of SLDC of Kerala.
5. On behalf of the petitioner, Adv. Pulkit Agarwal submitted the following;
 - (i) Railways is not a consumer and but a deemed licensee. As per Section 42 of the Electricity Act, 2003, only consumers need to pay cross subsidy surcharge and additional surcharge. Railways will not come under the purview of an open access consumer, but is an open access customer.
 - (ii) Supreme Court judgement in Civil Appeal No. 5479 of 2013 (M/s Sesa Sterlite Ltd vs OERC) is issued for Special Economic Zone and not applicable for Railways.
6. On behalf of the respondents, the following submissions made before the Commission.
 - (i) KSEB Ltd submitted that the review petition filed by Railway is not maintainable as per the Section 94 of the Electricity Act, 2003 and Code of Civil Procedure 1908. . Without prejudice to the maintainability, KSEB Ltd submitted that, it had executed PPA with different power developers considering the electricity demand of Railways also as per the agreements entered with them.

Further, KSEB Ltd submitted that, at present the Railways entered into agreement with them for contract demand of 107 MVA, whereas the Railways has requested for NoC for open access for 35 MW only. Hence, the Railways may continue to avail power from KSEB Ltd even after availing open access.

The rationale for levying cross subsidy surcharge is clearly prescribed under Section 42 of the EA-2003. Further, as per the judgment of the Hon'ble Supreme Court dated 25th April 2014, even a licensee which purchase electricity for its own consumption would be liable to pay cross subsidy surcharge.

Rajasthan ERC vide its order dated 23.04.2019 ordered that, West Central Railways has to pay cross subsidy surcharge and additional surcharge to the DISCOM Jaipur Vidyut Vitran Nigam Ltd while availing open access.

OERC vide the judgment dated 25.02.2020 ordered that, Railways is a 'deemed licensee' for the purpose of transmission license and not for distribution license.

SERCs in other states determined cross subsidy surcharge and additional surcharge for Railways while availing open access.

Considering the above reasons, KSEB Ltd prayed before the Commission to dismiss the petition filed by KSEB Ltd.

- (ii) Smt. Gertrude K G, Assistant Executive Engineer on behalf of the SLDC submitted that, SLDC has its own apprehension in managing the system once Railway opt out of the system and no backup arrangement is made with KSEB Ltd. Since, M/s Railways being a bulk consumer, availing open access without backup arrangement may have considerable impact on the Kerala Grid.

In this issue, M/s Railways submitted that they will be going for their own arrangements on backup power in the event of failure of the firm power tied up. Sri Jyothiraman, and Sri Venkatasubramanian responded to the queries of the Commission.

Analysis and Decision

7. The Commission examined in detail the Review Petition filed by M/s Southern Railway, the counter argument of the respondent KSEB Ltd with reference to the provisions of the Electricity Act, 2003 and judgment of the Hon'ble Supreme Court and other relevant rules and Regulations in force.
8. Based on the deliberations of the subject petition, the Commission examined in detail the following two issues in detail.

- (1) Issue No. 1. Whether the Review Petition dated 31.01.2020, filed against the order of the Commission dated 12.12.2019 in OP No. 31/2019 is maintainable?
- (2) Issue No.2. Whether as a deemed licensee, Railways is bound to pay cross subsidy surcharge and additional surcharge while availing open access.

Issue No. 1. Whether the Review Petition dated 31.01.2020, filed against the order of the Commission dated 12.12.2019 in OP No. 31/2019 is maintainable?

9. The prayers of the petitioner M/s Southern Railways in the original petition OP No. 31/2019 is extracted below.

“

- (a) *Issue a directive to the respondents herein to issue “No Objection Certificate” and Concurrence to the petitioner for non-discriminatory open access to avail power supply from M/s. Bharatiya Rail Bijlee Company Limited (BRBCL) Power plant at Nabinagar, Bihar or any other source to the Railway Traction Substations as deemed licensee.*
- (b) *Direct the Respondents to consider all the drawal points from Inter State Transmission System (ISTS) Located within the Kerala State shall be a single entity for the purpose of scheduling and Energy Accounting as laid down by CERC in its order dated 05.11.2015 (Annexure B) that the drawal points from ISTS located within a State shall be treated as single entity for the purpose of scheduling and group of Traction Sub Stations (TSSs) situated in a State and connected directly with ISTS may be treated as one fragmented control area.*
- (c) *Direct the Respondents to provide back-up power supply for Railway Traction in the event of Open Access supply interruption and to claim back-up power supply charges as per Traction tariff approved by Hon’ble Commission for the backup power supplied by KSEB Limited only and not for the power which is wheeled through Open Access.*
- (d) *To declare that the 2-phase power supply system existing in the Southern Railway has no unbalance effect in upstream 3-phase power grid and alternate power supply scheme is not warranted as already Hon’ble Commission has recognized the 2-phase scheme of Traction power supply and approved separate tariff for Railway Traction.*

(e) It is prayed that a formal Deviation settlement mechanism may be please be enabled to take care of the operational requirement of Open Access.”

10. The Commission, after detailed deliberations on the subject petition OP No. 31/2019, including public hearing, disposed it vide the order dated 12.12.2019, as follows.

“Order of the Commission

16. The Commission after examining the petition filed by M/s Southern Railway, the objections raised by KSEB Ltd as per the provisions of the Electricity Act, 2003, KSERC (Connectivity and Intra-state Open Access) Regulations, 2013, orders of the CERC dated 05.11.2015 in Petition No. 197/2015, and other documents placed during the proceedings of the subject petition, hereby orders the following.

(1) KSEB Ltd shall issue ‘No objection Certificate’ to Southern Railway for availing open access for drawing power from any source, on payment of the charges applicable for the open access consumers in the State.

(2) If the petitioner avails open access, SLDC shall treat all Traction Substations of the petitioner within the State of Kerala as one “fragmented control area” for scheduling, accounting, metering, balancing, applicable open access charges and losses etc.

However, as mandated in the sub Regulation(4) of Regulation 11 of the KSERC (Connectivity and Intra-State Open Access) Regulations, 2013, the petitioner shall install Special Energy Meters and Remote Terminal Units and maintain them properly at all Traction Substations.

(3) As detailed in paragraph 13 above, if the petitioner M/s Southern Railways do not propose to maintain contract demand with KSEB Ltd, the licensee do not have the obligation to provide any back up supply to the petitioner at the traction tariff approved by the Commission.

(4) Considering the reasons cited under paragraph 14 above, the Commission cannot approve the prayer of the petitioner to declare that 2- phase power supply system existing in the Southern Railway has no unbalance effect in upstream 3-phase power grid.

As extracted above, and also as detailed under paragraph 11 to 15 of the original order dated 12.12.2019 in OP No.31/2019, which produced as Annexure-A to this review petition, the Commission had examined all the prayers of the petitioner in the original petition and decided on it as per the provisions of the Electricity Act, 2003 and rules and Regulations in force.

11. The petitioner Railways has not raised any issue, any error or mistake on the decision of the Commission in the said original order dated 12.12.2019.

12. However, as detailed under paragraph-1 of this order, the petitioner filed this petition to review the original order dated 12.12.2019 with new prayers. The crux of the prayers in the review petition is to direct the respondent KSEB Ltd to exempt Railways from payment of cross subsidy surcharge and additional surcharge while availing open access. In support of such demand, M/s Southern Railway raised new issue such as they are not a consumer, but availing open access as a customer. Further, being a deemed licensee, they are not liable to pay cross subsidy surcharge and/or additional surcharge.
13. Since the petitioner raised entirely new prayers in the review petition dated 31.01.2020, the Commission examined in detail the review jurisdiction provided in the Electricity Act, 2003. The details are discussed below.

- (i) Section 94 of the Electricity Act-2003, provide as follows:
“ (1) *The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the **same powers as are vested in a civil court under the Code of Civil Procedure, 1908** in respect of the following matters, namely: -*
(a) *Summoning and enforcing the attendance of any person and examining him on oath;*
(b) *Discovery and production of any document or other material object producible as evidence;*
(c) *Receiving evidence on affidavits;*
(d) *Requisitioning of any public record;*
(e) *Issuing commission for the examination of witnesses;*
(f) reviewing its decisions, directions and orders;
(g) *Any other matter which may be prescribed.:*
- (ii) Order 47 rule 1 of the Code of Civil Procedure dealing with review of the orders and decisions of a Civil court is quoted below:
“
Application for review of judgment.- (1) *Any person considering himself aggrieved,—*
(a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
(b) *by a decree or order from which no appeal is allowed, or*
(C) *by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.*
(2) *A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.*
Explanation : The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.”

As extracted above, as per the provisions of the Electricity Act - 2003 and Order 47 rule 1 of the Code of Civil Procedure, the review jurisdiction of the Commission is very limited. For reviewing its decisions, the discovery of new and important matter or evidence, which was not within the knowledge of the petitioner or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on face of record, or for any other sufficient reason.

The petitioner has not submitted any new facts before the Commission and also has not pointed out any apparent error on face of record; the Commission is liable to reject the review petition at the admission stage itself. ***Accordingly, the Commission rejects the Review Petition as not maintainable.***

Issue No.2. Whether as a deemed licensee, Railways bound to pay cross subsidy surcharge and additional surcharge while availing open access.

14. Without prejudice to the decision of the Commission on Issue No.1 as above, the Commission has examined in detail, whether the Railways is liable to pay cross subsidy surcharge and additional surcharge.
15. There is no dispute between the petitioner Southern Railways and respondent KSEB Ltd that, till date M/s Southern Railway availing power from the respondent KSEB Ltd at the traction tariff determined by this Commission from time to time. The present contract demand of the Southern Railways is 107 MVA. Now the petitioner M/s Railways, as a deemed licensee proposed to avail power through open access as per the provisions of the Electricity Act, 2003.

It is also a fact that, though M/s Railways is a deemed licensee, proposed to avail open access for their own consumption and not for re-sale of electricity to other consumers. It is a fact that, Railways are not authorized to re-sell electricity as a distribution licensee at the retail tariff approved by the State Electricity Regulatory Commission as per the provisions of the Electricity Act-2003. Railways also not have any license area for distribution of electricity. More explicitly, the Regulatory functions of the SERCs as provided in the Section 86(1)(b) of the EA-2003 cannot be made applicable to the Railways as a deemed licensee.

In this matter, the Commission noted the following provisions of Electricity Act, 2003, and the Regulations notified by this Commission and CEA.

Section 2 (17) of the Electricity Act 2003, defines the term '**distribution licensee**' as follows.

(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

Section 2 (19) of the Electricity Act, 2003 defines the term '**distribution system**' as follows.

(19) "**distribution system**" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;

Section 2 (3) of the Electricity Act, 2003 defines the term '**area of supply**' as follows.

(3) "**area of supply**" means the area within which a distribution licensee is authorised by his licence to supply electricity;

Section 2(70) of the Electricity Act, 2003 defines the term '**supply**' as follows.

(70) "**supply**", in relation to electricity, means the sale of electricity to a licensee or consumer;

As extracted above, Section 2 (17) of the Electricity Act, 2003 provides that distribution licensee **means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in an area of supply**. More precisely, as per the Electricity Act, 2003, **distribution is to supply electricity to consumers in his area of supply for which the licensee has to operate and maintain a distribution system**. Hon'ble Supreme Court in the judgment dated 25th April 2014 in Civil Appeal No. 5479 of 2013 observed under paragraph 49 of its judgment that, "By merely being authorised to operate and maintain a distribution system as deemed licensee, would not confer the status of distribution licensee to any person".

Railways is not into the supply of electricity to consumers and also does not maintain a distribution system for this purpose. The petitioner is consuming electricity for its own purposes exclusively and does not sell it to any other end consumer. Therefore Railways, strictly speaking, is not a deemed distribution licensee as per the provisions of the Electricity Act, 2003.

Railways also have no obligation of universal supply as per Section 43 of the Electricity Act, 2003, and further neither has any distribution network to distribute electricity to the consumers. Railways also is not authorised to function as a distribution licensee as defined in Electricity Act, 2003.

Till date, Railways has been availing supply from KSEB Ltd at 110 kV for traction purposes. The Section 2(15) of the Electricity Act, 2003 defines the term '**consumer**' as follows.

(15) "**consumer**" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

Further, as per the Regulation 2(8) of the CEA (Technical standards for Connectivity in the Grid) Regulations, 2007, the term 'Bulk consumer' is defined as 'a consumer who avails supply at voltage 33 kV or above'. Accordingly, till date M/s Railways is a 'Bulk consumer' of KSEB Ltd availing supply at 110 kV for railway traction.

The term '**open access customer**' is defined under Regulation 3(26) of the KSERC (Connectivity and Intra-state Open Access) Regulations, 2013, as extracted below.

(26) "open access customer" means a consumer, trader, distribution licensee or a generating company who has been granted open access under these regulations.

As stated above, a consumer granted open access under KSERC (Connectivity and Intra-state Open Access) Regulations, 2013 is also an 'open access customer' under the said Regulations.

Thus, as per the provisions of the Electricity Act, 2003 and KSERC (Connectivity and Intra-state Open Access) Regulations, 2013, for the purpose of open access, Railway is a consumer situated in the distribution licensee's area.

16. The Rationale for payment of cross subsidy surcharge by a deemed licensee has examined by the Hon'ble Supreme Court in detail vide the judgement dated 25.04.2014 in Civil Appeal No. 5479 of 2014. The relevant paragraphs of the said judgment are extracted below.

" CSS: Its Rationale

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

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

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

- (a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and
- (b) obligation to supply.

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

- 17. As extracted above, as per the judgment of the Hon'ble Supreme Court dated 25th April 2014 in Civil Appeal No. 5479 of 2013, it is settled position that, even a licensee purchasing power through open access for their own consumption, they are liable to pay Cross Subsidy Surcharge under the Electricity Act, 2003. Since the Southern Railways as a deemed licensee proposed to avail power through open access for their own consumption, Southern Railway also bound pay Cross Subsidy Surcharge as per the provisions of the Electricity Act. 2003.
- 18. As discussed in the preceding paragraph and also in view of the judgment of the Hon'ble Supreme Court dated 25th April 2014 in Civil Appeal No. 5479 of 2013, this Commission is of the considered view that, the Railways is liable to bear Cross Subsidy Surcharge while availing power through open access for their own consumption.

Orders of the Commission

- 19. The Commission after examining the review petition filed by M/s Southern Railways as per the provisions of the Electricity Act, 2003, Judgement of the Hon'ble Supreme Court dated 25th April 2014 in Civil Appeal No. 5479 of

2013, the Regulations and other rules in force, hereby orders that, the review petition dated 31.01.2020 filed against the order of the Commission dated 12.12.2019 in OP No. 31/2019 is not maintainable. Accordingly the review petition is here by rejected.

**Sd/-
Preman Dinaraj
Chairman**

Approved for Issue,

C.R Satheesh Chandran
Administrative
Officer in charge of
Secretary