

**MADHYA PRADESH ELECTRICITY REGULATORY
COMMISSION
BHOPAL**

Sub: In the matter of Petition filed under section 9, Section 42 and Section 86 And in the matter of levy of Additional Surcharge on wheeling at ON SITE co-generation Captive power Plant of the Petitioner contrary to the order dt. 10.12.2021 Hon'ble supreme court in Civil Appeal No. 5074-5075 of 2019 in the matter of JSW steels & others and Hon'ble APTEL order dt. 06.01.2023 in RP No. 10 of 2022 & IA Nos. 2157 & 2156 of 2022 and RP No. 11 of 2022 & IA Nos. 2156 of 2022 in the matter of Prism cement and others

ORDER

**(Hearing through video conferencing)
(Date of Order: 11.09.2023)**

Tirupati Starch & Chemicals Limited,
Shree Ram Chambers, 1st Floor,
12 Agrawal Nagar, Main Road,
Indore, 452001

- **Petitioner**

Vs.

Managing Director,
MP Paschim Kshetra Vidhyut Vitaran Co. Ltd.,
GPH Compound, Polo-Ground, Indore

- **Respondent**

Shri Dheeraj Singh Pawar, & Shree Ajay Porwal appeared on behalf of the petitioner.

Shri Shailendra Jain, DGM, appeared on behalf of the Respondent

The subject petition is filed under section 9, Section 42 and Section 86 And in the matter of levy of Additional Surcharge on wheeling at ON SITE co-generation Captive power Plant of the Petitioner contrary to the order dt. 10.12.2021 Hon'ble supreme court in Civil Appeal No. 5074-5075 of 2019 in the matter of JSW steels & others and Hon'ble APTEL order dt. 06.01.2023 in RP No. 10 of 2022 & IA Nos. 2157 & 2156 of 2022 and RP No. 11 of 2022 & IA Nos. 2156 of 2022 in the matter of Prism cement and others.

2. By affidavit dated 05th May' 2023, the petitioner broadly submitted the following:

(i) *That The Petitioner has established an ON SITE 2 MW Steam turbine cogeneration power plant for use of 100% power as captive under section 9 of The Electricity Act 2003 on dated 14.08.2015 Electrical safety department permission dated 10.02.2015.*

(ii) *The Petitioner surprise Respondent sent a notice ref 1204 dated 21/11/2022 for payment of Rs 1,75,79,200/- (Rs One Crore Seventy five lakhs seventy nine thousand two hundred only)with 15 days' time.*

(iii) *The Petitioner Represented on 28.11.2022 before Respondent that additional surcharge on wheeling is not applicable on Petitioner CPP in lieu of Hon'ble Supreme Court order dated 10th December 2021 in petition no. 5074-5075/2019, in which Hon'ble Apex Court held that, "the captive*

consumers/captive users are not liable to pay the additional surcharge leviable under section 42(4) of the Electricity Act 2003, the appellant-distribution licensee has to refund the same”.

Petitioner also represented that hon'ble MPERC order in the petition no. 49 of 2021 & IA N. 08 of 2021 of M/s Grasim Industries Ltd. and in petition no. 53 of 2021 of M/s Kasyap Sweeteners Ltd. held that in light of the Judgment of Hon'ble Supreme Court, that Additional Surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for their manufacturing units.

In light of above orders Respondent shall withdraw above referred supplementary bill for additional surcharge and not take any coercive action on account to f above supplementary bill which is in clear violation of Hon'ble Supreme court order. Copy of representation dated 28.11.2022.

- (iv) Petitioner did not receive any reply to its representation hence Petitioner again sent a representation on dated 14/12/2022.
- (v) The Respondent started imposing surcharge of Rs. 6,67,495/- on supplementary bill towards addl. surcharge on wheeling. Copy of Respondent's bill dated 5th January 2023 and 6th February 2023.
- (vi) The Respondent also disallowed prompt payment incentive to the petitioner, to which Petitioner represented again vide letter dated 15.02.2023
- (vii) The Petitioner humbly submits that levy of additional surcharge under Section 42 of the Electricity Act 2003 (for short “the Act”) is in contravention of the provisions of the Act as well as National Electricity Policy.
- (viii) The Respondent have acted in complete violation of the order passed by the Hon'ble APEX Court dated 10th December 2021.
- (ix) The Petitioner further submits that the respondent has failed to appreciate the provisions of Section 9 of the Act wherein the power plants have been given the right to carry electricity from generating plant to the destination of their own use. Therefore, the question of permit and supply does not arise to the extent of self consumption by captive users of CPPs.

GROUNDS:-

- i. That the levying of additional surcharge by the respondent is in violation of the provisions of the Electricity Act 2003 and therefore the Bills raised should be cancelled by Respondent
- ii. That the action on the part of the Respondent is completely arbitrary and in violation of the provisions of the Act and orders of Hon'ble Apex Court, Hon'ble MPERC.
- iii. That the impugned bill raised by the Respondent is adverse in law and

should be quashed.

- iv. *That the alleged bill is nothing but an arm twisting technique used by the Respondent to harass the Petitioner.*
 - v. *That the Respondents has failed to appreciate the provisions of Section 9 (2) of the Act where in the power plants have been given the right to carry electricity from generating plant to the destination of their own use. Therefore, the question of permit and supply does not arise to the extent of self-consumption by captive users of CPPs.*
 - vi. *That the Petitioner craves leave to refer to other grounds at the time of the argument.*
3. With the aforesaid submissions the petitioner prayed the following:
- i. *The Hon'ble Commission may be please to admit the Present Petition;*
 - ii. *For order/directions to the Respondent No. 1 not to impose additional surcharge on its ON SITE CPP.*
 - iii. *Direct respondent to allow prompt payment rebate in it's bill*
 - iv. *Direct respondent to allow online payment rebate in it's bill.*
 - v. *For such other and further relief as the Commission may in the facts and circumstances of the present case, may deem fit and proper.*
4. At the motion hearing held on 04th July' 2023, Ld. Counsel who appeared on behalf of Petitioner reiterated the issues, raised in the petition and requested to admit the petition and to issue directions to Respondent. The petition was admitted and the petitioner was directed to serve a copy of petition to the Respondent within 07 days and Respondent was directed to submit response within 15 days of receipt of petition with a copy to Petitioner. The Petitioner might file his rejoinder within 15 days of receipt of response from respondent. The case was fixed for hearing on **16.08.2023**.
5. Respondent, MP Paschim Kshetra Vidyut Vitaran Company Ltd. by Affidavit dated 10th August 2023 broadly submitted the following in its reply to the petition:

PRELIMINARY SUBMISSIONS

A. RE: HON'BLE SUPREME COURT'S JUDGMENT "MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED VS. JSW STEEL LIMITED AND OTHERS" REPORTED IN (2022) 2 SCC 742 (JSW STEEL CASE) IS NOT APPLICABLE IN THE INSTANT CASE

- 4) *The finding of Hon'ble Supreme Court in the JSW steel Judgment is not applicable in the instant case due to following reasons:*
- a) *Petitioner is a 'consumer' within the meaning of Section 2(15) of the Act, 2003.*
 - b) *In the State Of Madhya Pradesh Open Access even by Captive Generating Plant is Regulated by State Commission (MPERC) through Regulations.*
- 5) *It is settled legal position that Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. In this regard observation of the Hon'ble Supreme Court in K. T. M. T. M , Abdul Kayoom and another vs. Commissioner of Income Tax, Madras {AIR 1962 SUPREME COURT 680} in paragraph 19 is relevant.*
- 6) *Attention is drawn towards the following finding of Hon'ble Supreme Court in the JSW Steel judgment supra:*
- “ 14..... Therefore, it is to be held that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.”*
- 7) *It may be seen that as per aforesaid judgment of Hon'ble Supreme Court captive consumer/ captive user other than the consumers defined under Section 2(15) of the Act shall not be subject to the levy of additional surcharge. In other words, any captive consumer who is a consumer under Section 2(15) is liable to pay additional surcharge. The Section 2(15) of the Act reproduced by the Respondent.*
- 8) *It is submitted that in the instant case petitioner is maintaining contract demand and availing supply from the answering respondent (distribution licensee) herein. Accordingly petitioner is a consumer within the meaning of Section 2(15) of the Act, 2003 and does not form a separate class.*
- 9) *Thus, being a consumer within the meaning of Section 2(15) of the Act, 2003 petitioner is liable to pay additional surcharge to the respondent and JSW Steel case has no applicability in the present circumstances of the case.*
- 10) *In the State Of Madhya Pradesh Open Access even by Captive Generating Plant is Regulated by State Commission (MPERC) through Regulations. Hon'ble Supreme Court in the JSW Steel judgment supra held as under:*
“9.....it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/ carry electricity to the captive user is granted by the Act, and is 100% subject to and does not require the State Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the

State Commission may adjudicate. ”

- 11) *It is submitted that in the state of Madhya Pradesh Hon'ble Madhya Pradesh Electricity Regulatory Commission (MPERC) has issued the MPERC (Terms and Conditions for Intra – State Open Access in Madhya Pradesh) Regulations, 2005 ('OA Regulation 2005'). The relevant provisions of the said Regulations are reproduced by the Respondent.*
- 12) *It may be seen that in the state of Madhya Pradesh Hon'ble MPERC grants permission of consumption from any source other than the distribution licensee of area by way of aforesaid Regulations. The requirement of such permission made applicable to the generating company as well as captive generating plant and in this regard term 'generating company' includes captive generating plant. In other words as per Regulations applicable in the state of Madhya Pradesh there is no difference in the Generating Company and Captive Generating plant. It may further be seen that as per provisions of the aforesaid Regulations such consumption from other source is subject to the payment of additional surcharge*
- 13) *At this juncture it would be appropriate to refer the relevant provisions of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision - 1) Regulations, 2010:*
 - (i) *Regulation 12.2 of aforesaid Regulations after 7th amendment and prior to 7th amendment is reproduced below:*
 - (a) *Prior to the 7th Amendment, the said regulation provided as under:*

*“12.2 Wheeling charges, Cross surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time . **Captive Consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy procured from Renewable Sources of Energy.**”*
 - (b) *Amended Regulation 1 2.2 of MPERC cogeneration Regulations, 2010 provides as under:*

“ 12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order. ”

(Emphasis Supplied)
- 14) *It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges if any, under Section 42 of the Act shall be applicable in terms of retail supply tariff order issued by the this Commission. The validity and legality of aforesaid amendment (Writ Petition No. 9870/2018) was challenged before the Hon'ble High Court of MP but the same has been upheld by the Hon'ble High Court. Thus the aforesaid principle provided in the MPERC Co-*

generation Regulations, 2010 also applicable in the present circumstances of the case.

- 15) *It is relevant to mention that Hon'ble MPERC has notified the Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The provisions of the Regulation 11.2(d) of the said Regulations are reproduced reproduced by the Respondent. It may be seen that aforesaid Regulations 2021 specifically provided that the captive consumers are liable to pay additional surcharge. Thus the aforesaid principle provided in the Regulation also applicable in the present circumstances of the case. It is settled legal position that Regulation once notified shall be treated as part of Act and order issued by the regulatory Commission should be in conformity with the Regulations.*
- 16) *It is submitted that in the matter of PFC India Limited v Central Electricity Regulatory Commission, through Secy, (2010) 4 Supreme Court Cases 603 constitution bench of Hon'ble Supreme Court held that Regulation stands on a higher pedestal vis- a -vis an Order (decision) of Regulatory Commission and validity of Regulations can only be challenged seeking judicial review under Article 226 of the Constitution of India. The relevant part of the said judgment is reproduced by the Respondent.*
- 17) *Though the above principles emerge in the context of regulations framed under Section 178 by the CERC, the law laid down in the judgment is applicable to the regulations framed under Section 181 by the State Electricity Regulatory Commissions. It may be seen that Hon'ble Supreme Court clearly held that Regulation making power of the Hon'ble Commission is very wide. Further, neither the MPERC Regulation's nor the Regulation making power of MPERC in this regard was under consideration of the Hon'ble Supreme Court in JSW case. Therefore, JSW judgment is not applicable in the present circumstances of the case.*
- 18) *Similarly Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC 715 has held that even the High court exercising its power of appeal under a particular statute cannot exercise suomotu the constitutional power under Article 226 or 227 of the Constitution. The relevant part of the said judgment is reproduced by the Respondent.*
- 19) *In view of above, it is submitted that in the instant case petitioner has not challenged the vires of the aforesaid Regulations. Further while deciding instant dispute this Hon'ble Commission can neither ignore the prevailing Regulations nor can decides the validity of the same. Thus, as per provisions of the Regulations prevailing in the State Of Madhya Pradesh petitioner is liable to pay additional surcharge.*
- B. **RE : JSW STEEL CASE IS DECIDED WITHOUT BRINGING TO THE NOTICE OF HON'BLE SUPREME COURT OF EARLIER BINDING JUDGMENT OF HON'BLE SUPREME COURT ITSELF:**
- 20) *That, without prejudice the submission that JSW Steel case is not applicable in the present circumstances of the case, it is submitted that while passing **the** JSW Steel Judgment, attention of the Hon'ble Supreme*

Court was not drawn towards the earlier binding precedent of coordinate bench, i.e., the judgment in the case of Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission [2015 (12) SCC 611]. In the Hindustan Zinc case Hon'ble Supreme Court clearly held that Captive generating plants are under regulatory jurisdiction of the Commission and captive consumers are also the consumer of the distribution licensee. The following is the comparative chart of findings of Hon'ble Supreme Court in the both of above judgments:

S. NO	ISSUE DECIDED BY HON'BLE SUPREME COURT	FINDINGS IN JSW STEEL CASE	FINDINGS IN HINDUSTAN ZINC SUPRA [(2015) 12 SCC 611]
1	Whether industries/ consumer setup the captive generating plant comes within Regulatory Jurisdiction of the commission	<p>9..... ..As provided under Section 9 of the Act, 2003, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Merely because the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, <u>it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit / carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission.</u> The right is conditioned by availability of transmission facility which aspect can be determined by the Central or State transmission utility <u>Only in case of dispute, the State Commission may adjudicate.</u>”</p>	<p>4. Learned senior counsel for the appellants contended that the impugned Regulations are ultra vires to Sections 7, 9, 86(1) (a) and (e) and 181 of the Act of 2003, and also the fundamental rights guaranteed to the appellants under Articles 14, 19(1)(g) and it is in violation of Article 265 of the Constitution of India, Policy, 2005 and the Tariff Policy, 2006. They have contended that the Act of 2003 has been enacted by the Parliament with a view to encourage participation of private sectors involved in generation of electricity and with that objective, generation of electricity was de-licensed and captive generation was freely prompted and in this manner the impugned Regulations are violative of the basic object and intendment with which the Act was enacted. Further, it has been asserted that the National Electricity Policy, 2005 as well as the Tariff to promote production of energy and utilization 5 thereof to the maximum extent in respect of the captive generation plants and not to compulsorily force them to lower down their production of energy by making them purchase renewable energy as per the newly framed the impugned Regulation No. 9 of Regulations 2010. It was also contended by them that the Act of 2003 has totally liberalized the establishment of captive them out of any licensing and regulatory</p>

			<p>regime, neither any license nor any approval from any authority is required to install al captive power plant and thus, the RERC has no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source; the renewable energy source and captive generating plant are both alternative sources of energy which have to be promoted, one cannot be placed on higher or lower footing. The RERC by imposing a compulsory obligation to purchase electricity from renewable source and to pay surcharge in case of shortfall in meeting out the RE obligation as per the Regulation referred to supra has acted beyond the object sought to be achieved under the National Electricity Policy, 2005 as well as the Act of 2003</p> <p>39. The above contention is rightly repelled by the learned counsel for the respondents that such an interpretation would render the words “percentage of total consumption of energy in the area of supply” redundant and nugatory is wholly untenable in law. In case, the legislature intended such power of the Regulatory Commission to be confined to the Distribution Licensee, the said words and phrases of Section 86(1)(e) would have read “total electricity purchased and supplied by distribution licensee” <u>.The mere fact that no licence is required for Establishment & Operation and Maintenance of a Captive Power Plant does not imply that the in industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission.</u> The RE obligation has been imposed upon the</p>
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			<p>consumption of electricity whether purchased from distribution licensee or consumed from its captive power plant or through open access. The RE obligation has not been imposed upon the Appellants in their capacity as owners of the captive power plants”.</p>
2	<p>Captive Consumer are consumer?</p>	<p>14. Even otherwise, <u>it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves.</u></p>	<p>42. Further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot be imposed upon the total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected <u>as the said contention depends on a erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees.</u> The cost of purchasing renewable energy by a distribution licensee in order to fulfill its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, <u>then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee any time they want, are not required to purchase / sharing the cost for purchase of renewable power.</u> The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation vis-à-vis the captive power consumers and open access consumers who apart from getting cheaper power, will also not share the costs or more</p>

21) *It may be seen that earlier coordinate bench of this Hon'ble Supreme Court in Hindustan Zinc supra categorically held that:*

(i) *The mere fact that no license is required for Establishment, Operation and Maintenance of a Captive Power Plant does not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission.*

(ii) *It is erroneous basic assumption that open access consumers and captive power consumers are not consumers of distribution licensees.*

(iii) *The RE obligation has not imposed in the capacity as owners of the Captive Power Plants but as consumer. Thus, the fact that captive generation is freely permitted has no consequences.*

22) *In view of above, findings of Hon'ble Supreme Court in the JSW Steel Judgment are contrary to the aforesaid findings of earlier coordinate bench of Hon'ble Supreme Court in the Hindustan Zinc supra.*

23) *Five judge bench of Hon'ble Supreme Court in [National Insurance Company Limited Vs Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 [(2017) 16 Supreme Court Cases 680] has considered the issue of precedent value of any judgment passed by a bench of the Hon'ble Supreme Court without taking note of earlier coordinate bench judgment and concluded as under vide its order dated 31.10.2017:*

59.1. *The two-Judge Bench in Santosh Detvi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.*

59.2 ***As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent. "***

24) *In the instant case, while passing the JSW Steel judgment, admittedly attention of this Hon'ble Supreme Court was not invited towards the earlier coordinate bench judgment in the Hindustan Zinc supra. As JSW Steel Judgment has not taken note of the decision in Hindustan Zinc supra, which was delivered at earlier point of time, the instant dispute ought to be decided in favour of respondent herein following the finding of Hon'ble Supreme Court in the Hindustan Zinc Supra.*

C. **RE: RATIONAL BEHIND LEVY OF ADDITIONAL SURCHARGE AND IMPLICATION OF RESPONDENT'S UNIVERSAL SUPPLY OBLIGATION**

(USO) TOWARDS PETITIONER CONSUMER

- 25) *That, the Electricity Act, 2003 (Act, 2003) gives freedom to a consumer to avail supply of electricity from any source of its choice i.e distribution licensee of area, generating stations owned by third party, captive generating plant owned by consumer itself e.t.c. Here, it is noteworthy to mention that although the consumer has given freedom to choose its source of supply, distribution licensee has been kept under obligation (commonly known as universal supply obligation) to supply electricity to the consumer on demand as per provisions of the Section 43(1) of the Act, 2003. Distribution licensee is also under obligation to provide non discriminatory open access over its distribution system as per provision of Section 42(1).*
- 26) *That, as per scheme of the Act, when a consumer procure electricity from distribution licensee while fixing the tariff of electricity, the tariff to be recovered from the subsidizing category i.e industrial consumer is being fixed at a rate more than the cost of supply, On the other hand tariff to be recovered from the subsidized category, i.e agriculture consumer and other weaker section of the society, is being fixed at the rate below the cost of supply. This additional tariff on the subsidizing category is referred as cross subsidy. Cost of supply of electricity being recovered from the consumers through Tariff also includes fixed charges payable to the generator of electricity. Such fixed cost is payable to the generators of the electricity even when there is no off take of energy from such generators by the distribution licensee. Whenever the consumer of the subsidizing category i.e. the bulk industrial consumers avail supply from a source other than the distribution licensee in the area, licensee loses element of cross subsidy and fixed cost of generation included in the cost of supply). Such element of cross subsidy is being recovered from the person who is availing supply from another source in terms of proviso to Section 42(1). Similarly, additional surcharge is being recovered, in terms of Section 42(4), on the quantum of consumption from other sources to meet the fixed cost of such distribution licensee payable to generators of electricity.*
- 27) *Therefore, while giving to the consumer the freedom to choose the source of supply, to protect the interest of the weaker section of the society legislature impose obligation on the consumers consuming electricity from other sources to pay cross subsidy surcharge and additional surcharge to the distribution licensee of area.*
- 28) *The Relevant part of Section 42 of the of the Act, 2003 are reproduced by the Respondent.*
- 29) *It may be seen that there are two kinds of surcharges, one is cross subsidy surcharge {first proviso to Sub Section (2) of Section 42} and another is additional surcharge {Sub-Section 4 of Section 42}. Vide fourth proviso to Section 42(2) a consumer consuming power from its own captive generating plant is not liable to pay cross subsidy surcharge. As per Section 2(8) Captive generating plant means a power plant set up by any person to generate electricity primarily for his own use. However, it may be noted that no such exemption for additional surcharge is provided to any class of consumers. Thus, consumers are liable to pay additional surcharge on the*

captive consumption.

- 30) *It is submitted that although the levy of additional surcharge is provided in the Section 42 (4) of the Act, 2003, Section 43(1) of the Act, 2003 is foundation for levy of additional surcharge. Section 43 of the Act provides that distribution licensee (DISCOM) has a universal supply obligation (USO) and required to supply power as and when demanded by any owner /occupier of premises in its area of supply.*
- 31) *From bare perusal of Section 42(4) quoted above, it may be seen that the State Commission is empowered to levy additional surcharge to meet the fixed cost arising out of obligation to supply. Section 43 provides for the obligation to supply. The relevant provision of Act, 2003 is reproduced by Respondent.*
- 32) *It may be seen that the distribution licensee has a duty to supply to each and every premises in its licensed area of supply. Premises also include premises of captive consumer and there is no distinction in this regard under the statute. In other words, duty to supply does not come to an end upon the consumer/ owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time.*
- 33) *It is submitted that the Respondent who is required to meet the requirement/ demand of all consumers, owner or occupier of any premises in its area of supply, enters into long term Power Purchase Agreements (PPA) with generators so as to ensure supply of power on request. While contracting energy through such long term PPAs, the tariff payable to the generators consists of two part viz., capacity charges and energy charges. The answering respondent has to bear the fixed cost (capacity charges) even when there is no off take of energy through such source. Therefore, whenever any person takes electricity from any source other than distribution licensee of area. The Respondent continue to pay fixed charges in lieu of its contracted capacity with generators.*
- 34) *The above leads to a situation where the Respondent is saddled with the stranded cost on account of its universal supply obligation. The mechanism of additional surcharge is meant to compensate the licensee on this aspect, namely as stated in section 42(4) of the Act to meet the fixed cost of such distribution licensee arising out of his obligation to supply. If this fixed cost of stranded asset is not allowed to be recovered from respondent consumers and other similarly placed consumers consuming power from other source of supply, then in such a case such cost shall be recovered from the other consumers of the Respondent by increasing their tariff and such other consumers will be cross subsidizing the persons taking Electricity from other sources, which would be unfair, unjust and inequitable. This obviously would not have been the intention of the legislature.*
- 35) *Any immunity from recovery of Additional Surcharge also from persons who have captive consumption would be contrary to the very scheme and provisions of the Act. The Act consciously provides for exemption from*

charges to captive generation and captive use in a limited aspect namely from payment of cross subsidy surcharge as per sections 38(2)d – proviso; 39(2)d – proviso; 40(1)c) – proviso; and 42(2- proviso. However when it comes to section 42(4) dealing with Additional Surcharge there is no such exclusion which makes it abundantly clear that there was no intention to exclude the same for captive generation and captive use.

- 36) The issue of open access and rational behind levy of surcharge came under consideration of the Hon'ble Supreme Court in case of Sesa Sterlite Limited v CERC & Others reported in (2014 8 SCC 444). The relevant part of the said judgment is reproduced as under:

“27. 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 quail 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-subsidies 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 of these aspects.**

28. Through this provision of open access, the taro 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.

29. 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.**

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

31. In the present case, admittedly, the Appellant (which happens to be the operator of an SEZ) is situated within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite (an Independent Power Producer ("IPP") (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the Cross Subsidy that WESCO would otherwise have got from it if WESCO were to supply electricity to the Appellant. **In order to be liable to pay cross subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition.**

37) In view of the above it can be safely concluded that:

- a. Section 42(4) providing for levy of additional surcharge is aimed to meet the adverse financial situation caused by arrangements made for complying with the obligation to supply,
- b. The additional surcharge is nothing but compensation from a person who avails power other than from distribution licensee of area.
- c. The compensatory open access charges are payable notwithstanding the fact that line of distribution licensee are being used or not for the consumption from other sources.
- d. For levy of additional surcharge, it is sufficient that power is being

procured from any source other than the distribution licensee of area.

- e. *Even the captive generating plant falls within the four corner of such 'other source' and there is no restriction regarding status of such other source captive or otherwise.*

38) *It is submitted that Section 42(2) of the Act deals with the cross-subsidy surcharge' while Section 42(4) deals with 'additional surcharge'. The Act clearly provides exemption from Cross-Subsidy Surcharge to a person who has established a captive generating plant for carrying the electricity to the destination of his own use [vide fourth proviso to Section 42(2)]. However, no such exemption has been provided with respect to 'Additional Surcharge' under Section 42(4). Thus in any View of the matter, the levy of additional surcharge on the petitioner is wholly justified.*

D. **RE: INSTANT DISPUTE IS COVERED IN FAVOUR OF THE ANSWERING RESPONDENT BY THE JUDGMENT OF HON'BLE APTEL IN INDIAN ALUMINUM COMPANY LIMITED VS WBERC (APPEAL NO. 1 OF 2006 ORDER DATED 11.07.2006) AND JUDGMENT OF HON'BLE MPERC IN MIS. MALANPUR CAPrivE POWER LIMITED v. M.P. MADHYA KSHETRA VIDYUT VITARAN CO. LTD. (PETITION NO. 02/2007)**

39) *It is submitted that instead of JSW Steel supra instant dispute is covered by the judgment of coordinate bench of Hon'ble APFEL in Indian Aluminum Company Ltd Vs WBERC (Appeal No. 1 of 2006 order dated 11.07.2006) supra. It is submitted that issue of levy of additional surcharge on the captive consumption done by the consumers of distribution licensee have already been decided in favour of respondent herein by earlier coordinate bench of Hon'ble APTEL. Hon'ble APTEL vide order dated 11.06.2006 in case of Indian Aluminum supra, upheld the law of additional surcharge on the electricity consumed through captive route. Para 11 of the said judgment recorded the finding of the West Bengal Electricity Regulatory Commission which had been challenged by the consumer before APTEL. The said para is reproduced by the Respondent.*

40) *Hon'ble APTEL has framed the question and answered the same with regarding to levy of additional surcharge in the para 14 and 28 of the said judgment in the following manner:*

"14. *The following points are framed for consideration in this appeal: -*
(D) *Whether appellant is liable to pay additional surcharge on the - charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003 on being permitted to receive supply from a person other than the distribution licensee of the area?*

28. *As regards point D regarding payment of additional surcharge, being statutory liability in terms of Sec. 42(4) the learned counsel did not Press the point but contended that in terms of National Tariff Policy, the additional surcharge is payable only if it is conclusively demonstrated that the obligation of a licensee continue*

to be stranded, we are unable to agree, hence this Point is answered against appellant holding that the appellant is liable to pay additional surcharge on the charges of wheeling, as may be fixed by State Commission in terms of Section 42(4) of the Act.

43. *As a result of our discussions, we record our findings as hereunder:*

(IV) *On point 'D', we hold that the appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003."*

41) *In the instant case petitioner consumer is having contract demand with the respondent Distribution licensee and is availing supply from the distribution licensee. Thus, respondent herein has universal supply obligation towards the petitioner. Hon'ble APTEL in Indian Aluminum **supra** held that a person whose premises is connected with the network of the licensee is a consumer and distribution licensee has universal supply obligation towards such consumers even if the said consumer is also availing supply through captive route. The relevant extract is reproduced by the Respondent.*

42) *In view of above, it is submitted that if there is universal supply obligation there shall always be levy of additional surcharge.*

43) *Similarly, this Hon'ble Commission in the Petition No. 02/2007 (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.) has considered the issue of levy of additional surcharge on the electricity consumed from own Captive Generating Plant without using the distribution system of the licensee, Hon'ble Commission has noted the submission of the petitioners in the para 3 and 4 of order dated 22.05.2007. The same is reproduced by the Respondent.*

44) *Thereafter considering the provision of the Act and Electricity Rule 2005 Hon'ble Commission upheld the levy of additional surcharge in the followings terms:*

"17. *The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross-subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4th proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above. Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users.*

The Commission agrees with the respondent that as per Section 42(4) of the Act, where the State Commission permits a consumer or class to consumers to receive supply of electricity

from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.....”

18. *Therefore, the Commission concludes from the combined reading of Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules, that captive generating plant and dedicated transmission line can be constructed, maintained and operated by a person for generation of power and supply to its captive users. However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.*

45) *In view of aforesaid judicial pronouncement petitioners are liable to pay additional surcharge even on the consumption of electricity through captive route.*

46) *Thus, in the present circumstances of the case, the petitioner consumer is liable to pay additional surcharge.*

E. **RE: MERE FACT THAT NO LICENCE IS REQUIRED FOR ESTABLISHMENT, OPERATION AND MAINTENANCE OF A CAPTIVE POWER PLANT DOES NOT IMPLY THAT THE INDUSTRIES ENGAGED IN VARIOUS COMMERCIAL ACTIVITIES PUTTING UP SUCH CAPTIVE POWER PLANTS CANNOT BE SUBJECTED TO REGULATORY JURISDICTION OF THE COMMISSION.**

47) *Petitioner consumer has sought to contend that there is difference between consumption from Captive Generating plant and consumption from other generating plant.*

48) *The Scheme of open access with regard to distribution sector is provided in Section 2(47) read with Section 42 of the Act. Section 2(47) of the Act reproduced by the Respondent.*

49) *As per aforesaid definition it may be seen that open access shall always be subject to regulation issued by the State Commission (MPERC in the instant case). Further, the aforesaid definition of open access covers every person engaged in the generation i.e captive generating plant or otherwise. In other words Act does not envisage the separate scheme of open access for captive generating plants. Hence, open access by the captive consumer is also subject to Regulations of the State Commission which includes payment of additional surcharge as a condition of open access. The Right to open access does not mean that such right will be available free from payment of charges as provided for under the Act, 2003.*

50) *The submission of the petitioner that captive consumer are not subject to regulatory jurisdiction of the State Commission is untenable.*

51) *It is submitted that the Act, 2003 does not create any distinction between*

'permission' to be taken under Section 42 (4) by a captive consumer and a non-captive consumer. Both are kept at the same pedestal.

52) *It is submitted that 'permission' of consumption from any source other than the distribution licensee of area (i.e open access) does not mean that permission shall be granted to individual consumers by the State Commission by its order on case to case basis. As provided in the Section 2 (47) of the Act, 2003 open access is governed by the Regulations commonly for all users of the transmission/distribution system whether captive or otherwise. Term 'permit' used in the Section 42(4) must be construed in the light of term 'regulate' used in Section 2(47). Term 'regulate' is much wider than the term 'permit'. In other words term Regulate includes in its ambit 'permission'.*

53) *It is pertinent to mention that, as open access is to be regulated by the Regulatory Commission through Regulations, Section 42(4) specifically provides for the permission to a 'class of consumer'. Therefore, if a consumer belongs to a 'class of consumers' to whom open access is permitted by the State Commission then in such a case consumer is liable to pay the additional surcharge fixed by the State Commission on the consumption of electricity from other source of supply. In the present case petitioner consumer comes within the 'class of consumer' to whom facility of open access is available as per Regulations issued by the MPERC.*

54) *In the matter of Hindustan Zinc supra, it was contended by the captive generating plant that the Act, 2003 has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, the Regulatory Commission had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source. In regard to the same this Hon'ble Supreme Court held as under:*

*"39. The above contention is rightly repelled by the learned counsel for the respondents that such an interpretation would render the words "percentage of total consumption of energy in the area of supply" redundant and nugatory is wholly untenable in law. In case, the legislature intended such power of the Regulatory Commission to be confined to the Distribution Licensee, the said words and phrases of Section 86(1)(e) would have read "total electricity purchased and supplied by distribution licensee". **The mere fact that no licence is required for Establishment, Operation and maintenance of a Captive Power Plant does not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission** and required to purchase certain quantum of energy from Renewable Sources. The RE obligation has not been imposed upon the consumption of electricity whether purchased from distribution licensee, or consumed from its own captive power plant or through open access. The RE obligation has not been imposed on the Appellants in their capacity as owner of the captive power plant.*

42. *further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot be imposed upon the total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected **as the said contention depends on a erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees.** The cost of purchasing renewable energy by a distribution licensee in order to fulfill its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee any time they want, are not required to purchase/ sharing the cost for purchase of renewable power. The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation Vis-à-vis the captive power consumers and open access consumers who apart from getting cheaper power will also not share the costs for more expensive renewable power.”*
- 55) *In view of above dictum of this Hon'ble Apex Court, it is clear that captive consumers doesn't enjoy any immunity from compliance of any provision of the statute.*
- 56) *Therefore, except cross subsidy surcharge which is exempted by the Act itself consumers are liable to pay all other open access charges on the captive consumption.*
- 57) *Thus, it can only be concluded that as far as issue of levy of open access charges is concerned, respective provisions of the Act (i.e Section 38-Central Transmission Utility, Section 39-State Transmission utility, Section 40-Transmission licensee, Section 42-Distribution licensee), are equally applicable for the captive generating plant and non captive generating plant. This, conclusion found supports from the fifth proviso to section 39 (2)(d), fifth proviso to section 39 (2)(d), fifth proviso to section 40 (c) and fourth proviso to section 42(2) of the Act vide which specific exemption has been granted to captive consumer from the levy of cross subsidy surcharge.*
- 58) *It may be seen that fourth proviso to Section 42(2) specifically provided that cross subsidy surcharge shall not be payable in case of Captive Consumption. However there is no such provision with regard to wheeling charges and additional surcharge. A proviso in a statutory provision inserted only with the object of taking out of the scope of that principal clause what is included in it. If Open Access Charges on open access availed by Captive Generating Plant is not governed by Section 42, there was no need to insert such proviso to Section 42(2). With regard to the utility and scope of proviso following judicial pronouncement are relevant:*

“a. *Sales-tax Officer, Circle 1, Jabalpur v. Hanuman Prasad 1967 (1)*

SCR 831 stated that:

"5.... It is well-recognized that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the Legislature desires should be excluded...."

- b. *Haryana State Cooperative and Development Bank Ltd. v. Haryana State Cooperative land Development Banks Employees Union and Another (2004) 1 SCC 574, it was held that:*

"The - normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment... The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case." (para 9)

59) *In view of above open access charges for captive consumption is regulated by Section 42 of the Act and except for the exemption from cross subsidy surcharge no other benefit can be extended to captive generating plant. Further, element of 'permission' from state Commission is also there while consuming power from captive generating plants in the form of regulations issued by MPERC to regulate various aspects of open access i.e. application, scheduling of electricity, charges for open access, permission of parallel operation, methodology of balancing and settlement of electricity, so injected in the grid etc. It cannot be argued that captive generator are freely entitled to inject power into the grid as per their wish without following grid discipline and related stipulation.*

60) *In case of A.P. Gas Power Corporation Ltd v. A.P. Electricity Regulatory Commission (AIR 2006 AP 12) the Hon'ble Andhra Pradesh High Court held that except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant. Relevant portion of the ruling of Hon'ble Court, vide order dtd. 27/07/2005 is mentioned by the Respondent.*

61) *In view of above as far as levy of open access charges is concerned, except to the extent of non-levy of surcharge for cross-subsidy, there is no distinction in law between a non captive generating plant and captive generating plant. Thus, submission of the petitioner consumer in this regard is contrary to the provisions of the Act and accordingly liable to be rejected.*

F. **RE: PETITIONER CONSUMER CONSUMING ELECTRICITY FROM OWN CAPTIVE GENERATING PLANT IS 'CONSUMER' WITHIN THE SCHEME OF THE ACT 2003.**

62) *Petitioner consumer is contending that only a consumer is liable to pay additional surcharge and not the captive user /consumer. In this regard it is stated that the Act defines the term 'consumer' as under:*

*“2(15) –consumer means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or 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, as the case may be;**”*

- 63) In view of above as per scheme of the Act 2003 any person become 'consumer' if:
- a. Such person is availing supply of electricity from distribution licensee of area for own consumption. and/ or
 - b. Premises of such person is connected with the works of a licensee for the purpose of receiving electricity.
- 64) It is submitted that Act only recognized the term 'consumer' as defined in the Section 2(15) of the Act in the aforesaid manner. Every person who is availing supply from a distribution licensee or who is connected with the network of the licensee is a consumer'. Thus, creating a different class of consumers for the purposes of Section 42 (4) ultimately leading to exemption of such a new class from levy of additional surcharge is contrary to the legislative intent. It is also noteworthy to mention that Section 2(47) only provide for the open access by the '**consumer**' and '**a person engaged in the generation**'. Thus, Act does not envisage separate scheme of the open access by the captive generating plant or by captive consumer.
- 65) Hon'ble APTEL **in case of** Indian Aluminum **supra** clearly held that a person whose premises is connected with the network of the licensee is a consumer and distribution licensee has universal supply obligation towards such consumers even if the said consumer is availing supply through captive route.
- 66) In Hindustan Zinc **supra** Hon'ble Supreme Court has held that the RE Obligation has not been imposed on the appellants captive consumers in their capacity as owners of the Captive Power Plants but in the capacity of the consumer. The relevant part is again reproduced by the Respondent.
- 67) This, Hon'ble Supreme Court in the case of Jiyajeerao Cotton Mills Ltd, Birlanagar, Gwalior v. State of M.P (AIR 1963 SC 414) held as under:
- 5..... A producer consuming the electrical Energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself”
- 68) Hon'ble Andhra Pradesh High Court in Rane Engineering Valves Ltd Vs State of Andhra Pradesh and others (Writ Petition Nos. 6095 of 2004 Dated: 19-05-2016) held that a producer of electricity can also be a consumer and such person is playing dual role. The relevant part of the said judgment is reproduced as under:
- 25.12.As held in Jija jee Cotton Mills Ltd that a producer of electricity can also be a consumer Such person is playing a dual

role ”

69) *It is submitted that a person who has set up a captive generating plant has dual role, one as a consumer and another as a generator. As per scheme of the Act, 2003 additional surcharge is payable in the capacity of consumer and not as generator.*

70) *In view of above, captive consumers are also the consumer as per Scheme of the Act and accordingly are liable to pay additional surcharge.*

G. **RE: ARRANGEMENT OF MAKING THE ELECTRICITY AVAILABLE BY THE CAPTIVE GENERATING PLANT TO THE MANUFACTURING UNIT OF THE PETITIONER CONSUMER IS 'SUPPLY' OF ELECTRICITY EVEN IF IT MAY NOT BE THE SALE TO THIRD PARTY.**

71) *It is submitted that the contention of the petitioner that it is not selling the electricity to the third party and hence additional surcharge would not be payable is baseless and untenable.*

72) *As per Section 42 (4) the additional surcharge is payable if there is supply of electricity. In this regard, the following definitions provided in the Act, 2003 are relevant:*

“Section 2(8) “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

Section 2(29)–generate means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;. Thus it is evident that a power plant set up solely to generate electricity for its own use is referred to as a captive generating plant and when a power plant generates electricity, it must always be for the purpose of supplying electricity to any premises and not for any other purpose. To put it another way, there can't be any generation unless it's for supply.”

73) *From a bare perusal of Section 2(29) read with Section 2(8), it is evident that a power plant set up solely to generate electricity for its own use is referred to as a captive generating plant and when a power plant generates electricity, it must always be for the purpose of supplying electricity to any premises and not for any other purpose, To put it another way, there cannot be any generation unless it is for 'supply'.*

74) *In Hindustan Zinc vs RERC (2015(12) SCC 611), the Hon'ble Supreme Court held that 'Supply' can be availed by three ways including captive generating plant and proceeded to hold in para 40 as under:*

*“40.... The other phrase “total consumption” has been used by the legislature in section 86(1) (e) and total consumption in an area of a distribution licensee can be by three ways either **supply through distribution licensee or supply from Captive Power Plants** by*

using lines cold transmissions lines of distribution licensee or from any other source. The area would always be of distribution licensee as the transmission lines and the system is of distribution licensee, the total consumption is very significant. The total consumption has to be seen by consumers of distribution licensee, Captive Power Plants and on supply through distribution licensee.

75) *It is further submitted that Hon'ble Supreme Court in Karnataka Power Transmission Corpn. & Anr. Vs Ashok Iron Works Pvt. Ltd. Civil Appeal No. 1879 of 2003 (AIR 2009 SC 1905) held that supply of electricity doesn't mean sale and inter alia held as under:*

**"21. Section 49 of The Electricity (Supply) Act, 1948 makes the following provision;
[49. Provision for the sale of electricity by the Board to persons other than Licensees.**

(1) *Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.*

22. *Whether the supply of electricity by KPTC to a consumer is sale and purchase of goods within the meaning of Section 2(1)(d) (i) of the Act, 1986? We do not think so. Although title of Section or marginal note speaks of "the sale of electricity by the Board to persons other than licensees" but the marginal note or title of the Section cannot afford any legitimate aid to the construction of Section. Section 49 speaks of supply of electricity to any person not being a licensee upon said terms and conditions as a Board thinks fit and for the purpose of such supply free uniform tariffs. **This Court has already held in Southern Petrochemical Industries (supra) that supply does not mean sale.***

76) *In addition, the petitioner is contending that it is using dedicated transmission line. It is relevant to refer to the definition of 'dedicated transmission line' provided in Act 2003:*

"2(16) –dedicated transmission lines mean IS any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations, or generating stations, or the load centre, as the case may be;

77) *It may be seen that dedicated transmission line is nothing but a Supply line. Therefore, while consuming power from the captive generating plant through dedicated transmission line certainly there is 'supply' of electricity by captive generating plant to the premises of the captive consumers even though 'sale of electricity' may not be taking place.*

78) *It is submitted that in Section 42(4), term 'supply' is preceded by the term*

'receive'. If for the purpose of section 42(4) 'supply' only means 'sale' then in that case legislature would have used term 'purchase' in place of term 'receive'. Use of term 'receive' further fortifies the conclusion that in the present context 'supply' does not mean sale.

- 79) Therefore in the case in hand the term supply is required to assign the same meaning which a common man understand from this term (i.e. providing electricity, to furnish electricity) and not the sale.
- 80) That, following is the summary of some other provisions of the Act where term 'supply' would have different meaning from the term 'sale':

<u>Provisions</u>	<u>Meaning of term 'supply'</u>
24. Suspension of distribution licence and sale of utility.- (1) if at any time the Appropriate Commission is of the opinion that a distribution licensee- (a) has persistently failed to maintain uninterrupted <u>supply of electricity</u> conforming to standards regarding quality of electricity to the consumers; or	Here supply means make available electricity and not the sale of electricity. Distribution licensee cannot Compromise quality of supply even if it is making available electricity to a captive consumer as common carrier.
56. <u>Disconnection of supply in default of payment.</u> - (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, <u>cut off the supply of electricity</u> 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 oft and reconnecting the supply, are paid I but no longer:	Here the supply means availability of electricity and not the sale Otherwise distribution licensee would not be able to disconnect supply even if a captive consumer not makes payment of wheeling charges or other dues of distribution licensee.
<u>53. Provision Relating to safety and electricity supply.</u> -The Authority may, In consultation with the State Government, specify suitable measures	Here supply means making available electricity, safety provisions are applicable notwithstanding the sale is being done or not.

<p>for- (c) prohibiting the supply or transmission of electricity except by means of a system which conforms to the specification as may be specified;</p>	
<p>Section 139. (negligently breaking or damaging works): Whoever, negligently breaks, injures, throws down or damages any material connected with the supply of electricity, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>Here expression supply would only mean making available electricity. Any other interpretation would mean that damaging the captive generating plant is not an offence because there is no sale or electricity.</p>
<p>Section 140. (Penalty for intentionally injuring works): Whoever, with intent to cut off the supply of electricity, cuts or injures or attempts to cut or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with fine which may extend to ten thousand rupees.</p>	

81) In view of above it can be safely concluded that whenever a captive generating plant make available electricity to the consumer it is nothing but the 'supply' even though it may not be sale. Therefore, petitioner is liable to pay additional surcharge to the Respondent.

H. **RE: LEVY OF 'ADDITIONAL SURCHARGE' BEING COMPENSATORY IN NATURE IS ALSO APPLICABLE IN THOSE CASES WHERE THERE IS NO USE OF LINE OF DISTRIBUTION LICENSEE (OPEN ACCESS) FOR CONSUMPTION OF ELECTRICITY FROM OTHER SOURCE AND ACCORDINGLY THERE IS NO SEPARATE BILLING OF WHEELING CHARGES.**

82) The contention of the petitioner that in the instant case there is no use of distribution system/ open access, for supply of power from petitioner's generating plant to its manufacturing unit hence additional surcharge cannot be levied is wholly untenable. It is submitted that issue of necessity of use of distribution system for the levy open access surcharges came under consideration of Hon'ble APTEL in case of Chhattisgarh State Power Distribution Co. Ltd. Vs. Aryan Coal Beneficiations Pvt. Ltd (Appeal No. 119 & 125 of 2009) and Hon'ble APTEL by its order dated 9.2.2010 held that levy of compensatory open access charges does not depend on the open access on the lines of distribution licensee. The relevant portion reads as under: -

"16. Section 42 (2) deals with two aspects; (i) open access (ii) cross subsidy. Insofar as the open access is concerned, Section 42 (2) has not restricted it to open access on the lines of the distribution licensee. In other words, Section 42 (2) cannot be read as a confusing with open access to the distribution licensee.

17. *The cross-subsidy surcharge, which is dealt with under the proviso to subsection 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. On this principle it has to be held that the cross-subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not."*
- 83) *In view of above, it may be concluded that for levy of compensatory open access charges use of the distribution system is not a prerequisite. Further, this Hon'ble Supreme Court in Sesa Sterlite Limited supra clearly held that the additional surcharge is compensatory in nature. Accordingly, the Appellant is liable to pay additional surcharge irrespective of whether the lines of the distribution licensee are used or not.*
- 84) *It is submitted that Section 42(2) of the Act deals with the 'cross-subsidy surcharge' and Section 42(4) deals with 'additional surcharge'. The Act 2003 provides clear exemption from Cross-Subsidy Surcharge to a person who has established a captive generating plant for carrying the electricity to the destination of his own use [vide fourth proviso to Section 42(2)]. However, no such exemption has been provided with respect to 'Additional Surcharge' under Section 42(4).*
- 85) *As per Section 42(4) of Act 2003, if a consumer belongs to a 'class of consumers' to whom open access is permitted by the State Commission then in such a case consumer is liable to pay the additional surcharge on the consumption of electricity from other source of supply. In the present case respondent consumer is comes within the class of consumer to whom open access is permitted.*
- 86) *Further, although the grid will not be used for conveyance of energy from other sources, the generating plant is operating parallelly with the grid. The Petitioner as a consumer of respondent is also availing supply against contract demand. Accordingly, continuous support from the grid is being provided to the petitioner consumer. Section 2(47) of Act 2003 describes open access as "non-discriminatory arrangement for the use of transmission lines, delivery systems, or associated facilities." As a result, the provision for the generator to provide continuous grid support in order to provide electricity to the Petitioner is akin to open access. Consequently, the Petitioner is liable for additional surcharge imposed by the Commission from time to time. In this regard kind attention is drawn towards the findings of **M/s Amplus Solar Power Pvt. Ltd. & another V.s Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018)**:*

"Accordingly, the consumer will not be liable to pay Wheeling Charges and transmission charges as the grid will not be used for supply of power from generating plant to the consumer. However, a

continuous support from the grid will be provided for reference voltage synchronization to operate inverters. Section 2(47) of the Act defines open access as “the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;”

Hence, the arrangement of taking continuous support of the grid by the generator for supplying power to the consumer is akin to sale under open access. Therefore, the consumer shall be liable to pay cross subsidy surcharge and additional surcharge, if any, as determined by the Commission from time to time. The consumer is not required to apply for open access since it is not using the lines of the licensee.”

- 87) *Similarly, Hon’ble Haryana Electricity Regulatory Commission in the matter of M/s Toshiba Corporation V.s Managing Director Dakshin Haryana Bijli Vitran Nigam Limited (Case No. HERC/PRO-23 of 2012) considered the issue of making available electricity through dedicated transmission line without use of distribution system and held as under:*

*“In view of above discussions, the Commission holds that the Petitioner can supply power from its proposed generating plant to the industrial consumer through dedicated transmission lines considering the load center as a consumer under section 10 (2) read with section 42 (2) and shall be liable to pay the cross-subsidy surcharge to the distribution licensee **and the additional surcharge as applicable under the regulations, framed by the Commission.** Accordingly, the issue framed at (iii) is answered in negative i.e., cross-subsidy and additional surcharge as decided by the Commission from time to time shall be payable by the Petitioner.*

Having observed as above, the Commission orders as under:

- iv) *Open access may be sought by consumers collectively or the Generator for the limited purpose of energy accounting to facilitate levy of cross –subsidy surcharge and additional surcharge.*
 - v) *.....*
 - vi) *Cross – subsidy surcharge and additional surcharge as decided by the Commission for relevant years shall be -payable by the Consumers / Generator to the distribution license(s) of the area.”*
- 88) *The above order of Hon’ble HERC was challenged before Hon’ble APTEL in Dakshin Haryana Bijli Vitran Nigam Limited, Haryana v Toshiba Corporation Through Its Smart Community Division- 1, Tokyo and others (Appeal No. 254 of 2013). The Hon’ble APTEL Vide order dated 29/05/2015 confirmed the said order and held as under:*

“22. Though ' Toshiba' has clearly stated that it shall not use the distribution or transmission network of distribution or

transmission licensee of the area of supply, but the State Commission even then had made it liable to pay cross subsidy surcharge curd other additional surcharge as decided by the State Commission under the concerned Regulations to the distribution licensee, the Appellant herein. In the impugned order propel arrangement has been made to ensure that the distribution licensee, the appellant herein, would be properly compensated through the payment of cross subsidy surcharge cold additional surcharge, if any, found fit by the State Commission."

- 89) *The aforesaid order of Hon'ble APTEL was challenged before Hon'ble Supreme Court being Civil Appeal No. 5318 of 2015 and this Hon'ble Supreme Court vide order dated 20/07/2015 dismissed the said civil appeal.*
- 90) *Without prejudice to the submission that use of distribution system is not necessary to levy of additional surcharge, it is submitted that, MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations. 2010 (Revision-1) {RG- 33(1) of 2010}, provides that power evacuation facility notwithstanding that cost of which has been paid for by the Developer, shall be the property of the concerned Licensee for all purposes. The relevant Regulation 7.2 is reproduced by the Respondent.*
- 91) *Aforesaid principle is also applicable in the present circumstances of the case.*
- 92) *In view of above, it is submitted that the issue of liability of additional surcharge even in the absence of use of distribution system is already been decided in favour of Respondent by Hon'ble Tribunal as well as Hon'ble Supreme Court. Therefore, petitioner is liable to pay additional surcharge.*
- 93) *It is submitted that purpose behind levy of wheeling charges and additional surcharge is altogether different. Therefore, the additional surcharge is payable even if there is no separate billing of wheeling charges for the reason that power generating plant has setup by the consumers within its premises and consumer has not used the line of the distribution licensee (open access) for the consumption of electricity from other source of supply.*
- 94) *Clause 8.5.4 of the National Tariff policy provides that the fixed cost of power purchase would be recovered through additional surcharge and the fixed costs related to network assets would be recovered through wheeling charges. The said clause is reproduced by the Respondent.*
- 95) *In view of above provision of National tariff Policy, additional surcharge is payable for obligation to supply even if there is no separate billing of wheeling charges, as in the present case.*
- 96) *As held by this Hon'ble Supreme Court in Sesa Sterlite Supra that the exit of the consumer from the preview of the distribution licensee adversely affects its finances, Thus, the fact that such exit is through dedicated line and not through line/distribution system of distribution licensee has no*

bearing on the consequential stranded capacity of the distribution licensee and in both the cases distribution licensee is required to pay fixed charges to the generators without actually procuring electricity. Accordingly, additional surcharge is payable even if there is no separate billing of wheeling charges.

- 97) It is submitted that Hon'ble Supreme court in Unicorn Industries v. Union of India [2019] 112 Taxmann.com 127 (SC) (Civil Appeal Nos. 9237-38 of 2019) vide its order dated 06/ 12/2019 overruled the proposition which is sought to be advanced by the respondent consumer in the instant matter. Relevant extract of the said order is reproduced as under:

"41. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. The reason employed in SRD Nutrients (P.) Ltd. (supra) that there was nil excise duty. as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. **The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess.** Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted."

- 98) Thus, it may be seen from the above that Hon'ble Supreme Court has categorically upheld the liability of additional duties even when the basic duty was nil, if:

- a) The additional duty is being levied for a different purpose.
- b) There is no specific exemption for additional duty.

- 99) In view of above ruling of Hon'ble Supreme Court, additional surcharge is payable even if there is no separate billing of wheeling charges as there is no difficulty in making the computation of additional surcharge. A reference is also drawn towards the Retail Supply Tariff Order 2020-21 issued by the Ld MPERC determining the additional surcharge and the relevant extracts is as under:

"3.32 The Commission has thus determined the additional surcharge of Rs. 0.674 per unit in accordance to the applicable Regulations from the date of applicability of this Retail Supply Tariff order."

- 100) *It may be seen that additional surcharge is to be levied on per Kwh consumption basis and there is no difficulty in computation of additional surcharge even if there is no separate billing of wheeling charges. Further the purpose behind levy of additional surcharge and wheeling charges is totally different. Thus additional surcharge is payable even if there is no billing of wheeling charges. Even otherwise such consumers who are consuming electricity from other sources without availing open access may also be made liable to compensate to distribution licensee on account of cost of stranded network asset in addition to the stranded cost of power purchase after getting approval of the State Commission.*
- 101) *Thus, it is apparent that cross subsidy surcharge and additional surcharge are compensation payable to the distribution licensee irrespective of fact as to whether its line is used or not. In the present case although cross subsidy surcharge is exempted but there is no such exemption for additional surcharge. Thus the petitioner consumer is liable to pay additional surcharge as determined by the Commission from time to time.*
- 102) *In the light of the above, particularly, the Regulations and Tariff Orders issued by the MPERC prevailing in the State of Madhya Pradesh, the petitioner is liable to pay additional surcharge to the Respondent.*
- 103) *It is also noteworthy to mention that at earlier occasions demand of additional surcharge has been upheld by this Hon'ble Commission in the petition No. 12 of 2020/ 61 of 2020/62 of 2020. The answering respondent has already filed the Civil Appeals (ref diary no. 3925/2023, 3927/2023 and 3957/2023) against the adverse order dated 29.11.2022 of the Hon'ble APTEL in the Appeal No. 198 of 2021 relied upon by the petitioner. Therefore, adverse orders of the Hon'ble APTEL and Hon'ble MPERC have not attained the finality till date. Accordingly, present petition should not be decided, relying on the earlier contrary decision of APTEL and this Hon'ble Commission, particularly in the present circumstances of the case when the question of law is pending before Hon'ble Supreme Court.*
- 104) *The main contents of para-wise reply of the Respondent are as under:*

3. Facts: -

- 3.1 *It is true that the 2 MW Steam Turbine Generating Plant was commissioned by the Petitioner on 14.08.2015. According to Section 6.40 of the Electricity Supply Code 2021, the permission of the said 2 MW Steam Turbine Generating Plant was not taken by the respondent. The said 2 MW Steam Turbine Generating Plant was found to be running without permission by the investigation team of DISCOM. On informing the Petitioner to complete the formalities for statutory operation of the 2 MW Steam Turbine Generating Plant and on completion of the formalities, The permission for the Grid Connectivity of said 2 MW Steam Turbine Generating Plant was issued vide Letter No MD/WZ/05/Com-HT/BS/ 14854 Dt. 27.11.2022. The temporary charging permission was issued by Adhikshan Yantri vide letter No Tak/ 59 - 4/Dhar/ 1516, Ujjain dated 10.02.2015.*

3.2 *The documents of 2 MW Steam Turbine Generating Plant were submitted by the Petitioner. The documents pertained to the period from the year 2015-16 to the year 21-22. According to the CA certificate in the submitted document, consumption of 22609696 units was shown in the period from the year 2015-16 to the year 21-22. The HT Billing Cell, after calculation the additional surcharge as per the provision of Section 42 of the Electricity Act, issued a demand of Rs 17579200/- to the consumer.*

3.3 & 3.4 *The petitioner's request was considered and no any coercive action was taken against the petitioner. The levy of additional Surcharge on the consumed units from the CPP has been stopped from monthly energy bills, till the verdict of Hon'ble Appellate Court is received. Further in light of approval of competent authority, the demand of ASC raised on consumer shall not be withdrawn by Discom, but kept in abeyance. However the demand of ASC after the amendment of Regulation RG-24 I (ii) of 2021 (2nd amendment dated 05.04.23) shall be withdrawn from 05.04.23.*

3.5 *As per billing process, it was display in Annex P-6 & P-7.*

3.6 *it is mentioned that Discom's High Tension Consumer's bill are generated through NGB Software. At present NGB software doesn't provide any Prompt Payment Incentive and Online Payment Rebate to the HT Consumers, who are in arrears. The arrear of Petitioner pertains to Additional Surcharge on units generated by it's own 2 MW Co-located Stream Generation plant and surcharge thereof.*

It is also mentioned that the Prompt Payment Incentive and Online Payment Rebate may be allowed only in case of full payment of energy bill excluding cases where judicial body has given interim relief.

As mentioned in reply para 3.3 & 3.4, the Discom has approached Apex court, the competent authority has given a conditional approval that till the order of apex court is received, the consumer is allowed for rebates on prompt payment and Online payments. The same will be allowed from next billing cycle.

3.7 *Not Acceptable, as the Discom is in appeal before Hon'ble Apex Court.*

3.8 *Not Acceptable. The above order has been issued by the Hon'ble Apex Court in JSW Steel vs Maharashtra Electricity. It is worth mentioning here that no provision has been made by the Maharashtra Electricity Regulatory Commission for levy of additional surcharge, while in the 7th amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulation, 2010, MPERC had been made provision for levy of additional surcharge (clause 12.2). Keeping this in view, a petition is being filed in the Hon'ble Supreme Court against the said order.*

3.9 *it is mention that Section 9 is not applicable in this case. Because as per Section 42(4) of Electricity Act 2003, additional surcharge is levied on a consumer who avail supply of electricity from a person other than its area distribution. According to the said clause the Discom has raised the additional surcharge.*

4. **GROUND**

4.1 *Not Accepted. Because as per Section 42(4) of Electricity Act 2203, additional surcharge is levied on a consumer who is receiving supply of electricity from a person other than its area distribution.*

According to the said clause the Discom has raised the additional surcharge. It is also mentioned that in the 7th amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulation, 2010, MPERC had been made provision for levy of additional surcharge (clause 12.2). Clause 12.2 states that-

“Wheeling charges, Cross Subsidy Charges, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the Electricity Act 2003 shall be applicable at the rate as decided by the Commission from time to time in its related supply tariff order.”

4.2 *Not Accepted. Because as per Section 42(4) of Electricity Act 2203, additional surcharge is levied on a consumer who receiving supply of electricity from a person other than its area distribution.*

4.3 *Not Accepted. Because the bill raised by Discom is according to law and petitioner is liable to pay the same. Not accepted.*

4.4 *Because the bill is according to law and it is not a matter of harassment to Petitioner.*

4.5 *Not Accepted. It is mention that Section 9(2) is not applicable in this case. Section 9(2) states that – “Every person, who has constructed a captive generating plant and maintains and operates such plants, shall have the right to open access for the purposes of carrying electricity front his captive generating plant to the destination of his use:”*

Whereas as per Section 42(4) of Electricity Act 2203, additional surcharge is levied on a consumer who is receiving supply of electricity from a person other than its area distribution. No category has been mentioned in the said section, only the power unit received from other sources has been mentioned. Section 42(4) states that –

“Where the State Commission permits a consumer or class of consumers to received supply of electricity from a person other than the distribution licensee of his area supply, such consumer shall be liable to pay an additional surcharge on the charge of

wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

And in the 7th amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulation, 2010, MPERC had been made provision for levy of additional surcharge (clause 12.2). Clause 12.2 states that-

“Wheeling charges, Cross Subsidy Charges, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the Electricity Act 2003 shall be applicable at the rate as decided by the Commission from time to time in its related supply tariff order.”

As per above clause 9(2), it is clearly show that levy of additional surcharge is not exempted on a consumer who is receiving supply of electricity from a person other than its area distribution.

PRAYER :

- I) The Hon’ble Commission may be please to cancelled the present petition.
- II) At present levy of additional Surcharge on the consumed units has been stopped from monthly energy bills till the verdict of the Hon’ble Appellate court is received.
- III) Prompt Payment Incentive will be conditionally allowed to Petitioner’s monthly energy bill till the verdict of the Hon’ble Appellate court is received.
- IV) Online Payment Rebate will be conditionally allowed to Petitioner’s monthly energy bill till the verdict of the Hon’ble Appellate court is received.
- V) The petitioner is not eligible for any kind of relief.

105) In view of the above submission there is no remaining live issues exist to decide by this Hon’ble Commission in the light of aforesaid approval of competent authority mentioned in the aforesaid para wise reply. Accordingly, issue raised by the petitioner has become academic. It is settled legal position that Court always decides an live issue and does not decide any issue which is only academic.

6. With the aforesaid submissions the Respondent prayed the following:

- i) Petition filed by the petitioner is devoid of merit; therefore, same may please be dismissed.
- ii) Condone any inadvertent omissions/ errors/ shortcomings/ delay and permit the answering respondent to add/ change/ modify/ alter this filing and make further submissions as may be required at later stage.

iii) *Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.*

7. Petitioner made his written submission on 23.08.2023 and broadly submitted as under:

(1) *That Petitioner Represented before Respondent that additional surcharge on wheeling is not applicable on Petitioner CPP in lieu of Hon'ble Supreme Court order dated 10th December 2021 in petition no. 5074-5075/2019, in which Hon'ble Apex court held that "the captive consumers/captive users are not liable to pay the additional surcharge leviable under section 42(4) of the Electricity Act 2003, the appelland-distribution licensee has to refund the same"*

Petitioner also represented that Hon'ble MPERC order in the petition no. 49 of 2021 & IA N.08 of 2021 of M/s Grasim Industries Ltd. and in petition no. 53 of 2021 of M/s Kasyap Sweeteners Ltd. held that in light of the Judgment of Hon'ble Supreme Court, that Additional Surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for their manufacturing units.

Respondent's argument that Petitioner is a consumer under section 2 (15) under the ACT hence said order of Hon'ble Apex court not applicable in Petitioner's case is absolutely baseless as Petitioner is also a CAPTIVE CONSUMER / USER.

Also, the definition of CAPTIVE USER defined by the Ministry of Power, Govt Of India under Rule 2(b) of the Rules 2005 dated 8th June 2005 was reproduced by the petitioner.

Petitioner submits that said order of Hon'ble APEX court is applicable in this case and in support of this claim Petitioner submits below, the relevant part of the Hon'ble Apex court: -The short question which is posed for the consideration of this The court is : "Whether the captive consumers/captive users are liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003.

7. *While deciding the aforesaid issue/question, the relevant provisions of the Electricity Act, 2003 namely Sections 9 and 42 are required to be noted/visited, which reads as under:-*

"9. Captive generation.- (1) *Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:

Provided further that no license shall be required under this

Act for the supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.

- (2) *Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*

Provided that such open access shall be subject to the availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be: Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

42. Duties of distribution licensees and open access.-

- (1) *It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

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

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of the current level of cross-subsidy within the area of supply of the distribution licensee:

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

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

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity Amendment) Act 2003 (57 of 2003) by regulations, provides such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time

exceeds one megawatt.

- (3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) 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 regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.*
- (4) Where the State Commission permits a consumer or class of consumers to receive a supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*
- (5) Every distribution licensee shall, within six months from the appointed date or date of grant of a licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.*
- (6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.*
- (7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.*
- (8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections."*
- (9) On a fair reading of Section 9, it can be seen that captive generation is permitted under sub-section (1) of Section 9. As per subsection (2), every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use, but of course, subject to availability of adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be. So, the captive generation / captive use is statutorily provided / available and for which permission of the State Commission is not required. The submission on behalf of the appellant that the captive generation under Section 9 is subject to the regulations as per first proviso to sub-section (1) of Section 9 and that even open access for the purpose of carrying electricity from his captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be, sub-section (4) of Section 42 shall be applicable and such captive users are*

liable to pay the additional surcharge leviable under sub-section (4) of section 42, has no substance and has to be rejected outright. Construction and/or maintenance and operation of a captive generating plant and dedicated transmission lines is not subjected to any permission by the State Commission. As provided under Section 9 of the Act, 2003, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Merely because the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, it cannot be said that for a captive generation plant, the State Commission's permission is required. The right to open access to transmit/carry electricity to the captive user is granted by the Act and is not subject to and does not require the State Commission's permission. The right is conditioned by the availability of a transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate.

- (10) *In light of the above observations and findings, the issue of whether such captive users are subject to the levy of an additional surcharge leviable under sub-section (4) of Section 42 is required to be considered.*

E Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive the supply of, electricity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory rights. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, 0) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee /licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

- (11) *The term "consumer" is defined in Section 2(15), which reads as under:-*

"(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;"

- (12) *Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply.*

However, with the permission of the State Commission such a

consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person — distribution licensee of his area of supply.

So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

- (13) *Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all.*

Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

- (14) *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.*
- (15) *It is reported that pursuant to the interim order passed by this Court dated 01.07.2019, staying the operation and implementation of the impugned order passed by the Appellate Tribunal, the appellant —distribution licensee has recovered the additional surcharge. Therefore, as such once it is held that the captive consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Act, 2003, the appellant--distribution licensee has to refund the same.*

Thus Petitioner is a CAPTIVE USER. Hence said demand for the additional surcharge on wheeling is illegitimate.

- 2) *Respondent has claimed that it has filed an appeal (para 3.7 page 88 of reply) before the Hon'ble APEX court. However, it has not provided any order from the Hon'ble APEX court, hence present order of the Hon'ble APEX court prevails.*

Respondent's contention is that it will allow applicable rebates and no conceive action will be taken and it should be allowed to show additional surcharge notice and bill as arrears is unacceptable as it may cause harassment to Petitioner in terms of additional security deposit demand and refusal of Respondent to give any contract demand extension on the ground that there are arrears against the Petitioner as this is a standard practice of the respondent to pressurize its consumers for recovery of arrears if areas are not legitimate and are challenged before courts.

8. Respondent, MP Paschim Kshetra Vidyut Vitaran Company Ltd. has also made written submission on 23.08.2023 reiterating the submissions made in the main reply alongwith additional submissions as under:

- 1) *Kind attention is drawn to the following approval given by the competent authority of the Discom (ref para 106 of the reply):*

*3.3 & 3.4 The petitioner's request was considered and no any coercive action was taken against the petitioner. **The levy of additional Surcharge on the consumed units from the CPP has been stopped from monthly energy bills, till the verdict of Hon'ble Appellate Court is received. Further in light of approval of competent authority, the demand of ASC raised on consumer shall not be withdrawn by Discom, but kept in abeyance. However the demand of ASC after the amendment of Regulation RG-24 I (ii) of 2021 (2nd amendment dated 05.04.23 [sic 07.04.2023]) shall be withdrawn from 05.04.23 [sic 07.04.2023].***

PRAYER :

- i) *The Hon'ble Commission may be please to cancelled the present petition.*
- ii) *At present levy of additional Surcharge on the consumed units has been stopped from monthly energy bills till the verdict of the*

- Hon'ble Appellate court is received.*
- iii) **Prompt Payment Incentive will be conditionally allowed to Petitioner's monthly energy bill till the verdict of the Hon'ble Appellate court is received.**
- iv) **Online Payment Rebate will be conditionally allowed to Petitioner's monthly energy bill till the verdict of the Hon'ble Appellate court is received.**
- v) *The petitioner is not eligible for any kind of relief.*
- 2) *In view of above submission there is no remaining live issues exist so as to decide by this Hon'ble Commission in the light of aforesaid approval of competent authority. Accordingly, issues raised by the petitioner have become academic. It is settled legal position that Court always decides an live issue and does not decide any issue which is only academic.*
- 3) *The Hon'ble Supreme Court in **Dhartipakar Madan Lal Vs Rajiv Gandhi** (1987 [SUPP] SCC 93), observed that court should not undertake to decide an issue unless it is a live issue between the parties. If the issue is purely academic, its decision one way or the other would have no impact on the position of the parties, it would not be prudent in deciding the same. Similarly in the case of **Arnit Das Vs State of Bihar** [2001] 7 SCC 657), the Hon'ble Apex Court has held that the court does not decide matters which are of academic interest on the facts of a particular case.*
- 4) *In view of above Hon'ble Commission is requested to dispose the petition accordingly by dismissing it.*

"ON MERIT OF THE MATTER"

- B. RE: HON'BLE SUPREME COURT'S JUDGEMENT IN "MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED VS. JSW STEEL LIMITED AND OTHERS" REPORTED IN (2022) 2 SCC 742 (JSW STEEL CASE) IS NOT APPLICABLE IN THE INSTANT CASE:**
- 5) *The submission of the petitioner that the issue involved in the instant case is covered in its favour by the findings of the Hon'ble Supreme Court in the JSW steel Judgment (along with judgment of this Hon'ble Commission & Hon'ble APTEL based thereon) is untenable.*
- 6) *The finding of Hon'ble Supreme Court is not applicable in the instant case due to following reasons:*
- a. *Petitioner is a 'consumer' within the meaning of Section 2(15) of the Act, 2003.*
- b. *In the State Of Madhya Pradesh Open Access even by Captive Generating Plant is Regulated by State Commission (MPERC) through Regulations.*
- 7) *Attention is drawn towards the following finding of Hon'ble Supreme Court in the JSW Steel judgment supra:*

"14.....Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section

42(4) of the Act, 2003.”

- 8) *It may be seen that as per aforesaid judgment of Hon'ble Supreme Court captive consumer/ captive user other than the consumers defined under Section 2(15) of the Act shall not be subject to the levy of additional surcharge. In other words, any captive consumer who is a consumer under Section 2(15) is liable to pay additional surcharge. The Section 2(15) of the Act reproduced by the Respondent.*
- 9) *It is submitted that in the instant case petitioner is maintaining contract demand and availing supply from the answering respondent (distribution licensee) herein. Accordingly, petitioner is a consumer within the meaning of Section 2(15) of the Act, 2003 and does not form a separate class.*
- 10) *Kind attention is also drawn to the fact that Hon'ble Supreme Court in the JSW Steel Judgment supra held that in the situation and/or eventuality wherein distribution licensee has already incurred the expenditure, entered into Power Purchase Agreements (PPAs) and invested money for supply of electricity to any consumers or class of consumers of the area of his supply, levy of additional surcharge is justified. It proceeded to hold as under:*
*“13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. **There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.....”**
Emphasis supplied*
- 11) *It is submitted that whenever an existing consumer of the distribution licensee like petitioner maintaining contract demand avails open access through captive route or consumes electricity from captive generating plant through dedicated transmission lines, such situation and/or eventuality arises wherein distribution licensee has already incurred the expenditure, entered into purchase agreements and invested money for supply of electricity to consumers of its area of supply. In the present case,*

admittedly the petitioner consumer is maintaining a contract demand with the answering respondent. Thus, answering respondent being distribution licensee has already invested in the Power purchase Agreement.

- 12) *Thus, being a consumer within the meaning of Section 2(15) of the Act, 2003 petitioner is liable to pay additional surcharge to the respondent and JSW Steel case has no applicability in the present circumstances of the case.*
- 13) *That in the State of Madhya Pradesh Open Access even by Captive Generating Plant is Regulated by State Commission (MPERC) through Regulations. Hon'ble Supreme Court in the JSW Steel judgment supra held as under:*
"9..... it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate."
- 14) *It is submitted that in the state of Madhya Pradesh Hon'ble Madhya Pradesh Electricity Regulatory Commission (MPERC) has issued the following regulations from time to time regulating all generators including captive generating plant:*
a. MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005.
b. 7th amendment to the MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations, 2010.
c. MPERC (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The provisions of the Regulation 11.2(d) of the said Regulations are reproduced by the Respondent.
- 15) *It may be seen that aforesaid Regulations 2021 specifically provided that the captive consumers are liable to pay additional surcharge. It is settled legal position that Regulation once notified shall be treated as part of Act and order issued by the regulatory Commission should be in conformity with the Regulations. It is submitted that in the matter of PTC India Limited v Central Electricity Regulatory Commission, through Secy. {2010} 4 Supreme Court Cases 603 constitution bench of Hon'ble Supreme Court held that Regulation stands on a higher pedestal vis-'-vis an Order (decision) of Regulatory Commission and validity of Regulations can only be challenged seeking judicial review under Article 226 of the Constitution of India (Ref Para 65, 92, 93). Similarly, Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC 715 has held that even the High court exercising its power of appeal under a particular statute cannot exercise suo motu the constitutional power under Article 226 or 227 of the Constitution (Ref. Para 50).*
- 16) *It is submitted that in the instant case petitioner has not challenged the*

vires of the aforesaid Regulations. Further while deciding instant dispute Hon'ble Commission can neither ignore the prevailing Regulations nor can decides the validity of the same. Further, neither the MPERC Regulation's nor the Regulation making power of MPERC in this regard was under consideration of the Hon'ble Supreme Court in JSW case.

- 17) In view of above, JSW judgment supra has no applicability in the present circumstances of the case and petitioner is liable to pay additional surcharge.

C. RE : JSW STEEL CASE IS DECIDED WITHOUT BRINGING TO THE NOTICE OF HON'BLE SUPREME COURT OF EARLIER BINDING JUDGMENT OF HON'BLE SUPREME COURT ITSELF I.E THE JUDGMENT IN THE CASE OF HINDUSTAN ZINC LTD V. RAJASTHAN ELECTRICITY REGULATORY COMMISSION [2015 (12) SCC 611]:

- 18) The Respondent again reiterated comparative chart of findings of Hon'ble Supreme Court in the both of above judgments as submitted in main reply.

- 19) It may be seen that in Hindustan Zinc supra Hon'ble Supreme Court held that Captive Generating plants are subject to Regulatory jurisdiction of the Commission. Further, Hon'ble Supreme Court in that case also held that captive consumers are the consumers of the distribution licensees. Accordingly, the Ratio Decidendi of both the above Judgments is contrary to each other. Ratio decidendi (Latin plural rationes decidendi) is a Latin phrase meaning "the reason" or "the rationale for the decision". In this regard Hon'ble Supreme Court in Shama Rao Petitioner v. Union Territory of Pondicherry Respondent (AIR 1967 SC 1480) held as under:
"5.....It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein...."

- 20) It is pertinent to mention that this Hon'ble Commission in petition No. 12 of 2020, 61 of 2020, 62 of 2020 and 64 of 2020 has placed reliance on the Hindustan Zinc supra and held that captive consumers are also the consumer of the licensee.

- 21) Five judge bench of Hon'ble Supreme Court in [National Insurance Company Limited Vs Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 [(2017) 16 Supreme Court Cases 680] has considered the issue of precedent value of any judgment passed by a bench of the Hon'ble Supreme Court without taking note of earlier coordinate bench judgment and held that later judgment would not be a binding precedent (Para 1, 14, 15, 17,27, 59).

- 22) Thus, following the ratio and the principle laid down in Hindustan Zinc Supra petitioner is liable to pay additional surcharge.

D. RE: IMPLICATION OF RESPONDENT'S UNIVERSAL SUPPLY OBLIGATION (USO) TOWARDS PETITIONER CONSUMER

- 23) It is submitted that if there is universal supply obligation there shall always be levy of additional surcharge. Section 43 deals with the duty to supply on request (universal supply obligation or USO) whereas section

42(4) deals with the additional surcharge. It is submitted that as per mandate of Section 43 a distribution licensee has a duty to supply on request to each and every premises in its licensed area of supply. Premises also include premises of captive consumer and there is no distinction in this regard under the statute. In other words, duty to supply does not come to an end upon the consumer/ owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time. A comparison of both sections is presented below:

<p>“43. Duty to supply on request.–(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:”</p>	<p>42 (4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply”</p>
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- 24) From the perusal of the aforesaid provisions and comparative analysis, it becomes evident that an additional surcharge is imposed to address the fixed cost of the distribution licensee, which emerge from the mandatory supply responsibilities outlined in Section 43. This essentially implies that in instances where a universal supply commitment is in effect, an additional surcharge is invariably imposed.
- 25) It is settled principle that the law does not permit a person to both approbate & reprobate'. Thus, the petitioner cannot claim that the distribution licensee has an obligation to provide them with supply and grid support, thereby deriving benefits from the services of the distribution licensee, and then subsequently argue that they are not liable to pay an additional surcharge intended to cover the fixed costs of the same distribution licensee, arising from the very same supply obligation. It is pertinent to mention that petitioner is an existing consumer of the answering respondent and is availing supply from the answering respondent. It is reiterated that if there is universal supply obligation there shall always be levy of additional surcharge.
- 26) In the instant case petitioner consumer is having contract demand with the respondent Distribution licensee and is availing supply from the distribution licensee. Thus, petitioner is liable to pay the additional surcharge.

RE: EFFECT OF SECTION 9 ON LIABILITY OF OPEN ACCESS CHARGES

- 27) That, the submission of the petitioner consumer that open access from captive generating plant is governed by the provisions of Section 9 and not

by the provisions of Section 42 hence, captive consumption is exempted from levy of all open access surcharges is baseless and untenable.

- 28) It is stated that Section 9 comes within the Part III of the Act, which deals with the subject matter of 'Generation'. It is submitted that the additional surcharge is not being levied on the petitioner in the capacity of generator but in the capacity of consumer. The petitioner has dual role in this regard.
- 29) In Hindustan Zinc supra Hon'ble Supreme Court has held that the RE Obligation has not been imposed on the captive consumers in their capacity as owners of the Captive Power Plants but in the capacity of the consumer. The relevant para 39 is reproduced by the Respondent.
- 30) This, Hon'ble Supreme Court in the case of Jiyajeerao Cotton Mills Ltd, Birlanagar, Gwalior v. State of M.P (AIR 1963 SC 414) held as under:
- "5..... A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself....."
- 31) Hon'ble Andhra Pradesh High Court in Rane Engineering Valves Ltd vs State of Andhra Pradesh and others (Writ Petition Nos. 6095 of 2004 Dated :19-05-2016) has held that a producer of electricity can also be a consumer and such person is playing dual role. The relevant part of the said judgment is reproduced as under:
- "25.12.As held in Jijajee Cotton Mills Ltd that a producer of electricity can also be a consumer. Such person is playing a dual role....."
- 32) It is submitted that a person who has set up a captive generating plant has dual role, one as a consumer and another as a generator. As per scheme of the Act additional surcharge is payable in the capacity of consumer and not as generator.
- 33) The Section 9 of the Act, 2003 is reproduced by the respondent.
- 34) It may be seen that Section 9(2) merely confers right of open access. However, what the 'open access' is as per scheme of the Act, 2003 is not provided in the Section 9. The Scheme of open access with regard to distribution sector is provided in Section 2(47) read with Section 42 of the Act. Section 2(47) of the Act reproduced by the respondent
- 35) As per aforesaid definition it may be seen that open access shall always be subject to regulation issued by the State Commission (MPERC in the instant case). Further, the aforesaid definition of open access covers every person engaged in the generation i.e captive generating plant or otherwise. In other words, Act does not envisage the separate scheme of open access for captive generating plants. Hence, open access by the captive consumer under section 9(2) is also subject to Regulations of the State Commission which includes payment of additional surcharge as a condition of open access. The Right to open access does not mean that such right will be available free from payment of charges as provided for under the Act, 2003.

Further, from the perusal of proviso to Section 9(2) it may also be conclude that such right of open access is with regard to transmission open access and not with regard to distribution open access availed by the consumer under Section 42.

- 36) *The submission of the petitioner that the additional surcharge is applicable when the State Commission permits consumers to get electricity from a supplier not within their area and in case of captive consumption no such permission is required is untenable. Petitioner has placed reliance upon the Section 9 of the Act 2003 in support of its submission.*
- 37) *In the present case petitioner consumer is comes within the class of consumer to whom facility of open access is permitted as per provisions under MPERC (Terms and Conditions for intra-state Open Access in Madhya Pradesh) Regulations, 2005 issued by the MPERC. Thus petitioner is liable to pay additional surcharge.*
- 38) *It is submitted that provisions of Section 9 are in the nature of enabling provision to set up the captive generating plant and for evacuation of power from such plant. None of these provisions are dealing with the open access charges for supply of power from captive generating plant to captive consumers.*
- 39) *In view of above open access charges for captive consumption is regulated by Section 42 of the Act and except for the exemption from cross subsidy surcharge no other benefit can be extended to captive generating plant. Further, element of 'permission' from state Commission is also there while consuming power from captive generating plants in the form of regulations issued by MPERC to regulate various aspects of open access i.e. application, scheduling of electricity, charges for open access, methodology of balancing and settlement of electricity so injected in the grid etc. It cannot be argued that captive generator are freely entitled to inject power into the grid as per their wish without following grid discipline and related stipulation merely because right of open access is granted under Section 9 of the Act, 2003.*
- 40) *In case of A.P. Gas Power Corporation Ltd v. A.P. Electricity Regulatory Commission (AIR 2006 AP 12) the Hon'ble Andhra Pradesh High Court held that except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant. Relevant portion of the ruling of Hon'ble Court, vide order dtd. 27/07/2005 is mentioned by the Respondent.*
- 41) *In view of above as far as levy of open access charges is concerned, except to the extent of non-levy of surcharge for cross-subsidy, there is no distinction in law between a non captive generating plant and captive generating plant. Thus, submission of the petitioner consumer in this regard is contrary to the provisions of the Act and accordingly liable to be rejected.*

E. RE: LEVY OF 'ADDITIONAL SURCHARGE' BEING COMPENSATORY IN NATURE IS ALSO APPLICABLE IN THOSE CASES WHERE THERE IS NO USE OF LINE OF DISTRIBUTION LICENSEE (OPEN ACCESS) FOR

CONSUMPTION OF ELECTRICITY FROM OTHER SOURCE AND ACCORDINGLY THERE IS NO SEPARATE BILLING OF WHEELING CHARGES.

- 42) *It is submitted that issue of necessity of use of distribution system for the levy open access surcharges came under consideration of Hon'ble APTEL in case of Chhattisgarh State Power Distribution Co. Ltd. Vs. Aryan Coal Beneficiations Pvt. Ltd (Appeal No. 119 & 125 of 2009) and Hon'ble APTEL by its order dated 9.2.2010 held that levy of compensatory open access charges does not depend on the open access on the lines of distribution licensee. The relevant portion of the judgement is reproduced by the Respondent.*
- 43) *Similarly, Hon'ble Supreme Court in Sesa Sterlite Limited v OERC & Others reported in (2014 8 SCC 444) has held that cross subsidy surcharge and additional surcharge are compensatory in nature therefore payable even though power is consumed from other sources through dedicated transmission lines. The relevant part of the said judgment is reproduced by the Respondent.*
- 44) *It is submitted that purpose behind levy of wheeling charges and additional surcharge is altogether different. Therefore, the additional surcharge is payable even if there is no separate billing of wheeling charges for the reason that power generating plant has setup by the consumers within its premises and consumer has not used the line of the distribution licensee (open access) for the consumption of electricity from other source of supply.*
- 45) *Clause 8.5.4 of the National Tariff policy provides that the fixed cost of power purchase would be recovered through additional surcharge and the fixed costs related to network assets would be recovered through wheeling charges. The said clause is reproduced 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."
- 46) *In view of above provision of National tariff Policy, additional surcharge is payable for obligation to supply even if there is no separate billing of wheeling charges, as in the present case.*
- 47) *As held by Hon'ble Supreme Court in Sesa Sterlite Supra that the exit of the consumer from the preview of the distribution licensee adversely affects its finances. Thus, the fact that such exit is through dedicated line and not through open access (i.e through use of line/distribution system of distribution licensee) has no bearing on the consequential stranded capacity of the distribution licensee and in both the cases distribution licensee is required to pay fixed charges to the generators without actually procuring electricity. Accordingly, additional surcharge is payable even if*

there is no separate billing of wheeling charges.

- 48) *It is submitted that Hon'ble Supreme court in Unicorn Industries v. Union of India [2019] 112 Taxmann.com 127 (SC) (Civil Appeal Nos. 9237-38 of 2019) vide its order dated 06/12/2019 overruled the proposition which is sought to be advanced by the petitioner consumer in the instant matter. Relevant para 41 of the said order is reproduced by the Respondent.*
- 49) *Thus, it may be seen from the above that Hon'ble Supreme Court has categorically upheld the liability of additional duties even when the basic duty was nil, if:*
- a) *The additional duty is being levied for a different purpose.*
 - b) *There is no specific exemption for additional duty.*
- 50) *In view of above ruling of Hon'ble Supreme Court, additional surcharge is payable even if there is no separate billing of wheeling charges as there is no difficulty in making the computation of additional surcharge. A reference is also drawn towards the Retail Supply Tariff Order 2020-21 issued by the Ld MPERC determining the additional surcharge and the relevant extracts is as under:*
- "3.32 The Commission has thus determined the additional surcharge of Rs 0.674 per unit in accordance to the applicable Regulations from the date of applicability of this Retail Supply Tariff order."*
- 51) *It may be seen that additional surcharge is to be levied on per Kwh consumption basis and there is no difficulty in computation of additional surcharge even if there is no separate billing of wheeling charges.*
- 52) *Reliance is also placed in this regard on the following judgments in which Hon'ble Courts upheld levy of additional surcharge even if consumer has not availed open access and accordingly wheeling charges not billed to consumer:*
- a. *Judgment of Hon'ble Madhya Pradesh Electricity Regulatory Commission in M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd. (Petition no. 02/2007)*
 - b. *Judgment of Hon'ble Uttrakhand Electricity Regulatory Commission in M/s Amplus Solar Power Pvt. Ltd. & another Vs Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018).*
 - c. *Hon'ble Haryana Electricity Regulatory Commission judgment in the matter of M/s Toshiba Corporation Vs Managing Director Dakshin Haryana Bijli Vitran Nigam Limited (Case No. HERC/PRO-23 of 2012).*
 - d. *Hon'ble APTEL in Dakshin Haryana Bijli Vitran Nigam Limited, Haryana v Toshiba Corporation Through Its Smart Community Division-1, Tokyo and others (Appeal No. 254 of 2013).*
 - e. *Hon'ble Supreme Court judgment in Civil Appeal No. 5318 of 2015 dated 20/07/2015.*

F. RE: ARRANGEMENT OF MAKING THE ELECTRICITY AVAILABLE BY THE CAPTIVE GENERATING PLANT TO THE MANUFACTURING UNIT OF THE PETITIONER CONSUMER IS 'SUPPLY' OF ELECTRICITY EVEN IF IT MAY NOT BE THE SALE TO THRID PARTY.

- 53) *It is submitted that the contention of the petitioner that there is no supply (i.e. sale) of electricity as provided in Section 42 (4) and hence additional surcharge would not be payable is baseless and untenable. It is submitted that the definition of term 'supply' in Section 2(70) of the Act begins with the expression "unless the meaning otherwise requires" As a result, the interpretation of any word specified in the definition clause may vary depending on the context. It is submitted that in the context of open access distribution licensee only acts as carrier and commercial arrangement (i.e. sale or otherwise) between generator and beneficiary is not relevant for the distribution licensee for performance of duties as carrier of the electricity.*
- 54) *The issue of contextual meaning of any term defined in any statute considered by Hon'ble Supreme Court in the case of The Vanguard Fire and General Insurance Co. Ltd vs M/s. Fraser And Ross And Another (AIR 1960 SC 971) [Ref para 6].*
- 55) *In this regard, the other relevant definitions at Section 2(8), 2(29) provided in the Act,2003 are reproduced by the Respondent.*
- 56) *From a bare perusal of Section 2(29) read with Section 2(8), it is evident that a power plant set up solely to generate electricity for its own use is referred to as a captive generating plant and when a power plant generates electricity, it must always be for the purpose of supplying electricity to any premises and not for any other purpose. To put it another way, there cannot be any generation unless it is for 'supply'.*
- 57) *Hon'ble Supreme Court in Karnataka Power Transmission Corpn. &Anr. Vs Ashok Iron Works Pvt. Ltd. Civil Appeal No. 1879 of 2003 (AIR 2009 SC 1905) has held that supply of electricity doesn't mean sale and reproduced para 21 , 22 and 24 of this order.*
- 58) *In addition, the petitioner consumer is contending that it using dedicated transmission line. It is relevant to refer to the definition of 'dedicated transmission line' provided in Act 2003. Definition at Section 2(16) reproduced by the Respondent.*
- 59) *It may be seen that dedicated transmission line is nothing but a supply line. Therefore, while consuming power from the captive generating plant through dedicated transmission line certainly there is 'supply' of electricity by captive generating plant to the premises of the captive consumers even though 'sale of electricity' may not be taking place.*
- 60) *In view of above it can be safely concluded that whenever a captive generating plant make available electricity to the consumer it is nothing but the 'supply' even though it may not be sale. Therefore, petitioner is liable to pay additional surcharge to the Respondent.*

- 61) *The detailed reply dated 10.08.2023 has already been filed before Hon'ble Commission. The content of the same is not being reproduced herein for the sake of brevity. Same may please be considered as part and parcel of this submission.*
- 62) *In view of above submission this Hon'ble Commission is requested to dismiss the petition and render justice.*
9. Last hearing in the subject matter was held on 16 August' 2023, the arguments were heard and the case was reserved for Order.

Commission's observations and findings:

10. The Commission has observed the following from the submissions of the Petitioner and Respondent in this matter:
- (i) The subject petition is filed under Section 9, Section 42 and Section 86 of the Electricity Act 2003 read with order dt. 10.12.2021 of Hon'ble supreme court in civil appeal No. 5074-5075 of 2019 in the matter of JSW steels & others and Hon'ble APTEL order dt. 06.01.2023 in RP No. 10 of 2022 & IA Nos. 2157 & 2156 of 2022 and RP No. 11 of 2022 & IA Nos. 2156 of 2022 in the matter of Prism cement and others seeking appropriate directions to restrain Respondent No. 1 from issuing demand of additional surcharge on captive consumption, allow prompt payment rebate in bills and allow online payment rebate in bills.
- (ii) The petitioner is an HT consumer of Respondent having a contract demand of 2650 KVA for running its Industrial Unit at Village Sejwaya Ghatabilloḍ, District Dhar.
- (iii) Petitioner Company has setup Steam Turbine Generating Plant of 2 MW at its premises at Village Sejwaya Ghatabilloḍ, District Dhar. The petitioner is utilizing 100% power of Steam Turbine Generating Plant for its own use as captive user.
- (iv) Respondent has raised impugned demand dated 21.11.2022 of Rs. 1,75,79,200/- towards alleged liability of additional surcharge as per Section 42 (4) of Electricity Act, 2003. The impugned demand of additional surcharge is raised retrospectively for the period from April' 2017 to March' 2022 in respect of energy generated from Steam Turbine Generator (STG) for Captive use of the petitioner.
- (v) Petitioner represented against the said demand on 28.11.2022 citing order dated 10th December 2021 of Hon'ble Supreme Court in petition no. 5074-5075/2019 in which Hon'ble Apex Court has held that, "the captive consumers/captive users are not liable to pay the additional surcharge leviable under section 42(4) of the Electricity Act 2003."

- (vi) Petitioner also represented that MPERC, in petition no. 49 of 2021 & IA N. 08 of 2021 of M/s Grasim Industries Ltd. and in petition no. 53 of 2021 of M/s Kasyap Sweeteners Ltd; has held that additional surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for their manufacturing units as per order dated 10.12.2021 of Hon'ble Supreme Court.
- (vii) Petitioner has relied on following grounds against levy of additional surcharge by Respondent on the power consumed from its CPPs in this matter:
- a. The Impugned Demand and Recovery of Additional Surcharge is without authority of law and contrary to the following judgments:
 - i. Order dated 05/05/2022 of MPERC in Petition No. 53/2021 (Kasyap Sweeteners limited).
 - ii. Order dated 14/05/2021 of MPERC in Petition No. 49/2021 (Grasim Industries Limited).
 - iii. Order dated 10/12/2021 of Hon'ble Supreme Court in Civil Appeal 5074-5075 of 2019 in the matter of JSW Steels and others
 - iv. Order dated 29/11/2022 of Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 198/2021 Para 17 and 18.
 - b. The entire generation from Steam Turbine Generating Plant of Petitioner is consumed for its own Industry.
 - c. Respondent acted arbitrarily by taking impugned action despite knowing orders of this Hon'ble Commission in case of Grasim Industries and Kasyap Sweeteners. Respondent has no respect or regard for the Hon'ble Commission's orders.
 - d. Levy of additional surcharge under section 42 of the Electricity Act 2003 is in contravention of the provisions of the Act as well as National Electricity Policy.
11. The reply of respondent to the above contention of petitioner is mainly based on the following orders/ Judgments:
- (a) Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC
 - (b) Hon'ble Supreme Court in Hindustan Zinc supra.
 - (c) Hon'ble Supreme Court in [National Insurance Company Limited V.s Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 [(2017) 16

Supreme Court Cases 680].

- (d) Hon'ble Supreme Court in case of Sesa Sterlite Limited v OERC & Others reported in (2014 8 SCC 444).
 - (e) Hon'ble APTEL in Dakshin Haryana Vitaran Nigam Limited Vs Toshiba Corporation (Appeal No. 254 of 2013 order dated 29.05.2015) supra.
 - (f) The Commission in the Petition No. 02/2007 (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.)
 - (g) Judgment of Hon'ble Madhya Pradesh Electricity Regulatory Commission in M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd. (Petition no. 02/2007
 - (h) Judgment of Hon'ble Uttarakhand Electricity Regulatory Commission in M/s Amplus Solar Power Pvt. Ltd. & another Vs Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018).
 - (i) Hon'ble Haryana Electricity Regulatory Commission judgment in the matter of M/s Toshiba Corporation Vs Managing Director Dakshin Haryana Bijli Vitran Nigam Limited (Case No. HERC/PRO-23 of 2012).
 - (j) Hon'ble APTEL in Dakshin Haryana Bijli Vitran Nigam Limited, Haryana v Toshiba Corporation Through Its Smart Community Division-1, Tokyo and others (Appeal No. 254 of 2013).
 - (k) Hon'ble Supreme Court judgment in Civil Appeal No. 5318 of 2015 dated 20/07/2015.
12. Respondent submitted that at present levy of additional surcharge on the energy consumption of petitioner from Steam Turbine Generating Plant has been stopped from monthly energy bills till the verdict of the Hon'ble Appellate court is received, Prompt Payment Incentive will be conditionally allowed to petitioner's monthly energy bill till the verdict of the Hon'ble Appellate Court is received and online Payment Rebate will be conditionally allowed to Petitioner's monthly energy bill till the verdict of the Hon'ble Appellate court is received.
13. Respondent has also submitted that judgement passed by Hon'ble Supreme Court in JSW case is not applicable in the present case as attention of the Hon'ble Supreme Court was not drawn towards the earlier binding precedent of coordinate bench in Hindustan Zinc Ltd Vs Rajasthan Electricity Regulatory Commission [2015 912) SCC 611]. Commission has however noted that Hon'ble Supreme Court in Hindustan Zinc Ltd Vs Rajasthan Electricity Regulatory Commission [2015 912) SCC 611] has dealt with validity of Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 while coordinate bench of Hon'ble Supreme Court in JSW case has dealt with specific issue of applicability of additional surcharge on electricity consumption of captive user from its captive power plants. Final orders passed by Hon'ble Supreme Court in both the above referred cases are on distinct matters.

14. Commission has noted that Respondent has relied on various judgments and orders previously passed by Hon'ble Aptel, this Commission and other State Commissions in similar matters in which it was decided that additional surcharge is leviable on captive consumption. Commission observes that after passing of binding judgement of Hon'ble Supreme Court in JSW case subsequent to the above referred judgement/orders, such judgement/orders of Hon'ble APTEL/this Commission and other State Commissions have no relevance in the present case.
15. The specific issue regarding applicability of additional surcharge on captive use of power has been dealt with by Hon'ble APTEL in its Judgment dated 27.03.2019 passed in Appeal No. 311 & 315 of 2018 in the matter of M/s JSW Steel Ltd. & Ors. v. MERC & Anr. and by Hon'ble Supreme Court vide Judgement dt. 10.12.2021 in Civil Appeal No. 5074-5075/ 2019. Order dated 27.03.2019 of Hon'ble APTEL has been upheld by Hon'ble Supreme Court in Civil Appeal No. 5074-5075/2019. We have already decided similar petitions in the matter of levying additional surcharge on captive consumption of power based on Judgment dated 27.03.2019 passed by Hon'ble APTEL in Appeal No. 311 & 315 of 2018 in the matter of M/s JSW Steel Ltd. & Ors. v. MERC & Anr. and Judgement dated 10.12.2021 passed by Hon'ble Supreme Court in Civil Appeal No. 5074-5075/ 2019. While deciding similar matters, the Commission held that additional surcharge is not applicable in case of captive consumption by a consumer from its captive generating plant. The operating paras of Judgement dated 10.12.2021 of Hon'ble Supreme Court passed in Civil Appeal No. 5074-5075/ 2019 are reproduced as under: -

"11. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

12. The term "consumer" is defined in Section 2(15), which reads as under:

"(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 licensee, the Government or such other person, as the case may be;"

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. **So far as captive consumers/ captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers/ captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003.** In the case of the captive consumers, captive users, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive user, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.
14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/ or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 41(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held

that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed.....”*

(Emphasis Supplied)”

16. Commission through 1st amendment in Madhya Pradesh Electricity Regulatory Commission (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20th Jan 2023 has omitted applicability of additional surcharge in respect of renewable energy-based captive generating plants from clause (d) of the Regulation 11.2 of the Principal Regulations. Commission has also specified in Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, (Revision-I) 2021 (Second Amendment) {ARG-24(I)(ii) of 2023} notified on 05.04.2023 that additional surcharge shall not be leviable in case a person is availing supply from the plant established as captive generation plant for his own use. As such, additional surcharge is not applicable in respect of conventional energy-based captive generating plants also.

17. In light of the above-mentioned Judgment of Hon’ble Supreme Court and in view of the foregoing observations, it is held that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2 MW Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner, if any, and withdraw the demand of balance amount along with consequential surcharge, if any, on account of additional surcharge on captive use of electricity within a period of one month from the date of this order. Further, Respondent shall not withhold prompt payment and online payment rebate on petitioner’s HT connection on account of nonpayment of additional surcharge as the levy of additional surcharge has been disallowed on captive consumption. With the aforesaid observations and findings, the subject petition stands disposed of.

(Prashant Chaturvedi)
Member

(Gopal Srivastava)
Member(Law)

(S.P.S. Parihar)
Chairman