Petition No. 36/2017 and I.A. No. 01/2017 in P-36/2017 clubbed with P.No. 56/2016

Sub: In the matter of petition under Section 42 read with Section 86 of the Electricity Act, 2003

ORDER

(Date of order: 30th December,2017)

M/s Prism Cement Limited, - Petitioner
305, Laxmi Niwas Apartment,
Amarpreet, Hyderabad- 500 016

State of Madhya Pradesh - Respondent No.1
Through Principal Secretary,
Energy Department,Vallabh Bhawan, Bhopal

M.P. Power Management Co. Ltd., - Respondent No.2
Shakti Bhawan, Rampur, Jabalpur

M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd., - Respondent No.3
Block No. 7, Shakti Bhawan, Rampur, Jabalpur

M/s BLA Power Pvt. Ltd., - Respondent No.4
P.O. Khursipar, Village Niwari,
Tehsil Gadarwara, District Narsinghpur

The Chief Engineer, - Respondent No. 5
State Load Despatch Centre,Nayagaon, Rampur, Jabalpur

Shri Amit Kapur, Sr. Advocate, Shri Buddy Ranganathan, Sr. Advocate, Shri S. Venkatesh, Advocate, Shri Pratyush Singh, Advocate and Shri Sandeep Rajpurohit, Advocate appeared on behalf of the petitioner.
Shri Ashish Bernard, Dy. Advocate General, M.P. and Shri R.V. Saxena, DGM appeared on behalf of the respondent no. 1&2.
Shri Naman Nagrath, Sr. Advocate, Shri Prakash Upadhyay, Advocate and Shri Sanjay Okhade, DGM appeared on behalf of the respondent no. 3.
Shri Sanjay Sen, Sr. Advocate and Ms. Titash Sen, Advocate appeared on behalf of the respondent no.4.
Shri R.A. Sharma, Addl. CE(LD) and Shri Ashish Bernard, Dy. Advocate General, M.P. appeared on behalf of the respondent no.5.

2. The petitioner, M/s Prism Cement Limited (hereinafter referred to as M/s PCL) has filed the subject Petition No.36/2017 under Section 42 read with Section 86 of the Electricity Act, 2003 seeking a declaration that no cross subsidy surcharge is leviable upon the petitioner for the power sourced from Unit No.1 of M/s BLA Power Pvt. Limited's Generating Station to the Petitioner's Cement Plant at Satna in as much as (and till such time) the said Unit No.1 of M/s BLA Power Pvt. Limited's generating station qualifies as a

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Captive Generating Plant qua the Petitioner under the provisions of the Electricity Act, 2003 read with the twin tests prescribed under Rule 3 of the Electricity Rules, 2005. The subject petition has been filed pursuant to the order dated 17.08.2017 in WP (C) No. 604 of 2017 passed by the Hon'ble High Court of Madhya Pradesh. In the subject petition, the petitioner has prayed the following:

"(a) Direct Respondent No. 3 not to initiate any coercive action against the Petitioner;

(b) Hold that no cross-subsidy surcharge is leviable upon the Petitioner being captive user for the power sourced from Unit-1 of BLA Power Pvt. Ltd.'s Generating Station (Captive Unit) to the Petitioner's cement plant in Satna in as much as (and till such time) the said Unit-1 of BLA Power Pvt. Ltd.'s generating station qualifies as a Captive Generating Plant qua the Petitioner under the provisions of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005;

(c) Quash and set aside the letters dated 20.10.2016, 25.11.2016 and 07.12.2016 issued by Respondent no.3 to the Petitioner and the invoices whereby Respondent no.3 has unilaterally and illegally made a demand of cross subsidy surcharge of Rs. 26.62 crores on the Petitioner for the period from June'2016 to July'2017, as the same are illegal, unlawful, contrary to law and arbitrary;

(d) Direct Respondent No.3 to withdraw the impugned letters dated 20.10.2016, 25.11.2016 and 07.12.2016 and the invoices issued by Respondent no.3 to the extent of charging of cross subsidy surcharge on power sourced by Petitioner from its Captive Generating Plant i.e. Unit-1 of the Generating Station;

(e) Restrain the Respondent No.3 from charging cross subsidy surcharge on power sourced by Petitioner from its Captive Generating Plant i.e. Unit-1 of the Generating Station."

3. Earlier, the M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd. (hereinafter referred to as MPPKVVCL) has filed a petition no. 56/2016 on 21.10.2016 on the issue of levy of cross subsidy surcharge and mainly prayed as under:

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"*(a) To clarify the issues set out in Paragraph 30 of this Petition under the provisions of regulation 4.38 of MPERC (Power Purchase and Other Matters with respect to conventional fuel based Captive Power Plants) Regulations (Revision-I) 2009read with section 86 and section 181 of the Electricity Act, 2003 and as per the order dated 21.02.11 of Hon'ble APTEL in Appeal No. 270/2006."*

4. In Paragraph 30 of its petition, MPPKVVCL has mainly sought clarification on the following:

"(a) Whether respondent M/s BLA Power Private Limited, a SPV was required to identify the units required to be declared as Captive Generating Plant at the time of infusion of equity?

(b) Whether, Status of Generating Unit of 45 MW identified as Generating Plant can be changed later on as Captive Generating Plant by infusion of equity by 3rd parties?

(c) Whether, there is any provisions in the Electricity Act, 2003 or MPERC (Power Purchase and Other Matters with respect to conventional fuel based Captive Power Plants) Regulations, (Revision-I) 2009 which allows twin identities i.e. captive generating plant and generating plant in a single unit of a generating station?

(d) Whether, power purchase agreement executed with Discoms and MPPMCL by BLA Power Pvt. Limited shall stand annulled in the light of changed status of generating plant of BLA Power to Captive Power Plant and whether the sale of power shall then be governed under the provisions of MPERC (Power Purchase and Other Matters with respect to conventional fuel based Captive Power Plants) Regulations (Revision-I) 2009.

(e) Whether, BLA Power Pvt. Limited being a SPV shall be required to consume captive power in proportion to its equity share in the 45 MW Unit?

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(f) Whether, sale of power from the 45 MW generating plant of M/s BLA Power Pvt. Limited to M/s Prism Cement Limited, Satna shall be considered as a sale of power from a generating plant to 3rd party through open access and cross subsidy surcharge shall be applicable on such energy?"

5. As the issue in both the above petitions was same, therefore both the petitions were clubbed subsequently and heard together.

6. Before dealing with the issues in the subject petition, it is necessary to look into the events leading to filing the subject petition by M/s PCL :

(i) The petitioner, M/s PCL is an HT consumer of the MPPKVVCL and have two Cement manufacturing units at District Satna namely M/s Prism Cement Limited, Unit-I and Unit-II. The petitioner is availing power supply at 132 kV for Unit-I and Unit-II for various contract demands as under:

Unit-I

34 MVA under HT agreement dated 01.08.2006.

34 MVA (rescheduled) under HT supplementary agreement dated 28.09.2006.

32 MVA under HT supplementary agreement dated 06.11.2013.

30 MVA under HT supplementary agreement dated 11.03.2015.

20 MVA under HT supplementary agreement dated 31.08.2016.

Unit-II

34 MVA under HT agreement dated 18.03.2010.

34 MVA (rescheduled) under HT supplementary agreement dated 28.08.2010.

34 MVA (rescheduled) under HT supplementary agreement dated 16.03.2011.

38 MVA under HT supplementary agreement dated 30.03.2011.

40 MVA under HT supplementary agreement dated 17.09.2011.

37 MVA under HT supplementary agreement dated 15.06.2015.

22 MVA under HT supplementary agreement dated 31.01.2016.

(ii) The petitioner was granted permission for short term open access for availing open

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access energy from IEX and drawing open access power since November, 2015 from IEX on payment of applicable cross subsidy surcharge to the MPPKVVCL.

(iii) By letter dated 13.06.2016 addressed to the CE, State Load Dispatch Centre (SLDC) with a copy to the MPPKVVCL, the petitioner has informed that a Power Supply Agreement for short term open access under Group Captive Mechanism for 25 MW on Round the Clock (RTC) basis has been executed with M/s BLA and requested to grant short term open access under Group Captive Mechanism. The petitioner also claimed that since the power purchased from M/s BLA is under Group Captive Mechanism, it will not be liable for cross subsidy surcharge (CSS) and requested to exempt the CSS on the power wheeled from their Captive Power Plant (CPP) to their Cement plants as per the provisions of the Electricity Act, 2003 and Regulations.

(iv) By letter no. 924 dated 15.06.2016, the CE, SLDC requested the petitioner to approach the MPPKVVCL for verification of the eligibility for exemption from CSS and to confirm the same for further processing the application for Intrastate Short Term Open Access. However, by letter no. 931 and 932 dated 15.06.2016, the CE, SLDC accorded approval for short term access to the petitioner for the period from 22.06.2016 to 30.06.2016 and thereafter for further periods from time to time.

(v) By letter no. 899 dated 16.06.2016, the MPPKVVCL in reference to the petitioner's letter dated 13.06.2016 informed the CE, SLDC that any decision on exemption from payment of Cross Subsidy Surcharge can only be taken by East Discom on representation of applicant along with satisfying documents. It was also requested to advise the petitioner accordingly.

(vi) By letter dated 16.06.2016, the petitioner sought clarification from the MPPKVVCL on the applicability of cross subsidy surcharge on the drawl of energy from Generating Plant of the M/s BLA claiming the same as Group Captive Power Plant as they have procured 30% equity in the plant and intends to consume more than 60% of the gross generation as such they fulfill the criteria of Group Captive Power Plant as envisaged in the Electricity Rules, 2005.

(vii) By letter dated 23.06.2016, the MPPKVVCL replied to the petitioner that since

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M/s BLA had identified the generating unit as generating plant instead of captive generating plant and executed Power Purchase Agreement (PPA) for 20 years period, the same unit cannot be identified as generating plant as well as captive generating plant simultaneously.

(viii) By letter dated 28.06.2016, the petitioner did not agree with the inference of the MPPKVVCL and informed that they have made investments in the Unit-I of the generating station of the M/s BLA and fulfilled the criteria to qualify a captive unit as required under Rule 3 of the Electricity Rules, 2005.

(ix) By letter dated 30.06.2016, the MPPKVVCL informed to the petitioner that since M/s BLA did not identify the generating unit as captive generating plant at the time of infusion of equity and as the PPA exists between M/s BLA and the MPPKVVCL/ respondent no. 2 (Hereinafter called MPPMCL), the generating power plant of M/s BLA does not qualify as captive power plant at this stage and that the power supplied from the M/s BLA to the petitioner shall attract payment of cross subsidy surcharge.

(x) By letter dated 04.07.2016, the petitioner in reference to its letter dated 28.06.2016 had submitted an undertaking to the MPPKVVCL which provides that:

" It refers to above mentioned subject and our letter to your office. We understand that the decision whether to levy Cross Subsidy Surcharge is under consideration.

While the matter is under consideration, we request you not to levy the CSS. We also undertake that in event it is finally determined by appropriate authority/forum that CSS is payable under law, we agree to pay same."

(xi) By letter dated 04.07.2016, the following was conveyed to the M/s PCL by the MPPKVVCL:

" We have considered your request and have decided to defer the levy of cross subsidy surcharge on your energy drawl from BLA Power for the time being. The matter has been referred to higher authorities and based on the clarification/ decision of higher authorities, further action shall be taken.

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(xii) By letter dated 26.09.2016, the petitioner pointed out to the Government of Madhya Pradesh (Hereinafter referred to as GoMP) that the levy of cross subsidy surcharge on captive consumption by the petitioner is against the law and defeated the State Government's policy of encouraging private investment in the State of Madhya Pradesh. The petitioner requested the GoMP to instruct the MPPKVVCL not to levy cross subsidy surcharge on the power flowing from Unit-I of the Generating Station to the petitioner's cement plant at Satna.

(xiii) By letter dated 20.10.2016, the MPPKVVCL also explained to the petitioner the circumstances under which the Unit-1 of 45 MW Generating Plant of the M/s BLA was not considered as a Captive Power Plant.

(xiv) Since there were disputes between the parties regarding status of the existing generating plant of M/s BLA, a petition was filed by the MPPKVVCL before the Commission on 21.10.2016 which was registered as P-56/2016.

(xv) By letter dated 03.11.2016, the petitioner responded to the aforesaid letter dated 20.10.2016.

(xvi) By letter dated 20.12.2016, the petitioner once again approached the GoMP mentioning that it was not liable to pay any cross subsidy surcharge for power sourced from Unit-1 of the Generating Station.

7. It is also necessary to look into the status of M/s BLA from where the power is sourced to M/s PCL:

(i) M/s BLA Power Pvt. Ltd. is a Special Purpose Vehicle (SPV) having a Generating Station comprising of 2 units of 45 MW each at village Newari, District Narsinghpur, Madhya Pradesh. The Unit-I of the Generating Station has been in operation from 03.04.2012.

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(ii) M/s BLA executed a Memorandum of Understanding (MoU) with the Government of Madhya Pradesh (GoMP) on 10.08.2007 for setting up of a thermal power station at village Newari.

(iii) Subsequently, the GoMP and M/s BLA entered into an Implementation Agreement (IA) on 01.09.2008. The MoU and the IA provide that M/s BLA has an obligation to provide to GoMP or its nominated agency 5% of the net power generated by its power station at variable charge, as determined by the Commission. Also, the GoMP or its nominated agency has the right to purchase up to 30% of the installed capacity of the generated units for a period of 20 years, at a rate approved by the Commission.

(iv) A Power Purchase Agreement was executed on 05.01.2011 between M/s BLA and the MPPMCL for sale of 30% power from the installed capacity of the Generating Station for a period of 20 years.

(v) A Power Purchase Agreement was executed on 04.05.2011 between M/s BLA and the GoMP for sale of 5% power from the installed capacity of the Generating Station. The MPPMCL was nominated by the GoMP to receive the aforesaid 5% power.

(vi) The petitioner invested in M/s BLA on 07.06.2016 by acquiring equity shares with voting right corresponds to 30.46% investment in Unit-1 of the Generating Station. Simultaneously, the petitioner also executed a Power Supply Agreement on 07.06.2016, identifying a part of Unit-1 of the Generating Station for captive use of M/s BLA and has been consuming 25 MW of power generated by Unit-1, amounting to at least 62.5% of the electricity generated by the said Unit-1.

8. Meanwhile, as submitted, the MPPKVVCL was issuing the bills to the petitioner from time to time towards cross subsidy surcharge on the power availed by the petitioner

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since June, 2016 from M/s BLA. After registering the petition no. 56/2016, the case was listed for motion hearing on 22.11.2016. During the hearing on 22.11.2016, it was noted that the petitioner could not justify adequately as to why under given circumstances, he has filed the said petition under Section 86 of the Electricity Act, 2016. The Commission granted one more opportunity to the MPPKVVCL to defend his case and the case was fixed for motion hearing on 24.01.2017.

9. Since the dispute on the cross subsidy surcharge was not settled between M/s PCL and the MPPKVVCL, M/s PCL approached the Hon'ble High Court of M.P. and filed a Writ Petition No. 604 of 2017 on the aforesaid issue of levy of cross subsidy surcharge. During the hearing on 24.01.2017 in P.No. 56/2016, the MPPKVVCL informed about the aforesaid court case and requested to defer the case till the decision of the Hon'ble High Court. Accordingly, the Commission decided to keep the Petition no.56/2016 in abeyance till the disposal of the W.P. No. 604/2017.

10. The Hon'ble High Court vide its order dated 17.08.2017 disposed of the aforesaid Writ Petition no. 604/2017 with the liberty to M/s PCL to avail the alternate statutory remedy as contained in Section 86(1)(f) of the Electricity Act, 2003, raising all questions of law and facts before the Commission. M/s PCL has filed the subject petition along with an Interlocutory Application before the Commission on 21.08.2017, which were registered as petition no. 36 of 2017 and I.A. No.01/2017 in P-36/2017. The Petition No. 56/2016 was listed for hearing and Petition No. 36/2017 along with I.A. No. 01/2017 was listed for motion hearing on 22.08.2017.

11. During the motion hearing on 22.08.2017, M/s PCL restated the contents of the petition and the I.A. in the petition. The Commission directed to issue notice for hearing to the respondents and the next date of hearing was fixed for 26.09.2017. Also, during the hearing on 22.08.2017 in Petition No. 56/2016, it was directed to club this petition with the Petition no. 36/2017.

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12. During the hearing on 26.09.2017, the MPPKVVCL sought adjournment on the ground that the Sr. Advocate engaged by the company is not available. The petitioner opposed the aforesaid request for adjournment on the ground that the date of listing i.e. 26.09.2017 was fully known to all parties on the last date of hearing and, therefore, it was not a cogent reason for seeking any adjournment. By letter no. 6128 dated 25.09.2017, the GoMP also authorized the MPPMCL to plead in this matter on its behalf. The Commission allowed adjournment and as agreed by Counsels for the parties, the next date of hearing was fixed for 12.10.2017.

13. During the hearing on 12.10.2017, the petitioner and the respondents put forth their arguments/counter arguments in the matter. It was noted that at para 8 of the petition, the M/s PCL has mentioned that the permission of open access was granted by the Chief Engineer, SLDC, MPPTCL, Jabalpur vide letter dated 15.06.2016 from 22.10.2016 onwards and annexed letter dated 15.06.2016. On perusal of the Annexure, it was observed that no such permission was granted. The petitioner then stated that by mistake it could not be mentioned that the copies of the permission are attached on pages from 63 to 66 of the petition. On perusal of the aforesaid pages in the subject petition, it was observed that these permissions are for the period from 22.06.2016 to 30.06.2016 only. Therefore, M/s PCL was directed to file the copies of the permissions as mentioned in the petition from July, 2016 onwards by 24.10.2017. It was also observed that at para 14 of the petition, M/s PCL has mentioned that by letter dated 4.7.2016, the Executive Director of the MPPKVVCL considered the request regarding recovery of cross subsidy surcharge and decided to defer the levy of cross subsidy surcharge and annexed letter dated 4.7.2016. But, the request letter dated 4.7.2016 of the petitioner was not attached with the petition. M/s PCL has submitted the same during the hearing on 12.10.2017.

14. On perusal of the reply dated 20.09.2017 filed by the MPPMCL, it was noted that in para 12, the MPPMCL has mentioned that it had been scheduling power from M/s BLA up to March, 2017 based on Merit Order Dispatch and M/s BLA had been supplying contracted capacity as per the existing PPAs. The MPPMCL was asked to clarify the intent

behind its aforesaid contention in para 12 of the reply. The MPPMCL could not explain the reasons thereof. The Commission noted that the issues relating to scheduling of power by the MPPMCL from M/s BLA against the Commission's tariff order dated 22.05.2015 are being dealt with by the Commission separately in Appeal No. 201 2017 filed by M/s BLA Power before Hon'ble APTEL . The MPPMCL further stated that no comments are being offered regarding levy of cross subsidy surcharge to the petitioner in this case and the MPPMCL is not interested to avail over and above the contracted power from the Unit I & II of M/s BLA. The petitioner and the respondents requested the Commission to allow them to file written submissions. As agreed by all the parties, the Commission allowed ten days time to file the same after serving a copy to each other.

15. In their written submissions, the petitioner and the respondents have filed their submissions mentioning the following grounds in support of their contentions:

(i) M/s Prism Cement Limited: (Petitioner)

(a) Section 2(8) of the Act defines Captive Generation Plant (CGP) to mean a power plant set up by a person to generate electricity for his own use.

(b) Section 2 (49) of the Act defines person to mean any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

(c) Section 9 (2) of the Act vests a statutory right in the hands of a captive generator to get Open Access to the grid for carrying electricity to its captive user.

(d) 4th proviso to Sections 39 (2) (d) (ii), 40 (c) (ii) and 42(2) of the Act mandated that no CSS is payable for open access on such captive consumption.

(e) Rule 3 of E Rules stipulates requirements to be fulfilled by a power plant to qualify as CGP as also a group captive. In terms of Rules :-

i. CGP has to fulfil the twin tests regarding ownership (at least 26%) of equity and consumption (at least 51%) of power consumption.

*ii. In case of a generating station owned by a Special Purpose Vehicle ('**SPV**'), specific unit(s) of such generating station may be identified for captive use,*

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provided that the twin criteria of ownership and consumption is satisfied only with respect to such Unit and not the entire generating station.

iii. *Rule 3(2) of the E Rules stipulate that it shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned is Rule 3(1) (a) and (b) is maintained. In case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.*

iv. *Explanation (b) to Rule 3(2) of E Rules define "Captive user" to be the end user of the electricity generated in a Captive Generating Plant. The term "Captive Use" has to be construed accordingly.*

v. *The National Electricity Policy **(Paras 5.12 and 6.3)** and the National Tariff Policy issued by the Central Government under Section 3 of the Act seeks to promote captive generation.*

vi. *Hon'ble APTEL in the matter Chhattisgarh State Power Distribution Company Vs M/s J P Saboo and others **[2011 ELR (APTEL) 0388]** has held that the captive generation and captive uses are to be encouraged under Act;*

vii. *Hon'ble APTEL in the case of Kadodara Power Pvt. Ltd. v. Gujarat Electricity Regulatory Commission **[2009 ELR (APTEL) 1037]** has held that the owner of CGP need not be one who constructs/sets up the plant. Placing purposive interpretation on the word "set up" in Section 2(8) of the Act in context of statutory objective the Tribunal held that the Act permits acquisition and transfer of shares even after the establishment of the generating plant for the purposes of qualification as CGP.*

viii. *Evidently, a change in ownership rights after a generating station has been setup is permitted and specifically provided for in the illustration to Rule 3. Rule 3 provides that the status of a CGP is dynamic and dependent upon the annual verification of the twin test regarding ownership and consumption.*

ix. *The facts of the instant case and how they meet the twin criteria of Rule 3 of the E Rules is tabulated below for the ease of reference of the Commission:-*

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Applicable Rule	***Facts of Petitioner's Case***
A generating station owned by a SPV i.e. an entity having no other business. ***[Rule 3(1)(b) read with Explanation 3(d) of Rule (2)]***	*BLA Power is Special Purpose Vehicle engaged in the business of generating electricity from the one Generating Station (2x45 MW).*
Electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use. ***[Explanation to Rule 3 (1) (b)]***	*BLA Power has two Units of 45 MW each presently commissioned. Unit - 1 has been identified for captive use since the time of infusion of equity by the Petitioner.*
In a generating station with two units of 50 MW each namely Units A and B, one unit of 5 MW namely Unit A may be identified as the Captive Generating Plant. ***[Illustration to Rule 3]***	*BLA has two Units of 45 MW each namely Unit - 1 and Unit- 2, One Unit of 45 MW (Unit -1) has been identified as Captive Generating Plant. All relevant documents and applications to SLDC etc. refers to Unit- 1 of BLA Power*
The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) ***[Illustration to Rule 3]***	*BLA Power has total 11,48,88,496 Equity Shares and has two units i.e. Unit - 1 and Unit - 2. The total shares are divided into two Units would mean 5,74,44,248 Shares per Unit i.e. for Unit - 1. Petitioner acquired 1,75,00,000 Shares o BLA, i.e.* ***30,46%*** *of shares in Identified Unit-1 or* ***15.23%*** *total shares of the SPV i.e. BLA Power on the premise of captive use/consumption as per Rule 3 of E Rules, 2005;*
Not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users. ***[Illustration to Rule 3]***	*As on 31.03.2017 (Period 22.06.2017 to 31.03.2017), Total Energy generated by Unit 1 of BLA 172,702,785 kWh. Total Energy Consumed by Petitioner from Unit - 1 163,283,728 kWh. [94.55%]*

x. *Since its consumption of from Unit 1 squarely falls within the ambit of captive use, no CSS can be levied by the contesting MPPKVVCL and the parties thereto upon such transaction. With M/s PCL acquiring equity in BLA, levy of CSS upon the power procured through Unit 1 of Respondent No. 4 violates the object and mandate of the Act. The impugned levy of CSS is, in clear contravention of the provisions of the Act, and Rules made thereunder. Being*

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an arbitrary, illegal demand, the said invoices (of the purported levy of CSS on power sourced from Unit - 1 of the BLA Power's generating station) are liable to be set aside.

xi. The contention of the petitioner that the petitioner has filed the present petition for waiver of Cross Subsidy Surcharge (CSS) and that the respondent no.3 is entitled to recover the same as per the provisions of the Section 42 of the Act is baseless and erroneous since the demand for CSS is arbitrary, illegal and in contravention of the Act, Electricity Rules framed thereunder. The respondent no.2 has flouted 4th proviso of Section 42 of the Act which declares that CSS is not payable by a captive user of a Captive Generating Plant (CGP).

xii. The contention of the respondent no.3 that a generating unit once set up by the respondent no.4 cannot be later treated as CGP by infusion of equity by the petitioner, is legally untenable since:

(a) This proposition was specifically tested and overruled by the Hon'ble APTEL in its judgment in Kadodara Power Private Limited (Appeal No.171 of 2008) {2009 ELR(APTEL) 1037} to hold that even if a plant was not set up as captive when it was being constructed, it acquire the status of 'Captive' subsequently once the conditions of Rule 3 are met.

(b) Respondent No.3 seeks to misconstrue the Judgment of the Hon'ble APTEL in Review Petition No. 02/2013 holding that the captive user is required to identify the unit/units intended for captive consumption at the time of induction of equity by the Captive User. MPPKVVCL has sought to twist this standard to aver that this infusion must be at the time when the plant was originally constructed.

xiii. The contention of the respondent no.3 that since the words 'set up' have been used in Section 2(8) of the Act, the equity infusion/identification as elaborated in Rule 3 (1) (b) has to be done at the stage of 'setting up' of the generating plant and not later, is devoid of merit for the reasons set out below:

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(a)If any such contention is accepted, this Hon'ble Commission would have to overrule/refuse to implement the judgments of the Appellate Tribunal which are binding on this Commission and cannot be so treated.

(b) It has already been held by Hon'ble APTEL that Rule 3 is not in contravention to the provisions of the Act and that it is framed to promote and encourage captive generation and captive uses under the Act: Chhatisgarh State Power Distribution Company Vs M/s J P Saboo and Others [2011 ELR (APTEL) 0388].

(c) The argument of Respondent No.3 has been specifically considered by the Hon'ble APTEL in the Kadodara Judgment and has been rejected and, therefore, the petitioner carves the liberty to rely upon the same.

(d) Respondent No.3 has pleaded its case contrary to the express language of Section 9 wherein it has been categorically provided that a person may construct, operate or maintain a captive generating plant and not construct, operated and maintain. By the use of word 'or', Section 9 makes it abundantly clear that a person can become a captive user even after the said plant has been 'set up'. The assertion of the respondent no.3 that definition in Section 2(8) be read to effectively render Section 9(2) and 4th Proviso to Section 42(2) of the Act otiose, besides Rule 3 of E Rules is devoid of merit and is liable to be rejected.

xiv. It is a settled position of law that this Commission cannot adjudicate upon validity of provisions of the Act or Rules and Regulations notified under the Act.

xv. MPPKVVCL has wrongly relied on the judgment of the Hon'ble Supreme Court in the matter of Global Energy Ltd. and Anr v. CERC ***(2009) 15 SCC 570****. The said judgment is not applicable to the present case.*

xvi. Reliance placed on the judgment of the Hon'ble Supreme Court in the matter of Pratap Chandra Mehta Vs. State Bar Council of Madhya Pradesh & Ors ***(2011) 9 SCC 573*** *by the MPPKVVCL is misplaced. The issue in the above case was whether the provisions of the rules are ultra virus to the Section 15*

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of the Advocates Act, 1961- tested by Hon'ble High Court in exercise of power of Judicial Review.

xvii. Reliance upon paras 4 and 10 of the Judgment of the Hon'ble Supreme Court in the case of Kabini Minerals (P) Ltd. & ANR v. State of Orissa & Ors. [(2006) 1 SCC 54] by the respondent no. 3 to build upon an interpretation of the words 'Set Up', is misplaced due to following reasons:

(a) The issue of interpretation of the Rule 6 of the Orissa Minor Mineral Concession Rules, 1980 was raised through a Writ Petition before the Hon'ble Orissa High Court- which cannot be applied to the facts of the present case.

(b) The word 'set up' qua captive plant has only been used in the definition clause and Section 9 which is the substantive provision in this case uses the words constructs, operates or maintains thereby meaning that a person can become a captive user at any point i.e. even after the plant has been set up. Hence, reliance on the above Judgment even otherwise is misplaced.

xviii. The Judgment of the Hon'ble Supreme Court in St. Johns Teachers Training Institute vs. Regional Director, National Council. [(2003) 3 SCC 321] emanates from a Writ Petition filed before the Hon'ble High Court which cannot be applied to the facts of the present case.

xix. The contention that different units of the same generating station cannot have the status of CGP and generating plant status is ultra vires the statute and devoid of merit due to following reasons:

(a) *A CGP is a sub-set of a Generating Station i.e. all CGPs are Generating Stations.*

(b) The Act envisages that up to 49% generation from captive plant can be sold to a third party, and seeks to promote generation/captive generation. No interpretation to any Regulation or Rule can be given to restrict the object for which the Statute was enacted.

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(c) There is no restriction on an existing generating station to be designated as CGP in case it satisfies the twin test laid down in the Rule 3 of the E Rules.

(d) Sale of power to the respondent no.2 under the PPA and supply of power to the petitioner, captive user under the PSA are distinct transactions/ commitments so long as these distinct contracts independently satisfy the applicable laws, either one of them does not in any manner affect the legality of the other obligation. In this regard, the petitioner seeks to places reliance on the opinion of the then Additional Advocate General of the State of Madhya Pradesh in the course of hearing.

xx. The contention of the respondent no.3 that PSA executed between Petitioner and BLA is an agreement of sale of excess power from unit 1 of the Generator and not an agreement to operate, maintain and supply from captive power plant, has to be noted to be rejected since:

(a) It relates to the arrangement/claims inter-se the respondent no.4 and the respondent no.2 which has no bearing on the present case.

(b) Unit-1 of the respondent no. 4 clearly qualifies as a CGP of the petitioner by operation of law, in particular Rule 3 of E Rules read with Sections 9 and 42 of the Act.

(c) The paras 5 and 14 of the reply filed by MPPMCL in the present petition is of relevance.

(d) The Hon'ble Commission may also pursue the Opinions of the then Additional Advocate General and PWC submitted by the respondent no.2 along with its reply to conclude that the transaction of Petitioner and Respondent No.4 is a captive sale and that Respondent No.4 is free to tie up its untied capacity in any manner.

(e) Opinion of Shri M.G. Ramachandran relied upon by Respondent No.3 also concludes that in present case no CSS should be levied upon Petitioner for consumption of electricity from Unit 1 of the

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respondent no.4.

M/s PCL also filed requisite open access permissions granted by the Chief Engineer, SLDC, MPPTCL.

(ii) State of Madhya Pradesh Through the Principal Secretary, Energy Department: (Respondent No.1)

No separate written submission was filed as the GoMP vide letter no. 6128 dated 25.09.2017, has authorized the MPPMCL to plead in this matter on its behalf. However, the MPPMCL has filed written submissions on its behalf only. Subsequently, GoMP has filed its written submission in this matter on 15.12.2017. The same is mentioned in the subsequent Paragraphs of this order.

(iii) M.P. Power Management Co. Ltd.:(Respondent No.2)

(a) Apart from 30% installed capacity and 5% power, the MPPMCL does not guarantee the purchase or sale of any power from M/s BLA, who is free to make other arrangements for sale of untied power (which is not contracted with the MPPMCL) to third parties it wishes, under the EA, 2003.

(b) The MPPKVVCL vide its letter dated 01.07.2016 referred the case of M/s BLA supplying power to M/s PCL sought certain clarifications. The legal opinion was sought from the then Additional Advocate General, State of MP as well as advice from an independent consultant Price-Waterhouse Cooper (PWC) in relation to the supply of power from Unit-1 of the M/s BLA to the petitioner. The legal opinion dated 29.07.2016 and advice dated 12.09.2016 were provided to the MPPKVVCL vide letter dated 23.09.2016 to take a decision protecting their commercial interest.

(c) The financial implication of the decision on the MPPKVVCL and their commercial interest may be considered by the Commission. Also, the interest of end consumers of the State be protected for getting cheaper power while deciding and not, in any manner, affect the commercial interest of the MPPMCL.

(d) The commercial interests of MPPKVVCL must not be compromised in any manner and they may not be put to financial disadvantage.

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Subsequently, MPPMCL has filed additional reply in this matter on 15.12.2017. The same is mentioned in the subsequent paragraphs of this order.

(iv) M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.: (Respondent No.3)

(a) It is settled principle of legal interpretation that Rules framed in exercise of the statutory power conferred under the Act has to be read along with the main provision of the Act and not in isolation. Thus the Rules framed, in exercising the power conferred u/s 176 of the Electricity Act, 2003 cannot be read in isolation and they are required to read along with the provisions of the Act.

(b) It is admitted position on record that Unit-1 of BLA Power has been set up by the M/s BLA which is generating company and Unit-1 is integral part of its Commercial "generating station" and BLA Power is operating, maintaining and supplying the electricity under PPA with the respondent no.1 to 3.

(c) That, perusal of the implementation agreement and PPA executed between the respondents make it clear that Unit-1 and Unit-2, both are generating plant of BLA Power have primarily obligation of supplying electricity towards their commitment made to respondent no.1 to 3, and thus till said PPA is enforced, by operation of law they legally barred from transferring or changing ownership of said Units (both Unit-1 and Unit-2).

(d) That, BLA Power, Under PPA has identified the said unit as non-captive Generating Unit and it is evident, by such declaration they have availed the benefit of non-captive Generating Station in form of active assistance by the State Government and respondent in grant of various permissions for construction and operation of said power plant. The power supply agreement also makes it clear in explicit term that even after acquisition of equity share capital consumption of more than 51 percent of aggregate electricity, the plant shall still be set up, maintained and operated by M/s BLA and M/s PCL is only user/consumer of the said electricity. From a perusal of annexure P/2 with annexure filed by MPPKVVCL (R-3/1), it is ample clear that the Unit-I for all practical and legal purpose is a power plant set up by M/s BLA and thus it prima facie lacks for first requirements U/s 2(8) of Captive Generating Plant.

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(e) ***Primarily for his own use –***

i. *That, from a perusal of agreement between M/s PCL and M/s BLA (power supply agreement), it is quite clear that the primary purpose of Unit-I of M/s BLA is not to supply electricity to M/s PCL. Clause E states as under; "This Agreement is contemplated only with respect to the untied power capacity available with Unit-I (as contemplated under Recital C) under the Power Purchase Agreements ("Untied Capacity of Unit-I"). **It is clarified that the supply of power contemplated pursuant to this Agreement will not in any manner affect the obligations of BLA under the Power Purchase Agreements".***

Thus, a perusal of the clause and their power supplying agreement would make it clear that M/s BLA has expressly made it clear to M/s PCL that its primary obligation is to cater the legal obligation under PPA with respondent no. 1 to 3 and "left over/untied power" would be sold under power supply agreement.

ii. *That, once M/s PCL, admittedly entitled only for "left over/untied power capacity," by their own agreement, agrees that the primary purpose of Unit-I is to generate electricity for use, by respondent no. 1 to 3 not by M/s PCL.*

iii. *That, the PPA of M/s BLA with respondent no. 1 to 3 also make it obligatory on the part of the M/s BLA to grant first right to Government of M.P. or its nominated agency to purchase power from the power station set up by it (which also included Unit-I)*[1].

iv. *That, M/s BLA is legally barred under PPA to designate Unit-I to be captive power plant of any third party and in fact clause 5.10 of the PPA further binds M/s BLA to offer first right of pre emption to respondent no. 1 to 3 even for extended or increased capacity.*

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(f) That, in these circumstances the claim of M/s PCL, supported by M/s BLA, that Unit-I is captive power plant of M/s PCL sans merit as it do not fulfills two primary conditions required in definition of captive generating plant, Section 2(8) of Electricity Act, 2003.

(g) That, Section 9 of the Electricity Act talks about captive generation and 9(2) provides that every persons who has constructed a captive generating plant and maintains and operate such plant have right to open access. In the present case it is admitted position on record that M/s PCL has neither constructed nor maintains or operate Unit-I of M/s BLA in fact, there power supply agreement is an agreement for supply of power and it cannot treated as agreement to maintain or operate a captive generation.

(h) That, during the course of argument the counsel for M/s PCL have heavily relied upon the judgment passed by Appellate Electricity Tribunal in Kadodara Private limited Vs Gujarat Electricity Regulatory Commission. However, the said judgment is distinguishable on following facts;

i. The power plant involved in those petition where already a captive power plant and the question which Hon'ble Appellate Commission was addressing is change of ownership of Captive Power Plant which is designated as captive power plant right from its inception.

ii. The facts before the Appellate Electricity Tribunal in Kadodara were totally different as power plant involved in those petition where neither commercial power plant nor they have taken any assistance from State Government in their construction of commencement. They were also not having a PPA (like in the present case) binding themselves to supply electricity to distribution licensee as their primary obligation or first right to purchase.

iii. The power plant involved in Kadodara decision were not selling surplus power/power of their plant to distribution licensee as Commercial Generating Plant (capacity charge billing to distribution company for tied

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up capacity) and we are not availing the benefit-fixation of tariff by State Regulatory Commission as Commercial Generating Plant. They were also not making a claim of capacity charge for supplying to distribution companies which is not available for supply through a captive power plant.

iv. Kadodara judgment is also not dealing with in issue that whether a part capacity of a power plant/unit can be declared as captive use and conferring dual status to a power unit.

v. Kadodara judgment primary dealing with the transfer of ownership of captive generating plant, it is not an authority on legal issue that whether a commercial generating plant can be simultaneously designated as captive power plant without losing its status/benefit of commercial generating plant and consent of party already under PPA.

(i) That, the whole petition is misconceived, the supply of M/s PCL cannot be treated as supply of captive power plant and thus liable to be dismissed.

(v) M/s BLA Power Private Limited: (Respondent No.4)

*(a) A bare perusal of the MoU, the IA, the said PPA, the 5% PPA and the records of Petition No. 10 of 2012 will demonstrate that the Generating Station was in no manner envisaged by BLA Power exclusively for the benefit of the State Government as has been sought to be alleged by MPPKVCL. It is submitted that BLA Power is free to deal with its capacity not tied up under the said PPA and 5% PPA, i.e. 65% of each of the two Units of the Generating Station over and above the 30% contracted capacity and 5% power **("Untied Capacity")** in any manner. Therefore, the averment of MPPKVCL that the entire plant of BLA Power has been set up for the primary use of the State of Madhya Pradesh and its Licensees is wholly without any merit and contrary to record and is liable to be rejected;*

(b) The contentions raised by MPPKVCL that till the said PPA is enforced, by operation of law, BLA Power is legally barred from transferring or changing

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ownership of Unit-I, are entirely incorrect. It is most respectfully submitted that MPPKVCL has failed to quote any provision of law or the said PPA whereby BLA Power is restrained, In any manner, from transferring its shares. In fact, to the contrary, under the provisions of the Companies Act a company is entitled to transfer, acquire, sell, pledge shares, in any manner as it deems fit.

(c) All allegations raised by MPPKVCL that BLA Power took active assistance from the State Government by identifying itself as a non-captive generating plant, are entirely baseless and incorrect.

(d) The Hon'ble Appellate Tribunal for Electricity in the case of Kadodara Power Pvt. Ltd. v. Gujarat Electricity Regulatory Commission, being Appeal No. 171 of 2008, by an order dated 22.09.2009, has sufficiently clarified the legal position that the owner of a captive generating plant need not be one who constructs/sets up the plant. By this order, the Hon'ble Tribunal has held that the Electricity Act, 2003 does not restrict, in any manner, the acquisition and transfer of shares even after the establishment of the generating plant, for purposes of qualification as a Captive Generating Plant.

(e) The law itself provides for a change in ownership rights of a CPP. In any event a bare perusal of Rule 3 of the Electricity Rules, 2004 clarifies that the status of a Captive Generating Plant is dynamic and dependent upon the annual verification of the twin test regarding ownership and consumption.

(f) MPPKVCL has also alleged that the primary purpose of Unit-1 is not to supply Electricity to Prism but to fulfil obligations of supply of contracted capacity under the said PPA. It is most respectfully submitted that this allegation is wrong and misplaced. The obligations of the parties are provided in the PPA, which has been duly approved by the Commission. No provision of the PPA is affected by the present arrangement to sell power to a consumer, who has also invested in the equity of the power plant and commits to off take a minimum quantum of electricity per year.

(g) Thus, there cannot be any doubt that the electricity generated by part of Unit

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-1 is being primarily used by its captive user namely Prism, in accordance with the provisions contained in the electricity Rules, 2005. The argument made by MPPKVCL goes beyond the Rules and cannot be accepted.

(h) The present Petition has to be adjudicated in terms of extant laws to see whether CSS would be applicable to for supply of power Prism. Prism invested in BLA Power by acquiring 1,75,00,000 equity shares with voting rights. These equity shares, in terms of Rule 3 of Electricity Rules 2005, correspond to 30.46% investment in Unit-1 of the Generating Station. Simultaneous with the aforesaid investment, Prism and BLA Power also executed a Power Supply Agreement on 07.06.2016, identifying Part of Unit - 1 of the Generating Station for captive use of Prism. In terms of the Power Supply Agreement, Prism has been consuming 25 MW of power generated by Unit-1, amounting to at least sixty two point five (62.5) percent of the electricity generated by the said Unit-1.

(i) The 4th proviso to Section 42(2) of the Electricity Act, 2003, clearly provides that Cross Subsidy Surcharge is NOT leviable for the power flowing from a Captive Generating Plant to the Captive User. Therefore, the demand for cross subsidy surcharge raised by MPPKVCL on Prism is unlawful.

(j) MPPKVCL has alleged that a generating plant cannot have dual/hybrid capacity that is, a generating plant cannot be a Generating Station as well as Captive Generating Plant under the provisions of the Electricity Act, 2003. This argument is entirely flawed and contrary to law.

(k) A Captive Generating Plant is defined Under Section 2(8) of the Electricity Act, 2003 as a power plant set up by a person to generate electricity primarily for his own. Thus, a Captive Generating Plant is also a Generating Station.

(l) MPPKVCL has alleged that the Judgment passed by the Hon'ble Tribunal in the Kadodara case cannot be applied to the facts of the present case as the power plants involved in that case were already a captive power plant and therefore the question whether a Generating Station can be converted to a

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Captive Generating Plant was not decided in that case. This argument is entirely flawed and contrary to the provisions of Rule 3 of the Electricity Rules, 2005.

(m) This Hon'ble Commission is bound by the judgment passed by the Hon'ble Appellate Tribunal and it will be improprietous on the part of this Commission to interpret and carve out distinctions in the judgment passed by the Hon'ble Tribunal.

(n) Certain allegations have been raised by MPPKVCL in Petition No. 56/2017 that the identification of the unit for captive use was to be made "at the time of infusion of equity" by BLA Power. This is wholly incorrect. The condition for identification of a captive unit "at the time of infusion of equity", is absent in Rule 3(1) (b). However, the Hon'ble Appellate Tribunal for Electricity in the case of M/s JSW Energy Ltd. vs. KERC & Ors. (Review Petition No. 2 of 2013 in Appeal No. 137 of 2011) has decided the issue "Whether the term" identified for captive use" used in the unit/units are required to be pre-identified or could be indicated at the end of financial year. "The Hon'ble Tribunal, in the said judgment passed on 30.04.2013 clarified that to prevent a captive user from indulging in gaming, it is necessary to identify any unit as captive at the time of induction of equity by the captive user in the generating company.

(o) MPPKVCL's purported reliance upon the MPERC (Power Purchase and Other matters with respect to conventional fuel based Captive Power Plants) Regulations, 2009 is entirely baseless and misconceived in as much as the said Regulations are not applicable to the supply of "contracted capacity" under the PPAs by BLA Power the MPPMCL.

(p) *Reliance placed by MPPKVCL on the judgments passed by the Hon'ble Supreme Court in the cases of Pratap Chandra Mehta vs State Bar Council of Madhya Pradesh & Ors. (2011) 9 SCC 573 and Global Energy Ltd. & Anr. Vs CERC (2009) 15 SCC 570 are entirely misplaced. In the former case the issue involved was whether the provisions of Rules 121 and 122-A of the*

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State Bar Council of Madhya Pradesh Rules are ultra vires Section 15 of the Advocates Act, 1961. In the latter case the constitutional validity of Regulation 6-A(b) and (f) of CERF (Procedure, Terms and Conditions for Grant of Trading License and Other Related Matter) Regulations, was under challenge.

(q) While High Courts can examine validity of Statutes, Rules and Regulations, similar power has not been vested upon statutory bodies like the Regulatory Commission and the Hon'ble Tribunal constituted under the provisions of the Electricity Act, 2003. This position stands settled by the Hon'ble Supreme Court in the case of PTC India Ltd. vs. CERC (2010) 4 SCC 603.

(r) Further the reliance placed by MPPKVCL on the judgment passed by the Hon'ble Supreme Court in the case of Kabini Minerals (P) Ltd. & Anr. Vs. State of Orissa & Ors (2006) 1 SCC 54 to allege a certain meaning to the term "set up" is entirely misplaced. It is most respectfully submitted that the issue involved in the said case was regarding the interpretation of Rule 6 of the Orissa Minor Mineral Concession Rules, 1980. In relation to Electricity Act, 2003, the position stands clear in view of the judgment passed by the Hon'ble Tribunal (an expert body operating under the provisions of the Electricity Act, 2003) in the Kadodara judgment.

16. The petitioner has relied upon the judgment of Hon’ble APTEL in an Appeal No. 171 of 2008 (Kadodara Power Pvt. Ltd. Vs Gujarat Electricity Regulatory Commission) where the issue of transfer of ownership of captive generating plant after setting up captive generating plant was dealt. This decision is not related to the present petition because aforesaid judgment is not dealing with the dual/hybrid status of any one unit of the Generating Station.

17. During the proceedings in the subject matter, it was mentioned before the Commission that some legal opinions were obtained by the MPPMCL and the MPPKVVCL. Also, M/s PCL is relying on the opinion of the then Additional Advocate General of the State of Madhya Pradesh and the PWC, Consultant whereas, the MPPKVVCL is relying on the

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opinion of Shri Ramachandran, Advocate. The Commission has noted that there exists a rival opinion dated 27.11.2012 of the then Attorney General of India also in respect of "Captive Generating Plant" under the provisions of the Electricity Act, 2003 read with the Electricity Rules, 2005 which states that *"Captive Generating plant is a plant which is set up or established as such and this can only be done with reference to the inception of the plant. One cannot contend that the resultant entity arising out of complex legal proceedings or demergers would satisfy the requirements of Section 2(8) of the Act."* During the proceedings, the Counsels for the petitioner and the respondents have stated that the Commission is not bound to consider various different legal opinions. As such, the Commission is not inclined to consider any of the opinions as these are contradictory to each other. The Commission is deciding the case on merit based on the provisions of the Electricity Act, 2003, Electricity Rules, 2005 and the relevant Regulations/ Code.

18. The Commission has noted that M/s BLA Power Pvt. Ltd. executed a Memorandum of Understanding with Government of Madhya Pradesh (GoMP) on 10.08.2007 for setting up of the thermal power station. Subsequently, the GoMP and M/s BLA Power Pvt. Ltd. entered into an Implementation Agreement on 01.09.2008. Also, M/s BLA Power Pvt. Ltd. has entered into a Power Purchase Agreement on 04.05.2011with GoMP for procurement of power/concessional energy. According to these agreements, the GoMP has the first right to purchase a total 35% of generated units.

19. The Commission also noted that the petitioner (M/s PCL) vide letter dated 13.06.2016 addressed to the CE, State Load Dispatch Centre (SLDC) with a copy to the East Discom (the respondent no.3) informed SLDC that a Power Supply Agreement for short term open access under Group Captive Mechanism for 25 MW on Round the Clock (RTC) basis has been executed with M/s BLA Power Pvt. Ltd. (the respondent no. 4) and the petitioner requested SLDC to grant short term open access under Group Captive Mechanism. By letter no. 924 dated 15.06.2016, the CE, SLDC requested the petitioner to approach MPPKVVCL **for verification of the eligibility for exemption from Cross Subsidy Surcharge and to confirm the same for further processing the application for Intrastate Short Term Open**

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Access. However, by letter no. 931 and 932 dated 15.06.2016, the CE, SLDC accorded approval for short term access to the petitioner for the period from 22.06.2016 to 30.06.2016 and thereafter for further periods from time to time. This needs the response of the SLDC that under what circumstances the SLDC granted short term open access without resolving the issue of levy of Cross Subsidy Surcharge despite writing letter dated 15.06.2016 to the petitioner to approach the MPPKVVCL for verification of the eligibility for exemption from Cross Subsidy Surcharge and to confirm the same for further processing the application for Intrastate Short Term Open Access.

20. The matter was deliberated at length in the meeting of the full Commission (Chairman and two Members) on 04.12.2017. The Commission noted that as mentioned in its petition, M/s PCL has also approached the GoMP and written letters dated 26.09.2016 i.e. before filing the Petition No. 56/2016 and on 20.12.2016 on the issue of levy of cross subsidy surcharge in the instant case. The Commission, therefore, decided that the views/ comments of the GoMP, being the facilitator of the plant under MoU & IA executed with M/s BLA Power Pvt. Ltd., are necessary to be obtained in the interest of justice in this matter. Similarly, the comments of the SLDC are also essential as the permission for short term open access was granted by it to M/s PCL from time to time under Group Captive Mechanism. Therefore, the case was listed for further hearing in the matter on 20.12.2017. The M.P. Power Management Co. Ltd., Jabalpur has filed the reply on behalf of the Government of Madhya Pradesh on 15.12.2017 and also filed an additional reply on its behalf. The Chief Engineer, SLDC has also filed the response on 15.12.2017.

21. In the written submissions made by the GoMP and SLDC and the additional reply filed by the MPPMCL, the following points have been mentioned for consideration:

(i) Government of Madhya Pradesh (Respondent No. 1):

(a) The Government of M.P. facilitated the investment made by Respondent No. 4 in 2 X 45 MW generating station at Gadarwara.

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*(b) As per sub-Section 8 of Section 2 of the Electricity Act, 2003 only such power plant is considered as Captive Power Plant, which is set up by any person to generate electricity **primarily** for his own use. At the time of signing PPA, no such intention was expressed by Respondent No.4.*

(c) The first proviso of Section 9 is reproduced below:

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

"It is obvious from the aforesaid provision of the Electricity Act, 2003 that the captive generating plant and the generating station of a generating company are two distinct and different entities, which are given similar treatment only for the purpose of regulation of electricity through the grid in the above proviso.

*(d) The Government of M.P. had entered into Memorandum of Understanding (MoU) with M/s BLA Power Private Ltd. **as an IPP**.*

(e) The Government of India issued coal linkage policy for 12th plan projects on 21st October, 2009. From this policy, it is clearly visible that IPP projects and Captive Power Projects are different from each other and the dispensation given to both of these is also different.The Commission determines tariff for the power projects under MoU route under Section 62 of the Electricity Act, 2003. The Commission has a separate Regulation for power purchase and other matters with respect to conventional fuel based Captive Power Plants. This again indicates that the IPP and CPP are given different treatment. In the instant case, the tariff is determined by the

Commission under Section 62 as an IPP supplying power to Discom and not a captive unit supplying power. Therefore, a unit cannot be both IPP & Captive at the same time.

(f) Till filing of this petition by M/s Prism Cement Ltd., no communication was made by the Respondent No.4 regarding change of its status from IPP to Captive Power Plant.

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(g) The petitioner and Respondent No. 4 as an afterthought have decided to switch over status of plant of Respondent No.4 from IPP to CPP ignoring the claims and rights of Respondent No.1 and also without any notice or intimation, which is causing loss to Discom.

(h) The PPA is binding on Respondent No. 4 and the change in status is not possible.

(i) The request of Petitioner may not be considered until and unless therespondent no. 4 amends its Power Purchase Agreements in line with the MPERC Regulation of power purchase and other matters with respect to conventional fuel based Captive Power Plants for the purpose of 30% share in installed capacity and also arrange its 5% power at the variable charge of this unit from any power plant.

(ii) M.P. Power Management Company Limited (Respondent No.2):

(a) As per the provisions of the Electricity Act, 2003, the captive generating plant and the generating station of a generating company are two distinct and different entities, which are given similar treatment only for the purpose of regulation of electricity through the grid. The factors which govern the establishment and operation of an Independent Power Producer (IPP)/ Genco are completely different and separate from that which govern the establishment and operation of a Captive Power Plant (CPP). The incentives and privileges available to a CPP under the Electricity Act, 2003 are not available to an IPP. This is the clear and express object and purposes of the Electricity Act, 2003 and hence a "Captive Power Plant" has to remain captive for the entire plant (Unit) and ***cannot be part captive and part IPP****. In the instant case, the plant of Respondent No. 4 is proposed to be part captive and part IPP and the same is clearly not in accordance with the provisions of the Electricity Act, 2003.*

(b) The Power Plant (Unit) set-up by the respondent no.4 at the time of execution

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of the PPA with the respondent no.2 and execution of MoU with the State of M.P. is as an IPP, without there being any intention of using the same as Captive Power Plant and therefore, no change in status as claimed by the petitioner and the respondent no.4 is possible and the instant petition ought to be dismissed.

(iii) State Load Despatch Centre (Respondent No.5):

(a) The permission for Short Term Open Access (STOA) was granted by SLDC toM/s Prism Cement Unit-1 and Unit-2 under collective transactions w.e.f. November, 2015 and for subsequent months on compliance of all the regulatory requirements.

(b) By letter dated 13.06.2016, the petitioner requested to grant STOA under Group Captive Mechanism for 25 MW power from M/s BLA Power Limited and informed that it will not be liable for Cross Subsidy Surcharge.

As the applicability and exemption of Cross Subsidy Surcharge is under the purview of Respondent No. 3, the petitioner vide letter dated 15.06.2016 was advised to approach the Respondent No. 3 regarding eligibility for exemption of Cross Subsidy Surcharge and to confirm the same for further processing of their application for Intrastate STOA.

(c) In response, by letter dated 15.06.2016 the petitioner informed that the matter will be submitted to the Respondent No. 3 on receipt of STOA approval. Accordingly, the STOA approval for the period from 22.06.2016 to 30.06.2016 to the petitioner vide letter dated 15.06.2016.

(d) The petitioner could not confirm regarding exemption of Cross Subsidy Surcharge on drawal of power, as mentioned in their application of STOA, the aforesaid permissions dated 15.06.2016 were withdrawn w.e.f. 00.00 Hrs. of 24.06.2016 vide letter dated 22.06.2016.

(e) By letter dated 23.06.2016, the petitioner has mentioned that under the provisions of the Electricity Act, 2003 read with the Open Access Regulations of the Commission, Open Access cannot be denied. The petitioner has further given an undertaking and accepted that if Respondent No.3 determines that

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Cross Subsidy Charges are payable in law, then Prism Cement Ltd. (the Petitioner) shall pay the same, albeit under protest and if an appellate / higher authority were to subsequently determine that the same are not payable, they reserve their right to claim refund for the same.

(f) Based on above, the permission was resumed vide letter dated 23.06.2016 as normal Open Access transaction. There was no ambiguity in granting STOA.

22. By its letter dated 08.12.2017 (delivered through messenger on 18.12.2017), Counsel for M/s PCL contended that "*the Commission had concluded the hearing on 20.10.2017 and directed parties to file their respective written submission, which as a matter of practice is done after the conclusion of the hearing*". Subsequently, by its another letter dated 16.12.2017(delivered through messenger on 18.12.2017), Counsel for M/s PCL contended that "*the Commission had reserved its Order in this Petition*". The aforesaid contentions of petitioner i.e. M/s PCL are completely misplaced. In fact, by daily order dated 13.10.2017, the Commission allowed ten days' time to file written submissions only on the requests of the petitioner and the respondents. This was agreed to by all the parties also. The subject matter was neither concluded nor reserved for orders as evident from the Daily order of the Commission itself.

23. During the hearing on 20.12.2017, M/s BLA Power Pvt. Ltd. sought adjournment to file its response on the written submissions of the GoMP, MPPMCL and the SLDC. The Counsel for the petitioner, M/s PCL also sought adjournment. During the hearing, the Commission asked the Counsel appeared for M/s PCL to file a copy of the Fuel Supply Arrangement between M/s PCL and M/s BLA as mentioned in PSA. The Commission also asked the representative of SLDC to inform the circumstances under which the open access permission was granted to the petitioner from time to time without settlement of dispute of levy of Cross Subsidy Surcharge by the MPPKVVCL as envisaged by the SLDC in its letter no.07-05/RPC-53B/BLA/924 dated 15.06.2016. The representative of SLDC was also asked as to why SLDC has revived the open access based on Undertaking for payment of cross subsidy surcharge under protest submitted by M/s PCL, if the exemption of Cross Subsidy Surcharge

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was under the purview of the MPPKVVCL. The representative of SLDC could not reply adequately and made a request to the Commission to allow time to file additional reply. The Commission allowed the same. The Commission also asked the MPPKVVCL to submit the copies of the records/correspondences showing the circumstances which led to seek legal opinion through the MPPMCL for applicability of Cross Subsidy Surcharge and filed the petition before the Commission. The MPPMCL was also directed to file the documents in this regard. The Commission directed them to file their reply/documents by 23.12.2017 and as agreed by all the parties, the next date of hearing was fixed for 26.12.2017.

24. During the hearing on 26.12.2017, M/s PCL sought adjournment on the plea that the Sr. Counsel/Advocate could not appear due to some personal reasons and stated that the last daily order passed by the Commission on 20.12.2017 has been challenged before the Hon'ble Appellate Tribunal for Electricity. M/s BLA stated that the affidavit filed by the GoMP and the MPPMCL on 15.12.2017 should not be considered as these were filed after conclusion of final hearing on 12.10.2017. He also stated that the reply dated 15.12.2017 filed by the MPPMCL is contradictory to its earlier reply dated 20.09.2017. Referring various Judgments, he filed a written submission on 26.12.2017 that too after the hearing on 26.12.2017 was concluded. The Counsel commonly appearing for the GoMP, MPPMCL and SLDC stated that necessary replies have been filed. In response to the aforesaid contention of M/s BLA, he stated that the MPPMCL in its additional reply dated 15.12.2017 nowhere submitted any statement which is contradictory to its reply earlier filed on 20.09.2017. It was further clarified by the Counsel that the reply of MPPMCL dated 15.12.2017 was an additional reply filed before the Commission for consideration. The Commission observed that the additional reply filed by the MPPMCL on 15.12.2017 contains additional submissions along with the same request as contained in its earlier written submissions dated 20.09.2017. Hence, the contention of the Counsel for M/s BLA on the aforesaid issue is not correct. For SLDC, it was stated by him that M/s PCL had written to the SLDC that the matter regarding levy of Cross Subsidy Surcharge shall be taken up with the MPPKVVCL. Considering the same, the SLDC granted permission for open access to M/s PCL in terms of the notified Regulations on open access and the SLDC is not concerned with the levy of Cross Subsidy Surcharge.

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25. During the hearing, Counsel for the MPPKVVCL stated that they have filed their written submission with the Commission. In its written submission dated 23.12.2017, it is mentioned by the MPPKVVCL that on receipt of representation dated 28.06.2016 from M/s PCL for exemption of cross subsidy surcharge, it was decided that opinion be sought from MPPMCL also as they are the principle signatory to PPA with M/s BLA and captive status of one unit of M/s BLA would affect the right accrued under PPA. The letter was issued on 01.07.2016. By letter dated 23.09.2016, MPPMCL forwarded legal opinion of the then Additional Advocate General, State of M.P. for assistance and guidance. It is further submitted by the MPPKVVCL that the matter was orally discussed with the Senior Counsel and there appears to be difference of opinion and, therefore, a decision was taken to get the issue settle from the Commission and the petition was filed before the Commission on 21.10.2016. It is also submitted by the MPPKVVCL that the legal opinions are not binding on the Commission. The Commission noted that the MPPKVVCL had not even mentioned about the legal opinion in its Petition No. 56/2016. Despite this, the MPPMCL in its reply dated 20.09.2017 and 30.10.2017 mentioned about this legal opinion and also enclosed copies of the same.

26. The Commission has noted that during the hearing on 20.12.2017, sufficient opportunity had been given to the petitioner and the respondents to plead and as agreed by all the parties, the case was again listed for hearing on 26.12.2017. The hearing was concluded on 26.12.2017. Having heard the parties and considering the documents filed on record, the case was closed for orders.

27. After the hearing was concluded on 26.12.2017, M/s BLA has filed a written submission. In its aforesaid submission, it is mentioned that "*Neither MPPMCL nor GoMP have the ability/right to file a written statement/reply affidavit on 19.12.2017, after conclusion of final hearing on 12.10.2017, after which date the matter was reserved for judgment and parties were directed to file written submissions following conclusion of hearing*". As already opined at para 24, the aforesaid statement is misplaced on account of the fact that by daily order dated 13.10.2017, the Commission allowed ten days time to file written submissions only on the requests of the petitioner and the respondents. This was also

agreed to by all the parties. The subject matter was neither concluded nor reserved for orders as evident from the Daily order of the Commission itself.

28. The Commission has also noted that the MPPKVVCL has deferred the levy of Cross Subsidy Surcharge based on the undertaking dated 04.07.2016 submitted by M/s PCL. This fact was not disclosed in the petition no.56/2016 filed on 21.10.2016. By letter dated 20.10.2016, the MPPKVVCL requested M/s PCL to make the payment of Rs. 8.66 Crores (till Sept., 2016 bill) towards cross subsidy surcharge. Having decided on its own the issue of levy of the Cross Subsidy Surcharge on M/s PCL, the MPPKVVCL has filed the Petition No. 56/2016 on 21.10.2016 before the Commission seeking clarification on the same issue. The Commission further noted that without getting clarification on SLDC's own letter dated 15.06.2016, the SLDC granted permission to M/s PCL treating them as CPP merely based on the undertaking submitted by M/s PCL vide letter no. EI/SLDC/20160623 dated 23.06.2016 to the SE (ABT & OA), SLDC, MPPTCL, Rampur, Jabalpur: Also, the SLDC revived the short term open access permission w.e.f. 24.12.2016 after obtaining the aforesaid conditional undertaking regarding payment of cross subsidy surcharge under protest.

29. Having heard the petitioner and the respondents at length and considering their written submissions and also various contentions raised during the course of hearing, the Commission observed that though the petitioner has raised various issues which were countered by the respondent no. 1 to 3, the Commission is of the view that the only issue which needs to be adjudicated is whether Unit-1 of M/s BLA Power Pvt. Ltd. (Regulated IPP) which is supplying partial power primarily to MPPMCL under a long term agreement for 20 years can be treated as a CPP and the status of the petitioner as captive user consequently. Other issues raised are not relevant for consideration.

30. Views and Findings of the Commission:

(a) In the separate Petition No. 16/2014 and Petition No. 39/2017, the Fuel Supply Agreement dated 25.04.2011 executed between BLA Industries Private Limited ("Seller") and BLA Power Private Limited ("Purchaser") was

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filed by M/s BLA Power Private Limited and the MPPMCL respectively. The clause (A) of the aforesaid agreement provides as under:

" (A) The Purchaser desires to design, finance, build,own and operate a 90 MW Coal fired thermal power plant at Gadarwara, District Narsinghpur, in the State of Madhya Pradesh, consisting of 2 units of 45 MW each ***for generation and sale of electricity as an independent power plant*** *(the "Plant" or "Power Station"), to be built together with the necessary coal unloading points, coal storage, coal handling and other facilities; and"*

From the above, it is evident that both the Units of M/s BLA Power are IPP. Also, M/s BLA Power Pvt. Ltd. is a regulated entity as it has entered into a Long Term Power Purchase Agreement for 20 years with MPPMCL and GoMP for 30% and 5% power respectively.

(b) The perusal of Power Supply Agreement executed between M/s PCL and M/s BLA on 07.06.2016 clearly brings out in clause (E) and (I) that M/s PCL will get only untied capacity i.e. partial power from Unit-1. But Unit-1 will continue to supply power to MPPMCL under Long Term Power Purchase Agreement for 20 years with MPPMCL and GoMP. Thus it is evident that in the scheme of things, the Unit-1 shall be partially IPP and partially CPP.

(c) While determining the status of a power plant as IPP or CPP, the status should be determined based on the legal and factual issues peculiar to the case in question. Section 2(8) of the Electricity Act, 2003 defines the Captive Generating Plant as *"the power plant set up to generate electricity primarily for his own use"*. Section 2(30) of the Electricity Act, 2003 defines the Generating Station as "*any station for generating electricity"*. Factually, the main function of both the Captive Generating Plant and the Generating Station is generating the electricity. However, the distinction between the two was made on account of the purpose of setting up. The Captive Generating Plant is set up to generate electricity **primarily for its own use subject to fulfillment of criteria as per Rule 3 of the Electricity Rules, 2005** but this

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shall not be the case with Generating Station. As such, it is concluded that any Captive Generating Plant may be considered as a Generating Station and not vice versa.

(d) The incentives and the privileges available to a CPP under the Electricity Act, 2003 are not available to an IPP. As such, the status of IPP is different than that of CPP.

(e) There is no provision either in the Electricity Act, 2003 or in the Regulations notified by the Commission regarding hybrid status of **a single Unit of the Generating Station** i.e. mix of Captive Generating Plant and Generating Station (IPP in the subject matter with a long term power purchase agreement for 20 years with Regulated tariff to be determined by the Commission) in **a single Unit** of the Generating Station.

(f) The Independent Power Producer (IPP) is defined in the M.P. Electricity Grid Code, 2005 as under :

" Independent Power Producer being a Power Station within the State, owned by a Generator who is not part of MPPGCL, STU or Central Sector Generation and is not classified as a CPP.**"(Emphasis Supplied)**

Thus, Unit No.1 of M/s BLA Power Pvt. Ltd. cannot claim the status of part captive power plant.

(g) The petitioner has mentioned the provisions of Rule3 of the Electricity Rules, 2005 to make his point, but the petitioner has not applied this Section fully. The relevant extract of the Illustration in clause 3(2) of the Electricity Rules, 2005 provides as under:

"In a generating station with two units of 50 MW each namely Unit A and B, one Unit of 50 MW namely Unit A may be identified as the Captive Generating Plant....."

From the above, it is evident that only a complete Unit of the Generating Station may be identified as CPP. But in the instant case, a part of the regulated Unit-1 (untied capacity of Unit-1) was identified as CPP by M/s BLA Power Pvt. Ltd. under its Power Supply Agreement dated 07.06.2016,

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which is not in accordance with the provisions of the Electricity Rules, 2005.

31. Based on the above, the Commission has found that a part capacity of Unit-1 of M/s BLA Power Pvt. Ltd. in the subject matter cannot be treated as Captive Power Plant as it has a Long Term PPA for 20 years in the capacity of an IPP in terms of MoU & IA signed with GoMP. Having decided the aforesaid issue and the status of Unit No.1 of M/s BLA Power Pvt. Ltd., M/s Prism Cement Limited cannot be treated as a Captive Power User in as much as a part of the Unit-1 of M/s BLA Power. Consequently, Cross Subsidy Surcharge is leviable/applicable on the power sourced by M/ s PCL from Unit-1 of M/s BLA under the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 made thereunder.

32. With the above observations and findings of the Commission, the Petition No. 36/2017 & I.A. No. 01/2017 in P-36/2017 and Petition No. 56/2016 are disposed of.

Ordered accordingly.

(Alok Gupta)
Member

(Dr. Dev Raj Birdi)
Chairman