

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Sub: Petition under Regulation 46 of MPERC (Conduct of Business) Regulations, 2004 seeking appropriate directions for setting aside the demand of additional surcharge and to grant refund of amount paid against impugned demand and surcharge thereon recovered in violation of provisions of Electricity Act.**

**ORDER**  
**(Hearing through video conferencing)**  
**(Date of Order: 31 July 2023)**

**Rama Phosphates Limited,**  
20/4 KM Stone Indore- Ujjain Road,  
Gram Rajoda, Dharampuri, Tehsil- Sanwer,  
Indore, (M.P)- 453551

**- Petitioner**

**Vs.**

- 1. Managing Director,**  
MP Paschim Kshetra Vidyut Vitaran Co. Ltd.,  
GPH Compound, Polo-Ground, Indore
- 2. Superintending Engineer (HT Billing Cell),**  
MP Paschim Kshetra Vidyut Vitaran Co. Ltd.  
GPH Compound, Polo-Ground, Indore

**- Respondent**

Shri Dheeraj Singh Panwar, Advocate & Mr. Amit Jain appeared on behalf of the petitioner.  
Shri Shailendra Jain, Dy. Director and Shri Nirmal Sharma, SE (Com-HT) appeared on behalf of Respondent

The subject petition is filed under Regulation 46 of MPERC (Conduct of Business) Regulations, 2004 seeking appropriate directions for setting aside the demand of additional surcharge and to grant refund of amount paid against impugned demand and surcharge thereon recovered in violation of provisions of Electricity Act.

2. By affidavit dated 23<sup>rd</sup> February' 2023, the petitioner broadly submitted the following:
  - i) *That, the petitioner is a Company incorporated under Companies Act.*
  - ii) *That, the respondent is a wholly owned Government of M.P. Company engaged in business of supply of Electricity in Indore & Ujjain Regions as Distribution Licensee under Section 14 of Electricity Act, 2003.*
  - iii) *That, petitioner is availing supply from respondents through HT Connection with present Contract Demand of 1900 KVA for running its Industrial Unit at Tehsil Sanwer, District Indore as per its business object Clause in the Memorandum of Association and High Tension (HT) Agreement executed with the Respondent Licensee.*

- iv) *That, the petitioner Company is law abiding body corporate and is regularly making payment of the monthly electricity bills apart from all duties and taxes imposed by the respondents.*
- v) *That, the petitioner Company has setup Steam Turbine Generation Plant of 2250 KVA at its premises at Tehsil Sanwer, District - Indore. The petitioner is generating steam energy for its own use as captive user of the self generated electricity.*
- vi) *That, the petitioner is not selling or providing the electricity to any Third Party or entity and thus there is no transmission of electricity from the petitioner's premises to any other place or premises. As such the petitioner is not required to comply or follow the regulations of wheeling of electricity or to pay wheeling charges. The petitioner is making self use of the Steam Turbine Power Generated by its Steam Turbine Generator (STG).*
- vii) *That, as there is no wheeling of electricity from petitioner's own premises to any other place or premises, the petitioner is not under any obligation to pay additional surcharge as per Section 42(4) of Electricity Act, 2003.*
- viii) *That, the Petitioner submitted complete technical details etc. for operation of its already approved Steam Turbine Generation Plant by letter dated 17/08/2021. Petitioner submitted permission dated 25/08/2000 granted by State Government and also submitted certificate of ownership of captive power plant along with undertaking as per respondent's requirement.*
- ix) *That, the respondent has raised impugned demand dated 12/10/2021 of Rs. 1,84,32,834/- 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'2021 in respect of energy generated from Steam Turbine Generator (STG) for Captive use. The petitioner was compelled to make payment of demand amount as petitioner's electricity connection was to be disconnected on account of non-payment of the demand.*
- x) *That, the Petitioner under compelling circumstances had no option except to make payment against Impugned Demand toward alleged liabilities of additional surcharge and therefore by letter dated 29/10/2021 petitioner made request to provide opportunity of installments and requested to pass on the benefit of court orders in other pending cases where levy of additional surcharge was already challenged, which was allowed by respondents letter dated 22/11/2021 and permitted to pay demand amount in installments.*
- xi) *That, the petitioner submitted letter dated 07/01/2022 and 14/01/2022 requesting respondents to waive the additional surcharge as the petitioner is not liable to pay the same. The petitioner also requested to adjust the already paid amount under protest.*
- xii) *That, the respondent's again compelled to pay demand amount and issued Notice dated 14/09/2022 for disconnection of the petitioner's supply which was duly replied by the petitioner vide its letter dated 20/09/2022 requesting respondents not to take any coercive action.*
- xiii) *That, the petitioner further submitted letter dated 04/10/2022 requesting the respondent's not to take any coercive action in case of nonpayment of additional surcharge and informed the respondents about order dated 05/05/2022 passed by*

*MPERC in case of Kasyap Sweeteners and order of Hon'ble Supreme Court in case of J S W Steel limited.*

- xiv) *That, the petitioner submitted letter dated 17/01/2023 and 20/01/2023 requesting respondents not to levy the additional surcharge as not payable by the petitioner and to refund the amount of Rs.59,50,183/- paid by petitioner against the impugned demand.*
- xv) *That, the petitioner has paid part of demand amount under duress and the compelling circumstances though it is not liable to make payment under the Electricity Act and Regulations. The respondents have acted in harsh and arbitrary manner utilizing their higher position and monopoly in the Electricity distribution.*
- xvi) *That, the respondents have accorded approval for Grid Connectivity of petitioner's 2250 KVA Steam Turbine Generation Plant by letter dated 28/10/2021.*
- xvii) *That, the Petitioner has complied with necessary requirements and documentation formalities with respect to Respondents consent for Steam Turbine Generation and establishing its captive status and therefore also the Respondents is not required to raise any demand toward Additional Surcharge under Section 42 (4) of Electricity Act 2003. However, the Respondents have continued to raise additional demand of additional surcharge despite being not payable by the Petitioner in the Monthly Electricity Bills. Respondents also levied penalties on unpaid amount of impugned demand which is wholly illegal and not sustainable.*
- xviii) *It is submitted that the respondent has levied the additional surcharge contrary to the provisions of the Act and the legislative intent of promoting captive use of electricity. Section 42 (4) of the Act states that :-*

*“Section 42 (Duties of distribution licensee and open access) :*

*...*

*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....”***

*Therefore, Section 42 (4) of the Act envisages that :-*

- i) *Additional Surcharge is levied on a consumer when the State Commission permits a class of consumer(s) to avail Open Access for receiving supply of electricity from a person other than its area distribution licensee.*
- ii) *The Additional Surcharge is :-*
  - (a) *Payable on charges for wheeling*
  - (b) *To meet the fixed cost of the distribution licensee arising out of its obligation to supply electricity.*
- xix) *It is submitted that additional surcharge can only be levied by a Distribution Licensee if there is a stranded cost which the distribution licensee has to bear out of its obligation to supply from open access consumer, it is only then that a distribution licensee can claim for additional surcharge. It is submitted that the Petitioner is a captive user and not an open access customer. Therefore, any additional surcharge is not leviable on the Petitioner.*
- xx) *That, the impugned demand is contrary to judgment of:-*

- i. Order dated 05/05/2022 of Hon'ble MPERC in Petition No.53/2021 Kasyap Sweeteners limited.
  - ii. Order dated 14/05/2021 of this Hon'ble MPERC in Petition No. 49/2021.
  - iii. Order dated 10/12/2021 of Hon'ble Supreme Court in case of Maharashtra State Electricity Distribution Company Limited V/s M/s J.S.W. Steel Limited and others (2022) 2 SCC 742.
  - iv. Order dated 29/11/2022 of Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 198/2021 Para 17 and 18.
- xxi) In view of the above, it is submitted that the levy and demand for additional surcharge on the Petitioner for its Steam Turbine Generation Plant ('STGP') is untenable and contrary to law. Hence, the Petitioner is constrained to approach this Hon'ble Commission by way of present petition for setting aside the impugned demand and refund of amount recovered by respondents.  
Thus being aggrieved by impugned demand of additional surcharge raised by respondents illegally, the present petition is filed on following grounds:-

**GROUND'S URGED:**

- xxii) Because the Impugned Demand and Recovery of Additional Surcharge is without Authority of Law.
- xxiii) Because there is no transmission of electricity and no wheeling of Electricity in case of petitioner and thus no Additional Surcharge is payable by Petitioner.
- xxiv) Because the Steam Turbine Generation Energy Generated by Petitioner is consumed for its own Industry and not sold or transmitted to any other place or party and there is no use of system of Respondent for any wheeling.
- xxv) Because the procedural requirements for Grid Connectivity as directed by Respondent has been complied by Petitioner.
- xxvi) Because, the impugned demand is contrary to judgment of :-
  - i. Order dated 05/05/2022 of Hon'ble MPERC in Petition No.53/2021 Kasyap Sweeteners limited.
  - ii. Order dated 14/05/2021 of this Hon'ble MPERC in Petition No. 49/2021.
  - iii. Order dated 10/12/2021 of Hon'ble Supreme Court in case of Maharashtra State Electricity Distribution Company Limited V/s M/s J.S.W. Steel Limited and others (2022) 2 SCC 742.
  - iv. Order dated 29/11/2022 of Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 198/2021 Para 17 and 18.
- xxvii) Because Respondents has recovered and utilized huge amount without any Authority of Law and Petitioner has been deprived of usage of his own money, as such Respondent has been unduly enriched.
- xxviii) Because, the Respondents raised impugned demand towards Additional Surcharge alleged to be payable under Section 42 (4) of Electricity Act, 2003 retrospectively from April- 2017 to 23/03/2021 and is raising said illegal demand along with monthly electricity bills.
- xxix) Because respondents 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 orders.

- xxx) *Because the amount recovered deserves to be refunded along with interest provided under Section 62 (6) of Electricity Act, 2003.*
- xxxi) *Because, respondent's action is arbitrary, illegal, unconstitutional, without authority of Law, jurisdiction and contrary to principles of natural justice.*
3. With the aforesaid submissions, the Petitioner prayed the following:
- a. *That, present petition may kindly be allowed, and the respondent's impugned demand dated 12/10/2021 with further recovery of Additional Surcharge along with monthly electricity bills may kindly be set aside in the interest of Justice.*
  - b. *That, the respondents be directed to refund the entire excess amount recovered by way of Additional Surcharge, along with interest as per Section 62 (6) of Electricity Act, 2003.*
  - c. *That, any other relief as deemed fit may kindly be granted by the Hon'ble Court.*
4. At the motion hearing held on 11<sup>th</sup> April' 2023, Ld. Counsel who appeared on behalf of Petitioner reiterated the prayer. The petition was admitted, and the petitioner was directed to serve a copy of petition to the Respondents within 15 days and Respondents were directed to submit response within next 15 days with a copy to Petitioner. The case was fixed for hearing on **23.05.2023**.
5. Respondent, MP Paschim Kshetra Vidyut Vitaran Company Ltd. by Affidavit dated 18<sup>th</sup> May 2023 broadly submitted the following in its reply to the petition:
- i) *That, the petitioner has filed present petition challenging the legality and validity of levy and billing of additional surcharge by the answering respondent on the consumption of power from the source other than the distribution licensee of area.*
  - ii) *That, from perusal of averment made in the petition along with relief claimed, it is apparent that the primary grievance raised by the petitioner vide instant petition is with respect to the billing of additional surcharge on the part of its supply availed from the Steel Turbine Generation plant of 2250 KVA. That, broadly petitioner has challenged the billing of additional surcharge payable under Section 42(4) of the Electricity Act 2003 on the following grounds:*
    - a) *Levy of 'Additional Surcharge' is not applicable in those cases where power is being drawn by a consumer from 'Captive Generating Plant' as captive user;*
    - b) *There is no wheeling of electricity from petitioner's own premises to any other place or premises the petitioner is not under obligation to pay additional surcharge as per Section 42(4) of Electricity Act, 2003.*
    - c) *Petitioner is not liable to pay additional surcharge in view of Order of dated 10/12/2021 of Hon'ble Supreme Court in case of Maharashtra State Electricity Distribution Company Limited V/s M/s J.S.W Steel Limited and others (2022) 2*

*SCC 742 along with order of this Hon'ble Commission & Hon'ble APTEL based on JSW Steel Limited.*

- d) *Petitioner is a captive user and not open access consumer.*
- iii) *At the outset, the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein, as if the same has been traversed in seriatim, save and except what has been specifically and expressly admitted hereinafter in writing. Any omission on the part of the answering respondent to deal with any specific contention or averment of the petitioner should not be construed as an admission of the same by the answering respondent. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.*

**PRELIMINARY SUBMISSIONS**

- iv) *Before submitting the para-wise response, the Answering Respondent wishes to place the following submissions of certain specific aspects, which are relevant for the consideration of the Hon'ble Commission.*

**A. RE: HON'BLE SUPREME COURT'S JUDGEMENT "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**

- v) *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. It is submitted that JSW steel Judgment decided by the Hon'ble Supreme Court is based on the following findings:*
- a. *Such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003 are not liable to pay additional surcharge (Para 14).*
  - b. *Captive generating plant are not subject to the regulatory jurisdiction of the Commission (para 9, 11)*
- vi) *The aforesaid 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.*
- vii) *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 following 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} is relevant in the instant case:*
- 19. .... Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may*

*alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo)\*by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive.....”*

viii) *As regard to issue no. 5 (a) mentioned above, 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.”*

ix) *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 provides 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 person, as the case may be;”*

x) *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.*

xi) *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.*

xii) *That as regard to issue no. 5 (b) i.e. 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 Sate 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.”*

xiii) *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 as under:

"Open Access Customer" means a person permitted under these regulations to receive supply of electricity from another person other than the distribution licensee of his area of supply, or a generating company (including captive generating plant) or a licensee, who has availed of or intends to avail of open access.

**3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED**

3.1 Subject to the provisions of these regulations, open access customers shall be eligible for open access to the intra state transmission system of the State Transmission Utility (STU) or any other transmission licensee and intra state distribution system of the state distribution licensees or any other distribution licensee.

3.2 Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with the regulations framed for the purpose.

3.3 Subject to operational constraints and other relevant factors, open access shall be allowed in the following phases:

i. For Non-Conventional Energy Sources:

The non-conventional energy generators and users shall be provided with open access with immediate effect and they shall be governed by the existing policy of State Government. The non-conventional energy generators shall be provided access to the transmission and sub-transmission system in the same manner as had been provided to them by the erstwhile integrated Madhya Pradesh State Electricity Board in accordance with State Government Policy in this regard on the same terms and conditions.

ii. For Captive Generating Plants of Conventional Energy:

Open access for the captive power plants shall be provided with immediate effect.

iii. For all other open access customers: Open access to users other than at Sl. No. 3.3(i) and 3.3(ii) shall be provided as per the timetable below

.....

| Sr. No | Phases | Customer with contracted power under open access for transmission and wheeling and at voltage | Date from which open access is to be granted |
|--------|--------|-----------------------------------------------------------------------------------------------|----------------------------------------------|
| 7      | VII    | Users requiring 1 MW and above and situated                                                   | October 1,                                   |



|  |  |                       |      |
|--|--|-----------------------|------|
|  |  | anywhere in the State | 2007 |
|--|--|-----------------------|------|

**CHARGES FOR OPEN ACCESS**

*i. The licensee providing open access shall levy only such fees or open access charges as may be specified by the Commission from time to time. The principles of determination of the charges are elaborated hereunder. The sample calculation are enclosed as annexure –I.*

*a. Transmission Charges –The transmission charges for use of the transmission system of the transmission licensee for intra-state transmission shall be regulated as under, namely: -*

.....

*b. Wheeling Charges –. The Wheeling charges for use of the distribution system of a licensee shall be regulated as under, namely: -*

.....

*f. Surcharge – The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.*

*g. Additional Surcharge – The Commission shall determine the additional surcharge on a yearly basis.*

.....”

*xiv) 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 sources is subject to the payment of additional surcharge.*

*xv) 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 -I) Regulations, 2010:*

*Regulation 12.2 of aforesaid Regulations after 7<sup>th</sup> amendment and prior to 7<sup>th</sup> amendment is reproduced below:*

*(a) Prior to the 7<sup>th</sup> Amendment, the said regulation provided as under:*

*“12.2 Wheeling charges, Cross Subsidy 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 12.2 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)*

- xvi) *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.*
- xvii) *It is relevant to mention that Hon’ble MPERC has notified the Madhya Pradesh Electricity Regulatory Commission (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 as under:*

*“The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, **but it shall be liable to pay** wheeling charges, **additional surcharge**, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.”*

*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.*

- xviii) *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.. The relevant part of the said judgment is reproduced as under:

“65. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a Regulation stands on a higher pedestal vis-'-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a precondition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act.....

92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze).....

**Conclusion:**

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

*The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.*

xix) *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.*

xx) *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. The relevant part of the said judgment is reproduced as under:*

*"50. From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition. In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers.*

xxi) *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.*

**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:**

xxii) *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<br>N | ISSUE<br>DECIDED BY<br>HON'BLE<br>SUPREME<br>COURT                                                                     | FINDINGS IN JSW STEEL<br>CASE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | FINDINGS IN<br>HINDUSTAN ZINC<br>SUPRA [(2015) 12 SCC<br>611]                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|--------|------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1      | Whether Industries/consumer setup the captive generating plant comes within Regulatory Jurisdiction of the Commission? | 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, <b><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</u></b> | 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, the National Electricity 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 promoted and, in this manner, the impugned Regulations are violative of |

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|  |  | <p><b><u>the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission.</u></b><br/> <i>The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. <b><u>Only in case of dispute, the State Commission may adjudicate.</u></b></i></p> | <p><i>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 Policy, 2006 were framed to promote production of energy and utilization 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 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 RERC had 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</i></p> |
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*has acted beyond the object sought to be achieved under the National Electricity Policy, 2005 as well as the Act of 2003.*

*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.** The RE obligation has been imposed upon the 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***

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|----------|-----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|          |                                               |                                                                                                                                                                                                                                    | <p><i>capacity as owners of the captive power plants”.</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <p>2</p> | <p><i>Captive consumers are consumer?</i></p> | <p><b><u>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.</u></b></p> <p>.....</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 <b><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></b> The cost of purchasing renewable energy by a distribution licensee in order to fulfil its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, <b>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</b></p> |



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|  |  |  | <p><i>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.</i></p> |
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xxiii) *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.*

xxiv) *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.*

xxv) *Five judge bench of 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] 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 as under vide its order dated 31.10.2017:*

*1. Perceiving cleavage of opinion between Reshma Kumari and others v. Madan Mohan and another and Rajesh and others v. Rajbir Singh and others, both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Company Limited v. Pushpa and others thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us.*

*14. The aforesaid analysis in Santosh Devi (supra) may prima facie show that the two-Judge Bench has distinguished the observation made in Sarla Verma's case but on a studied scrutiny, it becomes clear that it has really expressed a different view than what has been laid down in Sarla Verma (supra). If we permit ourselves to say so, the different view has been expressed in a distinctive tone, for the two-Judge Bench had stated that it was extremely difficult to fathom any rationale for the observations made in para 24 of the judgment in*

*Sarla Verma's case in respect of self-employed or a person on fixed salary without provision for annual increment, etc. This is a clear disagreement with the earlier view, and we have no hesitation in saying that it is Absolutely impermissible keeping in view the concept of binding precedents.*

*15. Presently, we may refer to certain decisions which deal with the concept of binding precedent.*

*17. In State of Bihar v. Kalika Kuer alias Kalika Singh and Others ((2003) 5 SCC 448), it has been held:-*

*“10. ... an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. ...”*

*The Court has further ruled:-*

***“10. ... Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.”***

*27. We are compelled to state here that in Munna Lal Jain (supra), the three-Judge Bench should have been guided by the principle stated in Reshma Kumari which has concurred with the view expressed in Sarla Devi or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari being earlier in point of time would be a binding precedent and not the decision in Rajesh.*

*59. In view of the aforesaid analysis, we proceed to record our conclusions:-*

*59.1. The two-Judge Bench in Santosh Devi 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.”***

*xxvi) 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.

**RE: RATIONAL BEHIND LEVY OF ADDITIONAL SURCHARGE AND IMPLICATION OF RESPONDENT'S UNIVERSAL SUPPLY OBLIGATION (USO) TOWARDS PETITIONER CONSUMER**

- xxvii) *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 nondiscriminatory open access over its distribution system as per provision of Section 42(1).*
- xxviii) *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.*
- xxix) *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.*
- xxx) *The Relevant part of Section 42 of the of the Act, 2003 are reproduced as under:*

*“Section 42: (Duties of Distribution licensees and Open Access):*

- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated 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-subsidy and the*

operational constraints) as may be specified within the one year from the appointed date and in specifying the extent of open access in successive phases and in determining the charges of wheeling, it shall have due regard to all relevant facts including such cross-subsidies, and other operational constraints:

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

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

.....

**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:**

xxx xxxxxx”.

**(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”**

*Emphasis supplied*

- xxxi) *It may be seen that there are two kinds of surcharge, 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.*
- xxxii) *It is submitted that although the levy of additional surcharge is provided in 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.*
- xxxiii) *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 as under:*

*“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*

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*any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.”*

- xxxiv) *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.*
- xxxv) *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.*
- xxxvi) *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 subsidising 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.*
- xxxvii) *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.*
- xxxviii) *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 OERC & 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 avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both of these aspects.**

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

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 authorised 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 would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low-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 avail power supply through open access from someone other than such Distribution licensee in

whose area it is situated. **Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee.**

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.**

xxxix) 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.

xl) 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.

**B. 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 M/S. MALANPUR CAPTIVE POWER LIMITED V. M.P. MADHYA KSHETRA VIDYUT VITARAN CO. LTD. (PETITION NO. 02/2007 )**

xli) *It is submitted that instead of JSW Steel supra instant dispute is covered by the judgment of coordinate bench of Hon'ble APTEL 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 levy 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 as under:*

*"11. The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer from captive route and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined."*

xlii) *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."*

xliii) *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 as under:

17. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by losing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to Sections 42 (2); (4) and Section 62 of The Act. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee. We have already held so in Appeal No.34 of 2006 Bhusan Steel vs. W.B.E.R.C.

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20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmah is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.

23. On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP.....

24. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.....

- xliv) In view of above, it is submitted that if there is universal supply obligation there shall always be levy of additional surcharge.
- xlv) 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 as under:

3. It has been mentioned in the Petition that the Petitioner's Project is for captive generation of power, for its current captive user shareholders namely SRF, Montage and Supreme. The other sponsor shareholders are Wartsila India Ltd. and Compton Greaves Ltd. The installed capacity of the project is 26.19 MW but fuel tie up has been granted for 20 MW only. Out of this available capacity, the Captive Power Plant, (CPP) users are expected to consume a minimum of 13.90 MW, which translates to 69.5% of the available capacity. **SRF site being contiguous to the Petitioner's site, it is supplied power through a 6.6 KV cable connection, while supply to other CPP Users shall require 33 kV dedicated transmission line to be constructed.** The Petitioner has submitted that the Captive users of the petitioner company have contributed requisite equity throughout the development of the project and shall always maintain the minimum of 26% of shareholding; thus, satisfying all the relevant statutory requirements.

4. It is also submitted that the petitioner Company is a Special Purpose Vehicle owning, operating and maintaining a generating station and has no other business or activity. **Neither distribution license under section 14 of the Act is required by the Petitioner nor cross subsidy surcharge or additional surcharges under section 42 (2) and 42(4) of the Act are payable by the petitioner to the respondents.**

- xlvi) Thereafter considering the provision of the Act and Electricity Rule 2005 Hon'ble Commission upheld the levy of additional surcharge in the following 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 4<sup>th</sup> 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 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.....”*

*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.*

- xlvi) In view of aforesaid judicial pronouncement petitioners are liable to pay additional surcharge even on the consumption of electricity through captive route.*
- xlvi) Thus, in the present circumstances of the case, the petitioner consumer is liable to pay additional surcharge.*

**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.**

- xlvi) Petitioner consumer has sought to contend that there is difference between consumption from Captive Generating plant and consumption from other generating plant.*
- l) 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 as under:  
“2(47) —open access means 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;”*
- li) 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.*
- lii) The submission of the petitioner that captive consumers are not subject to regulatory jurisdiction of the State Commission is untenable.*

- liii) *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.*
- liv) *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’.*
- lv) *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 is comes within the ‘class of consumer’ to whom facility of open access is available as per Regulations issued by the MPERC.*
- lvi) *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 fulfil 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.”*

- lvii) *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.*
- lviii) *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.*
- lix) *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.*
- lx) *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)*

- lxi) *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.*
- lxii) *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 below-*

*“12. As seen above, Section 2(8) of the Act, which defines "captive generating plant", contains two parts, namely, main part and inclusive part. Main part is explanatory in nature and defines "captive generating plant" to mean a power plant set up by any person (including juristic person) to generating electricity primary for his/its own use. The inclusive part expressly includes a power plant, set up by (a) any co-operative society; (b) association of persons for generating electricity for use of its members. It is to be noticed that Section 2(8) does not contain exclusionary part. The Parliament was very cautious not to add exclusionary part in the definition of 'captive generating plant'. Presumably for the reason that Section 2(8) of the Act used the words and phrases, which are defined in the dictionary clause. The term 'power plant' or the term 'for generating electricity' have the same meaning as defined in Sections 2(22) and 2(29) respectively. Therefore, any electrical plant set up for generating Electricity by a person, an incorporated company, a co-operative society or an association of persons is a generating plant. If such generating plant primarily utilizes the electricity produced in its generating plant for the use of its members or for its own use, the same becomes 'captive generating plant'.*

*13. The Government of India in exercise of their powers under Section 176 of the Act, promulgated Rules vide GSR No. 379(E), which were published in the Gazette of India extraordinary dated 8-6-2005. These Rules are called Electricity Rules, 2005. As per Rule 3 thereof, no power plant shall qualify as a captive generative plant under Section 9 read with Section 2(8) of the Act,*

unless 26 per cent of the ownership is held by the captive users and not less than 51 per cent of the aggregate electricity generated is consumed for captive use. Therefore, to be a captive generating plant, the requirement is that it should be an electricity generating plant or station owned to the extent of 26 per cent by captive users and 51 per cent of the aggregate electricity produced in such generating plant is consumed by such users. Further, insofar as the applicability of the provisions of the Act, the functions and regulatory authorities and the duties and functions of transmission licensees and distribution licensees except to a minor extent are the same for all generating companies whether power plants set up by them are for captive use or not.

.....

16. Be it noted that as long as a generating company complies with the technical standards relating to connectivity with a grid, such company does not require licence to operate and maintain a generating station or power plant. Section 9 enables a person or a company to construct, maintain and operate a captive generating plant with dedicated transmission lines but as per the proviso to sub-section (1) of Section 9 of the Act, the supply of electricity from a captive generating plant through the grid shall be regulated in the same manner as the generating station or a generating company. Section 9(2) confers a right on the person who has constructed captive generating plant, to have open access for the purpose of carrying electricity from his plant to the destination of his use, subject to availability of transmission facility as determined by the State Transmission Utility or Central Transmission Utility. As per second proviso to sub-section (2) of the Act, any dispute regarding the availability of transmission facility shall have to be adjudicated by State Electricity Regulatory Commission. Thus, as we presently see insofar as establishing an electricity generating plant and the right to open access for the purpose of carrying electricity, or dispute resolution mechanism for the said purpose, there is no distinction between a generating company having generating station and captive generating company or plant set up by a person.

.....

17. Part V of the Act contains the procedure for Inter-State transmission of electricity, grid standards and also duties and functions of transmission utility. Part VI deals with distribution, duties of distribution licensee and provisions with respect to electricity trader. As noticed, for distribution and trading electricity, a licence is required under Section 14 of the Act. Be that as it is, Section 39 of the Act in Part V and Section 42 in Part VI are relevant to the consideration of question. Section 39(2) of the Act enumerates the functions of State Transmission Utility. As per clause (d) of sub-section (2) of Section 39, it shall be the function of State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. It is also competent for the State Utility to fix transmission charges and surcharge thereon as specified by State Electricity Regulatory Commission to be utilized for the purpose of meeting the requirement of cross-subsidy but as per fifth proviso to Section 39(2) of the Act, when State Transmission Utility provides open access to a captive generating plant, surcharge for the purpose of cross-subsidy cannot be levied. Except to the extent of prohibition for collection of surcharge for the purpose of cross-subsidy, Section 39 of the Act treats generating company and captive generating plant equally. So to say, the "generating company" appearing in Section

39(2)(d) also includes a captive generating plant. If such an interpretation is not opted, it would result in absurdity. For instance, in a given case, State Transmission Utility may deny open access to its transmission system to a captive generating plant on the ground that no such obligation is cast on it. In such an event, Section 9 of the Act, which confers a right on a person with captive generating plant to have open access to transmission system would be rendered redundant and meaningless. There is no provision which enumerates two different types of functions of State Transmission Utility, one in respect of generating company and other in respect of captive generating plant.

18. Section 40 of the Act describes duties of transmission licensees. Here again Section 40(c) of the Act casts a duty on a transmission licensee to provide non-discriminatory open access to its transmission system to a generating company or licensee on payment of transmission charges including surcharge for cross-subsidy. But as per fifth proviso to Section 40 of the Act, a transmission licensee is not empowered to levy surcharge on a person who established a captive generating plant for carrying electricity to the destination of such person's own use. Even under Section 42 of the Act, which enables a distribution licensee to provide distribution facilities to generating companies by duly collecting charges for wheeling including surcharge, law requires that a captive generating plant cannot be subjected to any surcharge for cross-subsidy.

19. A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a power plant for his/ its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted - in a given case; by a distribution licensee or transmission licensee. **These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharge from generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant.** That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. **Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant.** This is further made clear by Electricity Rules, 2005. If 26 per cent of the ownership in a plant is held by captive users and 51 per cent of electricity produced is used by them, a generating plant can be treated as a captive generating plant. It only means that the electricity generated over and above 51 per cent has to be necessarily go to the grid, in which event a transmission licensee and distribution licensee come into picture. **Even in the case of distribution and transmission of 51 per cent aggregate electricity generated in a captive generating plant, is to be wheeled to the destination of captive use, the same procedures have to be followed. Merely because a captive generating plant at least to the extent of 51 per cent consumes its electricity for captive use, the State Transmission Utility or a transmission licensee or distribution licensee, cannot discriminate while discharging their duties and functions."**

- lxiii) 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.*

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

lxiv) *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 person, as the case may be;**”*

lxv) *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.*

lxvi) *It is submitted that Act only recognised 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 distribution 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.*

lxvii) *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.*

lxviii) *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 as under for ease of reference:*

*“39. ....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.*

....”

lxix) *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.....”

lxx) *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 Jijajee Cotton Mills Ltd that a producer of electricity can also be a consumer. Such person is playing a dual role.....”

lxxi) *It is submitted that a person who has set up a captive generating plant has dual rule, 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.*

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

**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.**

lxxiii) *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.*

lxxiv) *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 co-operative 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. “*

- lxxv) *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'.*
- lxxvi) *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 and 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."*

- lxxvii) *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 interalia 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.***

.....

*24. Learned counsel urged that the definition 'service' is of limited nature and is limited to the providing facilities in connection with electricity. According to him, the facility is an expression which facilitates the supply of electricity to an installation and the definition of service does not cover supply of electricity.*

***This contention of the learned counsel is founded on erroneous assumption that supply of electricity is a sale of electricity and the use of expression 'supply' is synonym for 'sale'. We have already noticed above, which we need not repeat, that supply of electricity to a consumer by KPTC is not sale of electricity. The expression 'supply' is not synonym for 'sale'. We reiterate what has been stated by this Court in Southern Petrochemical Industries Co. Ltd. (supra) that supply does not mean sale.....”***

lxxviii) 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 means 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;

lxxix) 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.

lxxx) 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.

lxxxii) 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.

lxxxii) 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—<br><br>(a) has persistently failed to maintain uninterrupted <b>supply of electricity</b> conforming to standards regarding quality of electricity to the consumers; or<br><br>..... | 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. <b><u>Disconnection of supply in default of payment.</u></b> —(1) Where any person neglects to pay                                                                                                                                                                                                                                         | Here the supply means availability of electricity                                                                                                                                                                           |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>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, <b>cut off the supply of electricity</b> and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:</p> | <p>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.</p>              |
| <p><b>53. Provision relating to safety and electricity supply.</b> –The Authority may, in consultation with the State Government, specify suitable measures for–<br/><br/>.....;<br/><br/>(c) <b>prohibiting the supply</b> or transmission of electricity except by means of a system which conforms to the specification as may be specified;</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p>Here supply means making available electricity. Safety provisions are applicable notwithstanding the sale is being done or not.</p>                                                                                |
| <p><b>Section 139. (Negligently breaking or damaging works):</b><br/><br/>Whoever, negligently breaks, injures, throws down or damages any material connected with the <b>supply</b> 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 of electricity.</p> |
| <p><b>Section 140. (Penalty for intentionally injuring works):</b><br/><br/>Whoever, with intent to cut off the <b>supply</b> 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>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                       |

*lxxxiii) 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.

**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.**

lxxxiv) *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) can not 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 sub-section 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.”*

lxxxv) *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.*

lxxxvi) *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).*

lxxxvii) *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.

lxxxviii) 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.”**

lxxxix) 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.”*

xc) *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 and other additional surcharge as decided by the State Commission under the concerned Regulations to the distribution licensee, the Appellant herein. In the impugned order proper arrangement has been made to ensure that the distribution licensee, the Appellant herein, would be properly compensated through the payment of cross subsidy surcharge and additional surcharge, if any, found fit by the State Commission.”*

xc) *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.*

xcii) *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-I) {RG- 33(I) 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 is reproduced as under:*

*7.2. As per incentive policy for encouraging generation of power in Madhya Pradesh through Non-conventional Energy sources (solar, wind, bio-energy, etc.) issued vide notification dated 17.10.2006 by the Government Madhya Pradesh, the power evacuation will be an integral part of the project and all expenses for power evacuation facility shall be borne by the Developer. **Such infrastructure laid, notwithstanding that cost of which has been paid for by the Developer, shall be the property of the concerned Licensee for all purposes.** The Licensee shall maintain it at the cost of the Developer and shall have the right to use the same for evacuation of power from any other Developer subject to the condition that such arrangement shall not adversely affect the existing Developer(s).*

xciii) *Aforesaid principle is also applicable in the present circumstances of the case.*



- xciv) *In view of above, it is submitted that the issue of liability of additional surcharge even in the absence of use of distribution system has 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.*
- xcv) *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.*
- xcvi) *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.”*

- xcvii) *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.*
- xcviii) *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.*
- xcix) *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.”

c) 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.

ci) 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.”

cii) 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.

ciii) 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.

civ) 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.

**RE: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:**

- cv) *Without prejudice the submission that additional surcharge is payable in the present circumstances of the case it is submitted that, as far as the refund is concerned, the Principle of Unjust Enrichment applies to the facts of present case and Consumers who have paid additional surcharge, would have passed on the same to the end users. In this regard kind attention is drawn towards the Judgment of Hon'ble Supreme Court in **The State of Jharkhand & Ors V. Brahmputra Metallics Ltd, Ranchi & Anr2020 SCC OnLine SC 968** wherein the principle of Unjust Enrichment has been held to apply in the context of refunds:*

*63. In Indian Council for Enviro-Legal Action vs Union of India, a two judge Bench of this Court, speaking through Justice Dalveer Bhandari, outlined the ingredients of unjust enrichment in the following terms:*

*“152. “Unjust enrichment” has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.”*

***Applying this definition to the facts of the case at hand, the doctrine of unjust enrichment could have been attracted if the respondent had passed on the electricity duty to its customers and then retained the refund occasioned by the 50 per cent rebate in its own pocket. This is not demonstrated to be the factual position and hence, the respondent cannot be denied relief on the application of the doctrine.***

- cvii) *In view of above no refund can be granted as prayed by the petitioner. 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 dairy 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.*
- cvi) *In view of the above, the para-wise reply is as under:*

**SUBJECT MATTER/IMPUGNED ORDER:**

**Para 1.1** *According to this office's letter No. DCDH/05/05/05/13637/ 01/01/2021, the SE (HT Billing Cell) Indore, vide letter No. MD/WZ/SE/HT Billing Cell/ 792, Indore, dated 12.10.2021, addl. surcharge from the month of April 2017 to 23.03.2021, calculated and payable amount comes to Rs. 1,84,32,344/-, for which a demand letter was issued for depositing in 15 days.*

**Para 1.2** According to this office's letter No. MD/WZ/05/HT/BS/14930 Indore, dated 28.10.2021, Grid connectivity permission was issued for 2250 KVA Steam Turbine Generator to M/s Rama Phosphate Ltd.

1.3 The permission was given to the consumer for its captive use only. Therefore the narration of petitioner for not selling power to any third party can be accepted. As such the demand of additional surcharge is raised on the consumer and not the wheeling charges.

**Para 1.4:** As there is no wheeling of energy through network of Discom, the wheeling charges are not imposed, but the consumer is liable to pay additional surcharge. Preliminary submission in this regard is reiterated.

**Para 1.5:** Question of law is pending before Hon'ble Supreme Court in case of answering respondent. Judgment in JSW case is not applicable in the present circumstances of the case. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.

**FACT OF THE CASE :-**

**Para 2.1 to 2.5** - General legal information. No comment. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.

**Para 2.6:** As there is no wheeling of energy through network of Discom, the wheeling charges are not imposed, but the consumer is liable to pay additional surcharge. Preliminary submission in this regard is reiterated.

**Para 2.7:** As there is no wheeling of energy through the network of Discom, the wheeling charges are not imposed, but the consumer is liable to pay additional surcharge. Preliminary submission in this regard is reiterated.

**Para 2.8:** The petitioner has produced an application in the subject "Reworking of over old TG Set permission of 2250 KVA installed in our Fertilizer Division" and sought its approval, which placed as Annexure P-4. It is further intimated that the certificates of ownership, undertaking for captive status, Articles of Association and Charging Permission dated 25.08.2000 was submitted by the petitioner along with letter dated 17.08.2021. However, petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.

**Para 2.9-2.10** The demand for additional surcharge has been made as per the prevailing regulation at that time. It is true that after issue of demand letter by this office, M/s Rama Phosphate has submitted an application on 29.10.2021 for depositing additional surcharge amount in 48 installments. Accordingly, action taken by the MPPKVVCL as per rules. There was no any unnecessary pressure was made on the consumer. As per the application of the consumer, facility of paying addl. surcharge amount Rs. 1,84,32,344/- in 48 installments was provided vide Tol No. MD/WZ/05/Com-HT/BS/15938 Indore, dated 22.11.2021. The applicant has deposited Rs. 12,47,695/- as an installment of additional surcharge.

**Para 2.11:** *The petitioner has submitted applications dated 07.01.2022 and 14.01.2022 for refund of the deposit of additional surcharge. However, petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

**Para 2.12 & 2.13:** *Due to non-deposit of the full amount of the bill for the month of Aug-2022, the Disconnection notice was issued on dated 14.09.2022. However the petitioner was not compelled to pay additional Surcharge and no any coercive action was taken against the petitioner. JSW judgment has no applicability in the present circumstances of the case. Preliminary submission in this regard is reiterated.*

**Para 2.14:** *The amount declared by the consumer is verified from HT Billing Cell and it is informed that the amount is 57.17 lac (Principle amount 38.56 lac and Surcharge amt 18.61 lacs). However petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

**Para 2.15:** *Not accepted, no pressure has been created by the Discom.*

**Para 2.16:** *Agreed. However, Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

**Para 2.17:** *The Captive Status for FY 17-18 to 20-21 and to raise the demand of additional surcharge on generated/consumed units has been approved by the competent authority. The contention of petitioner that the demand towards additional surcharge is not payable by the consumer is wrong. But the invoice issued by the Discom in Annexure P-15 is correct. Preliminary submission in this regard is reiterated.*

**Para 2.18 & 2.19:** *Incorrect interpretation has been made by the petitioner. The additional surcharge is being levied for the consumption other than from distribution licensee of area. Source/status of such consumption is not relevant at all for the levy of additional surcharge. Petitioner is a consumer of the answering respondent. Accordingly answering respondent has universal supply obligation towards petitioner. Accordingly additional surcharge is payable. Preliminary submission in this regard is reiterated.*

**Para 2.20:** *Question of law is pending before Hon'ble Supreme Court in case of answering respondent. Judgment in JSW case is not applicable in the present circumstances of the case. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

**Para 2.21:** *Additional surcharge is being recovered as per prevailing statutory provisions. The preliminary submission in this regard is reiterated.*

**Para 3, 4 and 5** *are not there in the petition.*

**Para 6** (excluding 6.7, 6.8 & 6.9): *The above points have been taken up again, the response of which have been given. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

**Para 6.7:** *The Petitioner's statement that demand of additional surcharge is illegal is not acceptable. Preliminary submission in this regard is reiterated.*

*Para 6.8: Statement of para is not acceptable. The Discom refuse the statement of petitioner. Question of law is pending before Hon'ble Supreme Court in case of answering respondent. Judgment in JSW case is not applicable in the present circumstances of the case. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

*Para 6.9 : The amount recovered by Discom against ASC is correct. It is to mention that Section 62 sub-section 6 of the Electricity Act 2003 mentioned is not applicable in this case. Because as per to Section 42(4) of the Electricity Act 2003, additional surcharge is levied for the consumption other than from distribution licensee of area. According to the said provision, the answering respondent has raised additional surcharge from the consumer.*

*Para 7: The petitioner prays for relief's, which is not acceptable/ not justified because the additional surcharge is being billed and recovered as per prevailing statutory provisions. Petitioner is not entitled for any relief. Preliminary submission in this regard is reiterated.*

*cviii) In view of above submission petitioner is liable to pay additional surcharge. Accordingly, this Hon'ble Commission is requested to dismiss the petition and render justice.*

6. With the aforesaid submissions the Respondents 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. At the hearing held on 23.05.2023 Petitioner had stated that they received a copy of reply from Respondents only 2 days earlier and sought time for rejoinder. Two weeks' time was granted for filing rejoinder. The case was fixed for hearing on **13.06.2023**.

8. By affidavit dated 07<sup>th</sup> June' 2023, the Petitioner broadly submitted the following in its rejoinder:

- i) That the submission in reply Para No. 1 and 2 need no rejoinder.*
- ii) That the submission in reply Para No. 3 is vague and claims liberty to change the Respondent's stand from one to another which is not permissible in the judicial procedure as per law.*
- iii) That the submissions in reply Para No. 4 to 11 with respect to applicability of Supreme Court Judgment of J.S.W Steel Ltd., is evasive, as such denied. The petitioner reiterate the submissions made in the Petition.*

- iv) *That the submissions in reply Para No. 12 to 16 are irrelevant and do not help the Respondent's at all. The impugned demand is raised under Section 42(4) of Electricity Act towards Additional Surcharge on the charges of wheeling and the Respondent is avoiding to respond that there is no wheeling of electricity and there is no question of attracting levy of Additional Surcharge under Section 42(4), as such denied. The Petitioner reiterate the submissions made in the petition.*
- v) *That the submissions in reply Para No. 17 to 29 have been made for the sake of filing reply and has no bearing on cause / grievance raised in the Petition, as such denied.*
- vi) *That the submissions in reply Para No. 30 to 38 are again evasive submissions made without advertng to the claim raised in the petition. The Petitioner is not claiming any exemption from the additional surcharge but the Petitioner's grievance is that Respondent has raised demand which is not at all provided under Section 42(4) of Electricity Act for the Petitioner as such the submission are denied.*
- vii) *That the submissions in reply Para No. 39 is made to mislead the Hon'ble Commission as the Cross-subsidy Surcharge and Additional Surcharge are two different charges and the Petitioner had not raised any claim for exemption.*
- viii) *That the submission in reply Para No.40 to 47 are incorrect and the judgment of APTEL in case of Indian Aluminum Company and M/s Malanpur Captive Power Plant do not apply to facts of present case and are based on different facts and circumstances, as such denied. The Petitioner reiterate the submissions made in the petition.*
- ix) *That the submissions in reply Para No.48 to 58 do not help the Respondent's at all and the judgment relied by the Respondent in the forgoing Paras it is clearly held that the Additional Surcharge is payable on Wheeling Charges as per Section 42(4) only, as such all the submission justifying the claim against Petitioner are false and as such denied.*
- x) *That the submissions in reply Para No. 59 is repetitive and as such denied.*
- xi) *That the submissions in reply Para No. 60 to 62 are contrary to the applicable provisions, are based on misleading and unilateral interpretation of the Respondent as such denied. The submissions are also contrary to the orders of this Hon'ble Commission passed in different cases as mentioned in Para 2.20 of the Petition. The Respondent's reliance on judgment in the case of A.P Gas Power Corporation is of no avail as it does not apply to the facts of this case as such denied.*
- xii) *That the submissions in reply Para No.63 to 71 is repetitive and as such denied in view of rejoinder given in the forgoing paras.*
- xiii) *That the submissions in reply Para No.72 to 82 are made with attempt to mislead and divert attention of the Hon'ble Commission and the judgment relied in the said paras are not applicable to the facts of present case, therefore entire submissions are denied. The petitioner reiterate the submissions made in the petition.*

xiv) *That the submissions in reply Para No.83 to 103 are denied as evasive submissions made by the Respondent's and the judgment relied in the said paras are not applicable to the present case. The petitioner reiterate the submissions made in the petition. The Respondent has filed instant reply raising false pleas and grounds not applicable to the case on affidavit (though copy not supplied) which is liable to be condemned by this Hon'ble Commission. It is once again submitted that petitioner is not claiming any exemption but is challenging the illegal demand raised by Respondent's contrary to the provisions of Section 42(4) of Electricity Act and in utter violence of the orders already passed against the Respondent's by this Hon'ble Commission, in identical cases.*

xv) *That the submissions in reply Para No. 104 to106 are denied and judgment relied in the said paras do not relate to the Electricity matters and also to facts of this case as such denied.*

xvi) *That the reply / submissions made in the Para 1.1 to 1.5 and 2.1 to 2.21 and 3 to 7 at the end of the reply are nothing but the respondent's wrong approach of denying the petitioner's claim.*

*The petition deserves to be allowed in view of already existing orders passed by this Hon'ble Commission. The Respondent have filed entire evasive reply without adverting to the pleas raised by the Petitioner Company and false submissions have been made and submitted on affidavit which needs examination by this Hon'ble Commission. The submissions made in the reply are not sustainable and deserves to be struck down in the interest of justice and the petition of Petitioner may kindly be allowed and Respondent be directed to refund the entire excess amount recovered by way of Additional Surcharge along with interest a per Section 62(6) of Electricity Act as the Respondent have recovered and enjoyed the amount taken from the Petitioner and the Petitioner is not able to make use of its own amount paid to Respondent under threat of coercive action. In such case where the West Discom has recovered Excess amount by going against the provision of law, the High Court has directed to refund the amount along with interest. One of such order passed in W.P No. 9654/2021 in Narmada Resources case which is upheld by the Division Bench of Hon'ble High Court of M.P in W.A No.1418/2022 order dated 04/01/2023.*

xvii) *That in view of the submissions made in the petition and there being no satisfactory reply except evasive submissions made and in view of already existing orders of the Hon'ble Commission mentioned in Para 2.20 of the Petition, the present petition may kindly be allowed in the interest of justice.*

9. Last hearing in the subject matter was held on 13<sup>th</sup> June' 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 Respondents in this matter:

- (i) The subject petition is filed under Regulation 46 of MPERC (Conduct of Business) Regulations, 2004 seeking appropriate directions for setting aside the demand of



additional surcharge and to grant refund of amount paid against impugned demand and surcharge thereon recovered in violation of provisions of Electricity Act.

- (ii) The Petitioner is an HT consumer of Respondent having a contract demand of 1900 KVA for running its Industrial Unit at Tehsil Sanwer, District Indore as per its business object Clause in the Memorandum of Association and High Tension (HT) Agreement executed with the Respondent Licensee.
- (iii) The Petitioner Company has setup Steam Turbine Generation Plant of 2250 KVA at its premises at Tehsil Sanwer, District - Indore. The petitioner is Generating Steam Energy for its own use as captive user of the self generated electricity and not selling or providing the electricity to any Third Party or entity and thus there is no transmission of electricity from the petitioner's premises to any other place or premises. As such the petitioner is not required to comply or follow the regulations of wheeling of electricity or to pay wheeling charges as per Section 42(4) of Electricity Act, 2003.
- (iv) That, the Respondent has raised impugned demand dated 12/10/2021 of Rs. 1,84,32,834/- 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' 2021 in respect of energy generated from Steam Turbine Generator (STG) for Captive use. The petitioner was compelled to make payment of demand amount as petitioner's electricity connection was to be disconnected on account of non-payment of the demand.
- (v) The 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 following judgments:
    - i. Order dated 05/05/2022 of Hon'ble MPERC in Petition No.53/2021 Kasyap Sweeteners limited.
    - ii. Order dated 14/05/2021 of this Hon'ble MPERC in Petition No. 49/2021.
    - iii. Order dated 10/12/2021 of Hon'ble Supreme Court in case of Maharashtra State Electricity Distribution Company Limited V/s M/s J.S.W. Steel Limited and others (2022) 2 SCC 742.
    - iv. Order dated 29/11/2022 of Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 198/2021 Para 17 and 18.
  - b. There is no transmission and wheeling of electricity while using electricity generated from Steam Turbine Generator in the same premises of the Petitioner and thus no additional surcharge is payable by Petitioner.

- c. The Steam Turbine Generation of Petitioner is consumed for its own Industry and not sold or transmitted to any other place or party and there is no use of system of Respondent for any wheeling.
  - d. The procedural requirements for Grid Connectivity as directed by Respondent has been complied by Petitioner.
  - e. Respondents has recovered and utilized huge amount without any Authority of Law and Petitioner has been deprived of usage of his own money, as such Respondent has been unduly enriched.
  - f. Respondents 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 orders.
  - g. The amount recovered deserves to be refunded along with interest provided under Section 62 (6) of Electricity Act, 2003.
  - h. Respondent's action is arbitrary, illegal, unconstitutional, without authority of Law, jurisdiction and contrary to principles of natural justice.
11. The reply of Respondent to the above contention of petitioner is based on the following orders/Judgments:
- (a) 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}
  - (b) Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC
  - (c) Hon'ble Supreme Court in Hindustan Zinc supra.
  - (d) 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].
  - (e) Hon'ble Supreme Court in case of Sesa Sterlite Limited v OERC & Others reported in (2014 8 SCC 444).
  - (f) Hon'ble APTEL in Indian Aluminum Company Ltd Vs WBERC (Appeal No. 1 of 2006 order dated 11.07.2006) supra.
  - (g) The Commission in the Petition No. 02/2007 (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.)
12. Respondent has 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.

13. Respondent has also cited previous judgments of Hon'ble APTEL dated 11.07.2006 and this Commission dated 22.05.2007 in which levy of additional surcharge on captive consumption has been upheld. Commission observed that after passing of binding judgement of Hon'ble Supreme Court in JSW case subsequent to the above referred orders of Hon'ble APTEL and this Commission, such orders of Hon'ble APTEL and this Commission have no relevance in the present case.
14. Commission also observed that through 1<sup>st</sup> amendment in Madhya Pradesh Electricity Regulatory Commission (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20<sup>th</sup> Jan 2023 applicability of additional surcharge in respect of renewable energy-based captive generating plants has been omitted 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) 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.
15. The specific issue regarding applicability of additional surcharge on captive use of power has been dealt with by Hon'ble Supreme Court in its binding order dt. 10.12.2021 passed in Civil Appeal No. 5074-5075/ 2019 in which order dated 27.03.2019 of Hon'ble APTEL passed in Appeal No. 311 & 315 of 2018 in the matter of M/s JSW Steel Ltd. & Ors. v. MERC & Anr. has been upheld. The operating paras of order 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 in light of the binding judgement of Hon’ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds 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 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of.

**(Prashant Chaturvedi)**  
**Member**

**(Gopal Srivastava)**  
**Member(Law)**

**(S.P.S. Parihar)**  
**Chairman**