MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Sub: Petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute on illegal levy and collection of cross subsidy surcharge and additional surcharge on wheeling.

ORDER

Hearing through video conferencing
(Date of Order: 20th April '2022)

(1) M/s. Ordnance Factory, Itarsi.
Distt. Hosangabad, MP – 461 122 - **Petitioners**

(2) M/s. Bharat Electronics Ltd.
Nagavara, Outer Ring Road, Banglore – 560 045

Vs.

(1) M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.
Nishtha Parisar, Govindpura, Bhopal – 462023

(2) M.P. Power Management Company Ltd.,
E-4, Arera Colony, Prakash Parisar, Bhopal (M.P.) - **Respondents**

(3) M.P. Power Transmission Company Ltd.
Shakti Bhawan, Rampur, Jabalpur

Shri Vikram Aditya Singh, Advocate appeared on behalf of the petitioner.
Shri C.K. Valecha, Advocate appeared on behalf of the Respondent No. 1.
Shri Manoj Dubey, Advocate appeared on behalf of the Respondent No. 2.
Shri Abhinav Anand, Advocate and Shri H.K. Tiwari appeared for the Respondent No. 3

The subject petition was filed under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute on levy and collection of cross subsidy surcharge and additional surcharge on wheeling by the Respondent No. 1.

2. The petitioner has broadly submitted the following in the petition:

"1. *It is most respectfully submitted that the Petitioner is the Ordnance Factory Board under the Department of Defence Production (hereinafter referred to as DDP) of the Ministry of Defence, Government of India. It is submitted that the Petitioner No. 2 is a company owned by the Government of India (Department of Defence Production, Ministry of Defence) The Petitioner no. 2 is owned and founded by the Government of India. The Petitioner No. 2 is primarily engaged in the manufacturing of advance electronic products for the Indian Arm Forces. It is under the control of DDP, Ministry of Defence. It is submitted that the Petitioner no. 2 has set up a Solar Power Plant on the site and premises of Ordnance Factory, Itarsi, the Petitioner No. 1, as per the directions of the Department of Defence Production, Ministry of Defence.*

Therefore, the Petitioners are generating company under the provisions of the Electricity Act, 2003.

2. *It is most respectfully submitted that the Solar Power Plant set up by the Petitioner No. 2 herein supplies 100% of the power for captive use for the Department of Defence Production, Ministry of Defence, who in turn has nominated the Petitioner No. 1 to receive the power. The Ministry of Defence, Government of India, had approved the decision of installation of 10 MW Solar Power Plant at the Ordnance Factory Itarsi through the Petitioner no. 2 on nomination basis under developer mode. The Petitioner no. 2 has been identified by The Ministry of Defence, Government of India as the implantation agency for facilitating generation and sale of 11 KV and above grid connected Solar PV Power under Phase II, Batch III of the National Solar Mission of the Government of India. The scheme for setting up of 300 MW of grid connected and off grid connected Solar PV Power Projects by Defence Establishments under The Ministry of Defence and Para Military Forces was first sanctioned on 7th January 2015. On 7th May 2019, the Government of India further extended the time for setting up such project. (Copies of documents in connection of the approval of the MoD in respect of the installation of Solar Power Plant at Ordnance Factory and its subsequent extension are annexed hereto and collectively marked with the* ***Annexure P-1.****)*

3. *It is submitted that the instant dispute is arising on account of an incorrect and arbitrary interpretation of the Electricity Act, 2003 and Electricity Rules, 2005 undertaken by the Respondent No. 1 on the basis of the opinion given by the Company Secretary of the Respondent No. 1. The impugned letter of the Respondent No. 1 is dated 28.08.2019 and the impugned letter of the Company Secretary of the Respondent No. 1 is dated 20.08.2019. A copy of letter dated 28.8.2019 and 20.08.2019 are collectively attached as* ***Annexure P-2****.*

4. *At this stage, it is pertinent to mention the basic facts for the purpose of adjudication of the instant petition. It is most respectfully submitted that the Union of India, through the Department of Defence Production has various companies, Boards and organizations under the Ministry of Defence and, therefore, the Petitioners Ordnance Factory, Itarsi and Bharat Electronics Limited (BEL) are both owned by the Government of India through the Department of Defence Production, Ministry of Defence. It is submitted that for the purpose of the instant petition about 51.14% shares in the Petitioner no. 2 are held by the Union of India through the Department of Defence Production and the Ordnance Factory Board (Petitioner No. 1) is also fully owned by the Department of Defence Production, Ministry of Defence.*

5. *It is submitted that the Ministry of Defence has nominee Directors on the Board of the Petitioner No. 2 and also the Ministry of Defence fully controls the Petitioner No. 1 (Ordnance Factory) and, therefore, it will be seen that the Board of the Petitioner No. 2 approves, monitors and controls the various*

programmes and products including the set up of Solar Power Project.

6. *It is submitted that the Solar Power Plant set up by the Petitioner No. 2 is on the land and premises of the Ordnance Factory, Itarsi, the Petitioner No. 1 and the power generated is for 100% captive use for the Department of Defence Production. It will be therefore seen that the Petitioners herein fulfill the twin conditions as mentioned in Rule 3 of the Electricity Rules, 2005 and therefore the Solar Power Plant is a captive generating plant supplying power for captive use to the Department of Defence Production (Ordnance Factory). It is, therefore, submitted that prima facie it is evident and clear that no cross-subsidy surcharge cannot be levied on the petitioners for supplying power for captive use in accordance with the fourth proviso of Section 42 of the Electricity Act. It is submitted that the Petitioners are therefore exempt from payment of Cross Subsidy Surcharge and additional surcharge.*

7. *The Relevant rules framed in connection with such permission for captive generating plant are reproduced herein below.*

   "(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

   (a) In case of a power plant –

   (i) Not less than twenty six percent of the ownership is held by the captive user(s), and

   (ii) Not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive uses:

   Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

   Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

8. *Accordingly, under the said Rule not less than 26 percent of the ownership has to be held by the captive user. The said Rule further stipulates that not less than 51 percent of the aggregate electricity generated in such plant is to be determined on an annual basis and the same is to be consumed for captive use.*

9. *As narrated hereinabove, both the Petitioners/applicants are under the control of DDP, The Ministry of Defence, Government of India. In both the cases, the Ministry of Defence is the major shareholder of both the Petitioners and consequentially the Petitioner cannot be barred from being granting*

permission under the said Rule on account of being two separate entities.

10. *In the present case under the scheme as approved by the Government of India the Petitioner no. 2 on nomination basis would establish a captive generating plant for use of the applicant no. 1. Both the applicants are under the control and supervision of The Ministry of Defence, Government of India, and therefore cannot be considered to be separate entities for attracting of provision of Rule 3 of Electricity Rules, 2005, as declared by the respondent. In line with the definition of "Ownership" as per para 7 above, the said solar power plant shall be set up by a Company (BEL) with 51.14% shares held by Central Government (through DDP, Ministry of Defence, common owner of BEL and OFB). Government of India through Ministry of Defence has nominee Directors in BEL's Board and BEL Board does approve, monitor and controls various programmes and Projects of Ministry of Defence, Government of India including Solar Power Plant Projects.*

11. *At this stage, it is also pertinent to note that a power purchase and wheeling agreement (PPWA) was also executed between the Ordnance Factory, Itarsi (the Petitioner No. 1), the Petitioner No. 2, MPPMCL and the Respondent No. 1 (Central Discom) in which it has been clearly stated at several places in the PPWA, that the Petitioners have established the power plant for captive use and requisite permissions for Captive Use have been obtained. It is also pertinent to note that in the said PPWA it has also been clearly mentioned that the Ordnance Factory, Itarsi, the Petitioner No. 1 and Petitioner No .2 have set up 10 Mega Watt capacity Solar based power plant and that the parties have entered into the wheeling and banking agreement for the surplus power only. It is pertinent to mention for completion of narration of facts that the Respondent No.1 is a signatory to this PPWA and is a conforming and agreeing party. It is pertinent to mention herein that the aPPA (Power Usage Agreement) has to be executed between the CPP and CPP User in view of the MNRE Defence Scheme of the Government of India dated 7.1.2015. However the PPA does not alter the CPP status of the plant or its exemption for CSS in any manner whatsoever and both the Petitioner no. 1 and 2 are owned and controlled by Government of India. A copy of the PPWA dated 25.08.2018 is attached as* ***Annexure P-3*** *and PPA between CPP/BEL and CPP User/OFI is attached as* ***Annexure-P-4****.*

12. *It is further submitted that thereafter MPPMCL has also issued the letter dated 31.08.2018 to the Ordnance Factory, Itarsi, the Petitioner No. 1, forwarding a copy of the PPWA executed in original and it has been specifically mentioned in the forwarding letter dated 31.08.2018 that the PPWA with banking facility is for captive consumption for the 10 Mega Watt consumption power plant established at Ordnance Factory, Itarsi. A copy of letter dated 31.08.2018 is annexed as* ***Annexure P-5****.*

13. *It is submitted that in this factual background the Respondent No. 1 who is a signatory and therefore an agreeing and confirming party to the PPWA wherein it is clearly stated that the Petitioner No. 2 has established a captive*

power plant along with Ordnance Factory, Itarsi, the Petitioner No. 1, has now issued the impugned letters dated 28.08.2019 and 20.08.2019 wherein it has said that the Petitioners shall not be eligible for exemption from cross subsidy surcharge and necessary action for recovery of the same shall be taken.

14. *It is submitted that the letter dated 28.08.2019 is based on the letter dated 20.08.2019 wherein an incorrect and arbitrary interpretation to the Electricity Rules, 2005 has been undertaken by the Respondent No. 1. It is the interpretation of the Respondent No. 1 that although the Central Government (Ministry of Defence, Department of Defence Production) holds about 51.14% shares in the Petitioner No. 2, the ownership of the asset shall be of the Petitioner No. 2 and not of the Government of India. It is on this sole reasoning the Respondent No. 1 holds that the Ordnance Factory, Itarsi, i.e., Petitioner No. 1 does not qualify as a captive consumer as it is the incorrect interpretation of the Respondent No. 1 that the Central Government is holding 51.14% equity in BEL (Petitioner No. 2) only and not in the assets of the company.*

15. *It is submitted at the outset that the interpretation given by the Respondent No. 1 is completely absurd for the simple fact that if a person has x% share holding in the company then that person also owns the assets of the company to the extent of his shareholding and, therefore, on the first principle itself the interpretation given by the Respondent No. 1 in the impugned letter dated 20.08.2019 is unsustainable in law. It is submitted that the above interpretation is completely incorrect and not in accordance with law. It is further submitted that a perusal of the definition of "Ownership" as given in the Electricity Rules is pertinent to be produced at this stage which reads as under:-*

    "(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant."

    A perusal of the above definition of "Ownership" is very important for the adjudication of the instant case as ownership means the company holding equity share capital with voting rights in the generating station or plant and/or having the proprietary interest or control over the generation station or power station.

16. *It is submitted that as submitted hereinabove the Petitioner No. 2 has set up the Solar Power Plant and about 51.14% of the shares are held by the Central Government through the Department of Defence production which is also the owner (proprietary interest) of the Ordnance Factory Board (i.e, Ordnance Factory, Itarsi) and, therefore, it will be seen that there is proprietary interest and control of the Central Government through the Department of Defence Production over the generating power plant of 10 Mega Watt set-up by the*

Petitioner no. 2 and there is also full control over the Ordnance Factory, Itarsi, the Petitioner No. 1. It is also further to be noted that the captive consumer is the Ordnance Factory Board (Ministry of Defence) through the Department of Defence Production and therefore, also it will be seen that it is the Central Government only which is controlling the generating station on the one hand and also has the requisite equity/Proprietary interest in the Petitioner No.1 and the Petitioner No. 2. It is, therefore, submitted that the petitioner No.1 and 2 fulfill the conditions as mentioned in Rule 3 of the Electricity Rules, 2005 and, therefore, their 10 Mega Watt qualifies as a captive generating plant.

17. *It is submitted at this stage that the M.P. Power Transmission Company Limited has noted in its letter dated 11.01.2018 that the Petitioner No. 2 is a sister concern of Petitioner No. 1 as they come under the Department of Defence Production and the 10 Mega Watt Solar Power Plant is eligible for seeking long term open access for captive use of energy. It is also stated by the Transmission Company that the Petitioners No. 1 and 2 are under the Government of India, Ministry of Defence, Department of Department of Defence Production and 51.14% share in the BEL are owned by Government of India and, therefore, the same is a captive power plant and the Petitioner No. 1 is a captive consumer which has been established in accordance with the Rules of 2005. A copy of the letter dated 11.01.2018 is annexed herewith as **Annexure P-6**.*

18. *It is further submitted that the Respondent No. 1 is also estopped from issuing the impugned letters in view of the fact that it has executed the PPWA dated 28.08.2018 in which it has clearly accepted, admitted and agreed that the 10 Mega Watt Solar Power Plant is a captive power plant for captive use and, therefore, the respondent No.1 is bound by the agreement and confirmation given by it in the PPWA dated 25.08.2018 and also the principles of promissory estoppel.*

19. *It is further submitted that the Petitioner no.2 has represented the matter to the Respondents vide tis letter dated 1.10.2020 and 17.11.2020. It is submitted that MPPMCL vide its letter dated 11.11.2020 rejected the representation by stating that the matter is to be adjudicated by this Hon'ble Commission. A copy of the letter dated 1.10.2020, 11.11.2020 and 17.11.2020 are attached as **Annexure-P-7-Colly**.*

20. *It is submitted that the Respondent Discom has recovered CSS to the tune of Rs. 31312977/- from the Petitioner no. 1 and additional surcharge on wheeling to the tune of Rs. 15479414/- from June 2018 to December 2020 and the same is illegal recovery. It is submitted that CSS is not leviable for the reasons mentioned hereinabove and also additional surcharge on wheeling is only leviable if the conditions mentioned in section 42(4) are satisfied. It is submitted that in the instant case there is no wheeling undertaken through the system of Respondent Discom or sale of electricity from CPP-to-CPP User so as to attract the provision of section 42(4) of the Act. A copy of the chart*

showing CSS and additional surcharge levied and paid is attached as ***Annexure-P-8****.*

21. *It is further submitted that as per the 8th Amendment to the MPERC Cogen Regulations 2010 undertaken on 17.12.2019 levy of CSS and Wheeling charge has been exempted on renewable energy-based captive generating plant. It is submitted that the Petitioners CPP plant is a RE based Solar power CPP and therefore also exempted from the levy on this ground also. A copy of the 8th Amendment to the MPERC Cogen Regulations 2010 undertaken on 17.12.2019 is attached as* ***Annexure-P-9****."*

3. With the aforesaid submissions, the petitioner prayed the following in the subject matter:

(i) *To set aside the impugned letters dated 28.08.2019 and 20.08.2019 issued by the Respondent No. 1; and*

(ii) *To hold and declare that the petitioners are entitled to exemption from payment of cross subsidy surcharge for power supplied from the captive power plant of petitioner No. 2 to the petitioner No .1, who is the captive consumer of petitioner No. 2 and further be pleased to direct the Respondent No. 1 to refund the cross-subsidy surcharge levied and collected from the petitioner No. 1 from June 2018 to December 2020 amounting to Rs. 31312977/- and also as levied and collected from January 2021 onwards; and*

(iii) *To hold and declare that the petitioners are not liable to pay the additional surcharge on wheeling for the power supplied from its CPP to the CPP User through its own dedicated transmission lines as the provision of section 42(4) of the Act, 2003 is not attracted and further be pleased to direct the Respondent No. 1 to refund the Additional Surcharge on Wheeling levied and collected from the Petitioner No. 1 from June 2018 to December 2020 amounting to Rs. 15479414/- and also as levied and collected from January 2021 onwards.*

4. At the motion hearing held on 10.08.2021, the petition was admitted and petitioners were directed to serve copy of the petition to Respondents within three days and report compliance of service to the Commission. The Respondents were directed to file their replies to the subject petition within two weeks and serve a copy of their replies to petitioners simultaneously. The petitioners were directed to file rejoinder on the aforesaid reply within two weeks, thereafter.

5. At the next hearing held on 26.10.2021, the Commission observed the following:

(i) Ld. Counsel who appeared for the Respondent No. 1 (MPMKVVCL) submitted that he had received copy of petition through E-mail without some of the annexures.

(ii) Ld. Counsel of the petitioners stated that he would serve physical copy of complete petition within three days.

(iii) The Respondent No. 2 (MPPMCL) filed reply to the petition on 11.10.2021. Ld. Counsel for the Respondent No. 2 requested that other two Discoms may also be impleaded in this matter.

6. In view of the above, the petitioners were directed to implead all necessary parties in this matter and to ensure service of hard copy of complete petition to all the Respondents including Respondent No. 1 within three days. The petitioners were also directed to report compliance of service to the Commission by 30.10.2021. The Respondent No. 1 and 3 were directed to file their replies to the subject petition within two weeks. The petitioners were directed to file rejoinder to the same within a week, thereafter. The parties were directed to strictly adhere with the aforesaid timelines for submission of their replies and rejoinder. The case was fixed for arguments on 21.12.2021 however, the case could not be heard due to vacancy of Member Law in the Commission from 09.12.2021 to 04.02.2022.

7. At the hearing held on 15.02.2022, it was observed that Respondent No.1 and 3 filed their replies on 11.11.2021 and 10.11.2021, respectively. Ld. Counsel who appeared for the Respondent No. 2 (MPPMCL) again stated that other two Discoms be also impleaded as necessary parties in this matter. In view of the issues involved in the subject matter, the Commission held that M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal, M.P. Power Management Co. Ltd., Bhopal and M.P. Power Transmission Co. Ltd, Jabalpur being necessary parties are already made Respondents in the subject matter. Therefore, there is no necessity to implead any other party as Respondent in this matter. The case was fixed for arguments on 28.02.2022.

8. At the hearing on 28.02.2022, Ld. Counsels who appeared for the petitioner and Respondent No. 1 concluded their arguments. Ld. Counsel who appeared for Respondent No. 2 stated that he adopts the reply filed by Respondent No. 1. No arguments were put forth by representatives of Respondent No. 3. As requested, the petitioner and Respondent No. 1 were allowed to file their written arguments within seven days. Case was reserved for order.

9. Respondent No. 2 (MPPMCL) vide its letter dated 11.10.2021 broadly submitted the following:

"(1) That, the Respondent No. 1 is the contesting respondent in the above referred petition. The letters impugned in the petition have also been issued by the Respondent No. 1. The Respondent No. 2 appears to be a formal party in the present case.

(2) That, in the facts and circumstances of the case, the answering Respondent No. 2 adopts the reply / submissions that may be made by the contesting Respondent No. 1."

10. Respondent No. 1 (MPMKVVCL) on 11.11.2021 broadly submitted its preliminary objection to the petition as under:

*"1- That, the Petitioner no. 2 has no right to file the complaint against the Respondent no. 1 because the Petitioner no. 2 does not come under the definition of "**consumer**" but Petitioner no. 1 is consumer of Respondent no. 1 and it has right to file dispute against the company and not Petitioner no. 2.*

> *"Respondent no. 1 relies on CPJ 2012 Part 4, Page- 154, National Consumer Disputes Redressal Commission* ***"Consumer Protection Act, 1986 - Sections 2(1) (d), 21 (d) - Electricity Connection - Misappropriation of money - Amount deposited under coercion alleged- District Forum allowed complaint - State Commission held that complainant is not a consumer-Hence revision - Contention, since money was demanded from complaint, he paid the same and therefore, he became 'consumer' - Not accepted - Connection not transferred in name of complainant by payment of bill - Complainant got no privities of contract with opposite party - He has no locus standi to challenge action of respondent - Impugned order upheld."***

2- That, petitioners have not exhausted ***alternative remedies*** *available to them, which are as follows:*

a. A complete machinery has been provided in section 42 (5) and 42(6) for redressal of grievances of individual consumer. Hence, wherever a forum/ombudsman has been created the consumer can only resort to these bodies for redressal of their grievances.

"The Division Bench of Hon'ble Supreme Court held in the case of <u>Maharashtra State Electricity Distribution Company Ltd. Vs Lloyds Steel Industries Ltd. 2007</u> (III) MPWN 73 Electricity Act 2003 - S. 45 (5)-- Consumer Grievance Redressal Forum and Ombudsman created under the Regulation -- consumer's grievance can be entertained by this forum only and the Forum and Ombudsman have power to grant interim orders - Commission has no jurisdiction thereafter 132 (2006) DLT 339 approved and same view has been establish by the Hon'ble High Court in the AIR 2007 Delhi page 161, *in the light of aforesaid decisions this Hon'ble commission has no Jurisdiction to entertain the said petition*."

b. That as per the Power Purchase and Wheeling Agreement entered between the parties dated 25-08-2018, Clause 13.1, any disputes shall be first referred to the co-ordination committee as mentioned in clause 3.1 of the agreement. The petitioner in the present case has not made any effort in referring the dispute to the committee.

c. *Further, as per clause 30 of the same agreement any dispute arising between the parties shall be adjudicated by the competent courts at Jabalpur.*

Thus, the petitioners have no locus standi to approach before this Commission

directly in view of availability of other remedies.

PARAWISE REPLY

1- *That, the onus to prove contents of the Para 1 is upon petitioners.*

2- *That, the onus to prove contents of the Para 2 is upon petitioners.*

3- *That, the contents of the Para 3 of the petition are denied. It is specifically denied that the instant dispute is arising on account incorrect and arbitrary interpretation of the Electricity Act 2003 and Electricity Rules 2005. The interpretation is based on sound and reasonable grounds.*

4- *That the contents of Para 4 to 10 are collectively denied. It is pertinent to note that the main issue involved in these para is "Whether the petitioners fulfill the conditions mentioned in rule 3 of Electricity Rules, 2005". The relevant rules framed in connection with such permission for captive generating plant are reproduced as below;*

"Requirements of Captive Generating Plant.

(2) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless –

(a) In case of power plant -

(i) not less than twenty six percent of the ownership is held by the captive user(s) and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on a annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user (s) shall consume not less than fifty one percent of the electricity generated determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent.

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

Explanation:-

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit of units in aggregate identify for captive use and not with reference to generating stations as a whole; and

(2) the equity share to be held by the captive user (s) in the generating station shall not be less than twenty six percent of the proportionate of the equity of the company related to the generating unit of units identified as the captive generating plant.

Illustration: in a generating station with tow units of 50 MW each namely Units A and B one units of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(3) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (i) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is supply of electricity by a generating company.

Explanation – (1) For the purpose of this rule –

a. "Annual Basis" shall be determined based on a financial year;

b. "Captive User" shall mean the and user of the electricity generated in Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

c. "Ownership" in relation to a generating station of power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

"OFI functions under Ordnance factory Board, Kolkata which is further under the control of Central Government, it is a distinct legal entity and by virtue of being under the control of central Government

the ownership cannot per se be interpreted to lie with the Ordnance Factory, Itarsi, Therefore OFI neither enjoys having not less than 26% equity share capital with voting rights nor has proprietary interests and control over generating power station or power plant. Regarding the Captive Status of OFI, since the ownership of the plant does not lie with OFI, it cannot qualify as a Captive User."

A bare perusal of Rule 3 shows that it lays down the conditions that are required to be fulfilled to qualify a power plant as "captive generating plant" Two conditions are required are required to be met to qualify as a captive generating plant. First, is not less than 26% of the ownership to be held by the captive user(s) which is Ordnance Factory, Itarsi in this case and the second condition is consumption of not less than 51% of the aggregate electricity generated in such plant, determined on annual basis to be consumed for the captive use.

So, far as the first condition of having not less than 26% ownership to be held by the captive user is concerned, one of two conditions need to be fulfilled to ascertain whether or not OFI has ownership status in the power plant. As per the definition of "ownership" provided in clause 3(2) (1) (c), in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant.

In the present case, the power plant has been set up by M/s BEL which is a company registered under the Companies Act 1956 whereas Ordnance Factory, Itarsi functions under the Ordnance Factory Board Kolkata. The Government of India through the Ministry of Defence and Department of Defence Production has 58.83% shareholding of M/s BEL as on 31st March 2019 and other Ordnance Factory Board is also under the control of Government of India. However, despite both entities being under control of Government of India, the fact remains that M/s. BEL and Ordnance Factory, Itarsi are two separate entities governed by distinct laws and serving distinct purposes.

The definition of "ownership" provided in clause 3(2)(1) (c) pertains only to the ownership in relation to a generating station or power plant. In this case,, Central government enjoys 58.83% shareholding through 2 shareholders as on 31st March 2019. However, there is nothing to demonstrate that the Ordnance Factory, Itarsi or Ordnance Factory Board owns not less than 26% equity share capital with voting rights. Even though the Ordnance Factory, Itarsi functions under Ordnance Factory Board, Kolkata which is further under the control of Central Government, it is a distinct legal entity and by virtue of being under the control of Central Government the ownership

cannot per se be interpreted to lie with the Ordnance Factory, Itarsi. ***Such interpretation of the aforesaid clause would mean all entities under the Ministry of Defence/Department of Defence Production would qualify having ownership M/s BEL and other companies under the control of the same department which would defeat the very intent of this clause which is clearly to enable the entity owning the plant and using it for it's own purposes****. This view is further strengthened by the definition of "Captive User" provided in clause 3 (2) (1) (b) which says that – "Captive User" shall mean the end use of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;*

Here, the end user is the OFI, and thus ownership will also have to be ascertained in respect of OFI and not the parent organization that is the Department of Defence Production. Since OFI in itself neither enjoys having not less that 26% equity share capital with voting rights nor has proprietary interest and control over the generating station or power plant, it cannot be said that Ordnance Factory, Itarsi has the ownership status in M/s BEL.

*In view of this definition and the rules discussed at length in foregoing paragraphs, it is clear that the primary requirement for qualifying as a captive user is setting up a plant for own use. The rules of 2005 have also put a lower cap that minimum 51% of generated power annually must be consumed for self-usage by captive user. Since, in the present case the ownership of the plant does not lie with Ordnance Factory, Itarsi, even through it uses 100% of the power generated annually, OFI cannot qualify as a captive user. The opinion of Advocate General was sought by the Respondent No. 1 regarding this, and the opinion is also in concurrence with the abovementioned arguments. [****Annexure 1****]*

Hence, the petitioners do not fulfill the conditions contained in rule 3. Thus, they are not entitled to exemption from cross subsidy surcharge and additional surcharge on wheeling.

5- That the contents of the Para 11 to 13 and 18, 19 are collectively denied. The main issue involved in these para is that, since, the respondent no. 1 is the agreeing party in PPWA, it cannot deny the captive status of OFI, It is submitted that, the respondent no. 1 relied on the assurance of petitioner no. 1 that the petitioner no. 1 and petitioner no. 2 are same legal entities, but after holding due enquiries the respondent no. 1 came to the conclusion that both of them are separate legal entities. Thus, the permission of captive status was withdrawn. The principle of promissory estoppel do not apply in the present case.

6- *That the contents of the Para 14 to 17 of the petition are collectively denied. It is specifically denied that both the petitioners should be treated as one entity because they both are indirectly owned by Government of India It is submitted that the interpretation taken by the respondent no. 1 is not absurd and is based on sound and reasonable ground.*

In the given case, the plant is commissioned by M/s BEL and as the asset is in the name of the company the ownership of the same will remain in the name of M/s. BEL. The Ordnance Factory of Indian through Central Government is holding 66.79% of equity in M/s. BEL and not in the asset of the company.

As per the documents provided by the company it is to mention that the Ordnance Factory of Itarsi (OFI) shall not quality as "captive generating plant" on the basis of the following points :-

(1) *Through the Central Government holds 66.70% of share in M/s. BEL the ownership of the asset will be BEL and not the Central Government.*

(2) *As far as the ownership of the asset i.e. the power plant is concerned, it will be in the names of M/s. BEL. The shareholder cannot be the owner of the asset of the company and the ownership as per books of accounts will remain in the name of the company i.e. BEL.*

Based on the above it is to mention that the Ordnance Factory of Itarsi (OFI) shall not quality as Captive consumer. Hence, they are not entitled to exemption of cross subsidy surcharge and additional surcharge. The same

It is pertinent to note that, mere holding of shares in the corporation does not means that shareholder gets ownership rights in the corporation, It has been repeatedly held by Hon'ble Supreme court and various High Courts in various Judgments including ***Cheeranjeet Lal Choudhary v. Union of India. AIR 1951 SC 41*** *and* ***Bacha Guxdar v. Commissioner of Income Tax, AIR 1955 SC 740,*** *that*

> *"The shareholder by purchase of the share does not acquire any interest in the assets of the company till after the company is wound up, A company is a juristic entity distinct from the shareholders."*

7- *That the contents of the Para 20 are denied. The petitioners are liable to pay additional surcharge on wheeling charges because as per clause 6.1 and 6.2 of Power Purchase and Wheeling Agreement Dated 25-08-2018, the petitioners have undertaken the liability to pay wheeling charges and other charges that are leviable. Thus, the petitioners are estopped from questioning the levy of wheeling charges.*

8- *That the contents of the Para 21 are denied it is specifically denied that petitioners are entitled to exemption from cross subsidy surcharge and wheeling charge as per the 8th amendment to the MPERC Cogen Regulations 2010 undertaken on 17-12-2019. It is submitted that the exemption under this amendment is available only in case of captive use of the power and not open access use. The petitioner no. 2 in the present case is using power for open access use.*

ADDITIONAL AVERMENTS

1.- *It is submitted that 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.***

In view of above, it may be concluded that for levy of compensatory open access charges open access i.e use of the distribution system is not a prerequisite and such charges are payable irrespective of whether the lines of the distribution licensee are used or not.

2- *Hon'ble Supreme Court in* ***Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Others (Civil Appeal No. 5479 of 2013)*** *has considered the scheme of open access surcharges and held that both the cross subsidy surcharge as well as additional surcharge is compensatory in nature. The relevant part of the said judgment is reproduced as under:*

"25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in

terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). ***The mechanism of surcharge is meant to compensate the licensee for both these aspects."***

3- *It is submitted that Hon'ble Supreme Court in the aforesaid judgment clearly considered the both the surcharges (cross subsidy surcharge as well as additional surcharge) as compensatory in nature. In the very same judgment Hon'ble Supreme Court further held as under:*

"28. Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. ***In nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer.*** *Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiorari, 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.***

4- *It may be seen that Hon'ble Supreme Court explicitly held that compensatory charges is to be levied even if line of the distribution licensee is not being used for supply of power. In the instant case levy of cross subsidy surcharge is exempted vide fourth proviso to Section 42(2) however there is no such exemption for additional surcharge. Thus, additional surcharge being compensatory in nature is payable even if no part of distribution system has used for consumption of power from other source of supply.*

11. Vide letter dated 10.11.2021 Respondent No. 3 (MPPTCL) submitted as under:

"1. That, as per the provisions of the Indian Electricity Rules, 2005 notified on 08.06.2005 declaring a consumer as a captive consumer, the following shall be fulfilled:

(1) No power plant shall qualify as a "Captive Generating Plant" under section 9 read with Clause 8 of section-2 of the Act unless –

***(i)** Not less than twenty six percent of the ownership is held by the captive user(s) and*

***(ii)** Not less than fifty one percent of the aggregate electricity generated in such plant determined on an annual basis, is consumed for the captive use.*

2. That, though the Central Government holds 66.79% of share in M/s. BEL, the ownership of the asset in question shall be of BEL and not the Central Government.

3. Since as indicated at para (1) above, minimum twenty six percent of the ownership must be held in the name of captive user in the asset, the captive status in the instant case has not been granted by MP Madhya Kshetra Vidyut Vitran Co. Ltd. to the Solar Power Plant in question at Ordnance Factory, Itarsi.

4. That, in view of the above, the levy of cross subsidy surcharge and additional surcharge by the Madhya Kshetra Vidyut Vitran Co. Ltd. is in order and valid."

12. Petitioner vide affidavit dated 15.02.2022 submitted the following in its rejoinder to the reply dated 10.11.2021 filed by Respondent No. 1:

"1. At the very outset, it is humbly stated that any and all the imputations made by the Answering Respondent in its Reply being responded to are stated to be false and are denied in totality unless specifically admitted to herein after.

2. The present petition is maintainable and the contentions of the Answering Respondent that the Petitioners herein are not consumer within the scope of the Electricity Act are denied. It is submitted that the Hon'ble Supreme Court too vide its recent judgement has 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. The contention raised by the Answering Respondent is not maintainable and devoid of merit.

3. It maybe noted that the Hon'ble Supreme Court has settled the law in this regard and stated that the captive consumers incur and huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission line etc. It is for these reasons that such captive consumers/ captive users, who for a separate class other that 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.

4. In the present case, it is reiterated that Petitioner No. 1 Board (now defunct

*and succeeded by Defence PSU in October, 2021) was under the Department of Defence Production (DDP), Government of India (GOI). Further Petitioner No. 2 is owned and founded by Government of India and operated under the control of DDP, GOI. The instant issue pertains to the Solar Power Plant erected and operated by Petitioner No. 2 on the premises of Petitioner No. 1, in compliance with the directions of DDP, GOI to implement the National Solar Mission. It may further be noted that GOI owns Petitioner No. 1 and owns about 51.14% shares in Petitioner No. 2. Therefore, is the common owner of Petitioner No. 1 and 2. In fact even the Office memorandum dt. 21.06.2021 issued in this regard by Ministry of Defence, Government of India the conversion of production units under Respondent Np. 1 into 7 Defence Public Sector Undertakings (DPSU) Ministry of Defence, GOI retains 100% ownership of the same. The said OM dt. 21.06.2021 bearing No. 1(5)/2021/OF/DP(Plg-V) is annexed herewith and marked as **ANNEXURE R – 1**.*

5. *It is reiterated that the Solar Power Plant set up by Petitioner No. 2 herein is on the land of Petitioner No. 1 and the power generated is for 100% captive use of DDP, GOI. The Petitioners for reasons stated herein before and in the present proceedings fulfill the twin conditions mentioned in Rule 3, Electricity Rules, 2005. The Solar Power Plant in question is a captive generating plant supplying power by one limb of DDP (Petitioner No. 2) to another limb of DDP, GOI (Petitioner No. 1). The understanding of the Respondents herein is contrary to the established principles of law in this regard and the same is evident from the communication dt. 13.01.2022 bearing No. EZ/COMML/PP-R/P-165(II)2008 is annexed herewith and marked as **ANNEXURE R – 2**.*

6. *It may further be noted that no cross subsidy charges ought to be levied on the Petitioners herein for the supplying power for captive use in accordance with Fourth Proviso, Section 42, Electricity Act. The Petitioners it is humbly submitted are exempt from paying cross subsidy charges and any additional surcharge.*

7. *The kind attention of this Hon'ble Commission is again drawn to the relevant rules in this regard i.e. permission for captive generating plant and the same are being reproduced herein below for the quick reference of this Hon'ble Commission:*

   "(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

   (a) In case of a power plant –

      (i) Not less than twenty six percent of the ownership is held by the captive user(s), and

      (ii) Not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive uses:

      Provided that in case of power plant set up by registered cooperative society, the conditions mentioned

under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;"

8. *Further, this Hon'ble Commission's attention is drawn to the definition of 'Ownership' under Electricity Rules, 2005 as under:-*

   "c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;"

9. *As illustrated above the Petitioners fulfills the criterion laid down for ownership and the Petitioners are entities owned by the GOI through Ministry of Defence. Further, as noted herein above not less than 26 percent of the ownership has to be held by the captive user. The said Rule further stipulates that not less than 51 percent of the aggregate electricity generated in such plant is to be determined on an annual basis and the same is to be consumed for captive use. Petitioners it is humbly submitted are under control of DDP, Ministry of Defence, GOI.*

REPLY TO PRELIMINARY OBJECTION

1. *In response to the Para under reply it is stated that the same are wrong and denied. It is reiterated that the Hon'ble Supreme Court too vide its recent judgement has 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. The contention raised by the Answering Respondent is not maintainable and devoid of merit.*

2. *In response to the Para under reply it is stated that the same are wrong and denied. The present proceedings are the most efficacious remedy available to the Petitioners herein.*

REPLY TO PARAWISE REPLY

1. *In response to the Para under reply it is stated that the same merits no response.*
2. *In response to the Para under reply it is stated that the same merits no response.*
3. *In response to the Para under reply it is stated that the same are wrong and denied. It is humbly stated that the case of Petitioners herein are squarely covered by the Hon'ble Supreme Court's judgements which shall be relied on by the Petitioners herein during the course of the final arguments.*

4-21. In response to the Paras under reply it is stated that the same are wrong and denied for reasons stated herein above and in the main Petition.

REPLY TO ADDITIONAL AVERMENTS

1. In response to the Para under reply it is stated that the same merits no response.

2-4 In response to the Para under reply it is stated that the same merits no response. It is humbly submitted that the ratio laid down by the Hon'ble Supreme Court in Sesa Sterlite v. Orissa Electricity Regulatory Commission and Ors. (2014) 8 SCC 444 pertains to a distinct and different question of law than the controversy in the present matter. It is humbly submitted that the facts and question of law decided by the Hon'ble Supreme Court are distinguishable from the present matter.

REPLY TO PRAYER

The prayer as sought by the Answering Respondent may not be granted and is humbly state are liable to be rejected against the Answering Respondent and in favor of the present Petitioners.

The Petitioners herein humbly pray that this Hon'ble Commission may stay the operation of the impugned order and injunct the Respondents from taking coercive steps or recovering any dues in the interim.

13. Petitioner broadly submitted in its written submission as under:

*"1. That the matter pertains to illegal and arbitrary levying of additional surcharge on wheeling of electricity upon the Petitioners for power supplied from its CPP to the CPP user through its own dedicated transmission lines. The Petitioners in this regard are challenging the letters dt. 20.08.2019 bearing No. MD/MK/CA/5708 (at **Pg. 29**, **Ann. P-2**) communicated to the Petitioners by way of letter dt. 28.08.2019 bearing No. MD/MK/Comm-III/F-261/ (at **Pg. 28, Ann. P-2**).*

*2. It is submitted that the Petitioner is the Ordnance Factory Board under the Department of Defence Production (Hereinafter referred to as **"DPP"**) of the Ministry of Defence, Government of India (Hereinafter referred to as MOD, GOI). Further, Petitioner No. 2 is a company owned by DPP, Ministry of Defence, Government of India. It may be noted that Petitioner No. 2, BEL has 51.14% stake owning of Government of India through DPP. Further 100% of the power generated by the Solar Power is consumed by the Captive User Petitioner No. 1.The said fact was duly communicated to the Respondents by way of Letter dt. 1.10.2020 bearing No. 1175/OFI/MPPMCL/1020 by Petitioner No. 2 (at **Pg. 109, Ann. P-7**).*

*3. The said Solar Power Plant was established under GOI's Jawaharlal Nehru National Solar Mission (JNNSM) where solar power plants shall be set up on all para military and Defence establishments dated 07/01/2015 (at **Pg. 17, Ann.P-1**).*

4. *In fact Respondent Nos. 1 & 2, herein are a signatory to the Power Purchase and Wheeling Agreement dt. 25.08.2018 (at* ***Pg. 31, Ann. P-3****) b/w Petitioner Nos. 1 and 2, wherein the said fact regarding stake owning and 100% captive use are clearly stipulated in the description of parties and the definition clause.*

5. *That Petitioner No. 2 has set up a 10 MW Solar Power Plant on its premise, as per the directions of the DPP, Ministry of Defence. The same provides 100% of the power generated for captive use for the DPP, which in turn has nominated the Petitioner No. 1 to receive the said generated power. The said fact regarding 100% captive power use and 66.7% shareholding is duly acknowledged by Respondent No. 2 Power Management Co. Ltd. by way of its letter dt. 11.01.2018 bearing No. 04-02/PS/OA-Bharat/F-288/98 (at* ***Pg. 108, Ann. P-6****).*

6. *The said PPWA, at numerous instances has articulated that the Petitioner has established the Power Plant for captive use and requisite permission for captive use have already been obtained. It is also pertinent to mention here that the said PPWA also articulately states that the Petitioner No. 1 and Petitioner No. 2 have set up a 10 MW Captive Solar Based Power Plant, and the parties have entered into the wheeling and banking agreement only for the surplus power. From these facts, it is evident that the Respondent No. 1, being a signatory of the said PPWA, had knowledge and was an agreeing party.*

7. *Further, PPA executed b/w a CPP and a CP user in view of the MNRE Defence Scheme of the Government of India dated 07/01/2015 (at* ***Pg. 17, Ann.P-1****). However, his PPA does not alter the CPP status of the plant or its exemption for CSS in any manner whatsoever, and both the Petitioners No. 1 and 2 are owned and controlled by Government of India. However, the Respondents, without any application of mind, issued the impugned letters dated 28/08/2019 and 20/08/2019 wherein the Respondents have alleged that the Petitioners are not eligible for exemption from cross subsidy surcharge and initiated necessary actions for recovery of the same.*

8. *It is humbly reiterated that 66.7% of the shareholding in the Petitioner No. 2 company are held by the Union of India through DPP. Further, the Petitioner No. 1 is wholly owned by the DPP. In this light, the present case also satisfies the twin test laid down by Rule 3 of the Electricity Rules, 2005. Rule 3 of the Electricity Rules, 2005 states as follows:*

   "(1) No power plant shall qualify as a 'captive generation plant' under section 9 read with clause (8) of Section 2 of the Act unless –

   (a) In case of a power plant –

   (i) Not less than twenty six percent of the ownership Is held by the captive user(s), and

   (ii) Not less than fifty one percent of the aggregate electricity generated in such plant, determined on an

annual basis, is consumed by the captive uses:
Provided that in case of power plant set up by registered corporate society, the conditions mentioned under paragraph at (i) and (ii) above shall be satisfied collectively by the number of co-operative society.
Provided further that in case of association of persons, the captive user (s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent"

9. *That in the instant case, by application of the Rule of not less than 26 Percent of the ownership being held by the captive user, and not less 51 percent of the aggregate electricity generated being consumed by the captive user, the Petitioner qualifies to be a captive generation plant, as it satisfies the above-mentioned twin test. Herein, the Petitioners are under the control of DPP, Ministry of Defence, Government of India, and the Ministry of Defence holds major shareholdings in both the Petitioners. For this reason, the Petitioners are under the control and supervision of the Ministry of Defence, and therefore, cannot be considered to be separate entities for attracting of provisions of Rule 3 of the Electricity Rules, 2005.*

10. *That further, from the bare perusal of the definition of the word "Ownership" as defined in the Electricity Rules, i.e.,*
    "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant."

    In the instant case, by applying the said definition, the DPP holding 66.7% shares of the Petitioner No. 2, and hence, has "Ownership" over the Petitioner No. 2. At the same time, Petitioner No. 1 is wholly owned by the DPP.

11. *That, in this regard, it is imperative to mention that recently the Hon'ble Supreme Court in the case of MSEDCL Vs. JSW vide judgement dated 10.12.2021 passed in Civil Appeal no. 5074-5074 of 2019 has clearly held that Additional Surcharge on Wheeling is not leviable in such circumstances on captive power plants/users. The Hon'ble Supreme Court on 10.12.2021 clarified the position of law w.r.t. Section 42(2) of the Electricity Act, 2003 in the abovementioned judgment, highlighting that levying of additional surcharge on wheeling for power consumed by a company's own CPP is arbitrary and illegal. For this reason, the actions initiated by the Respondents in this case deserve to be quashed for being bad in law."*

Commission's Observations and Findings:

14. The Commission has observed the following from the petition and the submissions of the petitioners and Respondents in this matter:

(i) The Petitioner No.1 is the Ordnance Factory Board under the Department of Defence Production of the Ministry of Defence, Government of India. The Petitioner No. 2 (BEL) is a Company owned by the Government of India (Department of Defence Production, Ministry of Defence). The Petitioner No. 2 is owned and founded by the Government of India and it is primarily engaged in the manufacturing of advance electronic products for the Indian Armed Forces. The Petitioner No.2 is under the control of Department of Defence Production, Ministry of Defence and it has set up a Solar Power Plant in the premises of Ordnance Factory, Itarsi, the Petitioner No. 1.

(ii) The Solar Power Plant set up by the petitioner No. 2 supplies 100% of the power to the petitioner No. 1. The Respondent No. 1 (Distribution Licensee) vide letters dated 28.08.2019 and 20.08.2019 has conveyed to the petitioner No. 1 that the petitioners shall not be eligible for exemption from cross subsidy surcharge and necessary action for recovery of the same shall be taken. The aforesaid communication of Respondent No. 1 has been on the basis of opinion given by its Company Secretary. Therefore, the aforesaid impugned letter dated 28.08.2019 of the Respondent No. 1 and the impugned letter dated 20.08.2019 of Company Secretary of the Respondent No. 1 are challenged in this petition. The petitioners have prayed to hold and declare that the petitioners are entitled for exemption from payment of Cross-subsidy Surcharge and Additional Surcharge on the power supplied from the power plant of Petitioner No 2 to Petitioner No. 1 contending that the said solar power plant of petitioner No. 2 is Captive power plant and Petitioner No. 1 is captive user under Rule 3 of the Electricity Rules 2005.

(iii) The petitioners have also sought refund of the amount levied and collected by the Respondent No 1 against Cross Subsidy surcharge and Additional Surcharge for the period of June 2018 to December' 2020.

(iv) As per the petition and documents on record, Petitioner No. 1 (Ordnance Factory, Itarsi) and Petitioner No. 2 (BEL) have executed a Power Purchase Agreement on 30th September' 2016 wherein it is mentioned that the power generated from the solar plant of BEL (Petitioner No. 2) will be sold to Petitioner No. 1 (Ordnance Factory Itarsi) at the fixed tariff under the scheme of Jawaharlal National Solar Mission, Government of India.

(v) Subsequently, on 25th August' 2018, a Power Purchase and Wheeling Agreement (PPWA) was executed between Petitioner No. 1, Petitioner No. 2, Respondent

No. 1 (Central Discom) and Respondent No. 2 (MPPMCL).

(vi) The core issue under dispute in this petition is whether Petitioner No. 1 and Petitioner No. 2 hold captive status in terms of Rule 3 of the Electricity Rules, 2005 for exemption from cross subsidy surcharge and additional surcharge on the power drawn by the Petitioner No. 1 from the solar co-located power plant of Petitioner No. 2.

(vii) The foremost argument by Petitioner No. 1 is that both the petitioners i.e. Ordnance Factory Itarsi and Bharat Electronics Ltd. (BFL) are owned by the Government of India through the Department of Defence Production, Ministry of Defence and about 51.14% shares in the Petitioner No. 2 (BEL) are held by the Union of India through the Department of Defence and Production. Since, the Petitioner No. 1 (OFI) is also fully owned by Department of Defence and Production, Ministry of Defence therefore, there is proprietary interest and control of the Petitioner No. 1 through the Department of Defence Production over the generating power plant setup by the Petitioner No. 2. The petitioners have contended that the Central Government is controlling the generating station and also has the requisite equity/ proprietary interest in Petitioner No. 1 and Petitioner No. 2. Therefore, Petitioners No. 1 and 2 fulfill the conditions as mentioned in Rule 3 of the Electricity Rules 2005 and thus, 10 MW power plant qualifies as a captive generating plant.

(viii) The petitioners have also contended that since both of them are under the control and supervision of Ministry of Defence, Government of India and therefore cannot be considered to be separate entities for attracting provisions under Rule 3 under the Electricity Rules 2005. In order to justify their qualification in terms of definition of "ownership" under aforesaid Rule 3, the petitioners have pleaded that the solar power plant shall be setup by Petitioner No. 2 with 51.14% shares held by the Central Government through DDP, Ministry of Defence which is common owner of both the petitioners.

(ix) The Respondent No. 2 (MPPMCL) in its submission has broadly placed the following arguments:

(a) Twin conditions under Rule 3 of the Electricity Rules 2005 are required to be met to qualify as a captive generating plant. First, condition is not less than 26% of the ownership to be held by the captive user(s) which is Ordnance Factory, Itarsi in this case. Second condition is consumption of not less than 51% of the aggregate electricity generated in such plant, determined on annual basis to be consumed for the captive use.

(b) The Petitioner No. 1 functions under Ordnance factory Board, Kolkata which is further under the control of Central Government, hence, it is a distinct legal entity and by virtue of being under the control of central Government the ownership cannot be interpreted as per the petitioners' contention, Therefore OFI can neither be considered as having not less than 26% equity share capital with voting rights nor has proprietary interests and control over generating power station or power plant. Regarding the Captive Status of Petitioner No.1, since the ownership of the plant does not lie with OFI, it cannot qualify as a Captive User.

(c) As per the definition of "ownership" provided in Rule 3(2) (1) (c), in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant.

(d) In the present case, the power plant has been set up by M/s BEL which is a company registered under the Companies Act 1956 whereas, Ordnance Factory, Itarsi functions under the Ordnance Factory Board Kolkata. The Government of India through the Ministry of Defence and Department of Defence Production has 58.83% shareholding of M/s BEL as on 31st March 2019 and other Ordnance Factory Board is also under the control of Government of India. However, despite both entities being under control of Government of India, the fact remains that M/s. BEL and Ordnance Factory, Itarsi are two separate entities governed by distinct laws and serving distinct purposes.

(e) The definition of "ownership" provided in Rule 3(2)(1) (c) pertains only to the ownership in relation to a generating station or power plant. In this case, Central government enjoys 58.83% shareholding through 2 shareholders as on 31st March 2019. However, there is nothing to demonstrate that the Ordnance Factory, Itarsi or Ordnance Factory Board owns not less than 26% equity share capital with voting rights. Even though the Ordnance Factory, Itarsi functions under Ordnance Factory Board, Kolkata which is further under the control of Central Government, it is a distinct legal entity and by virtue of being under the control of Central Government the ownership cannot be interpreted to lie with the Ordnance Factory, Itarsi. **Such interpretation of the aforesaid clause would mean all entities under the Ministry of Defence/Department of Defence Production would qualify having ownership M/s BEL and other companies under the control of the same department which would defeat the very intent of this clause which is clearly to enable**

the entity owning the plant and using it for it's own purposes. This view is further strengthened by the definition of "Captive User" provided in Rule 3 (2) (1) (b) which provides that – "Captive User" shall mean the end use of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

(f) Here, the end user is the petitioner No. 1 (OFI), and thus ownership will also have to be ascertained in respect of OFI and not the parent organization which is the Department of Defence Production. Since OFI in itself neither has not less that 26% equity share capital with voting rights nor has proprietary interest and control over the generating station or power plant, it cannot be said that Ordnance Factory, Itarsi has the ownership status in M/s BEL.

(g) In view of this definition and the rules discussed at length in foregoing paragraphs, it is clear that the primary requirement for qualifying as a captive user is setting up a plant for own use. The Rules of 2005 have also put a lower cap that minimum 51% of generated power annually must be consumed for self-usage by captive user. Since, in the present case the ownership of the plant does not lie with Ordnance Factory, Itarsi, even through it uses 100% of the power generated annually, OFI cannot qualify as a captive user. The opinion of Advocate General was sought by the Respondent No. 1 regarding this, and the opinion is also in concurrence with the abovementioned arguments. Hence, the petitioners do not fulfill the conditions contained in Rule 3. Thus, they are not entitled to exemption from cross subsidy surcharge and additional surcharge on wheeling.

(x) The term "captive generating plant" is defined under Section 2(8) of the Act of 2003 as below: -

"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;

(xi) The Central Government in exercise of powers conferred under Section 176 of the Electricity Act, 2003 has made Rules called 'The Electricity Rules, 2005'). The relevant provisions under Rule 3 of the aforesaid Rules are as given below:

"3. **Requirements of Captive Generating Plant** – (1) No power plant shall qualify as a 'Captive Generating Plant' under section 9 read with clause (8) of section 2 of the Act unless –

(a) in case of a power plant –

(i) not less than twenty six per cent of the ownership is held by the captive user(s), and

(ii) not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b) In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -

Explanation - (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and
(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the

company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Explanation – (1) For the purpose of this rule –

(a) "annual basis" shall be determined based on a financial year;

(b) "captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "captive use" shall be construed accordingly;

(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity".

(xii) As per Rule 3(1)(a), the power plant in order to be considered as captive generating plant, should satisfy the following twin test:-

(i) not less than twenty six percent of the ownership must be held by the captive user (s), and

(ii) not less than fifty one per cent of the aggregate total electricity generated in the plant, determined on an annual basis, is consumed for the captive use.

(xiii) The term 'ownership' is explained under illustration of Rule 3 of the Rules 2005. as under:-

"ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant".

(xiv) In the instant case, the power plant has been set up by M/s BEL which is a

company registered under the Companies Act 1956 whereas, the Petitioner No. 1 works under the Ordnance Factory Board, Kolkata and it is functioning under the control of Central Government hence, the Petitioners No. 1 and 2 are distinct legal entities. Therefore, the arguments of petitioners that since the Petitioner No. 1 is also under the control of Central Government, therefore the Petitioner No. 1 has ownership in the on-site functioning power plant of Petitioner No. 2 has no merit. Therefore, the petitioner No. 1 (OFI) being a separate entity has neither equity share capital with voting rights nor proprietary interest and control over the generating station or power plant of Petitioner No. 2. Hence, it cannot be considered that Ordnance Factory, Itarsi has the ownership status in M/s BEL in terms of Rule 3 of the Electricity Rules 2005.

(xv) It is also noted that in clause 6.2 of Power Purchase and Wheeling agreement dated 25.08.2018 executed between Petitioner No. 1, Petitioner No. 2, Respondent No. 1 (Central Discom) and Respondent No. 2 (MPPMCL), it is clearly mentioned that as per prevailing Regulations (MPERC Seventh amendment of RE Regulations 2010 notified on 19.11.2010), Wheeling charges, Cross subsidy surcharge, additional surcharge on the wheeling and such other charges if any, under Section 42 of the Electricity Act 2003 shall be applicable at the rate as decided by the Commission from time to time in its retail supply tariff order.

15. In view of foregoing observations and examination of facts and circumstances placed on record in this matter and in light of provisions under MPERC (Cogeneration and Generation of Electricity from Renewables Sources of Energy) (Revision I) Regulation, 2010 as amended read with provisions under Section 42 of the Electricity Act 2003, the Commission finds that cross-subsidy surcharge and additional surcharge are leviable in this matter. With the aforesaid observations and findings, the prayers of petitioner are not allowed and the subject petition is dismissed.

(Gopal Srivastava)	**(Mukul Dhariwal)**	**(S.P.S. Parihar)**
Member (Law)	**Member**	**Chairman**