APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 02 OF 2018 & IA NOS. 10, 1096 & 1283 OF 2018
AND
APPEAL NO. 179 OF 2018

Dated : 17th May, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

APPEAL NO. 02 OF 2018 &
IA NOS. 10, 1096 & 1283 OF 2018

IN THE MATTER OF :

M/s Prism Cement Limited
Registered Office:
305, Laxmi Niwas Apartment,
Ameerpet, Hyderabad-500 016 **....Appellant**

Versus

1. **Madhya Pradesh Electricity Regulatory Commission**
Through its Secretary
Metro Plaza, Bitten Market
Bhopal, Madhya Pradesh

2. **State of Madhya Pradesh**
Through its Principal Secretary
Energy Department
Vallabh Bhawan, Bhopal

3. **Madhya Pradesh Power Management Company Limited (MPPPMCL)**
Through its Managing Director
Block-7 Shakti Bhawvan, Rampur
Jabalpur (M.P.)

4. **Madhya Pradesh Poorva Kshetriya Vidhyut Vitran Company Ltd.**
Through its Managing Director
Block-7, Shakti Bhavan, Rampur
Jabalpur (M.P.)

5. **BLA Power Pvt. Ltd.**
P.O. Khursipar, Village Niwari,
Tehsil Gardarwara,
Dist. Narsinghpur, Madhya Pradesh

6. **The Chief Engineer**
State Load Despatch Centre
Nayagaon
Rampur, Jabalpur **...Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur
Mr. S. Venkatesh
Ms. Nishtha Kumar
Mr. Rahul Adlakha

Counsel for the Respondent(s) : Mr. Alok Shankar for R-1

Mr. Aashish Anand Bernard
Mr. Paramhans for R-3 & 6

Mr. M. G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms. Poorva Saigal
Mr. Vikas Upadhyay
Mr. Ashwin Kr. Nair for R-4

Ms. Shikha Ohri for R-5

APPEAL NO. 179 OF 2018

BLA Power Pvt. Ltd.
Through Director
84, Maker Chambers III,
Nariman Point, Mumbai
Maharashta-400 021 **....Appellant**

Versus

1. **Madhya Pradesh Power Management Company Limited (MPPPMCL)**
Through its Managing Director
Block-16, Shakti Bhawan, Rampur
Jabalpur (M.P.)-482008

2. **Madhya Pradesh Poorva Kshetra Vidhyut Vitran Company Ltd.**
Through its Managing Director
Block-7, Shakti Bhavan, Rampur
Jabalpur (M.P.)

3. **M/s. Prism Johnson Cement Limited**
Registered Office:
305, Laxmi Niwas Apartment,
Ameerpet, Hyderabad-500 016

4. **State Load Despatch Centre**
Through Chief Engineer,
Nayagaon, Rampur
Jabalpur-482008

5. **Madhya Pradesh Electricity Regulatory Commission**
Through its Secretary
5th Floor, Metro Plaza, A-5 Arera Colony,
Bitten Market Bhopal, Madhya Pradesh-462016

6. **State of Madhya Pradesh**
Through Principal Secretary,
Energy Department,
Mantralaya, Vallabh Bhawan, Bhopal-462004

...Respondent(s)

Counsel for the Appellant	:	Ms. Shikha Ohri
Counsel for the Respondent(s)	:	Mr. Aashish Anand Bernard Mr. Paramhans Sahani for R-1 & 4 Mr. Vikas Upadhyay Mr. Ashwin Kr. Nair for R-2 Mr. S. Venkatesh Ms. Nishtha Kumar Mr. Somesh Srivastava Mr. Rahul Adhlakha for R-3 Mr. M. G. Ramachandran Ms. Ranjitha Ramachandran Ms. Poorva Saigal Mr. Pulkit Agrwal for R-4 Mr. C.K.Rai for R-5

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeals have been filed by **M/s Prism Johnson Ltd. (Appeal No. 2 of 2018) and M/s BLA Power Pvt. Ltd. (Appeal No. 179 of 2018)** challenging the Order dated 30.12.2017 (**"Impugned Order"**) passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"State Commission"**) in Petition No. 56 of 2016 and Petition No. 36 of 2017 respectively whereby the State Commission has held that cross subsidy surcharge is payable on the power sourced by Prism from Unit-1 of BLA Power's generating station.

2. M/s. Prism Johnson Ltd ("**M/s Prism**"), the Appellant in Appeal No. 2 of 2018, is a producer of cement having a plant with an installed capacity of 7 Million Tons Per Annum located at Satna, Madhya Pradesh. It is also respondent (No. 3) in Appeal No. 179 of 2018.

3. M/s. BLA Power Pvt. Ltd. ("**M/s BLA**"), the Appellant in Appeal No. 179 of 2018, is a generating company having a 90 MW (2 x 45 MW) thermal power Station at Niwari, Madhya Pradesh (M.P.). It is also Respondent No. (5) in Appeal No. 02 of 2018.

(i). In these two Appeals, **Respondent No.1/5, Madhya Pradesh Electricity Regulatory Commission** is a Statutory Body created under the Act and mandated for determining the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail within the State:

(ii). **Respondent No. 2/6,** State of Madhya Pradesh, Energy Department is to develop a financially viable and competitive

power sector that ensures quality power for all at affordable price is objective of the Energy Department.

(iii). **Respondent No. 3/1, Madhya Pradesh Power Management Company Limited (MPPMCL)** has been made holding company for all the DISCOMS of MP and acts as Nodal Agency.

(iv). **Respondent No. 4/2, Madhya Pradesh Poorva Kshetriya Vidhyut Vitran Company Ltd.** is an electricity supply company in MP looking after supply in eastern region of the State.

(v). Respondent No. 6/4, State Load Despatch Centre, Jabalpur, is the apex body to ensure integrated operation of the Power system in the State of MP.

4. FACTS OF THE PRESENT APPEAL(s):

4.1. M/s BLA has signed Memorandum of Understanding ("**MoU**") on 10.08.2007 and an Implementation Agreement ("**IA**") on 01.09.2008 with the Government of Madhya Pradesh ("**GoMP**") regarding setting up of a thermal power plant in the State of M.P.

4.2. The MoU and the IA provide GoMP to exercise the first right to purchase available 30% of the aggregate capacity of the M/s BLA's proposed project at the tariff determined by the Commission and additional 5% of the net power on annualized basis at a price equivalent to the Variable Cost only (excluding fixed charges). Pursuant to the exercise of the first right to purchase power,the following power purchase agreements ("**PPA**")were entered by M/s BLA:

i. On 05.01.2011, a PPA was executed between M/s BLA and M.P. Power Management Co. Ltd. ("**MPPMCL**") (earlier known as MP Power Trading Co. Ltd.) for sale of thirty percent (30%) of Installed Capacity of the Generating Station, for a period of 20

years (hereinafter referred to as the "**30% PPA**"). As per the 30% PPA, the Tariff for the capacity so supplied comprises of Capacity Charge, Variable Charge and any other charges as determined by State Commission.

ii. On 04.05.2011, a PPA was executed by M/s BLA and GoMP (hereinafter referred to as the "**5% PPA**"). By and under the said 5% PPA, GoMP nominated MPPMCL, to receive the 5% power (at variable cost) referred to in the IA, on its behalf.

The PPAs were operationalized and M/s BLA has been supplying power under these PPAs to MPPMCL

4.3. In June 2016, M/s Prism acquired 1,75,00,000 equity shares of M/s BLA, which corresponds to more than 26% shareholding in Unit-1 of M/s BLA's Generating Station. Simultaneously, M/s Prism and M/s BLA entered into a Power Supply Agreement ("**PSA**") on 07.06.2016 for supply of 25 MW of power generated by Unit-1 of M/s BLA's Generating Station whereby M/s Prism is contractually bound to procure more than 51% of the power generated by the said Unit-1 so as to qualify as captive consumers.

4.4. From 22.06.2016, M/s Prism commenced its captive consumption from the Unit-1 of M/s BLA

4.5. On 20.10.2016, M/s M. P. PoorvKshetra Vidyut Vitaran Co. Ltd. ("**MPPKVVCL**") directed M/s Prism to deposit an amount totaling to Rs. 8,66,99,753/- as CSS within 15 days treating consumption of power from Unit-1 of M/s BLA by M/s Prism as a supply to a consumer from a generator and not as captive consumption.

4.6. On 20.10.2016, M/s MPPKVVCL filed a petition being Petition No. 56/2016 before the State Commission, seeking clarification on various issues pertaining to change of status of an existing Generating Plant to a Captive Generating Plant and the applicability of **CSS** on M/s Prism's consumption from Unit -1 of M/s BLA.

4.7. In January, 2017 M/s Prism filed a Writ Petition WP No. 604 / 2017 before the Hon'ble High Court of Madhya Pradesh due the threat of disconnection and stand taken by MPPKVVCL.On 17.08.2017, the Hon'ble High Court of Madhya Pradesh vide its order granted liberty to M/s. Prism to approach the State Commission for redressal of its grievances.

4.8. On 21.08.2017 M/s Prism filed petition No. 36 of 2017 before the State Commission. The prayers under this petition are extracted below:

> *"(a) Direct Respondent No.3 not to initiate any coercive action against the Petitioner.*
>
> *(b) Hold that no cross-subsidy surcharge is leviable upon the Petitioner being captive user for the power sourced from Unit-1 of BLA Power Pvt. Ltd.'s Generating Station (Captive Unit) to the Petitioner's cement plant in Satna in as much as (and till such time) the said Unit-1 of BLA Power Pvt Ltd.'s generating station qualifies as a Captive Generating Plant qua the Petitioner under the provisions of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005;*
>
> *(c) Quash and set aside the letters dated 20.10.2016, 25.11.2016, and 07.12.2016 issued by Respondent no.3 to the Petitioner and the invoices whereby Respondent no.3 has unilaterally and illegally made a demand of cross subsidy surcharge of Rs. 26.62 crores on the Petitioner for the period from June'2016 to July' 2017, as the same are illegal, unlawful, contrary to law and arbitrary;*
>
> *(d) Direct Respondent No.3 to withdraw the impugned letters dated 20.10.2016, 25.11.2016, and 07.12.2016 and the*

invoices issued by Respondent no.3 to the extent of charging of cross subsidy surcharge on power sourced by Petitioner from its Captive Generating Plant i.e. Unit-1 of the Generating Station:

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

4.9. The State Commission through the impugned order held as follows:

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

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

4.10. In the impugned order, the State Commission has held that a power plant or a unit thereof cannot be an IPP (i.e. having a long term PPA) and CPP at the same time and that no such hybrid status is recognized under the Electricity Act, 2003 ("**Act**") or the Electricity Rules, 2005 ("**Rules**"). Consequently, the State Commission held that Unit-1 is not a CPP and therefore cross subsidy surcharge is payable on the power sourced by M/s Prism from M/s BLA's Unit-1.

4.11. On 02.01.2018 M/s MPPKVVCL issued two demand notices on M/s Prism for payment of Cross Subsidy Surcharge

5. The principle submissions on issues raised for our consideration in the instant appeal by Mr. Buddy A. Ranganadhan the learned counsel for the Appellants are as follows-

5.1. M/s BLA is a Special Purpose Vehicle ("**SPV**")having a Generating Station comprising 2 units of 45 MW each at village Newari, District Narsinghpur, Madhya Pradesh (hereinafter referred to as the "**Generating Station**"). Unit-1, that is, the first unit of the Generating Station ("**Unit -1**") has been in operation from 03.04.2012 and Unit-2 has achieved COD on 20.03.2017. The present dispute only relates to Unit-1.

5.2. Keeping in view its continuous and uninterrupted power requirement, M/s Prism invested in M/s BLA by acquiring 1,75,00,000 equity shares with voting rights on 6th and 7th June 2016. These equity shares, in terms of Rule 3 of the Electricity Rules, correspond to 30.46% of ownership in Unit-1 of the Generating Station. With the aforesaid investment, M/s Prism and M/s BLA also executed a PSA on 07.06.2016, identifying Unit-1 of the Generating Station for captive use of M/s Prism. As per the PSA, M/s Prism has contracted to consume 25 MW from said Unit-1, which amounts to around 64% of the power generated by the said Unit-1. M/s Prism has in fact consumed more than 51% of the power generation by the said Unit-1 in FY 2016-17, 2017-18, and is continuing to consume more than 51% power generated by the said Unit-1 in the current financial year. He submitted that therefore in terms of sections 2(8) and 9 of the Act read with Rule 3 of the Rules, by operation of law, Unit-1 of M/s BLA's Generating Station qualifies as a Captive Generating Plant ("**CGP**") with M/s Prism as the sole captive user.

5.3. There has never been any dispute by anyone that both criteria of 26% shareholding and minimum 51% consumption have not been satisfied. Hence, in terms of 4th Proviso to Section 42(2) of the Act, no Cross

Subsidy Surcharge ("**CSS**") is leviable on the power sourced by M/s Prism from Unit-1 of M/s BLA's Generating Station.

5.4. A bare perusal of the MoU and the IA establishes beyond doubt that neither the MoU nor the IA was entered into by M/s BLA as an "IPP", nor was the Generating Station envisaged for the exclusive benefit of MPPMCL or the GoMP. In fact, quite to the contrary, under Clause 12 of the MoU and Clause 3 of the IA, it has been categorically stated that GoMP does not in any manner guarantee purchase of power from the Generating Station.

5.5. The term "IPP" is a colloquial term and is conspicuous by its absence from the MoU and the IA. The Generating Station was never set up as an "IPP" as it could have never been set up as an "IPP" as there is no concept of an "IPP" recognized under the Act or the Rules made thereunder. If the Generating Station was set up as an "IPP" as has sought to be alleged by the Respondents, the MoU or the IA would have specifically said so.

5.6. Further, had there been any embargo in the Generating Station subsequently acquiring the status of a CGP, the MoU or the IA would have specifically provided for the same. However, no such embargo or restriction is provided for under the MoU or the IA. In any event, no such embargo could have been placed as any such embargo would be contrary to law.

5.7. As per PPA dated 05.01.2011, the Tariff for the 30% capacity supplied under the PPA comprises the Capacity Charge, Variable Charge and any other charges as determined by the State Commission.

5.8. In the Petition No. 10 of 2012 filed before the State Commission for approval of the 30% PPA, it has been demonstrated that the State of

MP was facing acute shortage of power for the past 5 years and therefore, GoMP entered into MoUs with private developers and nominated MPPMCL to receive GoMP's share of power from such private developers, to come out of the power deficit scenario in the State.

5.9. The provisions of the MoU, the IA, the 30% PPA, the 5% PPA and the records of Petition No. 10 of 2012 show that the Generating Station was neither envisaged as an "IPP", nor was it envisaged by M/s BLA exclusively for the benefit of GoMP. There was no embargo for the Generating Station (or a Unit thereof) to subsequently qualify as a CGP. It was submitted that M/s BLA is free to deal with its capacity not tied up ("Untied Capacity") under the 30% PPA and 5% PPA, i.e. 65% of each of the two Units of the Generating Station in any manner.

5.10. While referring to the Impugned Order, it is alleged that the State Commission failed to take judicial notice of the provisions of the Rules, which Rules provide the qualification criteria of a CGP.

5.11. He submitted that the following legal position emerges from of Rule 3 of the Rules:

5.11.1. The Rules provide the minimum criteria in relation to ownership, and consumption of a power plant to qualify as a CGP. The twin criteria prescribed under the Rules requires that in case of a power plant (i) not less than 26% of the ownership is held by captive users and (ii) not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use. The aforesaid twin criteria prescribed in the Rules are met in the present case.

5.11.2. It is not in dispute that, as regards Unit-1 of M/s BLA's Generating Station, in terms of Rule 3, the captive user (namely M/s Prism) owns and controls 30.46% of the equity share capital with voting rights. It is also without any dispute that the said captive user also consumes more than 51% of the aggregate electricity generated by the said Unit-1, determined on an annual basis.

5.11.3. Once the aforesaid twin tests are met, by operation of law the power plant (i.e. Unit-1) qualifies as a CGP. The said qualification and the status arising thereunder, cannot be taken away except in terms provided under the provisions of the said Rules.

5.11.4. Under the Rules, there is no restriction on the supply of balance 49% electricity generated that is available after meeting the minimum consumption requirement to qualify as a CGP. Section 9(1) of the Act specifically permits a CGP to supply power to a Distribution Licensee without any hindrance.

5.11.5. By virtue of Rule 3(1)(b) of the Rules, the law recognizes existence of a SPV for a Generating Station, where a unit or units of such station can be identified for captive use and not the entire Generating Station. The example and illustration given in Rule 3 is clearly applicable in the facts of the present case.

5.12. M/s BLA and M/s Prism have identified, on 07.06.2016 at the time of infusion of equity by M/s Prism (the captive user), that Unit-1 will be a CGP. Subsequently, on application of Rule 3(2), M/s Prism and M/s BLA have ensured that the consumption by the captive user is not less than 51% of the aggregate electricity generated in such plant,

determined on an annual basis. As a result, Unit-1 qualifies as a CGP in terms of Rule 3 of the Rules.

5.13. The finding of the State Commission relating to 'hybrid status' are contrary to the basic tenets of the provisions of the Act and Rules, that require consumption of at least 51% to qualify as a CGP. While meeting the required minimum 51% captive consumption, it is for the Generating Company to sell its non-captive capacity / power in the manner it so chooses. The Generating Company has a flexibility under the Act to sell such capacity/ energy on long term, medium, short term or day ahead basis. This ability of the Generating Company is in no manner restricted by the provisions of the Rules and/or the Act. The State Commission has failed to appreciate this basic/ fundamental aspect flowing from the statute.

5.14. By very nature of Rule 3(1)(a) of the Rules, there will be more than one kind of use/ supply from a CGP. The captive users would have to consume at least upto the prescribed limit of 51% and the balance electricity generated can be sold to any other person or entity, at the option of the Generating Company. There will always be a possibility of a mixed nature of use/ supply from a CGP and that the mixed nature of supply that is atleast 51% by captive users and balance to any third party does not confer "hybrid status". The conditions for a power plant to qualify as a CGP are provided in the Act and the Rules and that the manner of sale of balance power after meeting the minimum captive consumption does not and cannot have any effect on the status.

5.15. The State Commission wrongly relied upon the MP Grid Code. The MP Grid Code does not apply at all in the present case, for the reason that the conferment of captive status is in accordance with the provisions of the Act read with the Rules. The MP Grid Code only applies to manner of despatch and scheduling and nothing else and that the MP Grid

Code cannot in any manner grant or take away the captive status of a power plant if such power plant otherwise qualifies under the Rules. The MP Grid Code cannot add extra requirements to Rule 3 which are not in the Rules and then disqualify a CGP on that basis if the power plant otherwise qualifies under Rule 3.

5.16. The power to make regulations by a State Commission under section 181 of the Act specifically requires that such regulations have to be made consistent with the provisions of the Act and the Rules. If the MP Grid Code was to be read as imposing a condition in addition to Rule 3 of the Rules, it would be *ultra vires* on that ground alone and thus deserves to be ignored by the Tribunal.

5.17. The State Commission while relying on the definition of "IPP" in the MP Grid Code has not set out the definition of "CPP", contained in the same Grid Code. The definition of "CPP" as contained in the MP Grid Code, it is clear that the definition used in "captive power plant" is only "*For the purpose of Grid Code*" and not otherwise and therefore the same could not have been relied upon by the State Commission to interpret the Act and the Rules.

5.18. The existence of long-term PPAs does not in any manner disqualify Unit-1 of M/s BLA's Generating Station from being aCGP. He contended that once the twin test under Rule 3 is met, status of a CGP is conferred by operation of law andit is of no consequence whether for a quantum of power otherwise generated by the same plant has a long-term or short term PPA whose tariff is determined or not by the State Commission. There is no such criteria in the Rules that says that a CGP cannot have a long-term PPA for the 49% power that is available after meeting the minimum captive consumption requirement by the user.

5.19. While relying upon the judgement of the Apex Court in Tata Power Company Limited v. Reliance Energy Limited and Others, reported in (2009) 16 SCC 659, it is submitted that a generating company is completely delicensed and cannot be regulated. For sale of power to a distribution licensee, only the PPA of the distribution licensee is approved by a State Commission at the inception. Thereafter, the State Commission only determines tariff for sale of electricity generated by a Generating Company to a distribution licensee through a long term PPA under Section 62(1)(a) of the Act. In such a case, the State Commission has the jurisdiction to determine tariff based upon Section 61 principles of the Act and in terms of section 62 read with 64 of the Act. This does not make the Generating Company hostage to the whims and fancies of the State Commission contrary to law. He further submitted that in holding that M/s. BLA or its Unit-1 is a 'regulated entity', the State Commission has grossly violated not only the Act and the Rules made thereunder but also the above cited judgment of the Apex Court.

5.20. There is no restriction either in the Act or in the Rules relating to transfer of shares and/ or an existing power plant from acquiring the status of a CGP. The Judgment of this Tribunal in the case of Kadodara Power Pvt. Ltd. and Others v. Gujarat Electricity Regulatory Commission and Another, being Appeal No. 171 of 2008 dated 22.09.2009 is relied upon. This Tribunal clarified the legal position that the owner of a Captive Generating Plant need not be one who constructs/ sets up the plant and that the Act does not restrict, in any manner the acquisition and transfer of shares even after establishment of the generating plant for purposes of qualification as a Captive Generating Plant.

5.21. The law itself provides for a change in ownership rights of a Generating Company. The Rule 3 of the Rules clarifies that the status of a CGP is dynamic and dependent upon annual verification of twin tests regarding

ownership and consumption and a power plant, unable to fulfil the twin conditions in a particular financial year, may lose its character as CGP for that particular year. However, such a situation does not preclude it from satisfying the twin test in the next financial year and qualifying as a CGP.

5.22. There is no provision in law, which restricts a Generating Company from transferring its shares so as to allow acquisition by a person/ entity who then wishes to be a captive user of the Generating Station/unit. Moreover, to suggest restriction on transferability of shares in a generating business, which is otherwise delicensed would not only be against the provisions of the Companies Act but also against the core purpose of delicensing of generation business as per the EA, 2003. The ability to organize its affairs by way of sale of shares or otherwise is fundamental to any business operation.

5.23. The life of a Generating Station is between 25 to 30 years and that any suggestion that the business/ shareholding cannot be reorganised in this period is absurd. Thus, the impugned order deserves to be set aside and that it be declared that Unit-1 of M/s BLA is a CGP with M/s Prism as its captive user and consequently, no cross subsidy surcharge ("**CSS**") is leviable on power sourced by M/s Prism from the said Unit-1.

5.24. On behalf of Appellant M/s. Prism Mr. Amit Kapur, learned counsel while assailing the order of the State Commission, and while supporting the arguments made by Mr. Buddy Ranganathan submitted as follows:

5.25. The Impugned Order of the State Commission has rendered the statutory scheme of Captive Generation otiose, to thereby deny Prism its entitlements as a captive user and permitted Madhya Pradesh PoorvKshetra Vidyut Vitaran Co. Ltd. *("MPPKVVCL")*to unlawfully levy

and recover Cross Subsidy Surcharge from Prism contrary to the provisions of the 2003 Act and the 2005 Rules and binding judgments of superior courts.

5.26. The following statutory provisions are applicable or relevant for the present case:

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

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

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

d) The *4th proviso to Sections 39(2)(d)(ii), 40(c)(ii)* and *42(2)* of the Act mandate that no CSSis payable for availing open access on such captive consumption.

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

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

(ii) In case of a generating station owned by a Special Purpose Vehicle *("SPV"),* specific unit(s) of such generating station may be identified for captive use, provided that the twin criteria of ownership and consumption is satisfied only with respect to such Unit and not the entire generating station.

f) The National Electricity Policy *(Paras 5.2.24to 5.2.26)* and the Tariff Policy (*Clauses 5.12 and 6.3)* issued by the Central

Government under Section 3 of the Act also promote captive generation.

5.27. The judgment of this Tribunal in *Chhattisgarh State Power Distribution Company v. M/s. J P Saboo and* Others[2011 ELR (APTEL) 0388] to contend that captive generation and captive uses are to be encouraged under the Act.He also relied upon the judgment of this Tribunal in Kadodara to contend that the Act permits acquisition and transfer of shares even after the establishment of the generating plant for purposes of qualification as a CGP.

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

5.29. The judgment of this Tribunal in M/s *JSW Energy Ltd. v. Karnataka Electricity Regulatory Commission &Ors.,* Review Petition No.2 of 2013, is relied upon to contend that the Captive User is required to identify the unit/units intended for captive consumption at the time of induction of equity stage itself and not at the time when it is being set up.

5.30. At the time of equity infusion into the Generating Company, the unit has to be identified for captive sale, which has been done in the present case. He referred to the recitals of the Power Sale Agreement("*PSA*") between BLA Power and Prism in support of this argument.

5.31. The twin tests under Rule 3 are in fact satisfied by the Appellant/ Prism on account of the consumption and shareholding which are undisputedly substantiated as follows:-

(a) The Auditors Certificate issued on 10.06.2016; and

(b) Proof of consumption.

Consequently, no CSS can be levied on power consumed by Prism from BLA Power's Unit-1.

5.32. Prism had claimed that it is a Captive User of the power that it is sourcing from Unit 1 of BLA Power's generating station as a Captive Unit for consumption at the Appellant's cement plant in Satna District. In fact, the prayer clearly seeks a recognition that Unit 1 of BLA Power qualifies as a CGP qua the Prism in terms of provisions of Act read with Rule 3 of the Rules. Therefore, the observations of the State Commission regarding "part-IPP, part-CPP" are wholly fallacious.

5.33. The twin test laid down by the Act and Rules framed thereunder are duly satisfied in the present case and it was incumbent upon the State Commission to act within the framework prescribed by the Act and it could not have gone beyond it.

5.34. The State Commission has erred in repeatedly referring BLA Power as a Regulated Entity/ Regulated IPP/ Regulated/ Regulated Unit-1 and has exceeded the limits of its jurisdiction as in terms of the Act. He contended that the State Commission's attempt through the Impugned Order to license generation activity of the BLA Power by determining its ability to contract captive sale for the un-tied capacity is in teeth of the mandate expressed by the Hon'ble Supreme Court in the Tata Power Case.

5.35. The conduct of the State Commission and grave violation of principles of natural justice has been a matter of great concern. Apart from arguments relating to denial of opportunity of being heard, it is submitted that even after the grant of stay of the operation of the

Impugned Order by this Tribunal on 10.01.2018, the State Commission had initiated suomotu proceedings regarding the present Appeal (Appeal No. 2 of 2018), being Petition No. 21/2018 and listed the matter for hearing on 10.07.2018. Prism became aware of the aforesaid suomotu proceedings on perusal of the State Commission's website on 27.06.2018, and immediately filed IA No. 784 of 2018 seeking directions against State Commission not to proceed with Petition No.21/2018 till the final adjudication of the issues pending before this Tribunal. On 05.07.2018, this Tribunal directed the State Commission not to proceed with the Suo-moto Petition No. 21 of 2018 pending before it until the issues raised in Appeal No. 2 of 2018 are finally decided by this Tribunal. These sequence of events demonstrate the prejudiced mind and haste with which the issue has been dealt with by the State Commission to the prejudice of Prism.

5.36. It is contended that owing to the conduct of the State Commission, the Tribunal may decide the matter in terms of the facts and law instead of remanding the matter for fresh consideration as remanding the matter would ordinarily cause delay and prejudice to the involved parties.

6. The principal submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Respondents are as follows:

6.1. Mr. C.K. Rai, learned counsel appearing for the State Commission in Appeal No. 179 of 2018 submitted as follows:

6.2. The CSS is levied in terms of Section 42 of the Act to compensate the distribution company for the loss of cross subsidy (revenue) which the distribution company would have recovered from the subsidising consumers like the Appellant M/s Prism. The cross subsidy is utilized for subsidizing the retail consumers. The objective of the CSS is to keep the retail tariff reasonable and that the same has been affirmed by this

Hon'ble Tribunal in various judgements and the Supreme Court in Sesa Sterlite vs. Orissa Electricity Regulatory Commission &Ors., (2014) 8 SCC 444.

6.3. M/s BLA being a Generating Company has a subsisting power purchase agreement (PPA) with Madhya Pradesh Power Management Company Limited. The said PPA was entered upon pursuant to the Memorandum of Understanding and Implementation Agreement entered into between M/s BLA and State of Madhya Pradesh.

6.4. The Memorandum of Understanding ("MOU") between the M/s. BLA and the State of Madhya Pradesh was entered on 10.08.2007 pursuant to the policy of the State Government to encourage private power generation projects in the State of Madhya Pradesh. In terms of the MOU the generating company was assured all possible assistance and fullest cooperation in setting up the Project.

6.5. In pursuant to the MOU, an Implementation Agreement ("IA") was entered into between M/s BLA Power Ltd. and the State of Madhya Pradesh on dated 01.09.2008. Neither in the MOU nor in the IA there was any reference to the proposed generating station being set-up as a captive generating station. On the other hand, the MOU and the IA clearly provide that the generating company shall obtain necessary approvals for sale of power to its consumers and/ or licensees. Further, as per clause 4.1.3 of the IA,M/s BLA also agreed to pay wheeling charges and such other applicable charges as determined by the State Commission from time to time for the actual power wheeled.

6.6. The project was proposed to be set-up as a generating station which may or may not have a power purchase agreement with the distribution licensee in the State of Madhya Pradesh, which would supply power to entities (consumers or licensees) within or outside the State of Madhya

Pradesh. Upon payment of wheeling charges and other charges as determined by the Commission power would be wheeled by the respective licensee to the destination of its use.

6.7. The clause 12 of the MOU and clause 3.1(iii) of IA provide MPPMCL to exercise the first right to purchase available 30% of the aggregate capacity of M/s BLA's proposed project at the tariff determined by the Commission and additional 5% of the net power on annualized basis at a price equivalent to the Variable Cost only (excluding fixed charges). Pursuant to the exercise of the first right to purchase, a power purchase agreement was entered into between MPPMCL and the generating company.

6.8. The PPA elaborately discusses rights and obligations of the parties i.e. M/s BLA and MPPMCL and the Discoms. Clause 10.1.1 of the PPA clearly envisages a two part tariff comprising of the Capacity Charge and Variable Charge.

6.9. The applicable tariff regulations notified by the MPERC is Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 ("MPERC Generation Tariff Regulations"). Regulation 3 of the above mentioned Regulations clearly provides that it applies to generating station other than those based on renewable sources supplying power to distribution licensee.

6.10. The other set of regulations which apply to generating stations other than those based on renewable sources is Madhya Pradesh Electricity Regulation Commission (Power Purchase and other matters with respect to conventional fuel based captive power plants) Regulations, (Revision-I) 2009 ("MPERC Captive Regulations"). While tariff under the MPERC Generation Tariff Regulations are two part tariff determined in

accordance with the norms laid down in the Regulations, under the MPERC Captive Regulations tariff for sale of firm power is fixed in the Retail Tariff Order.

6.11. On reading the MPERC Generation Tariff Regulations and MPERC Captive Regulations together it is clear that either an IPP (or a complete unit thereof) or a CPP (or a complete unit thereof) can have agreement for sale of power with the Distribution Licensee in the State of Madhya Pradesh. However, an IPP and a CPP would not be similarly treated for the purposes of tariff payments. Therefore, a generating station (or a complete unit thereof) can either be an IPP or a CPP. In other words, if a generating station or a complete unit thereof is being treated as an IPP and is subject to the provisions of the MPERC Generation Tariff Regulations; it cannot simultaneously treat itself as a CPP also. As such, unit of an IPP cannot be treated as a hybrid unit of an IPP and CPP. A part of the unit cannot be treated as a CPP.

6.12. On perusal of the provisions of the Act and the Rules in light of the provisions of the General Clauses Act, it is clear that the "set up by any person" "primarily for his own use" appearing in the Act and qualifications "not less than twenty six percent of the ownership" and consumption of "not less than fifty one percent of the aggregate electricity generated" provided in Rule 3 of the Rules must "have the same respective meanings". Therefore, the twenty six percent ownership requirement and fifty one percent consumption requirement would have to be interpreted to mean the requirements to be met at the time of setting up of the generating station.

6.13. The reliance of M/s BLA on the Kadodara Judgment is entirely misplaced. In the Kadodara Judgment, this Hon'ble Tribunal held that a captive Generating Station would not lose its status as a CPP merely because Captive Users who originally set-up the power plant have

exited and new Captive users have come-in. It is submitted that the facts before the Hon'ble Tribunal in Kadodara were totally different as power plant involved in those petition were not having a PPA (like in the present case) binding themselves for first right to purchase to the GoMP or its nominated agencies i.e. distribution licensees. The above judgment is also not dealing with the issue that whether a part capacity of a power plant/unit can be declared as captive use and conferring dual status of IPP and CPP to a unit of the generating plant. The judgment primary dealt with the transfer of ownership of a captive generating plant only. Therefore, the judgment in Kadodara cannot be stretched to argue that an IPP can after more than 4 years of commercial operation as an IPP can change its status to a CPP.

6.14. The principles of natural justice were fully complied with by the State Commission and that full and equal opportunity was given to all parties.

6.15. Mr. M.G. Ramachandran, learned counsel appearing for the East Discom, made the following submissions:

6.16. At the outset, it is fairly conceded that the issue in the present case is not the satisfaction or non-satisfaction of the conditions of the equity share holding and the quantum of consumption on annual basis as per Rule 3 of Electricity Rules, 2005. But the issue relates to the effect of the generating station or generating unit being already been identified by the generator (in the present case by M/s. BLA) unequivocally as non-captive generating station or generating unit and has taken advantage based thereon.

6.17. M/s. BLA has duly elected to and identified the generating unit as Independent Power Producer {IPP} and as non-captive power plant and based thereon to enter into PPA with Madhya Pradesh Power Management Company Limited (MPPMCL), the holding company of

Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Ltd. The PPA is for supply of electricity to the distribution licensees in the State of Madhya Pradesh on a long term basis i.e. for a period of 20 years at a tariff admissible for non captive generating Unit. This tariff payable to the Generator is significantly more than the Tariff which would have been payable had the generator approached MPPMCL based on the representation that the 45 MW unit is a captive power plant. The core issue is whether M/s. BLA can thereafter change its stand and subsequently claim the generating unit declared as non captive to Captive Generating Unit after having induced the MPPMCL and the distribution licensee MPPKVVCL to alter their position to pay tariff as a rate much higher than the tariff admissible for a captive generating unit/plant supplying surplus electricity to MPPKVVCL.

6.18. A generating company can establish operate or maintain the generation station or a generating unit in a generating station as a Captive Power Plant by identifying the captive users and by fulfilling the conditions specified in Rule 3 of the Electricity Rules, 2005. It is the choice of a person to establish a generating station or a generating unit as a Captive Power Plant with the objective of using the electricity primarily for consumption of the identified captive users or to establish a generating station or a generating unit as a non captive, namely, to undertake business of generation and sale of electricity to third parties and not for the purpose of consumption by the captive users.

6.19. A generating company or a generating unit established as a captive generating plant/unit can sell surplus electricity over and above the electricity captive used to any person including the licensees, as specifically recognised and provided under Section 9 of the Act. It is, therefore, open to a generating company establishing a captive generating station or a captive generating unit to sell the surplus capacity to the distribution licensees in the area where the captive plant

is situated or to any other licensee including a Trading Licensee or even to an end-user consumer other than the persons who qualifies as a captive user of electricity from the generating unit subject to the regulations framed & notified in this regard.

6.20. In exercise of the powers under Section 181 read with the other applicable provisions of the Act, the State Commission has been notifying from time to time the MPERC Generation Tariff Regulations in regard to the terms and conditions for purchase of electricity by a distribution licensee from the non-captive generating station. The MPERC Generation Tariff Regulations relevant for the present case in regard to purchase of electricity by MPPMCL on behalf of the distribution licensees in the State of Madhya Pradesh from M/s. BLA which commenced commercial operation in the year 2012 are:

i. Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulation, 2009;

ii. Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulation, 2012; and

iii. Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulation, 2015.

6.21. The State Commission has also notified an independent and separate Regulation, namely, the Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to Conventional Fuel Based Captive Power Plants) Regulations (Revision-1), 2009 specifically dealing with the procurement of surplus generation

capacity of captive power units in the State. The State Commission initially notified on 29.09.2006 and thereafter the said revised Regulation in the year 2009.

6.22. It is contended that a generating company has 2 options viz.:

6.22.1. To establish a generating station or a generating unit identifying the same as Captive Power Plant primarily for the use of its captive users and sell the surplus capacity from such generating units or generating station to the distribution licensees in the State of Madhya Pradesh. In such a case, the tariff terms and conditions shall be governed by the Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to Conventional Fuel Based Captive Power Plants) Regulations (Revision-1), 2006 or 2009, as the case may be.

6.22.2. Treat the generating station or the generating unit as a non-Captive Power Plant and offer sale of such capacity as the generating company may decide to the distribution licensees under Long Term Power Purchase Agreement. In such a case the tariff for such generation and sale of electricity was to be determined by the State Commission in accordance with the MPERC Generation Tariff Regulations 2005 or the subsequent MPERC Generation Tariff Regulations. In such a case the provisions of Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to Conventional Fuel Based Captive Power Plants) Regulations (Revision-1), 2006 or 2009 shall not have any application. In particular, the quantum of tariff shall not be restricted to the amount that may be determined by the State Commission for the purpose of purchase of surplus capacity from the Captive Power Plants.

6.23. There is a rationale for differentiating the purchase of electricity by a distribution licensee from a generating company which has not been identified as a Captive Power Plant and on a long term basis from such generating company in comparison to the generating station or a generating unit identified as a Captive Power Plant. In the latter case, the Captive Power Plant which is primarily established for the purpose of captive user is given a privilege of selling the surplus capacity to the distribution licensees. In such a case, the distribution licensee should not be required to pay the regular tariff which is determined as per the MPERC Generation Tariff Regulations 2009 or the subsequent MPERC Generation Tariff Regulations applicable to a non-captive generating station or the generating units.

6.24. It is submitted that a generating company establishing a generating station or a unit thereto has to elect which of the above two options it wishes to exercise.

6.25. The State Commission has been passing the Orders in terms of the above Regulations notified by it approving the tariff for sale of electricity by a generating company which has established a non-captive generating station or a generating unit and for a generating company which has established a Captive Power Plant or a captive generating unit separately in the Tariff Orders passed by the Commission from time to time since the year 2007, when M/s. BLA had approached the distribution licensees in the State to sell the power generated from its generating plant. M/s. BLA had signed the Memorandum of Understanding dated 10.8.2007 and the Implementation Agreement dated 01.09.2008 with the Government of Madhya Pradesh and the Power Purchase Agreement dated 05.01.2011 with MPPMCL during the existence and operation of the two sets of MPERC Generation Tariff

Regulations dealing with the sale of capacity from the generating station to the distribution licensees namely, either –

i. A generating company claiming a captive status; or
ii. A generating company not claiming captive status.

6.26. The PPA dated 05.01.2011 was entered into by the Appellant representing itself as a power generating company. There was no representation that any part of the generating station will be a Captive Power Plant. M/s. BLA did not implement the PPA entered into on 05.01.2011 as a Captive Power Plant till 31.03.2015. M/s. BLA was selling electricity to other also as a power generating company and not as a Captive Power Plant.

6.27. M/s. BLA had consciously elected for sale of electricity from its generating capacity to MPPMCL as a non-captive generating company, for which the approval of the tariff for generation and sale of electricity in terms of Sections 61 and 62 of the Act under the MPERC Generation Tariff Regulations 2005 and the subsequent MPERC Generation Tariff Regulations (M/s. BLA did not opt for sale of surplus capacity from a Captive Power Plant treating the generating station or the generating unit as primarily for the captive use).

6.28. While referring to and relying upon the terms of the PPA, it is contended that the provisions of the PPA, which is valid and enforceable for a period of 20 years, are clearly inconsistent with the generating station or the generating unit being claimed as a Captive Power Plant. M/s. BLA therefore had consciously elected to consider its generating station or the generating unit as a non- Captive Power Plant for the entire duration of the PPA, i.e., for a period of 20 years from the effective date and had sought for the tariff based on the generating station and the generating unit being not a Captive Power Plant or a captive generating unit under

the provisions of the Act read with the statutory MPERC Generation Tariff Regulations notified by the State Commission. If M/s. BLA had represented that it will have the option to project at any time during the duration of the PPA that the generating station or any of its generating units will be designated as captive power plant/unit, the tariff applicable would have been a generic tariff to be determined by the State Commission from time to time in accordance with MPERCCaptive Regulations and not the tariff applicable to non- captive generating company.

6.29. In terms of the applicable Regulations notified by the State Commission in Madhya Pradesh, M/s. BLA was entitled to a cost plus determination of tariff only if its status was a power generating company i.e. a non-Captive Power Plant. In the case of non-Captive Power Plant the applicable Regulations is the MPERC Generation Tariff Regulations. In contrast in the case of Captive Power Plant the tariff payable for sale of surplus power to the distribution companies is governed by the MPERC (Power Purchase and other matters with respect to the Conventional Fuel Based Captive Power Plant) Regulations, 2009. The MPERC Captive Regulations provides that the tariff will be as determined by the State Commission in the Tariff Order of the distribution licensees from time to time. The said tariff determined by the State Commission for the Captive Power Plants is in the region of Rs 2.22 to Rs 2.45/unit and not the cost plus tariff as claimed by M/s. BLA.

6.30. M/s. BLA had elected to be a power generating company and a non-Captive Power Plant for the entire duration of the PPA and thereby taken advantage of the determination of tariff of an amount much higher than Rs 2.22 to Rs 2.45/unit (all inclusive) allowed to a Captive Power plant selling surplus electricity to the distribution companies. Having taken the advantage, M/s. BLA is stopped from raising any issue that it is a Captive Power Plant. If M/s. BLA had elected to be a captive power

plant then there was no question of the MPPMCL/MPPKVVCL entering into the PPA providing for much higher Tariff than what is applicable to captive power plant for sale of surplus power.

6.31. M/s. BLA having so elected and further having secured the advantage of the tariff for generation and sale of electricity to MPPKVVCL on the basis of the generating station and the generating unit being non-captive (much higher tariff than the tariff provided under the MPERC Generation Tariff Regulations applicable to sale of surplus electricity from a captive generating station or a captive generating unit) is estopped from claiming that during the duration of the PPA dated 05.01.2011, any captive status to its power generating station. Further, M/s. BLA duly and consciously waived all the right to claim any part of the capacity available under the captive status, namely, primarily for use by the captive users. Thus, after waiving the right to be a captive generator and thereby entering into a long term PPA with MPPMCL/MPPKVL, M/s. BLA now cannot seek to reclaim the status of Captive Generator.

6.32. MPPKVVCL relies upon various judgments on the doctrine of election, estoppel and waiver in support of his arguments. He submitted that the right to be treated as a Captive Generating Plant and Captive user in terms of Rule 3 of the Electricity Rules 2005 is a statutory privilege granted. It can always be waived by a generator, particularly when a generator wishes to sell electricity to Distribution Licensee at a price more than what is admissible if the generator exercises the right to be treated as a captive generator. In such a case, the generator (M/s. BLA) would have been entitled to tariff as applicable to the surplus sale of electricity from a captive power plant and not to the much higher tariff agreed to in the PPA. There is no public interest involved in allowing M/s. BLA any higher tariff than what is provided in the various tariff

orders of the State Commission for surplus electricity sold by a captive generating plant.

6.33. MPPMCL believing / relying upon the representation of M/s. BLA had entered into the long term PPA with M/s. BLA on such terms as applicable to a non-captive generation unit / IPP. In case, M/s. BLA would have represented itself to be Captive Power Plant, MPPMCL would have entered into a PPA with BLA for supply of power at a rate applicable to supply of surplus power from Captive Plant as per MPERC Captive Regulations. Thus, M/s. BLA first identifying Unit-1 as an IPP and thereby securing a long term PPA with MPPMCL for supply of power at a rate applicable to supply of power to Discoms from a non-captive generating station/unit is estopped from now identifying its Unit-1 as an CPP and thereby seek privilege of non-payment of Cross Subsidy Surcharge for supply of power to M/s. Prism.

6.34. The Discom relies upon orders passed by the State Commission between 2012 and 2015 to contend that M/s. BLA has been taking an inconsistent and contradictory stand in regard to the status its generating units and the generating station, while in some proceedings M/s. BLA claims along with M/s. Prism that the Generating Unit No-1, is a Captive Power Plant or a captive generating Unit. Simultaneously in other respects, M/s. BLA has been claiming that the generating units established by it are generating station and M/s. BLA is acting as an Independent Power Producer selling electricity.

6.35. The claim of captive status and captive use of electricity is not admissible and the sale of electricity by M/s. BLA to M/s. Prism should be treated as a sale by a generating company to a third party and subject to payment of Cross Subsidy Surcharge under Section 42 (2) of the Act read with the applicable Regulations.

6.36. It is submitted that though initially raised an argument relating to non-satisfaction of the 26% equity criteria stipulated in Rule 3 but subsequently the argument was given up and the same was not being disputed.

6.37. During the duration of the PPA dated 05.01.2011 entered into between M/s. BLA and MPPMCL, M/s. Prism cannot in any manner seek the status of a captive user and M/s. BLA cannot claim to be a captive generator. M/s. BLA cannot take advantage of both the positions, namely, as an Independent Power Producer having a PPA for sale of electricity to MPPMCL or to third parties and at the same time as a captive generator in regard to the sale of electricity to Prism. While the sale of electricity by M/s. BLA to M/s. Prism is not being questioned, it is the obligation to pay the Cross Subsidy Surcharge and other applicable charges as exist.

6.38. M/s. Prism cannot be given the benefit of captive user notwithstanding its equity shareholding in M/s. BLA and notwithstanding its claim for consumption of electricity to the extent of 51% on annual basis from Unit No. 1, in view of the election done by M/s. BLA that it is a generating company selling electricity to MPPMCL at a rate other than the rate specifically provided for sale of surplus electricity by Captive Power Plant. M/s. Prism can be considered as a captive user if, and only if the primary purpose of setting up and/or maintaining the generating unit is for generation and supply of electricity to a captive user. If M/s. BLA had decided irrevocably on the status of the generating station/unit to be a non-captive for the entire duration of the PPA and taken advantage of the higher tariff, the primary purpose of generation and sale of electricity is, to make available electricity to the distribution company at a regular tariff and not at the tariff applicable to Captive Power Plant as per Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to

Conventional Fuel Based Captive Power Plants) Regulations (Revision-1), 2006 or 2009, there cannot be any claim for non-applicability of Cross Subsidy Surcharge.

6.39. The issue is not of the nomenclature of the generating station being call as an Independent Power Producer (IPP) which is generally used for classification of the non-captive generating station but in substance, the generating station was established by M/s. BLA for a long term supply (20 years) of electricity to the distribution licensees at a regular tariff and not opting for a tariff provided for sale of surplus capacity of a Captive Power Plant.

6.40. In Appeal No. 2 of 2018, Mr. Alok Shankar, learned counsel appearing on behalf of the State Commission submitted as under:

6.41. The Electricity Policy provides that independent power plant and captive power plants were always considered as separate and distinct modes of capacity addition. It was clear that captive generating station would be a brain child of one or more industries having large power requirements. Since, Captive generating stations were intended at leading to quick addition to the generation capacity and decentralised generation near the load centre; there were certain incentives available to the captive user (who originally set-up the plant) under the Act. The incentive under the Act available to a captive user is exemption from payment of cross subsidy surcharge. The rationale for such exemption obviously is the generation capacity addition in the county and reduced losses due to the fact that the generation is likely to be close to the place of consumption.

6.42. The issue requiring adjudication by this Tribunal is whether equity investment in an IPP by a large consumer can change the status of the IPP to a captive power plant (the **"CPP").** In the event the answer to the

above question is in affirmative what is the consequence of such changed status on the existing arrangements for sale and purchase of power executed prior to the date of investment by the large consumer.

6.43. The Appellant's argument that the moment the twin-tests under Rule 3 are satisfied it would become a captive user and be entitled to all benefits available to a captive user is misconceived. He relied upon the judgment of the Hon'ble Apex Court in Monnet lspat & Energy Ltd. vs Union of India &Ors (Civil Appeal No.18506-18507 of 2017 Decided on 13.11.2017) which explained the inter play between the Act and Rules on the issue of captive generating station. The Supreme Court held that Rules promote the rationale and essential qualification laid down in the Act itself. The primary test to be satisfied before any power plant can be declared as a captive generating station or not, is the essential qualifications required under the Act and not the Rules. The essential qualifications prescribed under the Act is *"power plant set up by any person to generate electricity primarily for his own use "*

6.44. The requirement specified in Section 2(8) and 9 of the Act are the substantive provisions of law and must be met at the threshold before the requirement of the Rules are considered. A bare perusal of Rule 3 which opens *with"(]) No power plant shall qualify as a 'captive generating plant ' under section 9 read with clause (8) of section 2 of the Act unless"* would also show that Section 2(8) and Section 9 of the Act are threshold requirements and must be met before requirements of the Rules are considered. The requirement of the Rules regarding "Annual Basis" cannot be interpreted in a manner to render the substantive provisions of the parent legislation as otiose.

6.45. The Captive Generation was a method of quicker addition of generation capacity in the country. It is not a mode of structuring power purchase

from an independent power plant by making upfront payment, structured as equity investment in an existing power plant.

6.46. It is submitted that in the event such structuring of power purchase is permitted, the same would result in catastrophic impact on the distribution licenses ability to serve the subsidized categories of consumers (agricultural and retail consumers) as it will be open to all industrial and high tension consumers to circuitously either individually or collectively purchase 26% share in an existing power plant and take supply of power through open access without paying cross subsidy surcharge. The same shall lead to tariff shock to the subsidised category of consumers without any benefit to the system at large which is expected when a power plant is set-up by a person having captive consumption.

6.47. M/s. BLA entered into a MOU with the State of Madhya Pradesh on 10.08.2007. Neither in the MOU or any documents executed pursuant to the MOU any reference to M/s. Prism was made. The intent in the MOU was always to establish an independent power plant and not a captive generating station for *"own use".* In furtherance of the MOU an Implementation Agreement **("IA")**was entered into on 01.09.2008. The IA contained detailed provisions of rights and obligations of the parties and all obligations in relation to development of the project were assumed by M/s. BLA. There was no express or implied reference to the plant being developed as a captive generating station for M/s. Prism. It is submitted that in the event at the time of execution of the MOU and the IA, the proposed generating station was identified as a CPP, the State would not have the power to demand a share in the total generation.

6.48. M/s. BLA entered into a power purchase agreement dated 05.01.2011 **("PPA").** As per the said PPA, M/s. BLA was obliged to sell 30 % of the

power stations installed capacity. Tariff for such sale had to be two part tariff comprising of Capacity Charge, Variable Charge and any other charge determined by MPERC as per norms contained in MPERC Generation Tariff Regulations.

6.49. At the time of signing of the PPA also two mutually exclusive arrangement for sale and purchase of power from a generating station to the distribution licensee at a tariff not determined through competitive bidding were in force. First wherein an independent power plant sold power to the generating station at tariff determined and the second being the regulations governing sale of surplus power of a captive generating station at a tariff specified in each retail supply tariff order. It was submitted that the regulations applicable to an independent power plant selling power to a distribution licensee is regulated by the MPERC is Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 **("MPERC Generation Tariff Regulations").**

6.50. The other set of regulations which apply to generating stations other than those based on renewable sources is Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to conventional fuel based captive power plants) Regulations , 2006 **("MPERC Captive Regulations"). The tariff under the MPERC Generation Tariff Regulations are two part tariff determined in accordance with the norms laid down in the Regulations. Under the MPERC Captive Regulations tariff for sale of firm power is fixed in the Retail Tariff Order.**

6.51. While entering into the **PP**A, by submitting that it would be entitled to two part tariff, M/s. BLA acknowledged that it was not a captive generating station. Therefore, there was no dispute that M/s. BLA considered itself as an **IPP** and thus entitled to two part tariff. Even after

execution of agreement between M/s. BLA and M/s. Prism for sale and purchase of shares, M/s. BLA has continued to treat itself as entitled to two part tariff. He relied upon the judgment of this Hon'ble Tribunal in Appeal No 201 of 2017 decided on 19.04.2018 (BLA Power Pvt. Ltd vs State of MP &Ors) in this regard.

6.52. The MPERC Captive Regulations existed at time of signing of the PPA, and therefore M/s. BLA was aware of different set of regulations governing relationship between an IPP and a distribution licensee and CPP and a distribution licensee. While referring to the power sale agreement executed between M/s. BLA and M/s. Prism, he submitted that recital 'J' mandated that *"As per the provisions of the Electricity Act and other Applicable Laws, the Untied Capacity of Unit-I has been identified for captive use to PCL in accordance with the terms of this Agreement."* The intent of the generating company was that part capacity which is being used to supply power to MP Discom's shall continue to be an IPP and thus entitled to two-part tariff under the applicable MPERC Generation Tariff Regulations and the untied capacity shall be captive to M/s. Prism, entitling M/s. Prism to claim waiver of cross subsidy surcharge. Such a position is not in accordance with the provisions of the Act and the Rules and therefore in light of such peculiar situation MPERC was constrained to observe that part capacity of a Unit as IPP and part capacity the same unit being treated as a CPP (hybrid generating station) is not permissible in the Act and the Rules.

6.53. The Act and the Rules (more specifically captured in Illustration under Explanation 2 to Rule 3 of the Rules) allow an entire generating station or a unit to be declared as captive. Neither the Act nor the Rules contemplate that a generating company, can treat a single unit of the generating station as both an IPP and as a CPP.

6.54. While relying on the doctrine of election, it is submitted that the Act and the Rules (more specifically captured in Illustration under Explanation 2 to Rule 3 of the Rules) allow an entire generating station or a unit to be declared as captive. Neither the Act nor the Rules contemplate that a generating company, can treat a single unit of the generating station as both an IPP and as a CPP. in the State of Madhya Pradesh benefits available to an IPP and CPP are separate. Since, M/s. BLA was set-up as an IPP and continues to enjoy the status of an IPP the claim for waiver of cross subsidy surcharge is clearly untenable and was rightly rejected by MPERC.

6.55. M/s. BLA was aware of two sets of regulations regulating tariff of a generating company selling power to a distribution licensee. M/s. BLA elected to be governed by the regime governing IPPs. Therefore, M/s. BLA is now estopped from declaring itself as a CPP and consequently the alleged "captive user" cannot claim exemption from payment of cross subsidy surcharge.

6.56. The reliance on the Kadodara Judgment is entirely misplaced in as much as in the said judgment, this Tribunal held that a captive Generating Station would not lose its status as a CPP merely because Captive Users who originally set-up the power plant have exited and new Captive users have come- in.

6.57. The Kadodara Judgement is a precedent on transfer of ownership of a CPP and not whether IPP can be subsequently converted as a CPP. The judgment in Kadodara cannot be stretched to argue that an IPP can after more than 4 years of commercial operation as an IPP can change its status to a CPP. As laid down by this Hon'ble Tribunal in Kadodara "set-up" as used in Section 2(8) and "construct , maintain or operate" as used in Section 9 are equal and therefore "own use" as used in Section 2(8) should also be read into Section 9. He submitted that Kadodara is

not an authority on the point that IPP to CPP status is changeable depending upon who is procuring power from the generating station. It only lays down that captive users of a CPP may change without losing the CPP status.

6.58. Mr. Ashish Bernand, learned counsel appearing on behalf of MPPMCL as well as SLDC, while adopting submissions made by Mr. Ramachandran, submitted as follows:

6.59. The primary issue which arises for consideration of this Tribunal on the basis of facts and submissions made in this case and in the connected Appeal No. 179/2018, is formulated as under:

6.60. A Generating Company (M/s. BLA) which has established its Power Plant (Units) as "Generating Company" under the provisions of section 7 of the Act can freely convert its Power Plant (Unit-1 and/or Unit-2) into a Captive Generating Plant at a later date under section 9 of the Act read along-with section 2(8), 2(28 and 2(49) of the Act; and

6.61. Once a Generating Company (M/s. BLA) has established its Power Plant (Units) and entered into a Power Purchase Agreement with the Distribution Licensee for that unit (Unit-1) and got the tariff determined from appropriate Commission under section 62, then can that Unit-1 of the Generating Company (M/s. BLA), be converted to be a part IPP (GenCo) and part CPP?

6.62. MPPMCL has a PPA dated 05.01.2011 BLA for 20 years. Under this PPA, MPPMCL has been procuring 30% of Installed Capacity of M/s. BLA (2 x 45 MW) Generating Station (non-Captive Power Plant) at Gadarwara upto a maximum of 27 MW. The tariff (Fixed and Variable Charge) for procurement of this Contracted Capacity is determinable by Hon'ble MPERC under section 62 of the Act.

6.63. Further, the State of MP has another PPA dated 04.05.2011 with M/s. BLA till the life of the Power Plant. Under this PPA, Energy equivalent to 5% of electrical output of BLA's Generating Station (non-Captive Power Plant) has to be made available at all times. The State of MP has nominated the MPPMCL to receive, on behalf of State of MP, the aforesaid five percent (5%) net power at Variable Charges/Cost to be determined by State Commission.

6.64. The PPA (dated 05.01.2011) executed is in line with the Model PPA and has been approved by the State Government and the Energy Department vide letter No.1689 dated 24.02.2011 considering the Generating Plant as non-Captive Power Plant.

6.65. It is further submitted that the PPA dated 05.01.2011 was approved by the MPERC under Section 86(1) (b) on 07.09.201 in Petition No.10 of 2012 considering the Generating Plant as non-Captive Power Plant. The order was further modified vide order dated 07.02.2013 for Petition No.85 of 2012.

6.66. Under the provisions of the Act the same Unit-1 of M/s. BLA which has been identified, established, operated and maintained as a GenCo (non- captive power plant), cannot be treated or converted into Captive Power Plant or part captive and part non-Captive Plant (GenCo).

6.67. A generating company cannot designate or have the same unit as a generating station/plant on the one hand and then classify the same unit (Unit-I) as a captive plant at a later date. It was submitted that the generating plant and a CPP are two distinct and different entities under the provision of the Act read along-with the relevant regulations of the State Commission. In this regard, section 2(8) and section 9 of the Act are extremely important. It was further submitted that as per the

provisions of the Act, the captive generating plant and the generating station of a generating company are two distinct and different entities, which are given similar treatment only for the purpose of regulation of electricity through the grid.

6.68. The factors which govern the establishment and operation of an IPP (Non-Captive Genco) are completely different and separate from that which governs the establishment and operation of a CPP. It is submitted that incentives and privileges available to a CPP under the Act are not available to an IPP. This is the clear and express object and purposes of the Act and hence a "Captive Power Plant" has to remain captive for the entire plant (Unit) and cannot be part captive and part IPP. In the instant case, M/s. BLA is claiming part captive and part IPP/Non-Captive GenCo status of the same Unit-I and the same is clearly not in accordance with the provisions of the Act.

6.69. The Power Plant (Unit-1) set-up by M/s. BLA at the time of execution of the PPA with MPPMCL and execution of MoU with the State of M.P. is as an IPP/Non-Captive GenCo, without there being any intention of using the same as a Captive Power Plant, and, therefore, no change in status as claimed by the is possible.

6.70. The submissions of the Appellants are legally incorrect and also commit hara-kiri with the Act, as the terminology of Section 7 and Section 9 of the Act is completely different and that a careful examination of Section 7 and Section 9 of the Act read along with Section 2 sub- section (28) and sub-section (49) creates a distinction between who can "establish" a "Generating Company" and who can "construct" a "Captive Power Plant".

6.71. It is submitted that the Act does not give permission to a "Generating Company" under Section 9 to "construct, maintain or operate" a Captive

Power Plant. He contended that under Section 7 of the Act, the permission to "establish", operate and maintain a Generating Station is given to a "Generating Company" while under Section 9 the permission to "construct", maintain or operate of a Captive Generating Plant is given to a "person". To become a "Generating Company" there should be a Company, body corporate, association or body of individuals which owns or operates or maintains Generating Station. In other words, every Generating Company is required to own a Generating Station to qualify as a Generating Company under the definition clauses whereas a person can be any company or body corporate or association etc but is not required to own a Generating Station. Therefore under the Act there is a clear distinction created between who can establish a Generating Company and who can construct a Captive Generating Plant and that the permission given to a "Person" under section 9 to construct a CGP is not and cannot be equated to be a blanket permission under the Act to a Generating Company to freely convert its Generating Units into a Captive Generating Plant at a later date.

6.72. Section 7 grants the permission to a Generating Company to establish and operate without a license whereas Section 9 grants a special and limited permission to only a "Person" to "construct, maintain or operate" a CGP for primarily for his own use. Section 9 does not give any permission to a Generating Company to also "construct, operate and maintain" a Captive Power Plant. The permission under section 7 given to a Generating Company to establish and operate without license does not *ipso facto* lead or convert into a permission also under Section 9 to become a Captive Power Plant at any later date, as the language of Section 9 is quite different. He also attempted to distinguish between the terms "establish" and "construct" used in the Act to contend that "establish" implies something of a permanent character while "construct" is only the act of building and need not be permanent.

6.73. The distinctions in language under Section 7 and Section 9 of the Act highlight the intention and purpose of the legislature, wherein the legislature gave flexibility to a person to construct a Captive Power Plant as it is primarily for its own use and once the own use is over the person can dismantle the Captive Power Plant as he does not require it primarily for its own use. However, such a liberty is not given to a Generating Company and the Generating Station established by the Generating Company is to be there as a permanent unit so as to supply power to the public at large on long term basis.

6.74. Under the Act, a Generating Company is only permitted to establish, operate and maintain without license and it does not have any statutory right under Section 9 to convert that unit into a Captive Power Plant as the permission to construct, operation and maintain a Captive Power Plant is given only to a person under the Act.

6.75. Further, the submissions made by Mr. Ramachandran as regards the applicability of the MPERC Generation Tariff Regulations or the MPERC Captive Regulations, and the doctrine of election are adopted.

6.76. On a without prejudice basis, if this Tribunal was to hold on the larger question that a Generating Company can freely convert itself into a Captive Power Plant and that there is no statutory embargo on the same even then the consequential question that would arise further for adjudication in the instant case would be whether a Unit-1 of that Generating Station of the Generating Company can be part captive and part non-captive IPP (regulated tariff). The Unit-I is having its tariff determined from the State Commission for MPPMCL to purchase 30% of its power under PPA and it is seen that the same Unit-1 identified as a captive unit with M/s. Prism being the captive user. As such, the same unit-1 of a Generating Station cannot be identified to be part captive and part IPP even if it is held that a Generating Company is permitted to

freely convert at a later date into a Captive Generating Plant. The reason being that if the Unit-1 is an IPP/GenCo then fixed charges and energy charges are payable by MPPMCL to M/s. BLA. However, if it is wholly captive then no fixed charges are payable by MPPMCL. However, if the Unit-1 is designated as part captive and part IPP then M/s. BLA shall be claiming fixed charges on the one hand and also selling power to its captive user on the other hand. It was submitted that this shall create a severe absurdity in law as legally and as per regulations, no fixed charges are payable to a captive power plant.

6.77. It is further submitted that therefore, there is a huge element of public interest and consumer interest involved in the instant case as the principle which will be adjudicated shall have huge ramification on other such power purchase agreement entered into between MPPMCL and similar other generators. The quantum of power involved in the instant case should not be a criterion for adjudicating the instant matter as the principle and issues involved shall have all India ramifications. The Electricity Rules, 2005 through its illustration put an end to any doubt over the issue whether a particular Unit-1 of a generating station can be part captive and part IPP as the illustration which is reproduced hereunder states that in a Generating Station with two units of 50 MW each, namely Unit-A and B, then one unit of 50MW may be identified as the Captive Generating Plant and the investment of 26% can be routed into this wholly captive unit which will also comply with the 51% consumption requirement. The upshot of this illustration in Rule 3 is that a single unit has to be wholly and completely identified as being a captive generating plant and there is no liberty given to even a Captive Generating Plant owner to identify that Unit-A as part captive and part IPP.

6.78. It is contended that Rule 3(1)(b) does not give permission to a “Generating Company” to identify its units for captive use irrespective of

the fact that the generating company may be an SPV of other company, therefore, in the facts of the instant case if M/s. BLA were to establish a captive power plant then the correct legal structure would be to establish another subsidiary company as a SPV and upon its incorporation as an SPV then it should have to identify units in that newly formed SPV as captive units and thereby then take the investment from M/s. Prism for making M/s. Prism a captive user.

6.79. If it was held that a generating company (M/s. BLA) can convert its Unit-1 at a later date to be a captive power plant and also if it were to hold that unit (Unit-1) can also be part captive and part IPP, then it leads to certain other absurdities in facts and law as the other parties who had established captive power plant at the first instance can stand up and claim that there is a preferential treatment being given to a Generating Company which was earlier an IPP and later converted it's Unit to a CPP and is, therefore, getting fixed charges for that same unit from which it supplies power to its captive user. Further other generators and other parties can also stand up and state that they also should not be penalized for having declared themselves as a captive at the first instance and, therefore, for the amount of power that they are supplying into the grid and not self-consuming, they should be also be given a regulated tariff and fixed charges ought also to be paid to them. It is submitted that this shall be completely against the provisions of Act and also against the consumers and public interest as it lead to unjust enrichment.

6.80. If the argument of the Appellants is accepted then as per the interpretation of the MPERC Captive Regulations which is a valid law and has not been declared ultra vires by any Court, would lead to a situation wherein the 65% power from M/s BLA which it is selling to M/s. Prism shall qualify as captive power and the balance 35% which it is selling to MPPMCL and the State of M.P. under its PPA shall qualify as

surplus power and, therefore, the tariff for this 35% power (surplus power) then cannot be regulated or determined under Section 62 of the Act and in such an event as it has allegedly claimed conversion to a captive power plant from the year 2016,MPPMCL shall be entitled to claim the refund of fixed charges paid by it from the COD, as it never had the intention of being a IPP right from its inception.

6.81. Lastly, it is submitted that the judgment of this Tribunal passed in Kadodara Power is not applicable to the facts and circumstances of the instant case for the simple reason that the issues raised in Kadodara Power were completely different from the issues and facts raised in the instant appeal. In Kadodara Power the issue was whether the existing captive generating plant can transfer its ownership after its set up and how the proportionality of consumption has to be assessed. It was submitted that this is not at all an issue in the instant matter as no one is arguing the point on the transfer of ownership of a captive generating plant once it has been set-up as a CGP.

Rejoinder Submissions:

7. In rejoinder, Mr. Sanjay Sen, learned senior counsel appearing on behalf of BLA Power made the following submissions:

7.1. Mr. Sanjay Sen reiterated the arguments made by Mr. Buddy Ranganadhan in the opening on the issue of non-leviabilty of cross subsidy surcharge on power consumed by Prism from BLA Power's Unit-1.

7.2. In response to on the applicability of the MPERC Captive Regulations, Mr. Sen made elaborate submissions. He submitted that though there was no finding on this issue in the Impugned Order, the State Commission has now disclosed its mind that if it were to lose the current matter before this Tribunal, the State Commission wants to wrongly

apply a different regulation (contrary to Section 61 principles) so as to negate the tariff order passed for determining tariff for supply of Contracted Capacity under the 30% PPA. He further submitted that the State Commission's raising of this issue is a way to circumvent its own order, so as to have the ability to cause further prejudice and harm to the interest of BLA Power should the instant appeal be allowed. Therefore, it is necessary for BLA Power to respond to this issue also, so that it could put to rest the controversy relating to the non-applicability of the MPERC Captive Regulations in the present facts.

7.3. Mr. Sen submitted that the MPERC Captive Regulations are not framed under Section 61 of the 2003 Act and no tariff for any Generating Company can be determined based on MPERC Captive Regulations. He further submitted that in any event,the MPERC Captive Regulations do not and cannot, at all apply when specified capacity (like in the present case 30% of the installed capacity) is already reserved under an existing PPA. He submitted that once there is a PPA based on reservation of capacity, the Commission in exercise of its jurisdiction under sections 62 and 64 read with the extant MPERC Generation Tariff Regulations determines a two part tariff, i.e., capacity (fixed charges) and variable (energy) charges.

7.4. He further submitted that the MPERC Captive Regulations might apply to a scenario where captive plants in the State of M.P. have "Surplus Power" i.e. untied / un-reserved capacity spare with them and such captive plants exercise their right to sell "Surplus Power" to Discoms for temporary periods at a time. He however submitted that this does not arise in the facts and circumstances of the present case. He submitted that it is purely an entitlement and right of the "CPP Holder" and there is no obligation to supply such "Surplus Power" to the Discoms.

7.5. Mr. Sen, while referring to the terms of the PPAs, submitted that:

a) The GoMP or its Nominated Agency had the first right to purchase upto 30% of the power station's installed capacity for a period of 20 years at the tariff determined by the Appropriate Commission;

b) The GoMP has exercised the first right to purchase power from the power station upto 30% of the power station's installed capacity.

c) Apart from the aforesaid, the GoMP in addition also has the right to purchase 5% of the net power (gross power generated [minus] auxiliary consumption) on annualised basis on a price equivalent to the variable cost only, as determined by the Appropriate Commission.

d) While the right in relation to purchase of 30% power is against the Generating Station's installed capacity, the 5% power that is purchased is in relation to the net power generated by the Generating Station.

e) There is a difference between the two contracts i.e. 30% PPA and 5% PPA. While the 30% PPA is a capacity contract to purchase electricity from a portion of the Generating Station's capacity, i.e. 30%, the 5% PPA is an energy contract for purchase of 5% of power injected in the grid at a variable cost.

7.6. Mr. Sen further submitted that it is undisputed that MPPMCL has executed a capacity contract for purchase of 30% of the Generating Station's installed capacity. He contended that on the other hand, the MPERC Captive Regulations enable sale of "surplus power" (not capacity) to a distribution licensee in terms contained therein. He further contended that word "entitled" as used in Regulation 3.1 shows that there is no obligation to sell "surplus power" to the distribution licensee. It is only an entitlement to sell.

7.7. It was further submitted that the sale contemplated in the MPERC Captive Regulations does not envisage reservation and sale of capacity, where a part of the installed capacity is already "reserved" for the distribution licensee or any other person under a capacity contract where the Captive Generating Plant / Generating Station is given

capacity charges (as a component of tariff) in terms of the extant MPERC Generation Tariff Regulations. Moreover, for sale of such 'surplus' power there is no certainty as to if and when such 'surplus' power is supplied to a discom.

7.8. Mr. Sen submitted that none of the opposing Respondents have either produced a copy of "*a standard Power Purchase Agreement"* which

ought to have been submitted before the State Commission latest by one month after 31.01.2009 (date of notification of the MPERC Captive Regulations) for approval. It was submitted that no such "standard Power Purchase Agreement" as envisaged under Regulation 3.4 of the MPERC Captive Regulations exists which is approved by the State Commission, hence, the question of applicability of the MPERC Captive Regulations on any Captive Generating Plant for the purposes of entitlement do not and cannot arise. He also submitted that the distribution licensee has not executed any contract for sale of power in terms envisaged under Chapter 3 of the MPERC Captive Regulations with M/s BLA.

7.9. He then submitted that the MPERC Generation Tariff Regulations apply in all cases of determination of generation tariff for a generating station or a unit thereof (other than those based on renewable sources of energy) under section 62 of the 2003 Act, read with section 86 of the Act for supply of electricity to a distribution licensee in the State of Madhya Pradesh. He submitted that the only exception to the applicability of the MPERC Generation Tariff Regulations is in relation to tariff of a generating station that has been discovered through tariff based competitive bidding in accordance with guidelines issued by the Central Government and adopted by the Appropriate Commission under section 63 of the 2003 Act. He submitted that this is in complete contrast to the MPERC Captive Regulations which, on the face of it, are

ascribable to Section 86(1)(b) of the Electricity Act and not to Section 62. It was contended by Mr. Sen thatthe MPERC Captive Regulations only regulate the procurement process and price of a licensee for purchase of "surplus power", only when a "CPP Holder" offers to sell such "surplus power".

7.10. While referring to the various components of tariff under the MPERC Generation Tariff Regulations, he submitted that the MPERC Generation Tariff Regulations contemplate determination of capacity charges separately, when there is a tariff determination under section 62. It was his contention that this is clearly applicable when there is a capacity contract as is there in the present case.

7.11. He submitted that after executionofthe30%PPAforsupplyof30% of the power station's installed capacity to MPPMCL (pursuant to the MoU and the IA), the State Commission vide orders dated 24.07.2012 and 22.05.2015 has determined the capacity charges and the energy charges in such tariff orders. He referred to the judgment in Tata Power to contend that the manner of executing a contract is wholly at the option of the Generating Company.

7.12. Mr. Sen further submitted that after the contract has been executed for supply of power to a distribution licensee, the jurisdiction for determination of tariff will arise. He added that in the present case, for the 30% PPA, the tariff has to be determined, and has been determined under section 62 and 64 of the 2003 Act from time to time based on principles enshrined in Section 61 of the 2003 Act.

7.13. It was also submitted that the 30% PPA for supply of capacity has been executed under Section 62 and acted upon and the applicable regulation for determination of tariff is the MPERC Generation Tariff Regulations, which Regulation is notified, *inter alia*, under Section 61 of

the 2003 Act. BLA Power's two-part tariff contract (i.e. the 30% PPA) has been approved by the State Commission. Further, BLA Power has not violated any term of the 30% PPA when Unit-1 of Generating Station has qualified as a CGP. He further contended that there is nothing in the MPERC Captive Regulations that automatically puts an end to an existing contract (i.e. the 30% PPA) upon Unit-1 of BLA Power's Generating Station becoming a Captive Generating Plant.

7.14. While referring to the judgment of the Hon'ble Apex Court in Tata Power, Mr. Sen lastly submitted that it is the decision of the generating company alone as to how it proposes to sell its power. The State Commission neither by regulation nor by an order, issue any direction to a generating company on the manner of sale of power.

7.15. In rejoinder, Mr. Amit Kapur, learned counsel appearing on behalf of Prism submitted as under:

7.16. He reiterated his submission that no cross subsidy surcharge can be levied on power consumed by Prism from BLA Power's Unit-1.

7.17. He submitted that the Respondents' submissions that a generating company cannot subsequently qualify as a CGP are in the teeth of the 2003 Act, the 2005 Rule and the National Electricity Policy and National Tariff Policy. He submitted that if the Respondents' contention is accepted, then it will result in reading the same as incorporating a requirement that once any generating company elects to commit any part of its capacity to long term sale, it is barred from claiming legal status of a CGP, which will be teeth of the 2003 Act and the 2005 Rules.

7.18. In response to the Respondents' contention that if the CGP status is granted to Unit-1, it would retrospectively alter the PPAs, Mr. Kapur submitted that the said contention is is contrary to facts and documents

on record. He submitted that from the express language of the PPA dated 05.01.2011 from the reading of the recitals, definitions, Article 4.1.1, 4.3.1, 5.10.1, 10.1.1 and 16.22.1, it was clear that the Respondents' entire argument is an afterthought. He submitted that the arrangement was limited to 30% + 5% of the power generated from each unit with no negative covenants or limitations on the rights of BLA Power under the existing legal framework. In fact, the Procurer being aware of the legal framework in 2011 chose to claim parity with tariff discovered under Section 63 but never provided anything relatable to the captive power or the MPERC Captive Regulations. He further submitted that filing of a petition for tariff determination for 30% of the power and MPERC approving the said tariff has no relevance or implication on a subsequent acquisition of equity and procurement of power from Unit 1 which fulfils the twin requirements of captive plant and captive user in the hands of BLA and Prism respectively.

7.19. He further submitted that there is no restriction/ embargo in the MOU or the PPAs prohibiting supply of balance power to any party after meeting supply of 30% capacity and 5% power under the PPAs. The said Agreements by their very nature permit supply of balance capacity to any party including a captive user.

7.20. Lastly, in response to the Respondents' arguments on the doctrine of election, Mr. Kapur submitted that Unit-1 has been identified for captive use since the time of infusion of equity by Prism. Further, at the time when the Power Plant was being established by BLA Power, no such election, as contended by the Respondents, was exercised as the Act, Agreement, Rules and Regulations do not contemplate the same. He added that such alleged election cannot in any event be irreversible as sought to be contended by the Respondents.

8. We have heard at length the learned counsel for the parties and considered carefully their written submissions and arguments put forth during the hearings. Following issues arise in the present Appeal for our consideration:

ISSUE NO. 1: **(a).** Whether the power plant i.e.Unit-1 of BLA Power's generating station satisfy the twin conditions under Rule 3 so as to qualify as a Captive Generating Plant?

(b). Whether Cross Subsidy Surcharge is leviable / applicable on the power consumed by M/s. Prism (captive user) from Unit-1 of M/s. BLA?

ISSUE NO. 2: If Unit-1 of BLA Power qualifies as a Captive Generating Plant, will the tariff for supply of 30% capacity under the Long Term PPA be determined under the MPERC Generation Tariff Regulations or the MPERC Captive Regulations?

Our Consideration and Findings

9. Issue No. 1 (a) and 1 (b):

We have carefully considered the submissions of the learned counsel for the Appellants and learned counsel for the Respondents and taken note of the available material on record. We examine and analyze the issue(s) in subsequent paras:

9.1 It is important to note that the Act was enacted with the primary purpose of de-licensing generation of electricity and promoting captive generation. Further the preface of the Act, clearly states as follows:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity* ***and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers*** *and supply of electricity*

to all areas, ***rationalization of electricity tariff, ensuring transparent policies regarding subsidies****, …"*

9.2 The following provisions of the Act are relevant for the purposes of the present case:

"2. Definitions - …

(8) "Captive generating plant" means a power plant set up 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 co-operative society or association

…

(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

…

(30) "generating station" or "station", means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;

…

9. Captive generation –

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

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

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licencee in accordance with the provisions of this Act and the rules and regulations made thereunder and to

any consumer subject to the regulations made under sub- section (2) of section 42.

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

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

…

42. Duties of distribution licensee and open access:

…

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

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

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

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

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

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive 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. "

9.3 Rule 3 of the Electricity Rules, 2005 is extracted hereinafter:

"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 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*:*

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 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 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.***
>
> *(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.*

9.4 Section 2(30) of the Act defines a generating station as any station for generating electricity. Section 2(8) defines a Captive Generating Plant

("**CGP**"). Rule 3(1)(b) deals with the requirements for a generating station owned by a generating company or for any one unit of such generating station to qualify as a CGP. Hence it is clear that a CGP is a Generating station or a unit of such generating station. In the current context, Rule 3 of the Rules specifies the conditions for such a unit of a generating station to qualify as a CGP. The term "IPP" is not defined in the Act or Rules.

9.5 The definition of captive generating plant in Section 2(8) of the Act is to be read with Rule 3 of the Rules. Hon'ble Supreme Court in Monnet Ispat & Energy Limited etc. Vs Union of India & Ors in Civil Appeal No. 18506 – 18507 of 2017 has had the occasion to look at Rule 3 and has held that Rule 3 is explanatory in nature and lays down the conditions to be fulfilled by a power plant to qualify as a CGP under Section 2(8) of the Act. The Hon'ble Court has laid down as under:

> *"… Reading of the aforesaid Rule makes it clear that* ***to be classified as 'captive generating plant' under Section 9 read with Section 2(8) of the Act of 2003, a power plant has to fulfil certain conditions; firstly, 26% of the ownership of the plant must be held by the captive user(s); andsecondly, 51% of the electricity generated in such plant, on annual basis, is to be consumed for captive use.*** *We find that the provision of the rule making power in Section 176 of the Act of 2003, deals with the power of Central Government to make the rules for carrying out the provisions of the Act and, Section 178 of the Act of 2003, deals with the powers of the Commission to make regulations.*
>
> *The Rules of 2005 have been framed by the Central Government under the power conferred upon it under Section 176 of the Act of 2003.*
>
> *11. The vires of Rule 3(1)(a)(ii) have been put into question in the instant cases. The High Court has rightly upheld its validity. We find that the definition of generating plant, as provided under Section 2(8) of the Act of 2003, emphasizes that the generation of electricity should be primarily "for his own use". Similar is the expression used in fourth proviso to Sub-Section 2 of Section 38,*

and the fourth proviso to Sub-Section (2) of Section 42 of the Act of 2003 contains provision of no surcharge on "his own use" as contemplated therein. Thus, while exercising the power under Section 176 of the Act of 2003, it was open to specify how much minimum use should be made in order to classify a captive power plant, primarily for "his own use". ***Thus, the Rule cannot be said to be repugnant to, rather it carries the very intendment of, the Act and is quite reasonable****…"*

(Emphasis supplied)

9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon'ble Supreme Court that to qualify as 'captive generating plant' under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;

a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and
b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.

Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant.It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year.Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin-conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year.

9.7 It is also not in dispute that a unit or units of such generating station could be identified for captive plant and there is no need that the entire generating station should be recognised or notified as captive generating plant. The illustration to Rule 3(1)(b) clearly indicates this

position. Therefore, the owners of generating plant, who invest in the setting up of captive generating plant by way of equity, can consume electricity for their own use.

9.8 This Tribunal has, in its earlier judgment dated 22.09.2009 in Appeal Nos. 171 of 2008, 10 of 2009 and 117 of 2009 (Kadodara Power Pvt. Ltd. &Ors Vs GERC &Ors), has held as follows:

> *"Can the ownership of the CGPbe transferred after its set up? 20) It is contended on behalf of the distribution licensees that the appellants in other appeals namely the CGPowners are not entitled to the benefit of the provisions of the Rules and the Act facilitating captive generation as they were not the persons who "set up" the generating plants. Reference can be made to section 2(8) of the Electricity Act which defines "captive generating plant" as a power plant "set up by any person to generate electricity primarily for his own use".*
>
> *21) It is submitted that the words "setup" here are important and that the person who has set up the plant alone can own captive generating plant and not the person(s) who is transferee from the original owner(s). This proposition has not been accepted by the Commission in the impugned order. Nor does this proposition appeal to us. The Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner. Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfilment of all other conditions requiring it to be so. Section 9 of the Act which permits captive generation begins with the following words: notwithstanding anything contained in this Act, the person may construct, maintain or operate a captive generating plant and dedicated transmission lines".* ***Obviously, the owner of a captive generating plant need not be one who constructs. Set up defined in section 2(8) has been made equal to "construct, maintain or operate" by the use of these words in section 9.*** *As we view it a captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s)."*

We are informed that judgment in Kadodara has been challenged before the Hon'ble Apex Court and the appeal is currently pending. However, there is no stay of the judgment passed in Kadodara. Any person who has setup a CGP by fulfilling the aforesaid twin-conditions qualifies as a captive user qua the captive generating plant irrespective of the fact whether he has originally constructed the same or not. The Act and the Rules permit a captive user to subsequently acquire equity shareholding in a power plant which was initially not qualified as a captive generating plant. It is immaterial whether the power plant at the time of initial construction was qualifying as a CGP under Rule 3 or not. Even if at the time of initial construction the power plant was not qualifying as a CGP under Rule 3, the same power plant can subsequently qualify as captive generating plant upon satisfaction of the twin-conditions under Rule 3. The arguments raised by the Respondents that the judgment in Kadodara case doesn't apply in the facts of the present case cannot be accepted for the reason that the issue of subsequent acquisition of shareholding / transfer was the subject matter of the said decision.

9.9 Therefore, the first issue that arises is whether M/s. Prism and M/s BLA fulfill the twin conditions laid in Rule 3 with respect to Unit-1 of M/s BLA which is the CGP in question in the facts of this case. It is the contention of the Appellants that these twin conditions are fully satisfied.

9.10 In accordance with Rule 3(1)(b), M/s. BLA has affirmed that it is an SPV in terms of Rule 3 of the Rules as it is not engaged in any other business or activity other than owning, operating and maintaining its generating station. This is also not disputed by any of the contesting Respondents. Hence, it is undisputed that M/s. BLA is a "Special Purpose Vehicle" in terms of the definition given in Rule 3.

9.11 Since, M/s BLA has two units, in accordance with Rule 3(1)(b), it is pertinent to evaluate whether M/s BLA has identified the appropriate unit from its two units for captive use by M/s. Prism or if the twin conditions of Rule 3 needs to pertain to the whole Generating Station. Both Mr. Buddy Ranganadhan and Mr. Amit Kapur, Counsel for the Appellants emphasised that the supply of power was only to be from Unit-1 of M/s BLA and this is clearly stated in the PSA. The power supply agreement dated 7th June 2016 between M/s Prism and M/s BLA at page 8, clause (lxiv) states;

> *"**Unit-1** means the first unit of the Power Plant with an installed capacity of 45 MW, **which BLA has identified as captive unit** for supply of the Contracted Capacity under the Applicable Law."*

It is clear from this clause in the PSA, the whole of Unit-1 has been identified by the Appellants for captive use. In the impugned order, the State Commission has not looked at the above clause and only looked at Clause E & I of the recital of the PSA. It is apparent to us that the State Commission has misconstrued Clause E & I of the PSA, which only specifies the quantum of electricity to be captively consumed by the captive user, which, undisputedly, is more than 51% of the generating capacity of Unit-1. As clearly identified that M/s Prism will captively consume power only from Unit-1 of M/s BLA so the twin-conditions of Rule 3 have to be applied in the context of said Unit-1. So far as the Captive User is consuming more that 51% of the aggregate generation from the Unit-1, Rule 3 does not provide for any restriction as to where the captive generating plant can supply the balance 49% of its generated electricity, and such conditions cannot be read/inserted into the Rules, where no such condition exists.

9.12 The issue of identification of a unit of an SPV has also been dealt with in this Tribunal's Judgment dated 21.12.2012 in JSW Energy Ltd. and

Another v. Karnataka Electricity Regulatory Commission and Others, Review Petition No. 2 of 2013 in the Appeal No. 137 of 2011 wherein it was held:

> *"14. The Conjoint reading of Explanation (1) & (2) along with the illustration as referred to above would establish that the unit/units intended for captive use are required to be identified in advance at the stage of induction of equity. Explanation (2) dealing with unit wise equity participation, read with illustration appended to it, makes this proposition quite clear. Let us apply the illustration to a case where two units are of different capacity for better understanding.*
>
> *A generating station has two unit viz., Unit A of 100 MW and unit B of 200 MW. In case the captive user desires to identify Unit A of 100 MW as the Captive Generating Plant, the captive user shall hold not less than 8.666 percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 100 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 user. However, in case the consumer desires to identify Unit B of 200 MW as the Captive Generating Plant, the captive user ought to hold minimum of 17.333 percent of the equity shares in the company (being the twenty six percent proportionate to Unit B of 200 MW) and ought to have consumed not less than fifty one percent of the electricity generated in Unit B determined on an annual basis. In other words, if any person has infused equity between 8.67% to 17.33% in the company, he would have to identify Unit A for its captive use. If he has equity shares in the Company in the range of 17.34% to 26%, he could identify either of the units for its captive use. In case he has more than 26% equity shares in the company he would be entitled to identify both the units for its captive use. However, he is required to identify the unit/units for captive use at the time of infusion of equity.*
>
> *15.* ***Thus, it is evident that the captive user is required to identify the unit/units intended for captive consumption at the time of induction of equity stage itself****."*
>
> (Emphasis supplied)

9.13 As per aforesaid Judgment of this Tribunal dated 21.12.2012, it must be seen if the Appellants identified the said Unit-1 simultaneous with the investment in the equity of M/s BLA by M/s Prism. It is emphatically stated by Learned counsel Mr. Kapur and confirmed by Mr. Ranganadhan that 30.46% equity shares with voting rights, corresponding to Unit-1, was inducted by M/s Prism in M/s BLA on 6th&7th June 2016 and the PSA was executed between the Appellants on 7th June 2016 as well. This is also established from the records before us. Hence, it is clear that simultaneous with the infusion of equity by M/s Prism in M/s BLA, Appellants had identified Unit-1 of M/s BLA as the specific unit of the power plant from which electricity will be supplied to M/s Prism. These facts are not in dispute. None of the contesting respondents have raised any argument that the flow of power to M/s Prism was made from any unit other than the unit specifically identified for captive purposes, i.e. Unit-1 of M/s BLA. Learned counsel Mr. Ramachandran appearing for the Respondent Discom has also accepted this fact during the course of arguments.

9.14 Having found that M/s BLA is an SPV in accordance with Rule 3 and both Appellants having identified Unit-1 of M/s BLA for captive use, it is required to be examined if the two conditions imposed in Rule 3 are met by the Appellants in context of the said Unit-1. It is the contention of both the Appellants that they have fully satisfied the twin conditions in accordance with Rule 3.

(i) In regard to the satisfaction of Rule 3(1)(a)(i) pertaining to M/s Prism owning not less than 26% of the proportionate equity of M/s. BLA related to Unit-1, the Appellants have submitted a certificate from the chartered accountant confirming that M/s Prism own 30.46% of proportionate equity share capital pertaining to Unit-1 of M/s BLA as on 7June 2016. The counsel for the Appellants confirm that these shares are equity shares with voting rights. The counsel

for Respondents do not dispute this. Hence it is found that the Appellants comply with the first condition of Rule 3.

(ii) In regard to the satisfaction of Rule 3(1)(a)(ii) pertaining to 51% of the electricity generated in Unit-1 on annual basis to be consumed for captive use, it is submitted by the Appellants that in terms of the PSA, M/s BLA's Unit-1 has to supply 63.92% of its capacity to M/s Prism for captive use. Further M/s Prism has submitted that for the period 22.06.2016 (i.e. start of captive supply) to 31.03.2017, they had actually captively consumed 94.55% of the power generated from Unit-1. None of the contesting respondents have disputed this. Hence it is found that the Appellants duly comply with the second condition of Rule 3 also.

In light of the above, we are of the view that the twin-conditions of Rule 3 are complied with by the power plant (Unit-1 of M/s BLA) with M/s Prism as the Captive User.

9.15 Having found that the compliance of Rule 3 is met by M/s. BLA's Unit-1 with M/s. Prism as Captive User, the issue that was pressed by the Respondents was that since there are long term PPAs for 35% capacity from Unit-1, the said Unit-1 of M/s. BLA, cannot be granted the status of a CGP. The relevant para from the impugned order is extracted below:

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

provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 made there under."

It is contended by the learned counsel for the Respondents that since M/s. BLA's Unit-1 was initially developed as a generating station, and has a long term PPA, it is not possible for Unit-1 to subsequently qualify as a CGP, even if it complies with the twin-conditions of Rule 3.

9.16 Let us now examine various aspects associated with CGP provided in the Act. Section 9 of the Act starts with a non-obstante clause. Section 9 is in two paras – 9(1) and 9(2). There are provisos to Section 9(1). Apparently, in terms of Section 9(1), a person which includes an association of persons or cooperative society may construct, maintain or operate a captive generating plant and have dedicated transmission line. The first proviso to Section 9(1) says, the supply of electricity from such captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

9.17 The first proviso to Section 9(1) of the Act deals with supply of Electricity from captive generating plant through the grid, which has to be regulated in the same manner as a generating station of a generating company. Section 9(2) of the Act creates or vests a positive right to a person who has constructed a captive generating plant to have the right to open access for the purpose of carrying electricity from his generating plant to the destination of his use.

9.18 Second proviso to Section 9(1) of the Act was inserted by virtue of amendment in 2007 with effect from 15.6.2007. In effect, this amendment provides supply of electricity to the non-captive consumers to the extent which can be supplied i.e., 49% after self-consumption of 51% of electricity by captive users or group captive users, i.e. 51% of electricity from the captive generating plant. Therefore, balance 49% of

electricity available to the captive generator could be sold to non-captive users including distribution licensee. The second proviso to Section 9(1) by way of amendment in the year 2007 came to be inserted to enable the captive generator not to waste the balance capacity but to sell the same to others. This was in line with the National Electricity Policy of 2005 which intended to remove all controls over captive generators as well as to enable the captive generators to supply available balance capacity to licensees and consumers (non- captive users).

9.19 Clauses 5.2.24, 5.2.25, 5.2.26, 5.7, 5.7.1 of National Electricity Policy 2005 are relevant which read as under:

> ***"Captive Generation***
>
> *5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.*
>
> *5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.*
>
> *5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to*

enable captive generation to become available as distributed generation along the grid. Towards this end, non-conventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant.

.....

5.7 COMPETITION AIMED AT CONSUMER BENEFITS

5.7.1 To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long-term power purchase agreement framework. In the coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the power markets and provide alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff. For achieving this, the policy underscores the following:-

.....

c. ***Captive generating plants should be permitted to sell electricity to licensees and consumers when they are allowed open access by SERCs under section 42 of the Act****."*

9.20 From the above Policy, it is clear that National Electricity Policy 2005 and the Tariff Policy of 2016 were directed to encourage captive generators, i.e. after meeting self-consumption (own use), balance capacity available with captive generator could be sold to third party. Therefore, we can safely opine that Electricity Rules 2005 which came into force much prior to the amendment of 2007 inserting second

proviso to Section 9(1) intended liberal interpretation of right of captive generators / captive generating plant. A bare perusal simple reading of the Act and the Rules does not justify this finding by the State Commission.

9.21 Section 2(8) and Section 9 read with the Rules only lay down the conditions in Rule 3 for a power plant to qualify as a CGP. Rule 3(1)(a)(ii) imposes a condition that "*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*". Rule 3 permits a captive generating plant to dispose off the balance 49% of electricity generated in such plant in any manner as it may deem fit. Since the Act specifically states that generation is a delicensed activity, supply of such balance 49% of electricity generated in a CGP can be made to users who are not captive users of such power plant including to distribution licensees.

M/s. BLA has been supplying approximately 35% of power generated from its Unit-1 to M/s. MPPMCL under its Long term PPAs. Hence, M/s BLA is in a position to give upto 65% to a captive user, which is more than the threshold requirement of 51% consumption required under Rule 3.As the law does not place any restriction on disposal of the balance 49% power, the same cannot be unilaterally imposed by the State Commission.

9.22 The findings in the impugned order using terms such as "Regulated IPP", "Unit-1 is partially IPP and partially CPP", "hybrid", "part captive", "part of the regulated Unit-1 (untied capacity of Unit-1) was identified as CPP", are legally and factually incorrect. If such an interpretation is to be given effect to, then captive user(s) of every captive generating plant will have to consume 100% of the electricity generated from the CGP, which is contrary to the express provisions laid down in the Act and the

Rules which clearly specify "not less than fifty one percent". Furthermore, the Act or the Rules do not define the term "IPP" or "Independent Power Producer". This is a colloquial term. Generally, this term is used in context of private sector generating companies. The impugned order wrongly relies on the definitions of "IPP" and "CPP" under the MP Electricity Grid Code framed by the State Commission. The MP Electricity Grid Code specified under 86(1)(h) has to be consistent with the Grid Code specified by the Central Commission under 79(1)(h) of the Act. We are however, not going into the details of such inconsistencies with the Grid Code under 79(1)(h) as this was not a subject matter of arguments. Based on only the arguments made before us, we are of the view, that the definitions of "IPP" and "CPP" laid down in MP Electricity Grid Code are only "For the purposes of the Grid Code" and are not consistent with the Act or the Rules and are irrelevant for the purpose of determining whether a power plant qualifies as a captive generating plant or not. Whether a power plant is a captive generating plant can only be determined based on the provisions of the Act and the Rules. In any case, the definitions of "IPP" and "CPP" laid down in MP Electricity Grid Code cannot override the provisions of the Act or the Rules.

9.23 We are unable to accept the view of the State Commission that since M/s. BLA's Unit-1 was initially an "IPP", and has a long term PPA, it is not possible for Unit-1 to subsequently qualify as a CGP. Such contentions is against the explicit wording of the Act. As mentioned above, "IPP" is a colloquial term which generally refers to a private sector generating station. There is nothing in the Act or Rules which prohibits a power plant (whether government owned or private owned) from acquiring the status of a CGP so long as it meets the conditions laid down in Rule 3 of the 2005 Rules. This is clear as Rule 3 itself recognizes that the captive status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status

in the subsequent year and thereafter again qualify as a CGP in the 2nd year if the twin-criteria under Rule 3 are satisfied in that particular year. It is immaterial whether the power plant has a long term PPA for part capacity which is entered into, either prior to, or subsequent to, acquiring captive status by meeting the twin-conditions imposed by Rule 3.

9.24 Mr Buddy Ranganadhan, the counsel for the M/s BLA, vehemently submitted that the various provisions of the MoU, IA and PPA make it clear that the State of MP and its nominee MPPMCL guaranteed purchase of only 30% capacity and 5% energy from M/s BLA's generating station and that M/s BLA is free to deal with the balance capacity of its plant is any manner it so chooses. He emphasized that the term "IPP" is missing from the Act, Rules, MoU, I.A. and the PPA. On a perusal of the MoU, IA and PPA, we are inclined to agree with this view. As we see, the MOU, IA etc don't use the term "IPP" or record that any such representation was made by M/s BLA. A power plant cannot be expected to operate only at 35% of its capacity and a generating company is required to find procurer(s) of its balance capacity. If such procurer(s) satisfy the twin-test under Rule 3, the generating station or a unit thereof, as the case may be, will qualify as a Captive Generating Plant. In our view, it could not make any difference if the generating company has a long term PPA or not. As observed above, there is nothing in the Act or Rules which prohibits a generating station from subsequently acquiring the status of a CGP. Merely because the generating company has a long term PPA, does not take away the captive status of the power plant or a unit thereof if the twin-conditions under Rule 3 are satisfied. It is well permissible for a power plant to qualify as a CGP and simultaneously fulfill its obligations under a long term PPA with a distribution licensee. There is nothing in the Act or the Rules which prohibits such a situation. Section 9 of the Act in fact permits a CGP to supply power to a distribution licensee.

9.25 Mr. Ramachandran learned counsel for MPPKVVCL (DISCOM) argued that the doctrine of election is applicable in the present case as M/s BLA's Unit-1 can either be a CPP or an IPP. He contended that once BLA Power had elected in beginning that Unit-1 would be an IPP and got tariff determined accordingly, it could not subsequently seek to convert Unit-1 into a CGP. We do not find force in this submission. The doctrine of election does not apply in the present case; it would only apply when two mutually incompatible options exist and a person is required to adopt one mutually exclusive course or the other. In the present case, however, law does not prohibit a CGP to have a long term PPA under Section 62 for which tariff is determined by the State Commission. Furthermore, the law does not prohibit a generating station (or a unit thereof) that has a long term PPA under Section 62 from becoming a CGP, if it meets the twin-conditions of Rule 3. M/s. BLA's Unit-1 is simultaneously fulfilling its obligations under the PPAs by supplying power to MPPMCL and at the same time fulfilling the requirement of Rule 3 by supplying more than 51% power generated by the said Unit-1 to M/s. Prism (i.e. captive user). As such, the question of doctrine of election being applied in the present case does not arise. For the same reason, since the doctrine of election is not applicable in the present case, the question of any waiver or estoppel also does not arise in the present case.

9.26 In light of the fact that the twin-conditions as per Rule 3 are met by Unit-1 of M/s. BLA, we hold that Unit-1 of M/s. BLA is a Captive Generating Plant with M/s. Prism as its captive user. Consequently, in terms of the 4th Proviso to Section 42(2) of the Act, no cross-subsidy surcharge is leviable on power sourced by M/s. Prism from M/s. BLA's Unit-1.However, we clarify that if at the end of a particular financial year it is found that the twin-conditions are not satisfied, the benefit of exemption from levy of cross subsidy surcharge would not be available.

ISSUE NO. 2

9.27 With reference to the second issue, Mr. Ramachandran and Mr. Bernard, learned counsel appearing on behalf of MPPKVVCL and MPPMCL respectively, contended that if Unit-1 has qualified as a CGP, the tariff of 30% Contracted capacity which is a two part tariff determined under section 62 based on Section 61 principles, automatically becomes a single part tariff due to the MPERC Captive Regulations. Mr. Ramachandran argued that once M/s. BLA's Unit-1 acquired captive status, M/s. BLA is not entitled to a two-part tariff determined by the State Commission under the MPERC Generation Tariff Regulations 2012-15 for the power supplied by it under the PPA to MPPMCL but it can only get generic tariff determined by the State Commission under MPERC Captive Regulations.

9.28 It is relevant to note that though this argument was raised before the State Commission, the impugned order does not give any finding on this issue possibly because the State Commission held that Unit-1 is not a CGP and therefore there was no requirement to go into this issue. Even though the impugned order is silent on this issue, the learned counsel for the State Commission as well as other Respondents have raised this point before us and is also covered in their written submissions. Since we have held above that Unit-1 of M/s BLA is a CGP, and since considerable arguments were heard from both sides to which MPERC regulation will apply for determination of tariff for M/s BLA's 35% long term PPAs, it is necessary for us to analyse and conclude this issue also.

9.29 Since, the issue pertains to tariff for a CGP having a Long Term PPA for a capacity of 35% (less than 49%), the relevant provisions of Part VII the Act are reproduced below:

"PART-VII

TARIFF

Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) ***the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies*** *and transmission licensees;*

(b) ***the generation****, transmission, distribution and supply of electricity* ***are conducted on commercial principles****;*

(c) ***the factors which would encourage competition, efficiency****, economical use of the resources, good performance and optimum investments;*

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) ***multiyear tariff principles****;*

(g) ***that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission****;*

…

(i) the ***National Electricity Policy and tariff policy****:*

…

Section62. (Determination of tariff):---*(1)* ***The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for*** *–*

(a) ***supply of electricity by a generating company to a distribution licensee****:*

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a

licensee *or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

…

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 64. (Procedure for tariff order): --- *(1)* ***An application for determination of tariff under section 62 shall be made by a***

generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

…

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

…

Section 66. (Development of market):

The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.

…

Section 181. *(Powers of State Commissions to make regulations): --- (1) The State Commissions may, by notification****, make regulations consistent with this Act and the rules*** *generally to carry out the provisions of this Act.*

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

…

(zd) ***the terms and conditions for the determination of tariff under section 61****;* **"**

It is clear from the Act that the tariff for supply of electricity by a generating company to a distribution licensee will have to be determined based on the specified terms and conditions (Regulations) while being guided by the various sub-sections in Section 61 of the Act. Section 62(1)(a) casts a mandate on the Appropriate Commission to determine tariff for supply of electricity by a generating company to a distribution licensee. Section 64 of the Act elaborates the procedure that has to be followed by a generating company for a tariff order based on application for determination of tariff under Section 62 for supply of electricity by a generating company to a licensee. Section 66 casts a mandate on the appropriate commission to promote the development of a market and has to be guided by National Electricity Policy. Section 181(2)(zd) empowers the State Commission to make regulations consistent with the Act and the rules for the terms and conditions for the determination of tariff under section 61.

9.30 The learned counsel (s) for the State Commission as well as the other Respondents have pleaded that the appropriate regulation for determination of tariff for M/s BLA's Long Term PPA is MPERC Generation Tariff Regulation. The MPERC Generation Tariff Regulation is renewed from time to time based on Central Commission norms and the relevant portions of the current MPERC Generation Tariff Regulation is extracted below:

No. 2267-MPERC.2015- Whereas, the first control period of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations 2005 (G-26 of 2005) expired on 31st March, 2009, the Commission notified revision (RG-26(I) of 2009) of these Regulations dated 30th April, 2009 on 08th May 2009 to specify the principles and methodologies for the second Multi Year Tariff control period from FY 2009-10 to FY 2011-12. Further, vide second amendment dated 24th February, 2012, the Commission extended the control period up to March, 2013. The Commission notified revision (RG-26(II) of 2012} of these Regulations on 12th December, 2012 to specify the principles and methodologies for the third Multi Year Tariff control period from FY 2013-14 to FY 2015-16. In order to specify the terms and conditions for determination of Generation tariff for the next control period from FY 2016-17 to FY 2018-19, it has become necessary to notify these Regulations;

Now therefore in exercise of the powers conferred ***by section 181(2) (zd) read with section 61 of the Electricity Act, 2003 (36 of 2003)*** *thereof and all other powers enabling it in this behalf, and after previous publication, the Madhya Pradesh Electricity Regulatory Commission, hereby, makes the following Regulations:*

CHAPTER -1 PRELIMINARY

1. Short title and commencement:

1.1 ***These Regulations may be called theMadhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 (RG-26 (III) of 2015)****.*

1.2 These Regulations shall extend to the whole of the State of Madhya Pradesh.

…

2. Scope and extent of application.

These Regulations shall apply in all cases of determination of generation tariff for a generating station or a unit thereof (other than those based on renewable sources of energy) under Section 62 of the Electricity Act, 2003 read with Section 86 of the Act for supply of electricity to a Distribution Licensee, *but shall not apply for generating stations whose tariff has been discovered through tariff based competitive bidding in accordance with the guidelines issued by*

the Central Government and adopted by the Commission under Section 63 of the Electricity Act, 2003.

6 Principles for Tariff determination

6.1 The, Commission, while specifying the terms and conditions for the determination of Tariff under these Regulations, ***is guided by the principles contained in Section 61 of the Electricity Act****.*

6.2 ***These Regulations intend to encourage generating company to operate on sound commercial principles****. The return on equity allowable to generating company shall depend upon its performance relative to the benchmark levels of the operating parameters" fixed by" the Commission. Only prudent capital expenditure shall be considered for inclusion in the asset base.*

6.3 ***The Multi-Year Tariff Principles adopted in these Regulations seek to promote competition, adoption of commercial principles, efficient working of the generating company and are based on the Central Electricity Regulatory Commission (CERC's) principles.*** *The operating and cost parameters for the Tariff period have been prescribed after duly considering the past performance, performance of similarly placed Units, fuel, vintage of equipments, nature of operation and capability of achievement in view of past performance for many years. The allowable Tariffs shall be determined in accordance with these norms. …*

7 Procedure for making application for determination of tariff:

7.1. The generating company may make an application for determination of tariff for new generating stations along with all relevant documents and details to be filled up in the formats as per Appendix IV with these Regulations within four months from the scheduled date of commercial operation.

…

7.3. The generating company shall provide details, as part of the application to the Commission, in such formats, in hard and soft copy, as may be required by the Commission. The generating company shall necessarily provide details Unit-wise and Station wise as envisaged in the formats to enable the Commission to determine the Tariff, as required.

7.4. The generating company shall make an application as per these Regulations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred during the tariff period of the generating station:

The generating company is required to furnish all such additional information or particulars or documents as may be considered necessary for the purpose of processing the application:

…

7.6. The generating company shall furnish to the Commission all such books and records or certified true copies thereof, including the Accounting Statements, operational and cost data, as may be required by the Commission for determination of Tariff.

…

8 Methodology for Determination of Tariff and Truing up

8.1 The Commission shall define Tariff period for the generating company from time to time. The principles for Tariff determination shall be applicable for the duration of the Tariff period. …

8.7 The generating company shall carry out truing up of tariff of generating station based on the performance of following Controllable parameters:

Controllable Parameters:

(i) Station Heat Rate;

(ii) Secondary Fuel Oil Consumption; and

(iii) Auxiliary Energy Consumption;

8.8 The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters…

CHAPTER - 4 TARIFF STRUCTURE

26. Components of Tariff:

26.1 ***The tariff for supply of electricity from a thermal generating station shall comprise two parts, namely, capacity charge (for recovery of annual fixed cost consisting of the components as specified in Regulation 27 of these Regulations) and energy charge (for recovery of primary and secondary fuel cost).***

…

27. Capacity Charges:

The Capacity charges shall be derived on the basis of annual fixed cost. The annual fixed cost (AFC) of a generating station shall consist of the following components:

(a) Return on equity;
(b) Interest on loan capital;
(c) Depreciation;
(d) Interest on working capital;
(e) Operation and maintenance expenses:

Provided that special allowance in lieu of R&M where opted in accordance to Regulation 22 or separate compensation allowance in accordance with Regulation wherever applicable shall be recovered separately and shall not be considered for computation of working capital.

28. Energy Charges:

Energy charges shall be derived on the basis of the Landed Fuel Cost (LFC) of a generating station (excluding hydro) and shall consist of the following cost:

(a) Landed Fuel Cost of primary fuel; and
(b) Cost of secondary fuel oil consumption:

Provided that any refund of taxes and duties along with any amount received on account of penalties from fuel supplier shall have to be adjusted in fuel cost.

The MPERC Generation Tariff Regulation is under Section 181(2)(zd) read with section 61 of the Electricity Act, 2003 and determines tariff under Section 62 following the procedure under Section 64 of the Act. Furthermore, as required under Section 61(a), these Regulations are made in line with the Central Commission Regulations for determination of tariff applicable to generating companies. The scope and extent of

the Regulations clearly specify that these Regulations shall apply in all cases of determination of generation tariff for generating stations or unit thereof under Section 62 of the Act with the exception of renewable sources of energy or any tariff which has been discovered through Section 63 of the Act. Regulation 6 of MPERC Generation Tariff Regulations specifies the principles for tariff determination. Regulation 7 specifies the procedure for making application for determination of tariff. Regulation 8 specifies the methodology for determination of tariff. Regulation 26 specifies the components of tariff, i.e. capacity charge and energy charge. It is admitted position of all parties that the tariff for supply of electricity under long term PPA dated 05.01.2011 has been determined under MPERC Generation Tariff Regulations.

9.31 The contesting Respondents including the State Commission argue that upon qualifying as a CGP, the tariff for supply of contracted capacity from Unit-1 of M/s BLA's Generating Station shall cease to be a two part tariff determined under MPERC Generation Tariff Regulations but will automatically become a single part tariff as determined under MPERC Captive Regulations by the State Commission in the retail tariff order. Hence, we look at the MPERC Captive Regulations.

9.32 The relevant provisions of the Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Other Matters With Respect To Conventional Fuel Based Captive Power Plants) Regulations, (Revision-I) 2009 {Rg-30(I) Of 2009}("**MPERC Captive Regulations**"), are extracted below:

> *"No. 254-MPERC-2009.* ***In exercise of the powers conferred by Section 181 read with Sub section (b) of Section 86 of the Electricity Act 2003 (36 of 2003) and all powers enabling it in that behalf,*** *the Madhya Pradesh Electricity Regulatory Commission hereby revises the Madhya Pradesh Electricity Regulation Commission (Power Purchase and other matters with*

respect to conventional fuel based captive power plants) Regulations, 2006 notified on 29.9.2006 to ***harness the surplus generation capacity of captive power units and to reduce peak time shortages in the system.***

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION (POWER PURCHASE AND ***OTHER MATTERS*** *WITH RESPECT TO CONVENTIONAL FUEL BASED CAPTIVE POWER PLANTS) REGULATIONS, (Revision-I) 2009 {RG-30(I) of 2009}*

PREAMBLE

Whereas the Commission had notified Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Other Matters with respect to conventional fuel based Captive Power Plants) Regulation, 2006 (G-30 of 2006) on 29.9.06 and whereas certain changes are necessary in these Regulations ***to align them with the Tariff Policy notified by the Ministry of Power, Government of India on 6th January 2006****, therefore these Regulations are being notified.*

CHAPTER I: PRELIMINARY

Short title, commencement and interpretation

1.1 These Regulations may be called the 'Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Other Matters with respect to conventional fuel based Captive Power Plants) Regulations, (Revision-I) 2009 {RG-30 (I) of 2009}'.

1.2 These Regulations shall extend to the whole of Madhya Pradesh and shall apply only to the Captive Power Plants using conventional fuels.

…

Definitions

1.4 In these Regulations, unless the context otherwise requires,

…

(d) "Captive Power Plant (CPP)" shall have the meaning assigned to the term under clause 1.5 of these Regulations;

(e) "CPP Holder" shall mean an individual, company or a body corporate being the owner of the Captive Power Plant;

(f) "Captive User(s)" shall have the meaning assigned to these Users under clause 1.5 of these Regulations;

…

(r) "User" means the Captive User;

(s) Words and expressions used and not defined in these Regulations but defined in the Act shall have the meanings as assigned to them in the Act, or in absence thereof, shall have the same meaning as commonly understood in the electricity supply industry.

Definition of a CPP with respect to own consumption versus sales mix

1.5 A power plant shall be identified as a Captive Power Plant only if it satisfies the conditions contained in clause 3 (1) (a) and (b) of the Electricity Rules, 2005 notified by the Ministry of Power, Government of India, on 8th June 2005, reproduced here for ready reference:

…

CHAPTER III:

CONDITIONS FOR SALE OF CPP POWER TO A DISTRIBUTION LICENSEE

3.1 Any CPP Holder shall be ***entitled*** *to sell surplus power to that Distribution Licensee in whose area of supply CPP is located.*

3.2 ***The maximum rate of purchase of power from a CPP Holder by the Distribution Licensee shall be as determined by the Commission in its tariff order issued from time to time.*** *However, the concerned Distribution Licensee shall have the option of procuring short-term / long-term power from any CPP Holder based on competitive bidding, using the guidelines specified by the Ministry of Power, Government of India in this regard but not exceeding the rates as determined by the Commission. In such an event, the Commission shall adopt the rate for power purchase as decided through such competitive bidding. In all such cases, the agreement shall be executed by M.P. Power Trading Co. Ltd. on behalf of the Distribution Licensee.*

3.3 In view of the Govt. of M.P. notification dated 3rd June, 2006 and allocation of power amongst three Distribution Licensees

vide notification dated 14th March, 2007 wherein Madhya Pradesh Power Trading Company Limited has been made the nodal agency for procurement of power on behalf of the Distribution Licensees, the applicability of these Regulations is extended to Madhya Pradesh Power Trading Company Limited.

3.4 Any CPP Holder with any exportable surplus power and who is willing to sell such surplus power to a Licensee, shall be required to enter into a Power Purchase Agreement (PPA) with such Licensee. ***The Licensee shall prepare and submit to the Commission a standard Power Purchase Agreement (hereinafter in these Regulations referred to as PPA) to be signed with CPP Holder for the Commission's approval, within one month of notification of these Regulations.***

…

Rates of Firm Power and In-firm Power rates for power purchase by Licensee from CPP:

3.6 The rate of purchase of Firm Power shall be differentiated between power purchased during normal time (between 0600 Hrs. to 1800 Hrs.), peak-time (between 1800 Hrs. to 2200 Hrs.) and off-peak time (between 2200 Hrs. to 0600 Hrs. of next day).

3.7 For CPP Holder having ***PPA with a Licensee****, the rate of purchase of Firm Power during normal time shall be as approved by the Commission in its Tariff Order for the financial year in question. The rate of purchase of Firm Power during peak time and off-peak time shall be 110 % and 90 % of the rate for normal time respectively."*

9.33 The MPERC Captive Regulations is framed under Section 181 read with Sub-section (b) of Section 86 of the Act. Notably, it is not framed under Section 61 or the related Sub-section 2(zd) of Section 181 of the Act. The MPERC Captive Regulations define the term "Captive Power Plant (CPP)" and equates it to CGP as a power plant qualifying under Rule 3 of the Rules. It further defines the term "CPP Holder" which term is not there either in the Act or the Rules. Regulation 3.1 entitles a CPP Holder to sell surplus power to a distribution licensee in whose area the CPP is located. Regulations 3.2 states that the State Commission may

determine the maximum rate of purchase of power from a CPP Holder by a distribution licensee in the tariff order issued from time to time. Regulation 3.4 empowers the CPP Holder with any exportable surplus power and who is willing to sell such surplus power to a licensee to enter into a power purchase agreement. Regulation 3.4 further mandates that the licensee shall submit to the Commission a standard power purchase agreement to be signed with the CPP Holder for the Commission's approval within one month of the notification of the MPERC Captive Regulations. It is observed by us that neither of the contesting Respondents have submitted a copy of such a 'Standard Power Purchase Agreement' which has been approved by the State Commission pursuant to Regulation 3.4 of the MPERC Captive Regulations, and neither is it contended by any of the contesting Respondents that such a 'Standard' PPA was ever approved by the State Commission.

9.34 The learned counsel (s) for contesting Respondents contend that under the MPERC Captive Regulations, the State Commission has been determining a single part tariff in its retail tariff order for purchase of power by the licensee from a 'CPP' and the same should apply to M/s BLA for supply of contracted capacity from its Unit-1 under long term PPA with M/s MPPMCL. However, in our view, the applicability of a regulation for determination of tariff for a generating company has to necessarily be under Section 61 of the Act. A plain reading of the Act makes it clear that the principles under section 61 of the Act has to be followed in all cases of determination of tariff. As we see it, the MPERC Generation Tariff Regulation is the only regulation which is notified under Section 61 of the Act and which is applicable on M/s BLA for tariff determination for a long term PPA under section 62 of the Act. Learned counsel (s) Mr. Sen and Mr. Buddy Ranganadhan appearing for M/s BLA argued that no tariff can be determined under the MPERC Captive Regulations as this would be in violation of Section 61, Section 62,

Section 64 and Section 66 of the Act. We agree with this submission. As mentioned earlier, the MPERC Captive Regulations are neither framed under Section 61 of the Act nor does it specify any terms and conditions for the determination of tariff. Hence, no tariff can be determined for long term supply of electricity by a generating company to the distribution licensee under the MPERC Captive Regulations. We are of the view that tariff for long term supply of electricity (conventional fuel based) by a generating company to a distribution licensee necessarily has to be determined by the State Commission under the MPERC Generation Tariff Regulations, even if power plant qualifies as a CGP or a unit thereof in accordance with Rule 3. The fact remains that a CGP is also a Generating Station.

9.35 We do not find force in the arguments of the learned counsel for the Respondents that the MPERC Captive Regulations applies in the current situation where M/s BLA has a long term capacity contract under its PPA dated 05.01.2011. Firstly, MPERC Captive Regulations pertain to entitlement of a "CPP Holder" to offer" surplus power" to a distribution licensee in its area. A "CPP Holder" is not defined in the Act or the Rules. Secondly, MPERC Captive Regulations is only for short term supply of electricity, which is not a committed supply of power, but purely at the discretion of the "CPP Holder". On the other hand, the Long term PPAs of M/s BLA is for a committed "Contracted Capacity" for 20 years. BLA is obligated under the PPA to supply such "Contracted Capacity" to MPPMCL. Such obligation to supply "Contracted Capacity" cannot be treated as an entitlement to supply "surplus power" as envisaged in the MPERC Captive Regulations. Thirdly, according to clause 3.4 of the MPERC Captive Regulations, a 'Standard' PPA was to have been approved by State Commission one month from the notification of the MPERC Captive Regulations, which could then be used by the Discoms for procuring short term power from a "CPP Holder". However, no such MPERC approved 'Standard' PPA

is presented by any of the Respondents before us, and hence we observe, that no such 'Standard' PPA, duly approved by the State Commission exists. Since, no 'Standard' PPA in terms of these regulations is approved, no such 'Standard' PPA could have been entered into by BLA. Indeed, no such 'Standard' PPA as envisaged under the MPERC Captive Regulations has been entered into by BLA Power. Fourthly, it is the admitted position of all parties that the Long-Term PPA under question have been entered into between the parties pursuant to an MoU and an I.A. with the Government of Madhya Pradesh. The Long-Term PPA of BLA Power are not pursuant to the MPERC Captive Regulations. The said Long Term PPA has been duly approved by the State Commission and two-part tariff therefore is determined under the MPERC Generation Tariff Regulations. Fifthly and lastly, just because Unit-1 of M/s BLA has qualified a CGP qua M/s Prism, the terms of the said Long Term PPA, which provides a two-part tariff to be paid to BLA Power, cannot be said to have changed or deemed to have been automatically amended upon Unit-1 of BLA qualifying as a CGP.

9.36 Therefore, we are unable to accept that the MPERC Captive Regulations apply for the supply of "Contracted Capacity" by BLA Power to MPPMCL under the long-term PPA. Tariff for such supply of "Contracted Capacity" under the long-term PPA dated 05.01.2011 between M/s BLA and M/s MPPMCL can therefore be determined only under the MPERC Generation Tariff Regulations. **Having regard to the submissions and pleadings of all the parties, we hold that tariff for supply of 35% power to MPPMCL by BLA Power would continue to be determined by the State Commission in accordance with its Generation Tariff Regulations.**

Summary of our Findings:

10.1 In light of the facts that the twin-conditions as per Rule 3 are met by M/s. Prism and M/s. BLA in terms of Unit-1, we hold that Unit-1 of M/s. BLA is a CGP with M/s. Prism as its captive user. Therefore, in terms of the 4th Proviso to Section 42(2) of the Act, cross-subsidy surcharge cannot be levied on power captively consumed by M/s. Prism from M/s. BLA's Unit-1. Consequently, the impugned demand notices dated 02.01.2018 are set-aside. However, we clarify that if at the end of a particular financial year it is found that the twin-conditions are not satisfied, the exemption from levy of cross subsidy surcharge would not be available.

10.2 Further, whether or not Unit-1 of BLA Power is qualifying as a CGP under Rule 3, the Tariff for supply of 30% of installed capacity of Unit-1 under Long-Term PPA will continue to be determined in the same manner as has been done in the past, i.e. under MPERC Generation Tariff Regulations.

10.3 Though a lot has been argued on the conduct of the State Commission in the present case, we do not wish to go into the same except to only state that State Electricity Regulatory Commissions are required and expected to act as a neutral Regulator and to adopt a judicious approach in all matters so as to strike a balance among all the Stake Holders.

ORDER

For the forgoing reasons, we are of the considered opinion that the issues raised in the present Appeals have merit and accordingly, the Appeals are allowed. The Impugned Order dated 30.12.2017 passed by the MP State Regulatory Commission in Petition No. 56 of 2016 and Petition No. 36 of 2017 is hereby set aside to the extent challenged in the Appeals.

The pending IA, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Open Court on this day of **17th May, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Kt