APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 131 of 2020 &

IA Nos. 425, 426, 1210 & 1215 of 2020

Dated : 7th June, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member (Electricity)

IN THE MATTER OF :

Tamil Nadu Power Producers Association
Represented by Secretary
No. 6, Sardar Patel Road, Guindy
Chennai- 600032. Appellant

Versus

1. Tamil Nadu Electricity Regulatory Commission,
   Having its registered office at No 19-A, Rukmini
   Lakshmipathy Salai (Marshalls road),
   Egmore, Chennai,
   Tamil Nadu - 600 008
   (Through its by its Secretary)

2. Tamil Nadu Generation and Distribution Corporation
   Limited Having its registered office at TANGEDCO,
   144, Anna Salai, Chennai,
   Tamil Nadu-600002

3. Sugapriya Paper and Boards (P) Ltd.
   107/2 N.Subbniahpuram
   SatturTaluk Virudhunagar
   District - 626205.

4. Indian Wind Power Association
   Represented by its Secretary General
   Door No.E, 6th Floor, Shakti T- II 766,
   Anna Salai Chennai - 600002.

5. The Southern India Mills Association
   41, Race Course Road
   Coimbatore - 641 018.
   (Represented by its Vice
   President Mr.K. Sathiavan)

6. Tamil Nadu Electricity Consumers Association
   SIEMA Building, 8/4,
   Race Course. Coimbatore - 641 018
   (Represented by its Vice President
   Mr.K. Sathiavan)

7. Sri Venkateshwara Boards
   1/40A, NH 7 Road,
   Pethureddipatti Village
   Odaipatti Post
   SatturTaluk Virudhunagar District - 626 205
   (Through its Director, Mr.G.Seenivasan)

8. Tamil Nadu Spinning Mills Association,
   12, Karur Road, Modern Nagar
   Dindigul - 624 001.
   (Through its Chief Advisor Dr.K.Venkatachalam)

9. The Southern India Mills Association
   41, Race Course Road
   Coimbatore - 641 018.
   (Through its Deputy Secretary General) …Respondent(s)

Counsel on record for the Appellant(s) : Mr. Sajjan Poovayya, Sr.Adv.
Mr. Buddy A. Ranganadhan
Mr. Hemant Singh
Mr. Mridul Chakravarty
Mr. Anirban Mondal
Mr. Tushar Srivastava
Ms. Soumya Singh
Mr. Lakshyajit Singh Bagdwal

Mr. Karan Govel

Counsel on record for the Respondent(s): Mr. Sethu Ramalingam **for R-1**

Mr. C. S. Vaidyanathan,Sr.Adv.
Mr. Balaji Srinivasan A.A.G (Tamil Nadu)
Mr. B. Vinod Khanna for **R-2**

Mr. Rahul Balaji
Mr. Senthil Jagadeesan **for R-4 & 9**

Mr. M.G. Ramachandran, Sr.Adv.
Mr. Kumar Mihir **for R-8**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

This Appeal being Appeal No. 131 of 2020 has been filed by Tamil Nadu Power Producers Association ("**TNPPA**") challenging the impugned order dated 28.01.2020 passed by the Tamil Nadu Electricity Regulatory Commission ("**TNERC**") in R.A. No. 7 of 2019wherein the said Commission has formulated a procedure for verification of status of Captive User(s) and Captive Generating Plant(s) ("**CGP**") located in the State of Tamil Nadu, said to be in terms of directions of Hon'ble High Court of Madras in W.A. (MD) No. 930 of 2017.

2. **Description of Parties**:-

i The Appellant i.e. Tamil Nadu Power Producers Association is an association of power producers in the State of Tamil Nadu formed in 2004, which includes CGP(s). The Appellant came to be formed in the year 2004. It was formed with the objective of promoting and protecting the interests of the various power producers in the State of Tamil Nadu.

The Appellant participated in the proceedings of R.A. No. 7 of 2019 in which the impugned order was passed. It has placed its Memorandum of Association, along with list of members as an annexure.

ii. The Respondent No. 1 is the Tamil Nadu Electricity Regulatory Commission which is a regulatory commission under the Electricity Act 2003 ("the Act"). The Respondent No. 2 is Tamil Nadu Generation and Distribution Corporation Limited ("**TANGEDCO**"), is a vertically integrated utility responsible for power generation and distribution in the state of Tamil Nadu. Respondent Nos. 3 to 9 are individual captive users, and associations representing captive users and captive generating plants and were parties in R.A. No. 7 of 2019 before TNERC.

3. Brief facts of the Appeal:

i. The Appellant has stated that Respondent No. 2, issued Circular Memoranda dated 15.03.2017, 18.03.2017, 30/31.03.2017, 07.04.2017 and 15.04.2017 requiring the captive generators and captive users to furnish documents, data for the purpose of verification of captive generating plants in accordance with Rule 3 of the Electricity Rules, 2005 (the "**Rules**").

ii The aforesaid Circulars were challenged by various captive users and captive generators before the Hon'ble High Court (Madurai Bench) by way of Writ Petitions, being W.P. Nos. 10497, 10542, 10576, 9304, 9305 of 2017 which were disposed of vide an Order dated 25.05.2017. The aforesaid Order was thereafter challenged by Respondent No. 2 by filing Writ Appeal, being W.A. (MD) Nos. 930-931 of 2017, wherein the

Division Bench of the Hon'ble High Court vide an order dated 09.10.2018, issued the following directions:

> "*10. In view of the above, we are not inclined to undertake any academic exercise in deciding the jurisdiction qua verification and adjudication as ultimately, final adjudication, in any case, would lie in the court of the second respondent. We may note that we are at the initial stage and therefore it would only be just and proper to proceed further resulting the adjudication. There is also a broad agreement on this course. In such view of the matter, these writ appeals stand disposed of with the following directions/observations.*
>
> *i. The issue qua the jurisdiction and power of the appellants to verify and determine CGP Status leading to entitlement of cross surcharge subsidy is left open;*
>
> *ii. The second respondent is directed to issue either a general or special order detailing the procedure to be followed for verification of the CGP Status either by directing or giving liberty to the appellants to verify the Captive Status of the Generating Companies;*
>
> *iii. The aforesaid order will have to be passed within a period of six weeks from the date of receipt of a copy of this order;*
>
> *iv. The private respondents are directed to furnish the particulars to facilitate the process of verification as per the procedure contemplated and the directions of the second respondent when asked by the appellants preferably within a period of four weeks;*
>
> *v. The appellants can make a determination on receipt of the aforesaid verification particulars from the respective Generating Companies and in the event of disputes, place them before the second respondent for adjudication after marking copies of the same to the concerned Generating Companies.*
>
> *vi. As and when the said exercise is done with respect to each and every Generating Company, the adjudication process will have to be commenced and thereafter completed by the second respondent within a period of six weeks;*
>
> *11. It is open to the second respondent to pass a common order in view of the commonality of the issues involved. All other issues both on fact and law are left open to 5 be*

> *agitated by the appellants and the private respondents and thus, adjudicated by the second respondent. No costs. Consequently, connected civil miscellaneous petitions are closed.*"

iii. On 27.02.2019, TNERC webhosted a draft procedure for verification of status of Captive User(s) and Captive Generating Plant(s) by the Distribution Licensee/ TANGEDCO. Against such webhosting of draft procedure for verification of CGP status, the Tamil Nadu Association of Spinning Mills/ Respondent No. 8 in the present proceedings, filed contempt petition, being C.M.P. No. 442 of 2019, before the Madurai Bench of the Hon'ble High Court, which was subsequently withdrawn. The Respondent No. 2 also filed Clarificatory Petitions being CMP Nos. 5958-5959 of 2019 in W.A. (MD) 930-931 of 2017, in the order dated 09.10.2018. The Division Bench of the Hon'ble High Court, vide order dated 17.09.2019 directed TNERC for fixing date of hearing by making publication on its website. The stakeholders were also granted liberty to put forth their views/ objections.

iv. Thereafter, TNERC on the representation of stakeholders issued a revised draft procedure on 09.12.2019 for verification of status of Captive User(s) and Captive Generating Plant(s) by Respondent No. 2. A hearing was also conducted on 23.12.2019 by TNERC, wherein, the Appellant herein was one of the participants.

v. On 28.01.2020, TNERC passed the impugned order passing various directions for verification of status of Captive User(s) and Captive Generating Plant(s) by Respondent No. 2. This order is under challenge before us in the captioned appeal.

vi. Parties have filed written submissions respectively. During the course of arguments, we have also been apprised of the fact that the Hon'ble Supreme Court have passed certain directions upon this Tribunal, vide an order dated 09.09.2020, in a transfer petition filed by Respondent No. 2, seeking transfer of the present appeal to the Hon'ble Madras High Court. The said order is provided below:

> "…
> *We, therefore, direct that the APTEL should, at the earliest, take up the matter for final hearing so that the final view of the APTEL in the matter is known rather than the concentration being only on the issue of interim relief, on which of course the APTEL is entitled to pass an appropriate order*…."

vii. In the aforesaid Apex Court Order, it is also specifically noted by us that learned counsel for Respondent No. 2 herein, who was the Petitioner before the Hon'ble Supreme Court, specifically stated that the present Appeal filed before this Tribunal is maintainable

viii. Indian Wind Power Association, Respondent No. 4, the Southern India Mills Association, Respondent No. 9 and Tamil Nadu Spinning Mills Association, Respondent No. 8 have also filed their responses and written submissions. The said Respondents have more or less supported the contentions of the Appellant.

ix. The Appellant, aggrieved by the impugned order passed by TNERC has preferred the instant appeal before this Tribunal on the following issues:

a. Appointment of TANGEDCO as the verifying, as well as adjudicating, authority;
b. Documents to be provided for availing open access under Section 9 of the Act and Linking of Wheeling/ Open Access with captive verification;

c. Wrongful treatment of SPV as an AOP;

d. Implementation of the proposed Draft amendment to Electricity Rules, 2005 issued by Ministry of Power, yet to be notified;

e. Criteria to be followed for verifying the criteria of consumption provided under Rule 3;

f. Retrospective applicability of procedure/ guidelines, which is impermissible under the Electricity Act, 2003; and

g. Methodology for verification of change in ownership and consumption;

4. Learned counsel for the Appellant/TNPPA has filed the written submissions and the gist of the same is as under:-

4.1. The Respondent Commission vide impugned Order proceeded to issue guidelines, prescribing the procedure for verification of status of Captive Generating Plants and Captive Users, in terms of certain directions issued by the Hon'ble Madras High Court, Madurai Bench in W.A. (M.D.) Nos. 930-931 of 2017 and C.M.P. Nos. 5958-5959 of 2019. Under the garb of providing criteria for verification of captive status under Rule 3 of the Electricity Rules, 2005, the Commission went on to provide criteria for grant of wheeling approval prior to open access, which is beyond the scope of the applicable TNERC Open Access Regulations, 2014 and Electricity Act, 2003. It was not at all the issue to be decided by the Respondent Commission. According to the prevalent framework of the Electricity Act, 2003, grant of Open Access is mandated to be non-discriminatory and approval for the same has to be granted within the specified timeline on the basis of the documents provided in the TNERC Open Access Regulations, 2014. It is the case of the Appellant that the impugned order has been passed without any jurisdiction, as it seeks to

amend Rule 3 of the Electricity Rules, 2005, by stepping onto the legislative domain, under the garb of a judicial order, which cannot at all be permitted under law.

4.2. The Appellant's submissions on various issues as stated above is as follows:

Re: Appointment of TANGEDCO as the verifying, as well as adjudicating, authority:

4.3. The Respondent Commission vide the Impugned Order, at para Nos. 6.1.4 to 6.1.6 vested the authority with respect to verification of captive status of the captive generating plants in the State of Tamil Nadu with TANGEDCO/ Respondent No. 2, which is the sole entity to gain in the event of the said plants lose their captive generating plant status. Further, the Respondent Commission additionally also formulated the procedure for such verification under para nos. 7.9.6 to 7.9.10 of the aforesaid Order.

4.4. It is contended that it is imperative that this Tribunal takes note of the legislative scheme and intent of the Electricity Act, 2003 as well as Electricity Rules, 2005 qua Captive Generating Plant (CGP) and Cross Subsidy Surcharge (CSS). It is Appellant's contention that on perusal of the provisions of Section 42 of the Act, and Rule 3 of the Rules, it is amply clear that the impugned directions empowering the State DISCOM/ Respondent No. 2 to verify the captive status of a generating plant is dehors the scheme and specific provisions of the Act and the Rules, wherein such critical process has nowhere been contemplated to be vested with and undertaken by a Distribution Licensee, the Respondent No. 2 in this case.

4.5. The provisions of Section 42(2) of the Act and Rule 3 of the Rules have to be read in conjunction to each other wherein, Section 42(2) envisages that the State Commission shall allow open access on payment of a surcharge in addition to charges of wheeling. Further, the said Section also contemplates 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.

4.6. The mandate of the Act is clear to the extent that in the event, captive users and captive generating plant, fail to fulfil the criteria provided under the aforesaid Rule 3 of the Rules, then such users would be liable to make payment of CSS to the distribution licensee/ Respondent No. 2. Thus, in essence, Respondent No. 2, undisputedly being a direct beneficiary and an interested party in the critical verification process of captive generating plant and captive users in the State of Tamil Nadu, ought not be vested with such powers or right to adjudicate/ verify the captive status, in the manner as contemplated under the Impugned Order. Therefore, in addition to being a direct beneficiary and an interested party, it is gainsaid, an undeniable and inevitable conclusion that the Respondent Commission has also erroneously vested and permitted Respondent No. 2 to be a judge in its own cause, which in the eyes of law is unsustainable and a direct constriction of the valuable principles of fair play as well as transparency. On this settled principle of law that no person can be made a Judge in his own cause, they place reliance on the following Judgments;

a. *Uma Nath Pandey &Ors. v. State of Uttar Pradesh &Anr.* reported in *(2009) 12 SCC 40* (refer Para 16); and

b. *J Mohapatra and Co. &Anr. v. State of Orissa &Anr.* reported *in (1984) 4 SCC 103* (refer para 10).

4.7. This Tribunal also passed the following judgments. However, in contravention of the settled legal position that verification qua captive status is to be done by a State Regulatory Commission, the impugned order was passed.

I. *Appeal No. 270 of 2006* titled as *Chhattisgarh State Power Distribution Co. Ltd. v. Shri J.P. Saboo, Urla Industries Association Ltd. &Ors.* (refer Para 34 and 35); and

II. *Appeal No. 116 of 2009* titled as *Chhattisgarh State Power Distribution Co. Ltd. v. Hira Ferro Alloys Ltd. &Anr.* (refer para 27 and 28)

4.8. The Impugned Directions passed by the Respondent Commission has further diluted the standards of judicial propriety, as, such a direction is against the ethos of the sacrosanct principles of fair-play and transparency.

4.9. Further, in the event the Respondent Commission delegates any of its power/ functions in terms of Section 97 of the Act, then it ought to appoint an independent agency/ authority for the purpose of verification of captive status, instead of appointing Respondent No. 2. This can be achieved either by giving power to collect and verify data to the Chief Electrical Inspector ("CEI") of the State, or to any other independent and neutral committee/ body. The matter of Verification of CGP Status is a complete and complex process, involving adjudication and therefore, such matters cannot also be left to TANGEDCO under the power of delegation, as provided under Section 97 of the Act. The State Commission is provided with powers and functions, under Section 86 of the Electricity Act 2003. Accordingly, under Section 86 (1)(f), one among the functions of the State Commission, is to adjudicate upon the disputes

between the Licensees and Generating Companies and to refer any dispute for arbitration. Therefore, the powers to adjudicate disputes under Section 86 (1)(f), dealing with the matters of disputes between Generators and Licensees, being a matter of adjudication, cannot be delegated to any other agency and it has to necessarily be within the Jurisdiction and power of the State Commission only. What the Distribution Licensee can do, is a matter already enumerated under Part VI of the Act from Sections 42 to 60, elaborately and therefore, just being a Licensee, Respondent No.2 cannot be provided to go beyond the powers and functions provided for it and more particularly with the adjudicatory powers of State Commission.

4.10. In the pleadings, as well as during the course of arguments, the contesting Respondents have sought to justify the said issue by placing wrongful but heavy reliance on the Judgment dated 09.10.2018 rendered by the Madurai Bench of the Hon'ble Madras High Court, by contending that the said Order directed and empowered the Respondent Commission to appoint Respondent No. 2 for verification of the captive status. It was specifically argued that the Appellant herein has conceded to the issue of appointment of Respondent No. 2 as a verifying authority by placing reliance on Para 9 of the said Order. The relevant extract is reproduced hereinbelow:

> "*9. Though the appellants have got some reservation over the aforesaid stand referred in the preceding paragraphs, the private respondents concur with it. It is submitted by the learned Additional Advocate General that without prejudice to the legal issue qua verification and determination by the appellants, this Court may direct the second respondent to issue appropriate orders to be followed for verification of the CGP Status by them. Accordingly, it is stated that the second respondent may be directed to undertake the said exercise of permitting/directing the appellants to verify the Captive Status of the Generating Companies.*"

4.11. In this regard, attention of the Tribunal is drawn to Para 8 of the aforesaid Order which records as follows:

> "*8. Having said that, a stand has been taken that such an exercise can be delegated by exercise of power conferred under Section 97 of the Electricity Act, 2003, and therefore, appropriate orders would be passed detailing the procedure to be followed by the Appellants for verification of the CGP Status.*
> *…*"

4.12. The entire plea of the Respondents that the Appellant herein conceded to the issue of appointment of Respondent No. 2 qua verification process is fallacious and inaccurate. The recording in Para 8 (supra) was to the effect that the Appellant does not have any quarrel with the statutory mandate of Section 97 of the Electricity Act, 2003, which empowers a Commission to delegate certain functions. However, it was/is the case of the Appellant that delegation under Section 97 of the said Act, has to be done in a manner which preserves the elements of transparency and fair-play, and however which is tarnished by the Impugned Directions by appointing Respondent No. 2.

4.13. Further, the Respondents also contended that the mandate of the Hon'ble High Court Order dated 09.10.2018 was to exclusively appoint the Respondent No. 2 qua the verification process of CGP and no other agency or body could have been appointed in its place. The Respondents have placed reliance on the following paragraph of the said Order:

> "*10. In view of the above, we are not inclined to undertake any academic exercise in deciding the jurisdiction qua verification and adjudication as ultimately, final adjudication, in any case, would lie in the court of the second respondent.*

> *We may note that we are at the initial stage and therefore it would only be just and proper to proceed further resulting the adjudication. There is also a broad agreement on this course. In such view of the matter, these writ appeals stand disposed of with the following directions/observations.*
> *…*
>
> *(v) The appellants can make a determination on receipt of the aforesaid verification particulars from the respective Generating Companies and in the event of dispute, place them before the second respondent for adjudication after marking copies of the same to the concerned Generating Companies.*"

4.14. In this regard, the Appellant craves leave to reproduce the following para of the aforesaid Order to harness the fact that the Hon'ble High Court had, in fact, kept the said issue open, and it was only in the interim that Respondent No. 2 could have verified the captive status till the issue was decided by the Respondent Commission:

> *10. In view of the above, we are not inclined to undertake any academic exercise in deciding the jurisdiction qua verification and adjudication as ultimately, final adjudication, in any case, would lie in the court of the second respondent. We may note that we are at the initial stage and therefore it would only be just and proper to proceed further resulting the adjudication. There is also a broad agreement on this course. In such view of the matter, these writ appeals stand disposed of with the following directions/observations.*
>
> *(i) The issue qua the jurisdiction and power of the appellants to verify and determine CGP Status leading to entitlement of cross surcharge subsidy is left open;*

4.15. The Respondents have deliberately evaded from referring to the aforesaid direction passed by the Hon'ble High Court as the same was only an interim arrangement and the actual mandate was for the Respondent Commission to independently apply its mind on the aspect of delegation of power for verification of CGP status. This is also because if the Hon'ble High Court had expressed a final view on the said

issue then there was no occasion for it to leave the same open for consideration by the Respondent Commission. Thus, the averments of the Respondents deserve to be rejected.

4.16. The contesting Respondents without any cogent evidence are stating there are approximately 7000-10,000 captive users in the State of Tamil Nadu and a majority of them have evaded payment of CSS and ASC leading to a substantial financial burden upon the State Instrumentalities and in turn have to pass on the burden caused due to such alleged non-payment of CSS and ASC upon the consumers in the State.

4.17. It is the case of the Appellant that this plea has been specifically placed before the Tribunal by the contesting Respondents in order to create bias and prejudice the Appellant. It is specifically submitted that Respondent No. 2/ TANGEDCO has no embedded right under the framework of the Electricity Act, 2003 and the extant rules to claim CSS from the CGP(s)/ Captive User(s) when they are exempted entities in terms of Section 42(2) of the Electricity Act, 2003. Further, the contesting Respondents also cannot force an argument of under recovery of CSS when captive user(s)/ CGP(s) satisfy the twin requirements under the Rules, which is verified annually at the end of a Financial Year. As such, said plea deserves to be rejected emphatically. Further, the contesting Respondents have diverted the actual *lis* raised in this Appeal by failing to appreciate that the foundation and basis of the present proceedings is for establishing a requisite protocol for verification of captive status, which protocol needs to be framed in terms of and within the scope of the Electricity Act and the Rules.

4.18. In terms of the above, once such a protocol for captive verification is established, only then the Captive User(s)/ CGP(s) could be required/ mandated to provide documents for verification, or for open access, strictly within such protocol. It needs to be appreciated that in the event the Captive User(s)/ CGP(s) deliberately evades from providing the mandated documents/ information to the verifying authority, then the relevant authority would be at liberty to initiate appropriate action under the ambit of framed protocol against such defaulting entities. As such, TANGEDCO cannot be allowed to raise the above argument.

4.19. Therefore, appointment of TANGEDCO is bad as opined at Para 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10.

Re: Documents to be provided for availing open access under Section 9 of the Act and Linking of Wheeling/ Open Access with captive verification;

4.20. Qua the aforesaid issue, the Respondent Commission committed a gross transgression of the intent of the Act as well as the directions of the Hon'ble Madras High Court (Order dated 17.09.2019 in CMP No. (MD) No.5958 of 2019 & 5959), by proceeding to formulate protocol for grant of wheeling/ open access for captive purposes.

4.21. On this aspect, it is submitted that wheeling/ open access is governed/ regulated by virtue of the TNERC Open Access Regulations, therefore the procedure for grant of open access ought to be as per the said Regulations only, and could not have been varied vide the Impugned Order. That, para Nos. 6.3.8, 6.3.9, 7.4 and 7.5 of the Impugned Order become paramount wherein the Respondent Commission issued directions for production of various documents

before starting wheeling of power (i.e. open access permission), in a financial year, for captive purposes. It is also pertinent to examine the directions contained in the aforesaid paras of the Impugned Order in the light of the provisions of Regulations 4(2) and 12 (a) of the TNERC OA Regulations, 2005 and Regulation 9(2) and 13(2) (a), 14(2) (a) of the TNERC OA Regulations, 2014, which mandate the procedure for grant of open access in the State of Tamil Nadu at a granular level. In this regard, the following points are important (*Page 438, 446-447, 470, 474, 477 of VOL-II of the appeal paper book*):

a) Regulation 4 (2) of the TNERC OA Regulation, 2005 provides that for the purpose of obtaining open access from a distribution licensee, either by a captive entity or a non-captive entity, the said entity is only required to make payment of wheeling charges as may be determined by the State Commission.

b) Regulation 12(a) of the TNERC OA Regulations 2005, provides for the documents to be furnished by the entity seeking open access along with the open access application. The documents which are to be provided are the agreement, commitment letter from supplier, details of terminal beneficiary etc. to the nodal agency i.e. STU.

c) Similarly, Regulation 9(2) of the TNERC OA Regulations, 2014 provides that generating stations, captive generating plants and consumers are eligible for open access to distribution system of the distribution licensee (TANGEDCO) on payment of wheeling and other charges as may be determined by the Commission from time to time.

d) Further, Regulation 13(2)(a) prescribes that every application for grant of long-term open access shall contain details such as name of the entity or entities from whom electricity is proposed to be procured, along with the quantum of power and such other details as may be laid down by the State Transmission Utility in the detailed procedure

specified in Regulation 43. It is pertinent to note that the procedure issued under Regulation 43 is in the draft stage and therefore, cannot be relied upon. This means that the documents for grant of long-term open access that are mentioned in the Regulations, can only be required to be submitted by the applicant; and

e) Regulation 14(2)(a) prescribes that the application for grant of medium-term open access (MTOA) shall contain such details as may be laid down under the detailed procedure and shall, in particular, include the point of injection into the grid, point of drawl from the grid and the quantum of power for which medium- term open access has been applied for. Since, as submitted above, the procedure is in draft stage, and therefore MTOA is to be granted on the basis of documents mentioned in the Regulations itself.

For short term open access, every application to the Nodal agency has to be in the specified format [FORMAT ST-1] containing details such as capacity needed, generation planned or power purchase contracted, point of injection, point of drawl, duration of availing open access, peak load, average load and such other additional information as may be required by the Nodal agency.

4.22. It is evidently clear from a perusal of the aforesaid Regulations under the TNERC Open Access Regulations, that there is no single provision which mandates that before granting open access for captive use, shareholding structure has to be verified. It is clarified that open access for captive use is a matter of right envisaged under Section 9 of the Act. Further, without dilating the contents of the present submission, it is domineering to mention herein that prior to the passing of the Impugned Order, the following documents were mandated and

submitted by the captive user(s) for obtaining approval for open access/wheeling as per the TNERC Grid Connectivity and Open Access Regulation, 2014, to the Nodal Agency ("SLDC/STU") without the requirement of submitting any other additional documents:

I. Open Access application as per the format given in aforesaid Regulation, 2014 with list of captive users;

II. Certificate from a Chartered Accountant or Practicing company secretary providing details of the ownership of the CGP with shareholding details as on the date of the application;

III. Consent/NoC obtained from DISCOM (Electricity Distribution Circle (EDC)) where the CGP is located. (Consent/NoC needs to be issued within 3 days as per OA Regulation, 2014);

III. Consent NOC obtained from DISCOM EDC where the captive users are located (for only new users);

IV. An undertaking of not having entered into a Power Purchase Agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought from the Captive user; and

V. Applicable Open Access application fee.

From the above it is evident that it is only the intimation or submission of the aforesaid documents which are required to be made by the person/ entity applying for open access, to the "Nodal Agency" and not to TANGEDCO/ Respondent No. 2. The foregoing documents are in line with the open access regulations, which are sufficient for granting approval of open access/ wheeling, as has been the practice, in the State of Tamil Nadu. It is therefore, the case of the Appellant that the

said documents should be enough for granting open access approval for captive purpose.

4.23 Per contra, according to the Respondents as per Regulation 16(2)(a) of the TNERC Open Access Regulations, 2014, a consumer connected to a distribution system seeking Open access, shall be required to submit consent of the concerned distribution licensee. Accordingly, it has been argued that the said Regulations empowers Respondent No. 2 to require any document from a consumer(s) or a captive user(s) before granting such consent. In this regard, it is submitted by the Appellant that the impugned procedure/ guidelines for verification of captive status cannot be interlinked with the Wheeling/ Open Access approval, i.e., application for Wheeling/ Open Access and its approval have to be strictly within the framework of TNERC Open Access Regulations, 2014.

4.24 It is imperative to be noted herein that under the aforesaid Regulations, the State Load Despatch Centre (SLDC)/ State Transmission Utility (STU) have been exclusively appointed as the "Nodal Agency" which in-turn are authorized to assess the availability in the transmission/ distribution system of the State, for the purpose of granting the approval for wheeling/ open access. In other words, there is no power, whatsoever, vested with TANGEDCO for prior verification of documents for the purpose of grant of open access.

4.25 Further, the reliance of the Respondents on Regulation 16(2)(a) of the said Open Access Regulations is misplaced. This is because any entity applying for open access, be it for long-term or medium-term or short-term period, under the aforesaid Regulations is

mandated to interact with the "Nodal Agency" i.e. SLDC/ STU. Similarly, any interaction with Respondent No. 2 qua grant of open access is governed strictly in terms of the Regulations 16(2)(b)(i), (ii) and (iii) of the TNERC Open Access Regulations, 2014, which mandate granting of consent by the said Respondent after considering the following two limited factors only:

(i) Existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the State Grid Code in force;

(ii) Availability of capacity in the distribution network; and

(iii) Availability of Remote Terminal Unit (RTU) and communication facility to transmit real-time data to the SLDC or Distribution Control Centre (DCC);

It is highlighted that in terms of the foregoing, the Respondent No. 2 is not mandated to seek any other document or information which would be required for verifying the captive status of an entity.

4.26 In fact, the aforesaid submission of the Appellant is further fortified by Regulation 16 (c) of the said Open Access Regulations, wherein the Respondent No. 2 is mandated to convey its consent to the applicant, within three (3) working days, where existence of necessary infrastructure and availability of capacity in the distribution network has been established. In case, the distribution licensee/ Respondent No. 2 does not communicate any deficiency or defect in the application within two (2) days from the date of receipt or communicate refusal or consent within the specified period of three (3) working days of receipt of the application, then in such an event, Regulation 16(f) mandatorily

stipulates that the requisite consent of the distribution licensee/ Respondent No. 2 shall be deemed to have been granted.

4.27 In view of the above, Para 6.3.8(2) read with 7.5.2, 7.5.4 of the Impugned Order, which mandate grant of open access after 30/ 45 days, is in the teeth of aforementioned provisions of the Open Access Regulations.

4.28 Apart from the above, critical reference is made to Section 9 of the Act, which provides for grant of open access for captive transactions. Section 9(2) gives an unequivocal "right" to a CGP for grant of open access. Further, vehement reference is also made to the provision of Section 42(2) of the Act, under which the Distribution Licensee is mandated under law to permit such open access. That, in terms of Section 42(3), open access has to be non-discriminatory. A combined reading of Sections 9, 42(2) and 42(3) of the Act would entail that open access to a CGP for wheeling captive power has to be granted, as a matter of right. Thus, as a natural corollary, the same means that there cannot be any undue hindrances in grant of such open access.

4.29 In addition to the foregoing, Appellant places reliance on Section 10 of the Act which provides for open access for non-captive purposes. It is submitted that reading of the aforesaid statutory framework entails that the only difference between Sections 9 and 10 of the Act, is that, for availing open access under Section 9, a mere intimation that the power is to be supplied for captive purposes, is sufficient and the Act does not prescribe any other requirement in this regard, other than such intimation. In this context, attention of this Tribunal is invited to Section 42(2) of the Act, which specifically provides that the conditions for grant

of open access have to be “specified” by the Commissions. The term “specified” is defined under Section 2(62) of the Act, which means specified by Regulations. In the present case, as already established, the conditions to furnish data, which is much beyond than what is required, has been provided under the garb of the order, and not through proper exercise of legislative function by the Respondent Commission by framing appropriate Regulations.

4.30 In terms of Rule 3 of the Rules, the shareholding structure, as well as consumption pattern of the captive users and CGPs is to be verified at the “end” of “each financial year”. As such, when the furnishing of data is in the interest of the captive generating plant, towards the end of financial year for the purpose of verification, so that the said plant is able to demonstrate its fulfilment of the captive status conditions as per Rule 3, then it defeats the said purpose, to seek detailed documents at the beginning of the financial year.

In this context, it is stated that the aforesaid proposition has been settled by this Tribunal in *Appeal Nos. 02 of 2018 and 179 of 2018*, titled as “***Prism Cement Limited v. MPERC &Ors.”*** (refer to para 9.6 and 10.1).

4.31 In light of the above, it is submitted by the Appellant that wheeling/ open access approval can be sought by any entity, on the basis of their requirement. This Tribunal may note that the only test for grant or denial of open access is the availability of adequate capacity in the distribution/ transmission system of the State. Hence, by excessively linking of the issue of approval of wheeling/ open access with the said captive verification process, the Respondent Commission failed to follow the mandate of the Order dated 17.09.2019, passed by the Hon’ble High

Court, and further, subverted the provisions of the Electricity Act, 2003, read with the TNERC Open Access Regulations.

4.32 It is also paramount to note the definition of "wheeling" and "open access" provided under Section 2(75) and 2(47) of the Act, which makes it clear that wheeling and open access are part and parcel of the same exercise, i.e. wheeling of power would be consequential to grant of open access. Therefore, an entity, whether captive or otherwise, has an independent and untrammelled right to open access under the scheme of the Electricity Act, 2003 and such a right cannot be subverted by creation of hindrances in the form of prescribing additional documents, when the same is not provided under the Open Access Regulations.

4.33 It is also necessary to submit that the Respondent Commission in Para 7.4.1 of the Impugned Order provides that before grant of open access, "verification" of the documents qua shareholding has to be carried out.

The aforesaid is completely contrary to Para 7.4.3 of the Impugned Order, which categorically specifies that the CGP status verification is an "annual verification process" and the documents in support of ownership have to be furnished for the annual verification process at the end of the financial year. After holding the same in Para 7.4.3 of the Impugned Order, the Commission again contradicted itself in paras 7.6.8. and 7.6.9 by holding that for the FY 2020-21 onwards, periodic verification is required in case of any change in shareholding.

4.34 In the Impugned Order at para 6.3.8(3) read with para 7.5.5 the Respondent Commission endeavoured to unreasonably burden the CGP(s) by putting an onus of providing details with regard to any change

in shareholding of existing shareholding in existing captive users and the proof of documents in this regard is mandated to be furnished within 10 days of such change.

It is to be noted here that the documents for every change in shareholding, ought not to be provided to Respondent No. 2 during the subsistence of a financial year, as Rule 3 of the Rules specify that such verification has to be done at the end of the financial year. As such, the said direction needs to be set-aside by this Tribunal.

4.35 In terms of para 6.3.8(2) read with 7.5.2, 7.5.4 of the Impugned Order, the Respondent Commission has specified the time period for submission of documents for proof of ownership. In terms of the said directions, the documents are to be furnished within a period of 30 days, when number of captive users are less than and up to 50, and within a period of 45 days when number of captive users are above 50, preceding the date from which wheeling under captive category is sought. Further, the approval for wheeling/ open access under captive category is to be granted by Distribution licensee on satisfactory verification of documents within the timeframe provided in para 7.5.4 of the Impugned Order.

4.36 Qua the above, it is the case of the Appellant that the documents to be furnished while seeking wheeling approval should be restricted to the new captive users who propose to become the shareholder of the CGP. However, the liability/ onus of providing documents upon any change in shareholding pattern, cannot be unreasonably imposed upon the entire structure of existing members. Further, the requirement of ownership details to be provided in advance prior to seeking wheeling

approval has practical difficulties, owing to the fact that the decision to subscribe to a specific shareholding by a captive user could be just before the date from which open access is to be availed. Hence, the Appellant specifically submits and prays that the requirement to furnish shareholding details at least 30 days, or 45 days, as the case may be, ought to be set aside, as the same is specifically contrary to Regulation 16 of the Open Access Regulations, 2014.

4.37 In addition to the above, from a plain reading of the Order of the Division Bench of the Hon'ble Madras High Court, the Commission had to only provide guidelines/ procedure for verification of captive status. As such, the observations with respect to grant of open access was an extraneous issue beyond the mandate of the remand Order of the Hon'ble High Court. In fact, when the public hearing was conducted by the Commission, the issue qua criteria for open access and related issues were not even on the agenda of the said Commission. It is an established tenet of law that a Court out of judicial propriety ought not to have decided an issue which was not presented before it for adjudication. In fact, the said issue of open access forming part of the Impugned Order was actually an act of astonishment for the objectors. In this context reference is made to following Judgments:

a) *Bachhaj Nahar v. Nilima Mandal &Anr.*, reported in *(2008) 17 SCC 491*. (please see para 10-13 and 22-23);

b) *V.K. Majotra v. Union of India &Ors.* reported in *(2003) 8 SCC 40* (please (refer para 8)

In the light of the aforesaid settled law, the Impugned Order to the extent of the criteria for providing wheeling/open access for captive purposes, ought to be set-aside, and that such open access ought to be granted as per the TNERC Open Access Regulation, 2014.

4.38 In terms of the above, Para Nos. 6.3.8, 6.3.9, 7.4 and 7.5 ought to be set aside.

Re: Wrongful treatment of SPV as an AOP

4.39 So far as the issue of wrongful treatment of SPV as an AOP, it is submitted that the Respondent Commission vide the Impugned Order dated 28.01.2020, at para 6.4.4 equated a Special Purpose Vehicle ("SPV") with an Association of Persons ("AOP"). This has resulted in subjecting a CGP, by way of SPV, to proportionate consumption test, which is otherwise applicable only to an AOP.

4.40 Further, reference is made to the provisions of Rule 3(1)(b), which deals with an SPV. The said provision only provides that the CGP and captive users have to comply with the conditions mentioned under Rules 3(1)(a)(i) and 3(1)(a)(ii). The applicability of provisos of Rule 3(1)(a)(i) is not mentioned in Rule 3(1)(b). Further, from a reading of the scheme of Rule 3 above, it is also evident that the legislature has enacted the 2nd Proviso to Rule 3(1)(a) as a stand-alone provision, which cannot, in any manner whatsoever, be intermingled with sub-rule (b).

4.41 In the case of an AOP, the requirement to be fulfilled for qualifying as Captive is stipulated under the second proviso to Rule 3(1)(a). This Proviso bears semblance of an independent, standalone provision. In other words, Sub-Rule (b) which deals with unit or units of a generating station and the 1st Proviso to Rule 3(1)(a) which deals with a power plant set-up by a registered co-operative society specifically resort to the twin conditions mentioned under Rule 3(1)(a)(i) & (ii).

However, the 2nd Proviso to the aforesaid Rule 3(1)(a), which deals with a power plant as a whole, in the case of AOP, self-envisages that the captive user(s) shall hold not less than 26% ownership of the plant in aggregate and shall not consume less than 51% of the electricity generated, determined on an annual basis, in proportion to their ownership of the power plant. Thus, the legislature in its wisdom has created an intelligible differentia, between an AOP and SPV, which ought to have been given effect to by the Respondent Commission in the Impugned Order and the said distinction cannot be diminished by equating the two. In the case of an SPV, the test of proportionality is not applicable.

4.42 In a case, where a Company owns a captive generating plant, and such Company is self-consuming power, and further issues equity shares to other captive users, then such a transaction is governed by main Rule 3(1)(a) of the Rules, and that there is no requirement that the captive users ought to consume power in proportion to their shareholding in the aforesaid Company, as the provisos of the above Rule are not applicable. A similar interpretation ought to be provided to Rule 3(1)(b), which only provides that the conditions mentioned in Rule 3(1)(a)(i) and (ii) are to be applicable for an SPV, excluding the provisos.

4.43 It is equally important to note that the above principle was laid down by this Tribunal, in the following decisions:

a) *Appeal Nos. 32 of 2007, 164, 165 of 2006*, titled as *Malwa Industries Ltd. v. PSERC &Anr.* (refer paras 16-18); and

b) *Appeal No. 116 of 2009*, titled as *CSPDCL v. Hira Ferro Alloys Ltd. &Anr.* (refer paras 31-35).

4.44 Vide judgment dated 22.09.2009, passed by this Tribunal in Appeal Nos. 171, 172, 10 of 2008 and Appeal No. 117 of 2009 titled as "***Kadodara Power Pvt. Ltd. v. GERC & Ors***", it has been held that a 'Special Purpose Vehicle' is covered by the definition of 'Association of Persons' and as such the CGP based on an SPV model, is required to consume 51% of the generation collectively of the captive generating plant by adhering to the principle of proportionality of consumption that is in accordance with their shares respectively. It is the case of the Appellant that the said observation ought to be held per-incuriam on the following grounds:

a) This Tribunal did not consider that an 'Association of Persons' and 'Special Purpose Vehicle' cannot be equated together and both are distinct entities. SPV is a Company incorporated under the provisions of the Companies' Act, 1956. Furthermore, consumption of energy proportionate to shareholding is not provided in case of a Special Purpose Vehicle setting up a captive generating plant.

b) It was also not considered that SPV is a 'company' and as Association of Persons is an unincorporated entity and, once an Association of Persons is incorporated; it becomes a 'company'. Further, a 'Company' is called an 'SPV' because the company is incorporated only for a special purpose or a specific object and will function in furtherance of only that object. That, once an 'Association of Persons' forms an incorporated entity; it no longer remains just an 'association of persons' but takes the character of a 'Company' as

enshrined under the relevant provisions of the Companies Act, 1956.

c) The Hon'ble Supreme Court of India also held in a number of cases that an 'association of persons' is a recognized tax entity, which is not an incorporated entity. Also, an association of persons is akin to a partnership, wherein an association of persons, comes together for a common purpose or object. The legal position relating to an association of persons is further crystallized, in the following judgment of the Hon'ble Apex Court.

In this context, reference is made to the decisions in the following three cases viz.

a) *B.N. Elias. (1936) I.L.R. 63 Cal. 538; CIT v. LaxmidasDevidas (1937) 39 BOM LR 910*; and *Dwaraknath Harishchandra Pitale, [1937] 5 ITR 716 (Bom)*

b) *RamanlalBhailal Patel v. State of Gujarat, (2008) 5 SCC 449*, (refer to paras 22-25)

c) *CIT v. Buldana Distt. Main Cloth Importer Group, (1961) 1 SCR 181* (refer to paras 6 and 7)

d) *Mohd. Noorulla v. CIT, (1961) 3 SCR 515*, (refer to para 6)

d) With the foregoing context in mind, it needs to be appreciated that Rule 3(1)(a) of the Rules consists of two provisos. It is a settled principle of law that provisos are exceptions to the general rule, and are applicable only if the conditions mentioned therein, or the situation, arises. In this context, reference is made to the following judgments:

i. *State of Punjab v. Kailash Nath* reported in *(1989) 1 SCC 321* (refer paras 9-12)

ii. *Union of India v. Sanjay Kumar Jain* reported in *(2004) 6 SCC 708* (refer para 11, 13 and 15)

e) The first exception (i.e. first proviso) to the general rule relates to power plant setup by a registered co-operative society. A registered co-operative society, setting up a captive power plant is required to satisfy both the conditions collectively by its members. Further, the second exception (i.e. second proviso) to the general rule relates to a power plant set up by an association of persons, whereby the captive users are required to hold 26% of the ownership of the plant in aggregate and they are also required to consume at least 51% of the electricity generated on an annual basis, in proportion to their shares of ownership of the power plant, with a variation not exceeding 10%. However, it is important to mention herein that this applies to generating plants set up by co-operative societies or association of persons.

However, the aforesaid exceptions (provisos) are not applicable to generating plants set up by special purpose vehicles, as the same constitutes a distinct and separate category from the other two, and is separately covered under Rule 3(1)(b), and not Rule 3(1)(a).

f) Under Rule 3(1)(b) of the Rules, the unit(s) of a generating station as set up by a special purpose vehicle, identified for captive use and not the entire generating station, is required to satisfy the conditions contained in paragraphs (i), (ii) of sub clause (a) above. This specifically excludes provisos. It

thus envisages that not less than 26% of the ownership of the power plant is held by captive users and not less than 51% of the aggregate electricity generated by the unit(s) of the generating station identified for captive use, is consumed by the special purpose vehicle. Further, it is significant to note herein that the conditions that are specified in the aforesaid clause (i) and (ii), as modified by clause (b) of Rule 3(1) are only required to be satisfied by the power plant owned by the special purpose vehicle, so as to qualify as a captive generating plant. Furthermore, clause (b) makes no reference to the two provisos of clause (a) of sub-rule (1) of Rule 3. The provisos have no application to the case of a power plant set up by a special purpose vehicle and cannot be looked at for the interpretation of Rule 3 (1) (b). The Rule must be given its plain meaning and cannot be interpreted by making additions which is not envisaged by it.

g) It has been mandated under the first explanation to clause (b) of sub-rule (1) of Rule 3 that the electricity required to be consumed by the captive users shall be determined with reference to such generating unit(s) in aggregate identified for captive use and not with reference to generating stations as a whole. Further, under the second explanation to the abovementioned Rule, mandates that equity shares held by the captive users in the generating station shall not be less than 26% of the proportionate equity of the company related to the generating unit(s) identified as the captive generating plant.

h) A very restrictive interpretation has been rendered to the case of a special purpose vehicle in ***Kadodara's case*** (supra) and if the same is applied to a captive generating plant, set up by a special purpose vehicle, the same results in causing unnecessarily grave and severe hardships to the shareholders of the special purpose vehicle, who shall have to scale down their production plans, if one of the captive user is not able to adhere to the proportionate consumption as sought to be applied by virtue of the said **Kadodara Judgment**, as otherwise, the rule of proportionality would not be capable of being complied with.

Illustration: A shareholder entitled to draw 20 MW from a 40 MW group captive power generating plaint set up as an SPV comprising of 4 shareholders, goes on an outage for one year, due to flood, etc. the captive generating plant would have to operate at a reduced capacity to enable the other three shareholders who are entitled to draw the power in proportion to their equity contribution with a deviation of +/- 10% as has been envisaged under the order dated 22.09.2009 passed by this Tribunal.

i) As per the illustration given above, there would also exist technical constraints in operating the plant at a reduced load if the major shareholder goes on outage. The same would also be economically unviable to run the plant at such part load on a regular basis as the same would affect the health of the machinery and the plant itself. Thus, keeping the same in mind, captive generating plant by a special purpose

vehicle has been kept distinct from that of a plant set up by an association of persons under the Rules and the National Electricity Policy.

j) Hence, in the submission of the Appellant, the **Kadodara Judgment (***supra*) passed by this Tribunal also makes an attempt to lift or pierce the corporate veil by virtually de-recognizing the status conferred under the Companies Act, as it is necessary to take note of the fact that only in case of an Association of Persons, the individuals can be sued, while in case of Company, it is only the Company which is capable of being sued or sue. The Association of persons, as a concept, emerged from the taxation perspective, to ensure that the incomes do not escape assessment, and hence, they are separately classified like Hindu Undivided Families (HUF) and Body of Individuals (BOI), while there are separate and distinct taxation rates applicable for Companies. This Tribunal did not take the abovementioned vital aspects and distinctions into its account, while laying down the interpretation that special purpose vehicle comprises of association of persons.

Therefore, in terms of the above discussion, the reliance placed by the Respondent Commission on the decision of APTEL in ***Kodadara*'s case**(supra) is erroneous, so far it endeavours to equate an SPV with an AOP. Further, as already mentioned above, the said decision of this Tribunal on the issue of AOP and SPV, ought to be treated as given 'per incuriam' to the said extent.

k) This Tribunal in a Judgment passed in Appeal No. 250 of 2016, on an issue as to whether Delayed Payment Charges (DPC) can be treated as non-tariff income, held its previous judgment on the same issue, being judgement dated 11.5.2017 in Appeal No. 250 of 2015 and in Appeal No. 242 of 2016, as per-incuriam. Applying the same principle in the present case, the decision in the **Kadodara Case** (Supra), with respect to treating SPV as equivalent to AOP, is also held per-incuriam in the light of the explanations given in the previous paragraphs. Based on the submissions made hereinbefore, it is evident that the decision in **Kadodara Case** (supra) was passed by ignoring material provisions of the Rule 3, whereby provisos under Rule 3(1)(a), are made applicable to Rule 3(1)(b). At present, the decision in **Kadodara**'s case is pending adjudication before the Hon'ble Supreme Court and its operation is under a stay by the Apex Court.

4.45 In addition to the above, the Respondent Commission vide the Impugned Order dated 28.01.2020, at para 6.4.5, exempted the operating companies owning CGP (i.e. non-SPV and non-AOP) from the test of proportional consumption. In addition, the Respondent Commission also inferred that a non-operating SPV will not be required to fulfil the test of proportionate consumption of power, and that such a Company is only required to fulfil the requirements of 26% minimum equity share capital and consumption of minimum 51% energy generated by CGP.

4.46 Without prejudice to the foregoing that an SPV cannot be treated as an AOP, it is the specific submission of the Appellant that qua a non-operating SPV, the Company which owns the CGP is also consuming captive power itself. This is different from the SPV model, in which the Company which owns the CGP, does not consume captive power. This Tribunal in the aforementioned appeals, being *Appeal Nos. 32 of 2007, 164, 165 of 2006*, in the case of *Malwa Industries Ltd. v. PSERC & Anr*, and *Appeal No. 116 of 2009*, titled as *CSPDCL v. Hira Ferro Alloys Ltd. & Anr*, has categorically laid down that a CGP based on a non-operating SPV model, is not required to fulfil the test of proportionate consumption. In the aforesaid Judgment it has been held that in a non-operating SPV captive model (i.e. the entity which owns the CGP, is itself a captive user), the twin-test of minimum 26% shareholding and minimum 51% consumption is to be met by all the captive users, and once the same is fulfilled, the proportionality principle is not applicable.

Therefore, it is required to be held that for a non-operating SPV, if the captive user(s) collectively consume minimum 51% of the electricity generated by the captive power plant, then the rule of proportionate consumption is not applicable.

4.47 Therefore, Para 6.4.4 deserves to be set aside.

RE: Implementation of the proposed Draft amendment to Electricity Rules, 2005 issued by Ministry of Power, (yet to be approved/notified);

4.48 The Respondent Commission vide the Impugned Order dated 28.01.2020, at Para 6.4.8 and 7.6.8 mandated that verification of ownership and consumption for any change in the group captive structure, shall be done for each corresponding period of such change.

In this regard, reference is made to Para 7.6.8 of the Impugned Order, which clearly goes to show that the Commission relied upon the proposed draft amendment to Electricity Rules. Reference is also made to the proviso to Clause no. 3(6) of the proposed draft amendment to Electricity Rules, 2005 issued by Ministry of Power (yet to be notified). It is settled principle of administrative law that unless delegated legislation is formally notified, the draft form of the said legislation has no legal force.

4.49 The amendments contemplated under the "Draft Rules", mean that the same are not provided under the present existing Rules. Otherwise, there would not have been any requirement to issue an amendment draft. This further entails that the order, to the extent it relies upon the draft rules, is beyond the scope of the existing Rules.

4.50 In addition, this Tribunal ought to mark the stark contradiction in the Impugned Order wherein, the Respondent Commission at para 6.4.5 exempted itself from following the amendments issued by the Ministry of Power in Rule 3 of the Electricity Rules, 2005, given they are still in draft stage. Thus, applying the same principle, which the Respondent Commission applied in para 6.4.5, the said Commission could not have given effect to the directions contained in foregoing paras 6.4.8 and 7.6.8.

4.51 It is pertinent to mention herein that the Respondent Commission in Para 10 of its Written submissions has sought to justify reliance on draft amendment to Rule 3 of the Electricity Rules, 2005. For said reliance, the Commission relied upon a Judgment of Hon'ble Supreme Court on the proposition of declaratory versus clarificatory

laws. It is submitted that the said reliance of the Commission is completely erroneous for the reason that the Judgment does not hold that a draft legislation as a document having force of law.

4.52 It is thus the case of the Appellant that since, the aforesaid directions issued by the Respondent Commission are based on the proposed draft amendment to the Electricity Rules, which are yet to be conferred with the force of law, the same cannot be sustained under law and ought to be set aside.

4.53 Hence, Para 6.4.8 and 7.6.8 ought to be set aside.

Re: Criteria to be followed for verifying the criteria of consumption provided under Rule 3?

4.54 The Respondent Commission vide the Impugned Order, at Paras 6.3 read with 7.8.2 held that, where the minimum requirement of 26% shareholding and 51% consumption are met, however, if any captive user fails to fulfil the proportionality consumption criteria, such user is to be declared as non-captive while the other users who fulfil the above test would remain as captive.

4.55 It is the case of the Appellant that the directions contained in the aforesaid paras is in stark contravention of the intent of Rule 3, which provides that the requirement of having 26% equity share capital with voting rights, and consumption of 51% of the electricity generated, by the captive users, is the minimum condition, beyond which there is no requirement to fulfil the test of proportionate consumption. This invariably means that a captive user(s) who holds shares beyond 26% of the equity share capital, can consume power in any proportion whatsoever.

Further, beyond 51% consumption, the captive user(s) can consume power in any quantity or ratio, whatsoever. Once, the minimum criteria is met by any set of captive users constituting 26% of the equity share capital with voting rights, the rest of the captive users have no mandate in law to consume power with respect to a certain criterion. Therefore, any power consumed by the captive users, qua the balance 49% power generated by the Captive Generating plant, shall have to be treated as captive consumption.

4.56 In this regard, useful reference is made to the following judgments of this Tribunal, wherein it has been held that the aforesaid conditions are minimum requirements, beyond which there is no need for the other captive users to comply the said conditions:

a) *Appeal No. 252 of 2014* titled as *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission & Anr.* (refer paras 17.9 and 17.11)

b) *Appeal No. 316 of 2013* titled as *M/s Sai Wardha Power Co. Ltd. v. Maharashtra Electricity Regulatory Commission & Anr.* (Refer Para 15.2 point vii)

4.57 In the light of the above, it is evident that once the minimum conditions are met, then the balance power can be consumed by any or all of the captive users in whatever proportion they wish to. In other words, if a set of captive users have 26% shareholding and consumed 51% of electricity generated in proportion to their shareholding, then the captive users who own shares beyond 26% have no obligation to fulfil any of the conditions provided under Rule 3, i.e. as per the aforesaid judgments, there cannot be any liability to make payment of CSS by defaulting captive users if the rest of the captive users fulfil the minimum

requirements of 26% shareholding and 51% of consumption. Therefore, the said directions to the extent as submitted above deserve to be set-aside by this Tribunal.

4.58 In terms of the above, Para 6.3 read with 7.8.2 ought to be set aside.

Re: Retrospective applicability of procedure/ guidelines, which is impermissible under the Electricity Act, 2003

4.59 The Respondent Commission vide the Impugned Order, at Para 6.2.5. & 7.2.4 prescribed the Applicability of the Procedure. Further, it has directed that the procedure for verification of CGP status shall be made applicable "retrospectively" i.e. from the Financial year 2014-15 for the CGPs and its users.

4.60 It is the case of the Appellant that the aforesaid direction of the Respondent Commission is directly in contravention of the settled principle of law that delegated legislation can be retrospective in nature by application, only in the event, such retrospectivity is permitted by the Parent Act. The Electricity Act, 2003, which is the Parent Act in the present case, nowhere contemplates promulgation of any delegated legislation, with retrospective effect.

4.61 In this regard, reference is made to the following judgments:

a) *Panchi Devi v. State of Rajasthan*, (2009) 2 SCC 589 (Refer Para 9);

b) *M.D. University v. Jahan Singh*, (2007) 5 SCC 77 (Refer Para 19); and

c) *State of Rajasthan v. Basant Agrotech (India) Ltd.*, (2013) 15 SCC 1 (refer Para 22).

From the above decisions, it becomes crystal clear that the Hon'ble Supreme Court has clarified the intent behind this rule of permissibility of retrospectivity of delegated legislation only if the parent law under which such legislation is born permits the same, is that, current laws should govern current activities, and hence a law passed today cannot apply to the events of the past, or affect the rights of parties for the past period. Further such retrospective application not only affects the vested rights of the Appellant but will be contrary to the parliamentary mandate.

Hence, in view of the above settled position of law, the Impugned Order having been passed in total disregard of the same renders it both unjust and illegal to this extent and deserves to be set-aside by this Tribunal.

4.62 In terms of the above, Para 6.2.5. & 7.2.4 ought to be set aside.

Re: Methodology for verification of change in ownership and consumption

4.63 The Respondent Commission at para 7.6.8 of the Impugned Order mandated that verification of ownership and consumption for any change in the group captive structure, shall be done for each corresponding period of such change. It is the case of the Appellant that the said direction of the Respondent Commission is grossly in the teeth of Rule 3 of the Rules, which mandates that any verification has to be done at the end of financial year and it renders the Impugned Order to this extent without jurisdiction.

4.64 The Respondents have raised a similar contention wherein they have alleged that qua the requirement envisaged under Rule 3(1)(a)(i) of the Electricity Rules, 2005, i.e. shareholding, the same is open for Respondent No. 2 to verify at any given point of time qua any CGP/ Captive User and they are not mandated by law to undertake such verification process at the end of the financial year/ annually. However, the Respondents have also contended that qua the requirement envisaged under Rule 3(1)(a)(ii) of the Rules, 2005, i.e. 51% consumption, the same can only be verified at the end of the financial year/ annually. In other words, as per the contesting Respondents, the verification of shareholding can be done at any time of the Financial Year, while it is only the verification of consumption at the end of Financial Year.

4.65 In this regard, it is specifically submitted that the aforesaid argument of the contesting Respondent is completely erroneous and fundamentally flawed. This is on account of the following:

a) Under Rule 3(1)(a)(i), the captive users have to hold minimum 26% of equity share capital along with voting rights, in the CGP;

b) Under Rule 3(1)(a)(ii), the captive users have to consume minimum 51% of power generated, by the captive user(s).

4.66 From a reading of the above, it is evident that the aforesaid Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) are not mutually exclusive but are completely interdependent on each other. It is submitted that verification of the criteria mentioned under Rule 3(1)(a)(ii) cannot be done on a stand-alone basis, by ignoring Rule 3(1)(a)(i).

4.67 Therefore, the verification of consumption of 51% of the aggregate electricity generated by Captive User(s), annually, can only be done by also considering and verifying as to whether the captive users hold 26% of ownership. Hence, the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the Financial Year. There cannot be any other interpretation but what is intended by the legislature.

4.68 As per the settled rules of interpretation of statutes, it is not open to the contesting Respondents to add or diminish words from the rigid statutory framework of Rule 3 of the Rules, in order to harness the desired intent, which otherwise strikes at the core foundation of such Rule.

4.69 Therefore, it is the submission of the Appellant that verification of minimum shareholding and minimum consumption on proportionate basis at the end of financial year, has to be done qua the captive users existing at the end of financial year only. It is relevant to note that the shareholding of the captive users is to be considered at the level existing at the end of financial year. This means that such shareholding is deemed to be the shareholding of the captive users throughout the financial year.

4.70 As already submitted hereinbefore, the directions contained in para 7.6.8 of the Impugned Order, is in the teeth of the provisions of the Act and the Rules. The said direction of the Respondent Commission finds place in the proposed draft amendment of the Electricity Rules which till date, do not have the force of law as they are yet to be finalized

and notified and is thus impermissible under law. In this context, reference of this Tribunal is re-drawn to the proviso to Clause no. 3(6) of the proposed draft amendment.

4.71 Further, the Respondent Commission, at para 6.4.5 of the Impugned Order exempted itself from following the amendments issued by the Ministry of Power in Rule 3 of the Electricity Rules, 2005, given they are still in draft stage. Thus, applying the same principle, which the Commission applied in para 6.4.5, the Commission could not at all have given effect to the directions contained in paras 6.4.8, 7.4.3, 7.6.2, 7.6.7 and 7.6.8 of the Impugned Order.

4.72 It is also significant to highlight before this Tribunal that the Respondent Commission at para 7.6.9, held that in the event the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within 10 days to the Respondent No. 2, otherwise the said licensee would proceed to verify captive status without considering weighted average of shareholding. When verification is to be done annually, i.e. at the end of the Financial Year, then the question of providing documents on account of change of shareholding of existing captive users, without adding any new shareholder, as a captive user, does not at all arise. It is only in the case that a new captive user is introduced, then only documents qua shareholding have to be furnished as fresh open access is required to be granted.

4.73 In this context, it is submitted that the very concept of weighted average of shareholding, as provided in the Impugned Order, is dehors the provisions of Rule 3 of the Rules. Thus, the prorated consumption by

each shareholder can only be determined based on their ownership at the end of the Financial Year and not upon weighted average shareholding which in essence is considering the ownership at different periods during the Year.

4.74 Therefore, it is submitted that the concept of weighted average shareholding is against the Rules and the adoption of this concept by the Respondent Commission is under challenge before this Tribunal. The order of Ld. Maharashtra Electricity Regulatory Commission (MERC) in the case of Sai Wardha, relied upon by the contesting Respondents, qua the weighted average calculation in terms of shareholding, as well as generation for FY 2015-16 & 14-15, was reviewed by Ld. MERC in *Case No.132 & 133 of 2018* and the same is under challenge before this Tribunal in *A. No. 340 & 341 of 2018*, which is pending adjudication. Therefore, the entire concept of weighted average cannot be applied as the same is *dehors* the legislative framework of the electricity sector.

4.75 In terms of the above, Para 7.6.8 ought to be set aside.

5. Learned counsel for Respondent No. 1/ TNERC has filed written submissions, the gist of which is as under:

5.1 The Appeal is not maintainable for the following reasons:

(a) The Generators who are challenging the verification process prescribed in the impugned order were a party to the Hon'ble High Court of Madras Order dated 09.10.2019 which records *"private respondents concur with it"*.

(b) Contrary to the averments in the Appeal, impugned order grants power for *adjudication* to the Respondent Commission.

(c) Hon'ble High Court of Madras, vide para10 (v) of the above judgment, directed the generators "*to furnish the particulars to facilitate the* verification *process…."* In case of any difficulty, the generators ought to have approached the Hon'ble High Court.

(d) As per para 7.9.6 to 7.9.9, of the impugned order, TANGEDCO can "*intimate the user's liability on dues provisionally*' and the amount is to be paid only if agreed to by user. In case of dispute the matter is to be resolved by the Respondent Commission. Thus, the proceedings are pre-mature.

(e) Impugned order specifically states "7.9.10 ……. *till such time final orders are passed by the Commission, no distraint proceedings or coercive action shall be taken*"

5.2 The Appellant contends that ownership status and consumption are to be verified only at the end of the year. It is respectfully submitted that the tone of the opening phrase of Rule 3 of the Electricity Rules 2005, "*no power plant shall qualify as captive Generating plant ……. unless …."* makes it clear that these are necessary conditions and not sufficient conditions for qualifying as a CGP. Further, the phrase "*on an annual basis*" occurs only in clause 3(1)(a)(ii) of the Rule. This makes it clear that condition of 51% consumption alone is to be checked annually. There is no such restriction for checking 26% ownership condition.

5.3 Besides, first proviso under Clause 3 (1)(a)(ii) of the Rule makes it clear that satisfaction of the conditions on collective basis is applicable only for co-operatives. All other entities are to be treated alike.

5.4 Cross subsidy surcharge is a statutory levy under Section 42(2) of

the Electricity Act, 2003. The captive consumers have been provided an exemption from the levy of cross subsidy surcharge under the fourth proviso to Section 42(2). The exemption is available only if the generator qualifies as a captive power plant in terms of section 9 of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005. However, before granting such exemption, it is reasonable that the licensee verifies the 'ownership' in terms of Rule 3 of the Electricity Rules, 2005 while according approval for open access. Enjoying an exemption or concession has to be based on certain pre-requisites. The Grid connectivity and open access Regulations specifies forms and documents to be furnished by an applicant who requires open access. The applicant may be a third party or a captive consumer. The third-party consumer would merely furnish data as per format specified in the open access regulations and pay cross subsidy surcharge for every unit consumed through open access. To classify a consumer as captive user, preliminary verification of documents related to 'ownership' is necessary. The Appellants have tried to read the provisions in the open access regulations and that of Rule 3 in isolation whereas what is required is a harmonious construction.

5.5 It was also contended by the Appellant that the procedure for advance verification of captive status is not provided in the Open Access Regulations. In this connection, it is respectfully submitted that Law is well settled on this aspect with the judgment of the Hon'ble Apex Court in PTC India Ltd. v. CERC (2010) 4 SCC 603 wherein it has been laid down:

> "*40..... To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre- condition to the Central Commission taking any steps/measures under Section 79(1)"*

5.6 The above position was reiterated vide APTEL judgment dated 18.01.2019 in Appeal No. 332 of 2017. The legal position applies to the State Commissions with equal force

5.7 Appellant also contended that there cannot be any retrospective verification. In this connection, attention is invited to para 6.2.1 to 6.2.5 of the impugned orders which are not repeated for the sake of brevity.

5.8 The Appellant contended that the Respondent Commission is applying an amendment to Rule 3 of the Electricity Rules based on a draft.

6. Learned counsel for Respondent No.2/TANGEDCO has filed following Written submissions :-

6.1 The Respondent No.2 has filed (i) written submissions (ii) a statement of objections on 26.08.2020, (iii) an affidavit dated 15.09.2020 and (iv) comments dated 23.09.2020 on Appellant's proposal ('**Pleadings'**). The Respondent herein seeks this Court's indulgence to refer to and rely on the same in these submissions.

I. The directions in the impugned order are reasonable and necessary to curb rampant abuse of captive status by both generators and consumers

6.2 There has admittedly been prolonged abuse of the system of captive generation by captive users and a resistance to verification of their status. It is estimated that an amount to the extent of Rs. 5000 crores is due from entities that have wilfully and wrongly claimed and enjoyed captive status. The impugned judgment goes a long way in protecting public interest by making these entities provide documents.

6.3 Thus 'verification' is essential to ensure that those entities that fulfil the twin requirements of captive generation in Rule 3 of the 2005 Rules, read with relevant provisions of the 2013 Act.

6.4 The law governing captive status has been laid out in detail in the Pleadings and is not reproduced herein. In summation, the law provides that captive generators are exempt from payment of cross subsidy surcharge (CSS) and that in order to avail this benefit, the twin requirements of not less than 26% equity ownership (with voting rights) and not less than 51% consumption have to be satisfied. The law is clear that not less than 26% equity ownership must be maintained at all times and that not less than 51% consumption must be assessed on an annual basis.

Importance of transparency at stage when open access is sought

6.5 The verification is necessary to ensure that those who are availing open access under captive status are rightfully doing so and that those who are not, are being billed for CSS. As per the Electricity Act, 2003, Sec 2 (47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.

6.6 As per the above, it is no doubt that Open Access has to be provided without any discrimination for the use of Transmission Lines or the Distribution System for any Consumer or a person engaged in generation of electricity.

6.7 But the one important aspect that has to be noticed is that the Open Access is provided under two different categories., viz., Captive Open Access and Non-Captive Open Access and for both the categories, the non-discriminatory use of Transmission Lines or the Distribution System have been mandated. Whereas the Open Access Regulations prescribes this non- discriminatory use of Transmission Lines or the Distribution System with the payment of Certain charges viz., Transmission Charges, System Operating Charges, Scheduling Charges, Cross Subsidy Surcharge etc, to levy the above charges, the State Commission issues Tariff Orders as to the calculation of the charges based on the applicable provisions of the Act, Rules & Regulations. When non-captive Open Access is sought for, the non-discriminatory use of Transmission Lines or the Distribution System is provided with the levy of all charges including Cross Subsidy Surcharge as per Regulation 23 of the Open Access Regulations issued by the State Commission. When Captive Open Access is sought for the non-discriminatory use of Transmission Lines or the Distribution System is again provided with the levy of all charges excluding Cross Subsidy Surcharge as per Regulation 9 (6) of the Open Access Regulations issued by the State Commission. Regulation 9(6) inter-alia states that Open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and in these Regulations.

6.8 It is relevant that CSS for all open access users (unless they qualify as captive) is required to be paid on a monthly basis under Rule 23 of the Tamil Nadu Open Access Regulations, 2014 (‘2014 Regulations’). CSS is a key component of maintaining the efficacy of the open access system as held by the Hon’ble Supreme Court in “***Sesa***

Sterlite Ltd. v. Orissa Electricity Regulatory Commission," 2014 (8) SCC 444at para 27. Thus, CSS is a key source of revenue for the Respondent herein.

6.9 Specifically, verification before a captive user avails of open access through captive category is imperative to uphold the integrity of the concession. Verification at this stage will ensure that only those who maintain not less than 26% stake in the CGP avail the concession of not paying CSS. The Appellants are trying to misinterpret the Open Access Regulations in such a way that the Open Access is to be granted to them within 3 days of their applying for Open Access. In this regard it is stated that the Regulation 16(2) of the Open Access Regulations states inter-alia that the distribution licensee shall convey its consent to the applicant of both Captive and Non-captive types of Open Access, by e-mail or fax or by any other usually recognized mode of communication, within three (3) working days of receipt of the application. This is primarily limited to the Distribution capacity availability and the existence of any dues payable by the applicant to the distribution licensee.

6.10 Most of the applicants for RE power are Long-term OA Customers and Most of the Appellants members (Non-RE) are Medium-term OA Customers. As per Regulation 14 (2) (e) of the Open Access Regulations, 2014 in case applicant is connected to the intra state transmission system the start date of the medium-term open access shall not be earlier than 5 months and not later than 1 year from the last day of the month in which application has been made after grant of Medium term Open Access during the initial waiting period of 5 months they can apply for Short-term Open Access i.e. before 15 days if they seek Open access from Nov 1 2020 they have to apply before 15th of October 2020.

6.11 In respect of the Medium term and Long-term Open Access the timeline prescribed by the OA Regulations (Annexure A-11 Pages 456-531 of Appellants Type set) are as follows;

6.12 The Open access Customer after obtaining the consent of Distribution Licensee has to make Application for Open Access specifying the category such as Long-term, Medium-term and Short-term Open Access. The Open Access application is to be disposed off within 20 days for both Long-term, Medium-term if the applicant is connected to the Distribution system and their injection and drawl points are within the distribution system. Similarly, the Open Access application is to be disposed off within 150 days if augmentation of capacity is required & 120 days if no augmentation required for Long term Open access applicants and within 20 days for Medium-term if they are connected to the intra-state transmission system and their injection and drawl points involve intra- state transmission system and the distribution system.

6.13 Presently, as per the procedure prescribed in the impugned order followed by the Respondents-2 for Captive Open Access, the applicant submits his Open Access application to the Nodal Agency along with the consent of the Distribution Licensee. Before submitting the application for Captive Open Access, the applicant submits documents prescribed in R.A.No.7 of 2019 dt: 28-01-2020 to TANGEDCO to prove his Ownership as per Rule 3 of the Electricity Rules,2005 to avail the exemption from being levied the CSS by TANGEDCO upon the users' monthly HT Bills. The time taken by TANGEDCO on an average to carry out the verification of Ownership is 3 working days for where there is one user, 7 working days where there is more than one user but less than 50 users and 10 working days where

the number of users is more than 50 except few instances. That the Respondent No.2/TANGEDCO has been outperforming the timelines stipulated in the Impugned Order at least since the lockdown on account the COVID-19 pandemic has been relaxed. Therefore, as the start date for Open Access after application is submitted under Long term and Medium Term Open Access is well after 15 days as explained above, the contention of the Appellants that there is inordinate delay and Open Access is denied are without any basis, misconceived and is only attempt to evade from being verified before granting a concession bestowed under law.

6.14 Therefore, it is prayed that no prejudice will be caused to the Appellants by verifying the Ownership before commencement of captive Open Access, and if no verification is done prejudice will be caused to Respondent No.2.

6.15 The Open Access Regulations, 2014 are to be read in conjunction with the Electricity Act, 2003 & the Electricity Rules, 2005. As per Regulation 9 (6) of the said regulations, inter-alia states that Open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and in these Regulations. If the Open Access Regulations are to be read in isolation as claimed by the Appellants that there is no specific clause to deal with verification before commencement of Captive Open Access then it is equally true that the Cross Subsidy Surcharge is payable by all Open Access Customers and no specific exemption has been provided for in the said Regulations and thus the Appellants are also liable to pay CSS in their monthly HT Bills even if they avail Captive Open Access.

6.16 In respect of the State of Maharashtra also the verification of

Ownership is carried out for grant of Captive Access. In this regard the relevant extract of the order of Maharashtra Electricity Regulatory Commission in Case No.23 of 2017 dated: 17-01-2018 is reproduced below:

> "*During these proceedings, the need for setting a time frame along with roles and responsibilities for the process of determining CPP status was also referred to. The Commission is of the view that this is necessary in order to systematise the process and give greater clarity and comfort to both sides. As the Commission has observe in its earlier Orders in Case Nos. 117 of 2012 and 101 of 2014, and considering the provisions of the Electricity Rules, 2005, the claimed Group CPP must declare any change in the shareholding pattern of Captive Users at the start Order in Case No. 23 of 2017 Page 19 of the financial year and any subsequent changes during the year, along with the applications for Open Access from the Licensee, without which the concerned entity would not be considered as a Captive User. In this background, the Commission is setting out the following modalities to be followed by the Distribution Licensees and the entities claiming to be CPPs:*
>
> *a) At the outset, when Open Access is first sought, details of the shareholding pattern of the claimed CPP shall be submitted in the context of the provisions of the Electricity Rules, 2005, supported by a Chartered Accountant (CA)'s Certificate. In the event of any change in the shareholding pattern during the financial year, the revised shareholding should be intimated to the concerned Distribution Licensee(s) within 10 days, with CA certification. The CA's Certificate should contain details of all shareholders, including the Captive Users, and their voting rights. In case there is no change in the shareholding pattern during the financial year, the Generators should provide an undertaking to that effect along with the CA Certificate as at the end of the year."*

6.17 Similarly, the Ownership verification is undertaken in the State of Gujarat also for grant of Captive Open Access

<u>Prevalence of abuse</u>

6.18 The system of captive generation, where there is minimal verification, is open to systemic abuse and 'gaming' by users. "*JSW*

Energy Ltd. v. Karnataka Electricity Regulatory Commission," Review Petition No. 2 of 2013 in the Appeal No. 137 of 2011 (paras 15-18); "*Chhattisgarh State Power Distribution Co Ltd. v. Chhattisgarh State Electricity Regulatory Commission*," Appeal No. 75 of 2015 & Appeal No. 69 of 2015 (paras 22,23, 29, 36, 37, 39, 40); "*Prism Cement Limited v. Madhya Pradesh Electricity Regulatory Commission"*, Appeal No. 179 of 2018 (para 9.12-14)].

6.19 The following example is just one illustration of this gaming:

> 'A' holds 10% of the ownership in a CGP, 'B' holds another 10% in the CGP and 'C' holds 6% in the CGP and they have availed open access under Captive category by possessing the not less than 26% Ownership. During the year, if C transfers his Ownership, say 5% to 'D' and 1% to 'E', the Captive generator has to approach the Licensee TANGEDCO and inform it of the changed shareholding pattern to identify the captive users at present. For example, if A, B & D alone are considered for captive wheeling and E is not a captive user, then the collective ownership of A, B & D falls below the prescribed 26% i.e. they hold only 25% as against the requirement of not less than 26%. The arrangement can no longer be termed as CGP as they fail to possess not less than 26% Ownership in the CGP, in which case monthly billing to HT consumer will include levy of CSS.

6.20 The specific instances of abuse by generators and users have been illustrated in the statement of objections at pages 17-20, affidavit dated 15.09.2020.

6.21 The implication of this sort of gaming on the revenue of

DISCOMS is immense as it effectively means that many users are availing the concession under the garb of taking power from a 'captive plant' when they themselves cannot demonstrate any nexus of ownership as mandated under law. In the aforementioned example, D and E, collectively hold only 6% in the CGP whereas the original captive users notified to Respondent No.2 collectively held 26% and hence were able to avail of the concession.

6.22 An assessment of shareholding patterns of the captive users in the generator is sufficient to shine light on the entities who are wrongly availing of the concession. Therefore, there is an imperative requirement for verification (i) at the time open access under captive status is sought and (ii) when there is a change in shareholding pattern. Verification at the end of the financial year, particularly to assess whether not less than 51% consumption requirement is met, is a separate but also important requirement. For the reasons already mentioned, end-of-year verification in itself is not sufficient to maintain transparency. If pre-verification is considered a hindrance by the Appellant or the other respondents, they may avail open access under non-captive route which is subject to timelines in the 2014 Regulations. The Impugned Order in RA 7 of 2019 introduces the aforementioned verification to address the gross abuse that has prevailed for several years. This is being challenged by the Appellant as being violative of their non-discriminatory right to open access, which, it is humbly submitted, is a grave misrepresentation.

Appellant's right to open access is not being denied

6.23 The Counsel for Appellant and Respondent Nos. 4, 8 and 9 vehemently argued that the reporting requirements provided in the Impugned Order tantamount to denial of open access. It is submitted

that this is a grave mischaracterisation of the scheme of captive status under the 2003 Act and the 2005 Rules. The right to avail open access through captive status is distinct from the right to avail open access through non-captive status. This distinction is evident from the legal framework. It is a well-established position under law that two terms defined separately in statute cannot be read to be interchangeable in their respective meanings and are to be treated as separate and distinct legal categories. Thus, the attempts by the Appellant and other generators to conflate open access with captive generation ought to be rejected. Open access through captive category is a concession because immediately upon being granted open access through this route, the user is no longer required to pay monthly CSS and he is exempt from paying this so long as he can show 26% and 51%. It is also trite law that only those can avail a concession if they qualify under law to do so. However, if there is no effective verification, as illustrated above, these entities continue to avail open access without payment of CSS even though they no longer qualify as a captive user. It has been argued at length that captive generation is a dynamic process whereby in one month a consumer may qualify as a captive user and in the next month he may not. Furthermore, the right to open access itself is not an unqualified right. As stated above, It is imperative that in order to avail open access one must remit the required charges such as CSS. If an entity is incorrectly availing open access through captive category without paying CSS when he ought to be paying it on a monthly basis, he cannot insist on availing open access. Thus, by abusing the system, he loses any right to open access. This is reflected in Regulation 9 and 37 of the 2014 Regulations. Under the latter, non-payment of any charge by the open access customer is considered non-compliance of the Regulations and is liable for discontinuance of open access as well as

action under sections56 and142 of the 2003 Act.

6.24 The Impugned Order rightly notes at para 7.1.3 that it is passed to supplement the laws including the 2014 Regulations.

6.25 In view of the scheme under the 2003 Act read with the 2005 Rules on captive generation, the legislative intention could not have been for the 2014 Regulations to be exhaustive on this issue. Therefore, it is submitted, that the Appellant's argument that the Impugned Order is not sustainable as it cannot be "reconciled" with the 2014 Regulations is again erroneous.

II. Conduct of appellant and other respondents non-submission of verification documents by appellant and other captive generators/users

6.26 The Appellant and other Respondents have asserted several times that going forward they are willing to submit certain documents, *albeit* of a limited nature and as a mere formality (i.e., without any prior verification). However, even this 'concession' has no sanctity as many generators who are part of the Appellant association have not been submitting documents since at least 2014 despite notices issued by the Respondent No.2 intimating the liability to pay CSS in the event of non-fulfilment of Captive Status. They have actively evaded efforts by this Respondent to verify (i) when in 2014 an auditor appointed by this Respondent sought documents of verification, (ii) when in 2017, notices seeking documents for verification of Captive Status and show cause notices for FY 2014-2017 (3 Financial years) indicating as to why the provisional liability on account of CSS for those who have not submitted documents for verification should not be levied, numbering 40000

(approx.) were issued to various purported captive generators and users and (iii) when notices were issued in 2020 seeking documents as per the directions in the Impugned Order.

6.27 Respondent No.2 has given details of notices issued during 2017 at Annexure C to the affidavit filed by Respondent herein on 15.09.2020 and this illustrates the extent of the non-compliance. Instead of submitting the required documents, the captive generators filed a writ challenging the said circulars before the Single Judge of the Madras High Court. It is relevant that the said circulars were not challenged before the Commission which was the appropriate forum under law. It is pertinent that this writ was filed by Respondent Nos. 3 and 8 herein.

Re-agitating issues that are *res-integra* and engaging in forum shopping

6.28 The Appellant and other respondents herein are trying to re-agitate certain key issues that were already conceded by them before the Ld. Division Bench of the Hon'ble High Court in its order dated 09.10.2018. In this order, the Hon'ble High Court made determinative findings based on concessions by the Appellant and other generators that (i) the Commission is within its powers of delegation under section 97 of the 2003 Act to delegate the verification function to Respondent No.2 whilst ultimately remaining as the final adjudicator on the issue of captive status; (ii) that Respondent No.2 has the wherewithal to conduct verification more effectively than the Commission; (iii) that there is an urgent need for a verification procedure to verify captive status and (iv) that the Commission has the requisite authority under law to formulate a procedure for verification.

6.29 The order of the learned Division Bench notes, at para 5 of pg. 288, that given the large number of captive consumers in the State of Tamil Nadu, Respondent No.2 has better wherewithal/work force to carry out the initial work of verification since it has got data of generation of electricity and consumption of its captive users. At paras 7 and 8 of the order, the Commission states that it is agreeable to delegating the limited verification function to the Respondent No.2 herein. However, the Additional Advocate General, representing TANGEDCO before the Ld. Division Bench, maintained that the verification be delegated without prejudice to the legal issue *qua* verification and determination because it was always the position of the Respondent herein that both adjudicatory and verification roles lie with it. The order notes at both paras 9 and 10 that the private respondents are in concurrence with the position taken by the Commission i.e., that the verification power can be delegated to TANGEDCO who was appellant before the High Court. The issue of verification and determination was left open at the behest of the counsel for the Respondent herein only but was conceded by the Appellant and other respondents.

6.30 As per the doctrine of *res judicata*, key issues have been determined by the High Court and have attained finality as the order was not challenged before the Ld. Apex Court "*M. Nagabhushana v State of Karnataka"* (2011) 3 SCC 408(paras 12, 13), "*Official Trustee of West Bengal v Stephen Court Ltd"* (2006) 13 SCC 401(paras 46-53), "*Commissioner of Endowments & Ors v Vittal Rao & Ors"* (2005) 4 SCC 120(paras 28,29), "*Hope Plantations Ltd. v. Taluk Land Board,"* (1999) 5 SCC 590(para 26), "*Sulochana Amma v. Narayanan Nair"*, (1994) 2 SCC 14 (para 5)]

6.31 Therefore, applying both doctrines of estoppel and *res judicata*, the Appellant ought not to be permitted to challenge the jurisdiction of the Respondent No.2 to verify captive status before the Commission and nor can it be raised in the present appeal. Furthermore, the principle of comity and discipline between courts and tribunals suggests that the Tribunals respect the Order of the High Court which has been passed after hearing the parties and if at all there is a question whether an issue has been decided or not by the High Court, it is respectfully submitted that it is not open for the Tribunal to decide the same. "*East India Commercial Co Ltd. v. The Collector of Customs, Calcutta"* (1963) 3 SCR 338 at para 31.

6.32 Without prejudice to the above submissions, it is submitted that the Commission was well within its competence to delegate verification to the Respondent herein as this is delegation of administrative and not adjudicatory functions "*Pradyut Kumar Bose v. Hon'ble Chief Justice of Calcutta High Court"*, (1955 2 SCR 1331at para 20).

6.33 There has been a concerted attempt by captive users to thwart attempts by the relevant authorities to implement effective verification and to engage in forum shopping to avoid effective adjudication of the issues [on forum shopping, "*Union of India v. CIPLA Limited & Anr"* (2017) 5 SCC 262(paras 148, 153, 155)].

6.34 Thus, the conduct of the Appellant and Respondent Nos.3-10 is summed up as follows:

- first by not cooperating with auditor appointed by TANGEDCO

- secondly by challenging circulars issues to them by TANGEDCO seeking compliance with the law
- thirdly by hijacking the operation of the Commission through a frivolous writ petition. In this context, an alleged PIL petitioner, Nirmal Kumar, obtained an order from the Hon'ble High Court of Madras (Madurai bench) injuncting the Commission from exercising adjudicatory functions until a judicial member was appointed. This injunction lasted from 03.04.2019 till 13.01.2020 when the Hon'ble Supreme Court finally vacated this order. Within two weeks of the order being vacated, the Commission passed the Impugned Order.
- Fourthly, by challenging the impugned order before the Ld. Tribunal even when the Hon'ble High Court (in writ proceedings) and the Commission (in revision proceedings) were already enjoined of the matter. In this context, after the Impugned Order was passed, the same was immediately challenged before the Hon'ble High Court of Madras in writ proceedings and a stay was sought restraining Respondent No.2 from in any manner denying right of open access. This stay was granted on 10.03.2020. Despite the same, the present Appellant impleading themselves before the High Court, approached this Ld. Tribunal. The very same interim relief has been sought by them from this Ld. Tribunal
- Lastly, not submitting any documents of verification

despite notices being issued by the Respondent No.2 seeking documents mandated in the impugned order.

III. issue of proportionality is not res integra

6.35 The Appellant had assailed the finding of the Commission at para 6.4.4 of the Impugned Order that SPVs ought to be treated as Association of Persons and the proportionality test therefore equally applies to them. The Appellant had contended that this issue is *res integra* and pending adjudication before the Hon'ble Apex Court. The position under law was originally set out by this Tribunal in "*Kadodara Power Pvt. Ltd. v. Gujarat Electricity Regulatory Commission"*, Appeal Nos. 171 of 2008, 10 of 2009 and 117 of 2009 at para 15. The judgment was challenged before the Hon'ble Apex Court but no stay of this judgment has been granted till date. Moreover, two subsequent judgments of this Tribunal in (i) "*Prism Cement Limited v. Madhya Pradesh Electricity Regulatory Commission"*, para 9.8 and (ii) "*JSW Steel Limited v. Maharashtra State Electricity Distribution Co Ltd".* Appeal No. 311 of 2018 at para 61, have reiterated that the law set out in *Kadodara* holds the field. The stay imposed in *JSW* by the Hon'ble Supreme Court was obtained by the State Commission with respect to the operative part of the order which found that additional surcharge is not payable by captive users. The statement that *Kadodara* still holds the field on the issue of treating SPVs as AOPs, which was *obiter*, is not hit by this stay.

6.36 Therefore, the law set out in *Kadodara* is operative and is followed in the Impugned Order.

IV. <u>There is no implementation of the 2018 amendment</u>

6.37 The Appellant has submitted that the Impugned Order seeks to bring in the Draft amendments to the 2005 Rules relating to Captive Generating Plant introduced by Central Government, Ministry of Power, by the back door. The Commission has not implemented any of the changes proposed in the draft amendments and this is demonstrated in the table below:

Sr No.	Key changes introduced by the 'Draft amendments in the provisions relating to Captive Generating Plant in Electricity Rules 2005' dated 22 May 2018	Impugned Order in RA No.7 of 2019 passed by TNERC
1.	Definition addedfor 'group captive generating plant' (i.e., CGP set up by two or more captive users)	Not done by TNERC
2.	Curtailment placed on group captive generation such that a group captive generating plant can only claim captive status for period during which shareholding pattern is maintained with only two changes permitted in any financial year	Not done by TNERC
3.	Principle of proportionality extended to all categories of captive generator (e.g. SPV, LLP, body corporate, individuals etc except registered cooperative society)	TNERC applied proportionality only to SPVs and AOPs as per prevailing position under law set out in various judgments of this Tribunal
4.	Principle of proportionality also made applicable to consumption of captive power beyond 51%	Not done by TNERC

5.	Definition of ownership made more stringent: (i) Excludes equity share capital with differential voting rights; (ii) Normative debt:equity ratio of 70:30 imposed	Not done by TNERC

6.38 In the said background, it is respectfully submitted that the present Appeal is devoid of merits and the Order impugned in the present Appeal does not call for any interference by this Tribunal and it is prayed that the present appeal be dismissed accordingly.

7. **Learned counsel for Respondent No.8/TASMA has filed following Written submissions**:-

7.1 This Written Submission is filed by Tamilnadu Spinning Mills Association (TASMA), the 8th Respondent in the instant appeal before this Tribunal. The 8th Respondent is mostly representing the WEGs/Solar Power Plants on which the members of the 8th Respondent are having 100% ownership and therefore, their WEGs / Solar Power Plants need to be treated differently than those power plants of the Appellant and others as long as they engage in Group Captive activities. However, there are some members of the 8th Respondent, engaged in Group Captive arrangements also, both in WEGs / Solar Power Plants. The members of the 8th Respondent are not having, however any Thermal Power Plants owned by 100% ownership. Further, many of the members of the 8th Respondent are captive users, sourcing power from several WEGs / Solar Power Plants / Thermal Plants in the State of Tamil Nadu, under Group Captive arrangement also.

7.2 The 2nd Respondent, the TANGEDCO and the 1st Respondent the State Commission were always claiming,

a) That the CGPs are not cooperating in submitting the documents for verification of CGP status since 2014-15 and have been agitating the matter before various fora.

b) That the CGPs are large in numbers to the extent of 7000 Plus and hence, the State Commission cannot undertake the exercise of CGP verification in the State of Tamil Nadu.

7.3 In the first phase the 8th Respondent submits that notices calling for documents for CGP verification were issued by the 2nd Respondent TANGEDCO, for the period from 2014-15 & 2015-16, only in March / April 2017 and its claim of the CGP verification matter is getting agitated for the last 7 years, contains no facts as such. The first process of CGP verification was commenced only during March 2017. The reason, as to why the verification of CGP status in TN is not going smooth with the 2nd Respondent TANGEDCO, is mainly due to the approach of the 2nd Respondent TANGEDCO, to make the verification process, to go completely against the provisions of law and also by completely neglecting the provisions provided under the Electricity Rules 2005 and also by neglecting all the decided case laws of this Tribunal in all core areas. Hence, the approach of the 2nd Respondent TANGEDCO, is completely to make all the CGPs to fail compulsorily, in one way or other and to make them all liable for payment of cross subsidy surcharges by following incorrect methodologies in the matter of verification of CGP status.

7.4 On such an approach alone, all the CGPs in the State of Tamil Nadu have started agitating the very methodology of verification, as

directed to be followed by the 2nd Respondent TANGEDCO, without even getting any approval from the State Commission. Since the methodology notified by the 2nd Respondent TANGEDCO were all on its own count, without respecting the provisions of law and also were not going consistence with the binding judgements of this Tribunal, there were strong objections in allowing to carry over the CGP verification, by the 2nd Respondent TANGEDCO. After a battle of more than three years, finally the matter has now reached almost to a finality, by the release of the impugned order in RA No. 7 of 2019 dated 28.01.2020. However, in the impugned order also, still there are few issues to be addressed and on that score only, the present appeal before this Tribunal is filed and pending, besides to various Review Petitions and Clarification Petitions filed before the State Commission itself. The matter is also under challenge before the Hon'ble High Court of Judicature at Madras in WP No. 6061 of 2020.

7.5 Coming to the second issue of large No. of CGPs available in the State of Tamil Nadu to the extent of 7000 Plus CGPs, the 8th Respondent submits the below summary of 100% Own Captive and Group Captive WEGs in the State is as follows:

Category	No. of Generating Companies	Capacity in MW
100% Own Captive	1396 *	3380.98
Group Captive	465 **	2769.70
Total	1861	6150.68

7.6 The comparison between our compiled data & TANGEDCO's compiled data provided in the affidavit filed before this Tribunal dated 15.09.2020, is furnished as below:-

Details	As per 2nd Respondent TANGEDCO's Affidavit filed before this Tribunal	As per our own Compilation which are the actual facts
Total No. of Generating Companies	3,284	1,861
No. of HTSC Nos. covered by the Generating Companies	7,119	7,220
Total Capacity(in MW) identified for captive use	6,068	6,151
No. of HTSC Nos. in 100% Own Captive Category	3,097	4,277

* The obligation of 2nd Respondent TANGEDCO, is to go for verification of CGP status, in respect of 100% ownership categories, is only on 1396 Companies.

** The obligation of TANGEDCO to go for verification of CGP status in respect of Group Captive categories, is only on 465 Companies.

7.7 The total obligation of the 1st Respondent State Commission, to go for verification of CGP status, in respect of both 100% Ownership and Group Captive categories, is only on 1861 Nos. and not 7000 Plus as has been misled all these times. Therefore, the number of the Generating Companies are not as projected by the 2nd Respondent TANGEDCO to extent of 7000 Plus cases. This is the basic error committed by the 2nd Respondent TANGEDCO to seek sympathy at all

forums by inflating the figures on its own and also to seek an order to verify the CGP status on its own.

7.8 The 7000 Plus as projected by the 2nd Respondent TANGEDCO, is highly an exaggerated and inflated figure and it is based on the total HTSC Nos. wise and not on Generating Company wise. But the fact remains that each Generating Company, has multiple WEGs, at multiple locations, with separate HTSC Nos. for each and constitute as a single CGP. The CGP verification therefore, need not to go based on HTSC No. wise and it needs to go only on the Generating Company wise. This basic approach is completely lacking and ignored by the 2nd Respondent TANGEDCO, for its own obvious reasons, to inflate the figure and to avoid CGP verification to go on in an aggregate manner, as ensured by the Electricity Rules 2005 and also declared by this Tribunal, in many judgements. This also helped the 2nd Respondent TANGEDCO, from not allowing to do the work of verification of CGP status by the State Commission, by showing such highly inflated figures to the extent of 7000 Plus, whereas the actual verification should go only in respect of 1861 cases alone.

7.9 As far as 100% ownership category of WEGs are concerned, the 2nd Respondent TANGEDCO itself is already possessing in its own hand, all the aggregate figures of generation and consumption, for each year separately as both the data of generation and data of consumption are available with the concerned Superintending Engineers at the Consumption / User End, in respect of Generating and Captive User Company wise, as both are Generators as well as Captive Users. There is no other third party involved in the Generation / Captive Consumption arrangement. The Generating Company itself is consuming 100% of its

generation, at its own Consumption End. Therefore, if the 2nd Respondent TANGEDCO can direct to make the Consumption / User End Superintending Engineers, for the verification of the data of annual consumption to ensure whether 51% minimum consumption was seen in all the years in respect of all the **1396** Generating Companies, which are 100% owned WEGs. By such an instruction the data verification work will go very smooth and in case of any Generating Company to be proceeded for the reason of not consuming 51% of the aggregate energy, in a particular year, the 2nd Respondent TANGEDCO can issue a notice and can get a reply from such of the Generating Company and if it is found not satisfied, the 2nd Respondent TANGEDCO can proceed in the matter, by filing a petition before the State Commission, for adjudication of the matter suitably, as per Section 86(1)(f) of Electricity Act 2003. In case, if the Generating Company provides a satisfactory reply, it can be intimated to the State Commission, to declare the satisfactory compliance of the status of the CGP / Generating Company, for the particular year and accordingly, the Commission may declare the satisfactory status suitably.

7.10 By the above arrangement, the Group Captive CGP category of Generating Companies, will be totally spared separately and the said quantum would come down sharply, only to the extent of 465 Companies and therefore, the State Commission, can itself directly verify the CGP status of such Group Captive CGP category of Generating Companies and can adjudicate the matter in case of any disputes under Section 86(1)(f) by providing opportunities for all, by following the due process of law. In a recent judgement, on a WP filed by some other Entity, the Ld. Additional Advocate General has undertook before the Hon'ble Madras High Court, that the 2nd Respondent TANGEDCO, would go in an

aggregate manner for verifying the CGP status and recording this undertaking, the Hon'ble Court passed an order in WP No.11694 of 2020 dated31.08.2020. Such a process will go more legally and equitably and would satisfy all the binding judgements of this Tribunal also.

7.11 The issues commonly faced by the CGPs in Tamil Nadu, in the RE Industry, is due to the wrong approach and attempt of the 2nd Respondent TANGEDCO, to verify the CGP status, by its own methodologies, by not following the Rule 3 of Electricity Rules 2005 and also on the reason of the method of the 2nd Respondent TANGEDCO totally going against all the binding judgements of this Tribunal. Few examples are as below:-

Issue No. I: Aggregate Consumption

7.12 While the Rules and all the binding judgements of this Tribunal, make it amply clear that the verification can go only in an aggregate manner, the 2nd Respondent TANGEDCO, is till now attempting to make the verification, only on individual HTSC No. wise / EWA wise. This Tribunal has held in its order dated 08.11.2016 in Appeal No.252 of 2015 "*Salasar Steel and Power Ltd Vs Chattisgarh State Electricity Regulatory Commission and others"* that the aggregated generation and consumption of the units identified for captive use, has to be considered for verification.

7.13 Primarily this makes the main issue, in making the objections from 2017 onwards, when the first attempt was made by 2nd Respondent TANGEDCO to proceed with the CGP verification, on individual HTSC

No. / EWA wise, instead to go with aggregate generation and consumption. Even the State Commission has, in the impugned order, ordered to go in aggregate manner, instead of individual HTSC No. wise / EWA wise. But the 2nd Respondent TANGEDCO is not listening to it till now and the State Commission is not seriously proceeding against the 2nd Respondent till now on such a non- compliance to go with the aggregate type of verification of Generation and Consumption.

Issue No. II: Grossing-up T & D Losses

7.14 The T&D losses are considered as deemed consumption, as per the binding judgements of the Tribunal and therefore, the T&D losses shall be ordered to be considered, as deemed consumption, while working out the 51% minimum consumption requirement. MERC in its order dated 28.08.2013 in case No.117 of 2012 has grossed up the T&D losses in the consumption, which has attained finality in this Tribunal's order dated 17.05.2016 in Appeal No.316 of2013.

Issue No. III - Deduction of Banking Charges

7.15 Likewise, banking charges @ 14% is being collected by the 2nd Respondent TANGEDCO in units by kind in the State of Tamil Nadu as per the Tariff Orders lastly issued by the State Commission, which are not available for consumption in any manner and therefore, such banking charges collected in kind by units, shall be allowed straightaway to be deducted, in the aggregate generation, as like the auxiliary consumption, while working out the 51% of minimum consumption requirement. Banking charges are akin to auxiliary consumption, which are not available for consumption. There are few other minor issues placed

before the State Commission, by way of Review Petitions and Clarification Petitions filed by various Respondents and even by the 2nd Respondent TANGEDCO itself and the same need to be ordered to be disposed of by the State Commission, before the actual CGP verification process starts or otherwise the status of verification of the CGP would get affected pre-judiciously.

Issue No. IV – Other Issues

7.16 The 8th Respondent submits that this Tribunal may pass appropriate directions on the above-mentioned issues viz.,

a. considering aggregate generation for determination of CGP status (and not EWA wise) in respect of WEGs both under 100% ownership and under Group Captive arrangement and also for the Solar Power Plants.

b. grossing up the T&D losses with the consumption and

c. deduction of banking charges paid in units from the aggregate generation in respect of both 100% ownership and Group Captive WEGs.

d. in spite of all efforts, the 2nd Respondent TANGEDCO is treating all the CGPs as AoPs only, where the status of such CGPs are falling either as Firms, Companies etc. As how to make all of them as AoPs is not properly understood by the 2nd Respondent TANGEDCO on its blind belief that only by making them all as AoPs, every CGP can be brought under Proportionality Rule.

Issue No. V - Verification of CGP status of 100% owned CGPs

7.17 Once this Tribunal decides on the above four issues, the Consumption / User End Superintending Engineers of the 2nd Respondent TANGEDCO, can be ordered to verify the data of Generation and Consumption in an aggregate manner, in respect of 100% owned CGPs, in terms of the fresh directions of this Tribunal. All the data relating to the aggregate generation and aggregate consumption of all 100% owned CGPs, are already available with the Consumption / User End Superintending Engineers of the 2nd Respondent TANGEDCO year wise and they can verify themselves without calling for any data from the 100% owned WEGs. As far as the ownership is concerned, these 100% owned Generating Companies, are all the only consuming entities and there is no third party or none other than the Generating Company involved in consumption and they are the only the entity to consume the power for their own captive use. Therefore, the need to verify the minimum 26% ownership, in respect of these 100% owned Generating Companies, would not arise at all, as there are no other captive user, involved in the captive arrangement and all the arrangements for captive consumption from the WEGs, are controlled by Long Term Open Access (LTOA) mechanism, through Energy Wheeling Agreements (EWAs), which would be in force for 20 years from the signing of the Agreement.

Issue No. VI - Group Captive CGPs / Generating Companies: In addition to the above three issues found narrated in Para 24, the following issues need to be resolved:

Verifying Authority

7.18 This Tribunal has already held that the jurisdiction to determine the CGP status, is with the State Commission and accordingly, the 8th

Respondent submits that the Group Captive CGPs, may be directed to be verified by the State Commission itself, as allowing the 2nd Respondent TANGEDCO would prejudice the whole matter, under the Doctrine of *nemo judex in causa sua.*

7.19 With the exclusion of 100% owned CGPs, the task on the State Commission to verify the remaining Group Captive CGPs, would be significantly lower the task and hardly requires small man power. The 8th Respondent is proposing this, with a view to make the process to go smoother and in strict compliance of the various judgements pronounced by this Tribunal for determination of the CGP status in a fair and justifiable manner. As the 2nd Respondent TANGEDCO, has a motive to somehow make all the CGPs non- complaint and taking interpretation and views, much contrary to the binding judgements of the Tribunal, the 8th Respondent is suggesting this proposal for Group Captive CGPs alone, which involves quality verification and ensure to go with the binding judgements of this Tribunal. This Tribunal in its judgment in Appeal Nos. 270 of 2006 (Order dated 21.02.2011) and Appeal No. 116 of 2009 dated 18.05.2010, has dealt with the matter clearly and settled the issue finally. Therefore, on this score, the impugned order needs to be set aside.

Issue No. VII - Levy of CSS for non-compliance of Rule of Proportionality after complying with 26% and51%

7.20 It is mentioned in the impugned order in RA No. 7 of 2019 dated 28.01.2020 in Para. 7.8.2, that if after complying with the threshold twin conditions of 26% equity shareholding and 51% consumption norms, if one or more consumers, do not fulfil the test of proportionality, other

consumers can retain CGP status, only if, after excluding the defaulting consumers, together hold not less than 26% of financial stake and consumed not less than 51% of the energy generated in Aggregate. If any failure on that, all of them would lose the captive status. In such cases, it shall be noted that if the twin conditions are met out and the test of proportionality alone is not met out, by one or few consumers, CSS is liable to be paid, only by the defaulting consumers and not by all other consumers, who have complied with the Rule of Proportionality.

7.21 Under Rule 3(1)(a), the minimum percentages are prescribed for the 26% ownership and 51% consumption. These are the collective obligations to be fulfilled by all the captive consumers taken together. The requirement of proportionate consumption is however remained to be an individual obligation to be fulfilled by individual captive users only.

7.22 In terms of Illustration (2) provided under the Rule 3 of Electricity Rules 2005, it shall be the obligation of the captive users, to fulfil the minimum percentages in sub-clauses (a) and (b) of sub-rule (1), failing which the entire electricity generated shall be treated as non-captive. The minimum percentages in sub-clauses (a) and (b) of sub-rule (1), are, only 26% ownership and 51% consumption. In all cases, minimum 26% ownership and 51% consumption, in an aggregate manner has to be fulfilled. When this twin obligation of 26% ownership and 51% consumption is complied with, then the plant would be qualified to be called as a CGP. Therefore, this Rule has to be analysed only in a harmonious manner and it cannot be applied to individual cases of captive users for whom only proportionality test alone is obligated. The obligation of individual captive users is available, only to test the proportionality alone with a reference to the shares, the individual captive

users held within the CGP. Therefore, any failure in meeting out the proportional consumption by any individual shareholder, would only make the individual captive user to fail in retaining the status and however, it will not affect the status of the CGP and the other complying captive consumers in any manner as long as the CGP has found complied with 26% financial stake and 51% minimum consumption in an aggregate manner in a financial year.

7.23 The collective responsibility of all the captive users, is to hold the minimum 26% shareholding in aggregate and to consume the minimum 51% of the aggregate generation. So long as these two criteria are fulfilled in an aggregate manner, any breach of the individual proportionality principle, would only affect such consumers alone who are in breach. The consumers who consume in accordance with the proportionality principle, would not be affected by other consumers who may not adhere to the proportionality principle. The bandwidth within which the proportionate consumption is to be made, is identified for each consumer and the compliance is also to be seen individually for each consumer, without affecting the other consumers. This legal proposition has been already reiterated by the KERC in it order in Case No. OP 33/2010 dated 07.07.2011 in Para. 22. On this score, the impugned order needs to be set aside.

Issue No. VIII - Verification for corresponding period within a financial year, if any change in the captive user during a financial year

7.24 In Para. 7.6.8 of the impugned order in RA No. 7 of 2019 dated 28.01.2020, it is mentioned that if a captive user is included during the middle of the year, verification shall be done for each period separately. This effectively means that a year can be split up in to more than one

period for verification. This goes against the order of this Tribunal and also against the express provisions made under the Electricity Rules 2005. In the Kadadora Order in Appeal No. 171 of 2008 dated 22.09.2009, the Tribunal has clearly held that the verification should be done only on an annual basis, for the year as a whole. Whenever a new consumer was granted with OA approval during the middle of the year, the MERC has considered the generation from the date on which the new OA approval was granted, for verification of compliance. In respect of other consumers, who remained throughout the year intact, the verification was done based on the annual generation and not based on the split up of the period in to different periods. Therefore, the impugned order, under Para 7.6.8 needs to be directed to be modified to the extent of complying the Judgement of this Tribunal in Appeal No. 171 of 2008 dated 22.09.2009 and accordingly, in respect of those persons, who continue from 1st April to 31st March, the test of consumption of 51% is based on the aggregate annual generation and however, in respect of persons who join during the middle of the year, it should be from the date of joining as shareholder and the generation happened between the date of joining and the date of leaving or 31st March as the case may be, would be the basis for the test of consumption to assess the status of the Captive User. On this score, the impugned order needs to be set aside.

Issue No. IX - Documents to be submitted for Grant of Open Access, Procedure and Timeline in case of RE Industry.

7.25 Majority of the RE CGPs to the extent of 90%, are owned by same owner who consumes 100% of the generation for its own purposes and in respect of such cases of 100% ownership, there is no requirement of open access approval, as they are all covered by a LTO Agreement validly available for 20 years by Energy Wheeling Agreements and

therefore, they may be exempted from submitting documents on a year on year basis, until any changes are found in the constitution / ownership. Balance are Group Captive CGPs with multiple consumers where the generator and the Captive Users would be of different legal entities. In case of Non-Conventional/RE power, the following documents may be ordered to be submitted to the office of the Chief Engineer-Non-Conventional Energy Sources (NCES), since the Nodal Officer with respect to the Non- Conventional/RE Power in the State is the Chief Engineer, Non-Conventional Energy Sources, TANGEDCO. Therefore, only the Group Captive Generators will submit the application seeking approval for Open Access with the office of CE(NCES) - (Nodal Officer) along with the following documents. An application has to be submitted by Group Captive CGP, by enclosing a Certificate from any CA or Company Secretary, providing details of the ownership of the Group Captive CGP, with shareholding details and voting rights to satisfy the minimum 26% ownership criteria at the time of seeking OA approval.

Issue No. X - Documents to be submitted for Grant of Open Access,Procedure and Timeline in case of Thermal CGPs.

7.26 In case of Thermal CGPs, as they are all covered under the Grid Connectivity and Intra-State Open Access Regulations 2014 of the State Commission, all the OA Approvals, may be directed to be provided by the State Transmission Utility / State Load Despatch Centre, strictly following the timelines and procedures, as laid down in the OA Regulations2014.

Issue No. XI – Separating the OA approval and the CGP verification

7.27 The Tribunal may direct the State Commission to separate the matter of granting OA approval either for Group Captive WEGs / Solar

Power Plants or for Group Captive Thermal Power Plants to go as per the procedures proposed in Para. 35 to 38 for RE Industry and to go with Para. 39 for the Thermal Power Industry and the issue of CGP verification need not be insisted as a pre-condition for providing the OA approval, as grant of OA approval is an in-discriminatory right made available to consumers even under the preamble of the Electricity Act 2003 and further ensured in other provisions of the Act. Therefore, only with reference to the ownership verification, the exercise of OA approval can be undertaken as per the proposals submitted above for the RE Industry by the CE-NCES and for the Thermal Power by the STU / SLDC suitably and a specific direction may be issued to delink the DISCOM in the OA approval process totally.

Summing Up:

7.28 The 8th Respondent submits that this Tribunal may set aside the impugned order in RA No. 7 of 2019 dated 28.01.2020 of the State Commission due to the various deficiencies found at various areas of the impugned order and may issue suitable further directions to the State Commission, to issue a fresh Verification Procedure by handling the CGP verification works by the State Commission itself or by appointing an Independent Third Party, for verifying the compliance of norms by the Group Captive CGPs, who can collect data and details from both the Group Captive CGPs and the 2nd Respondent TANGEDCO and hear them and complete the verification works in a stipulated period. If the Group Captive Plant is in compliance of the norms, the Third Party shall report the matter to the State Commission based on which the Commission shall pass orders declaring it as a Captive Generating Plant. In case of the State Commission itself doing the verification works,

it can itself declare the satisfactory status of the CGP. In case, if the Third Party / State Commission finds it non-compliance, the Third Party / State Commission shall intimate the CGPs, the grounds by which, it is considered as non-compliant, by giving suitable reasons and seeking the responses of the CGPs, within 15 days. Thereafter, CGPs shall provide their responses within 15 days, either by concurring with the opinion of the Third Party / State Commission or by providing their responses to justify their claim of compliance to the Third Party / State Commission. If the State Commission is satisfied with their responses, it shall conclude and declare that the plant as compliant. In case of Third Party doing the verification works, in such cases the Third Party can report the matter to the State Commission, for providing a final declaration that the plant is CGP compliant or otherwise when the verification is done by the State Commission itself, the State Commission itself can declare the satisfactory status of the CGP. In case, if the Third Party is not satisfied with the response provided by the CGP, the Third Party shall submit its report to the State Commission, for adjudication of the matter under Section 86(1)(f) of the Electricity Act 2003. In case the State Commission is making the verification, and if the State Commission is not satisfied with the response provided by the CGP, it can further direct the 2nd Respondent TANGEDCO to proceed with the matter for filing application with the Commission, by following the due process of law for a decision, as per Section 86(1)(f) of the Electricity Act 2003.

8. <u>Learned counsel for Respondent No. 4 & 9/Indian Wind Power Association & The Southern India Mills Association have filed the following Written submissions</u>:-

8.1 The Respondents adopt the arguments of the Appellant and for reasons of brevity are not repeating the same and are setting out

submissions to supplement the said submissions of the Appellant. The brief submissions on each issue that the Respondents wish to place before the Tribunal are set forth *in seriatim.*

A. **The untenable stand of the 2nd Respondent (TANGEDCO) that the appeal is not maintainable on the principles of res judicata and that TANGEDCO can be the determining authority as to captive status of a CGP under Electricity Rules,2005**

8.2 The principal defence and stand of the TANGEDCO to the appeal has been that the issue of the TANGEDCO being appointed as the authority to verify, determine and decide has already been affirmatively decided by the Hon'ble Madurai Bench of the Madras High Court in its judgment dated 9.10.2018 in W.A.(MD) Nos 930 of 2017 and others and therefore the appeal is not maintainable. This stand effectively seeks to cloak the Distribution licensee with an adjudicatory power which it does not and cannot have and is in any event contrary to the very terms of the judgment dated 9.10.2018 in W.A.(MD)No.s 930 of 2017.

8.3 At the outset, the issue of *res judicata* does not even arise in the present case since the Hon'ble Madras High Court specifically held that it was leaving all questions relating to the power of TANGEDCO to verify and determine CGP status open for decision by the TNERC and also specifically left all other issues both on fact and law open and to be agitated before the TNERC in express words. When the Hon'ble High Court has specifically held that it was not inclined to enter into 'an academic exercise' in deciding the issue of jurisdiction since the entire issue was being directed to be considered by the TNERC, the TNERC's stand in the impugned order and TANGEDCO's submissions by seeking to place reliance upon selective portions of the judgment to claim that the

issue is finally decided in its favour, is entirely untenable and contrary to the settled law on the principles relating to reading of judgments. In this context, it would be useful to refer to the judgment of the Hon'ble Supreme Court in "***Jitendra Kumar Singh v. State of U.P.,"*** (2010) 3 SCC 119 which at page 140 stated as under:

> ***53.*** *Even otherwise, merely quoting the isolated observations in a judgment cannot be treated as a precedent dehors the facts and circumstances in which the aforesaid observation was made.*
>
> ***54.*** *Considering a similar proposition in Union of India v. Dhanwanti Devi [(1996) 6 SCC 44] , this Court observed as follows: (SCC pp. 51-52, para 9)*
>
> *"9. … It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. … A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. … It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. … It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution."*
>
> ***55.*** *In State of Orissa v. Mohd. Illiyas [(2006) 1 SCC 275 : 2006 SCC (L&S) 122] the Supreme Court reiterates the law as follows: (SCC p. 282, para 12)*
>
> *"12. … Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. … A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. … A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament."*

8.4 The following paragraphs from the Judgment dated 09/10/2018 of Hon'ble Madurai Bench of the Madras High Court in W.A.(MD) 930 of 2017 would make it amply clear that the stand of the TNERC and TANGEDCO are palpably incorrect.

> *5. There are two issues raised. One is with respect to the verification and other is adjudication. While it is a case of the appellants that both the above are available to them, the respondents including the second respondent contend to the contrary. According to them, the second respondent viz. Tamil Nadu Electricity Regulatory Commission, is the authority constituted both for verification and adjudication.*

Thereafter the Hon'ble High Court considered the position of the various parties and specifically referred to the stand of TNERC. Thereafter the following issue was referred to

> *8. Having said that, a stand has been taken that such an exercise can be delegated by exercise of power conferred under Section 97 of the Electricity Act, 2003, and therefore, appropriate orders would be passed detailing the procedure to be followed by the appellants for verification of the CGP Status. The following paragraphs are referred appositely……*

8.5 It is clear from the above that only the stand of TANGEDCO was recorded with respect to the issue of exercise of the power. Thereafter in para 9 the position of the various parties is recorded. Thereafter the Hon'ble High Court after recording the contentions issued the following directions

> *10. In view of the above, we are not inclined to undertake any academic exercise in deciding the jurisdiction qua verification and adjudication as ultimately, final adjudication, in any case, would lie in the court of the second respondent. We may note that we are at the initial stage and therefore it would only be just and proper to proceed further resulting (in) the adjudication. There is also a broad agreement on this course. In such view of the matter, these writ appeals stand disposed of with the following directions/observations.*

> *(i) The issue qua the jurisdiction and power of the appellants to verify and determine CGP Status leading to entitlement of cross surcharge subsidy is left open;*
> *(ii)The second respondent is directed to issue either a general or special order detailing the procedure to be followed for verification of the CGP Status either by directing or giving liberty to the appellants to verify the Captive Status of the Generating Companies;*
> *……*
> *(iv)The private respondents are directed to furnish the particulars to facilitate the process of verification as per the procedure contemplated and the directions of the second respondent when asked by the appellants preferably within a period of four weeks;*
>
> *(v) The appellants can make a determination on receipt of the aforesaid verification particulars from the respective Generating Companies and in the event of disputes, place them before the second respondent for adjudication after marking copies of the same to the concerned Generating Companies.*
>
> *(vi) As and when the said exercise is done with respect to each and every Generating Company, the adjudication process will have to be commenced and thereafter completed by the second respondent within a period of six weeks;*

8.6 It is therefore clear that nowhere in the said judgment has the Hon'ble High Court either ruled on the issue or conferred any power on the TANGEDCO to be the deciding authority as to CGP status, as is now sought to be claimed. The TNERC despite the clear directive of the Hon'ble High Court acted contrary to the direction and has taken the position in the impugned order that the Hon'ble High Court has conferred the power on the TANGEDCO, when clearly it has not.

8.7 In the above context, the ruling of the TNERC on the issue is clearly contrary to the judgment and is to be set aside. The TNERC in the impugned order held as follows:

> "6.1.4 From the above orders of the Hon'ble High Court, it is clear that the Hon'ble High Court has clearly permitted TANGEDCO (appellant in the said case) to make determination on receipt of

> verification particulars from the generating companies (vide para 10 (v) of the orders). I*n view of the above categorical findings of the Hon'ble High Court, this Commission cannot make a finding different from that of the Hon'ble High Court and the respondents also did not agitate the said issue by way of filing further appeal. Having allowed to become the said decision of the Hon'ble High Court final, it is not open to the respondents / stakeholders to argue against the said decision of the Hon'ble High Court before this Forum."*

8.8 The above finding is a complete misreading of the judgment of the Hon'ble Madras High Court, which rather that permitting TANGEDCO to make a determination on receipt of verification particulars, in fact specifically held exactly the opposite, i.e., left the issue to be considered and decided by the TNERC. The term 'determination' in para 10(v) cannot be read in isolation to mean determination of CGP status but is only the act of determining whether on the basis of particulars provided and verified, the CGP status is clear or whether it is required to be decided upon by the TNERC which is the sole determining body and conferred with exclusive jurisdiction. The interpretation of the TANGEDCO and TNERC would run contrary to a plethora of judgments on the issue and be contrary to the settled law that the DISCOM cannot make a determination of captive status as that is the exclusive domain of the Regulator. An exclusive statutory power of adjudication cannot be delegated, that too, to the very party who stands to benefit and profit from a rejection of CGP status. Such a proposition would be contrary to all canons of law and therefore needs to be set aside. The judgment of the Tribunal in Appeal No. 136 of 2011 "***JSW Steel & Ors Vs. KERC***", Appeal No. 252 of 2014 "***MSEDC Vs. MERC***" and Appeal No. 252 of 2015 "***Salasar Steel Vs Chattisgarh Electricity Regulatory Commission***" have consistently held that the State Regulatory Commission alone has the exclusive jurisdiction on status determination of CGP.

B. **Incorrect position adopted by the TNERC of making the right of Open Access subservient to and dependent upon the prior determination of CGP status.**

8.9 The TNERC at para Nos. 6.3.8 read with 7.5 of the impugned order has created an anomalous situation by proceeding to direct production of various documents before starting wheeling of power (i.e. open access permission), in a financial year, for captive purposes. As a result, wheeling/ open access permission is linked and/or interdependent with the captive generation verification process. This is completely contrary to the very scheme of the Electricity Act, 2003. The right of Open Access is an absolute right guaranteed under S.2(47), S.9(2), S.39 and S.42 and only the Regulations for Open Access are required to be adhered to.

8.10 As regards the compliance with the requirements for a Captive Generating Plant under the Electricity Rules, 2005, they are only for purposes of being exempted from payment of Cross Subsidy Surcharge('CSS'). Therefore, in terms of sequence of actions-

a. The Open Access is to be granted as a matter of right and on demand.

b. The exemption from payment of CSS would be available to such CGP consumer which satisfies the first threshold requirement and files the necessary documentation to show 26% ownership in the CGP. Thereafter the second threshold compliance of 51% consumption is to be verified at the end of the year. For entities that do not provide the requisite documents evidencing ownership in CGP, the exemption would not be available. At the end of the year, such consumer which does not satisfy the 51% consumption or proportional consumption requirements would also not be eligible for CSS exemption.

c. In the event the TANGEDCO is of the opinion that the requirements are not satisfied, it has to refer the issue to the TNERC for adjudication and cannot make a determination of either the status as to CGP or levy of CSS which can only be done by the TNERC. At such hearing the TNERC would, in exercise of adjudicatory power, balance equities pending the final hearing and pass appropriate directions. The TANGEDCO being the beneficiary of any adverse determination of CGP status cannot surely claim to be the entity which will make such determination or impose the levy of CSS.

8.11 Thus, the impugned order is to be set aside to the extent it seeks to impose restrictions on the right to Open Access and makes it dependent upon the determination of CGP status.

C. **The untenable stand that due to the large numbers of CGPs in Tamil Nadu and the large sums of dues that are due as CSS, only the TANGEDCO would have the wherewithal to make the determination of CGP status**

8.12 The submission of TANGEDCO as also that of TNERC is delegating essential judicial and regulatory function on the ground of volume of work involved is completely untenable and in any event contrary to the true facts. The Respondents herein, as responsible Associations which have represented member interests in the State with responsibility over many decades are only seeking adherence to the mandate of law. Such of those captive consumers who comply with the legal requirements are entitled to the rights provided and those who do not satisfy the requirements, after a fair and transparent process, would of course have to suffer the consequences. It is wholly inexplicable that the TANGEDCO should on the one hand claim that over the past 4 years it has not been able to make a determination of CGP status and on the

other place a magic figure of Rs.5,000 crores as the alleged dues towards CSS in the State of Tamilnadu. Indeed, if the TANGEDCO had been unable to make a determination as to compliance of CGP status, it would be entirely contradictory to claim, in the same breath, that the dues are in the region of Rs.5,000 crores. In fact, this submission makes it all the clearer that the TANGEDCO is evidently having a target in mind to shore up its precarious financial position caused due to various reasons of its own doing by making untenable claims after deliberately denying CGP status even to compliant entities.

8.13 The TANGEDCO has further claimed that the number of CGPs in Tamil Nadu are in excess of 7000 making the entire process a tedious process. This stand is completely contrary to facts and to that extent misleading. As a matter of fact, the TANGEDCO's claim that there are approximately 7,119 generating companies is incorrect. In Tamil nadu, which is the state in India with the highest number of Wind Energy Generating plants (WEG), each WEG is provided a separate HT service Connection number. Thus, if this figure is examined, due to the fact that one CGP entity would have multiple WEGs which are all aggregated under the order of the TNERC for status determination as CGP, the total number of entities in Wind Generation would be only 1861.

No. of Wind Generating Companies - break up of 100% Captive and Group captive in Tamil Nadu

Details	No. of Generating companies
Total no. of wind generating companies (captive) in State	1861

Of the above	
Number of generating companies which are 100% own captive	1396*
Number of generating companies which are group captive	465**

* The obligation of to verify the CGP status, in respect of 100% ownership categories, is only on 1396 Companies in which practically no verification of documents is required as both generating and consuming entities are the same

** The requirement to verify the CGP status in respect of Group Captive categories, is only on 465 Companies.

8.14 An overwhelming majority of WEG CGPs are 100% owned wherein the generator and the consumer are one and the same legal entity and have entered into a one-time comprehensive wheeling/LTOA Agreement. Such 100% owned CGPs don't need periodical OA approval or verification. In the context of there being only 465 entities which are to be examined, it is unfortunate that the TANGEDCO is resorting to questionable presentation of information to show inflated figures. In any event, in law, the numbers do not matter. When an authority, viz., the State Electricity Regulatory Commission has been conferred with the exclusive statutory power, such power cannot be delegated on grounds of convenience. The Respondent herein is placing the above factual position only to show that even this claim of large numbers and therefore difficulty to the Regulator to verify is incorrect.

D. **The procedure to be adopted for OA approval and CGP verification which would be in consonance with the law (Renewable Energy)**

8.15 In case of Non-Conventional/RE power in Tamil Nadu, CE (NCES) of TANGEDCO is the Nodal Officer for granting open access and authority to execute wheeling agreements. All copies of documents shall simultaneously be filed with the TNERC's Regulatory wing. As already stated 100% owned CGPs require only a one-time approval and thereafter a verification whenever ownership changes take place at the time of sale of WEGs.

8.16 As regards Group CGPs the following process would ensure the protection of interests of all stakeholders.

a. Applications for OA approval are to be made for all newly established CGPs.

b. In respect of existing CGPs with approvals in place, application will be required to be made when new consumers are added or when the approval obtained in respect of existing users has expired or about to expire. No approval is required in respect of consumers for whom approvals are available until its expiry.

c. Time line for granting the open access is to be made applicable within 7 days from submission of application.

d. While seeking approval for captive wheeling a CA certificate from the CGP certifying the shareholding need to be provided. This certificate shall provide all details required for information and verification of ownership – total paid up capital, shareholding pattern and voting rights.

e. In the event the TANGEDCO is not satisfied with the CGP compliance documents, the same would be referred to the TNERC for its adjudication.

f. It should be made clear that during this entire process the right of Open Access should always be available for wheeling the power.

E. **Other Grounds- Appellant's submissions adopted and supplemented**

On the other grounds raised of

1. Wrongful treatment of SPV's as on AOP,

2. Implementation of the proposed draft amendment to Electricity Rules 2005 issued by MOP, yet to be notified which is sought to be applied.

3. Methodology for verification of change in ownership & consumption

4. Criteria to be followed for verifying the criteria of consumption provided under Rule 3,

5. Retrospective applicability of procedure/guidelines, which is impermissible under the Electricity Act 2003,

This Respondent adopts the stand of the Appellant and is setting out short additional submissions on specific aspects

8.17 Supplement Submission 1- Levy of CSS for non-compliance of rule of proportionality after complying with 26% and 51%

a. It is incorrectly set out in the impugned order in Para. 7.8.2, that if after complying with the threshold twin conditions of 26% equity shareholding and 51% consumption norms, if one or more consumers, do not fulfil the test of proportionality, other consumers can retain CGP status, only if, after excluding the defaulting consumers, other complying consumers together hold not less than 26% of financial stake and consumed not less than 51% of the energy generated in Aggregate.

b. This is incorrect. The collective responsibility of all the captive users, is to hold the minimum 26% shareholding in aggregate and to consume the minimum 51% of the aggregate generation. So long as these two criteria are fulfilled in an aggregate manner, any breach of the individual proportionality principle, would only affect such consumers alone who are in breach. The consumers who consume in accordance with the proportionality principle, would not be affected by other consumers who may not adhere to the proportionality principle. The bandwidth within which the proportionate consumption is to be made, is identified for each consumer and the compliance is also to be seen individually for each consumer, without affecting the other consumers.

c. This legal proposition has been already reiterated by the Karnataka Electricity Regulatory Commission in it order in Case No. OP 33/2010 dated 07.07.2011 in Para. 22.

> ‘’*22. In our view, merely because some of the shareholders are not consuming electricity generated in proportion to their shareholding in any year, it cannot take away the benefit available under the Act to the other shareholders who are consuming electricity in proportion to their equity holding when the total captive consumption is more than 51 per cent of the electricity generated. Sections 9 and 10 of the Electricity Act, 2003 and Rule 3(2) of the Electricity Rules, 2005 have to be read harmoniously and shall be interpreted*

> *keeping in view the avowed broad objective of the Act. As held by the Hon'ble ATE in Malwa Industries Ltd. [{2007)ELR (APTEL)1631] the Proviso to Rule 3(a)(ii)is in the nature of a qualification or an exception and it does not nullify, subsume or swallow the general Rule of captive consumption which shall be a minimum of 51 per cent of aggregate power generated on an annual basis. Rule 3(2) on which heavy reliance is placed by the respondent does not lay down that if any of the captive consumers does not consume power in proportion to the shareholding, all other stakeholders shall forfeit their benefit which is otherwise available to individual captive consumers even when the consumption by captive users exceeds 51 per cent. If it is held otherwise, it may defeat the very object of the Act in respect of facilitating captive generation and may discourage combined investments which may help only large industries".*

This order of KERC has been upheld by Tribunal in its judgment in Appeal No. 136 of 2011 dated 21.12.2012 and is required to be adhered to. The directions of the TNERC to the contrary are therefore to be set aside.

d. Finally, the Format V B that provides for the methodology for verification of test of proportionality is lacking clarity and gives scope for misinterpretation. Format V B has to be directed to be modified in such manner that it ensures compliance with the Electricity Rules,2005.

8.18 Supplement Submission 2 Verification for corresponding period within a financial year if any change in the captive user during a financial year

In Para. 7.6.8 of the impugned order the TNERC has held that if a captive user is included during the middle of the year, verification shall be done for each period separately. This effectively means that a year can be split up in to more than one period for verification. This is contrary to the terms of the Electricity Rules, 2005 as also the judgment of this Tribunal. In the *Kadadora*

Judgment in Appeal No. 171 of 2008 dated 22.09.2009, the Tribunal has clearly held that the verification should be done only on an annual basis, for the year as a whole. Thus, whenever a new consumer is granted with OA approval during the course of the year, the generation from the date on which the new OA approval was granted is to be considered for verification of compliance. In respect of other consumers, who remained throughout the year intact, the verification is to be done based on the annual generation and not based on the split up of the period in to different periods. Such a methodology was upheld by this Tribunal in *Appeal No 252 of 2014 MSEDC Vs. MERC &ors* by judgment dated 3.6.2016

8.19 Supplemental submission No.3 :Banking Charges paid in kind to be deducted from gross generation: Para 7.7 of impugned order and issues dealt with therein :As the wind energy generation is seasonal, banking of wind energy is permitted for which banking charges in kind are deducted from banked units. The units deducted as Banking charges are not available for consumption and hence needs to be adjusted from the gross generation. In the procedure notified, banking charges deducted in kind have not been allowed to be deducted from generation. However, it would only be appropriate if it is to be treated at par with Auxiliary consumption which is allowed to be deducted from Aggregate generation. Similarly banking charges paid in kind ought also to be allowed to be deducted from gross generation.

8.20 Supplemental Submission No.4: Grossing-up T & D Losses: T& D losses in kind are deducted for wheeling the power from the point of generation to the point of consumption depending upon the voltage level of the CGP and the consumer. If 100 units are exported to consumer

end, at the consumer end, units eligible for adjustment would be after deducting the T and D losses. T and D losses will have to be grossed up to the consumer consumption. Grossing up of T and D losses has not been allowed in the procedure. In MERC order 117 of 2012 dated 28.08.2013, T and D losses have been grossed up. This methodology has been upheld by the Tribunal in order No. 316 of 2013 dated 17.05.2016.

9. **We have heard learned senior counsel appearing for the Appellant, learned counsel for the Respondent Commission, learned senior counsel for the Respondent No. 2, the learned counsel for the Respondent Nos. 3 to 5, and the learned senior counsel for the Respondent No. 8 at considerable length of time and have carefully gone through their written submissions/arguments and also taken note of the relevant material available on record during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the Appeal for our consideration:-**

<u>Issue No.1</u>:- Whether the appointment of TANGEDCO as the verifying as well as adjudicating authority is justified in law?

<u>Issue No.2</u>:- Whether the documents to be provided for availing open access under Section 9 of the Act can be linked to Wheeling/ Open Access with captive verification?

<u>Issue No.3</u>:- Whether it is correct on the part of Respondent Commission to treat SPV as an AOP for ascertaining the eligibility of captive status?

Issue No.4:- Whether the State Commission is justified in implementation of the proposed Draft amendment to Electricity Rules, 2005 proposed by Ministry of Power which are yet to be approved and notified?

Issue No.5:- Whether the State Commission has correctly followed the Criteria for verification of consumption provided under Rule 3?

Issue No.6:- Whether Retrospective applicability of proposed procedure/ guidelines is justified under the law?

Issue No.7:- Whether the proposed Methodology for verification of change in ownership and consumption is in accordance with law?

10. Our Consideration & Analysis:-

ISSUE NO. 1:-

10.1 Learned Senior Counsel Mr. Sajan Poovayya and Learned Counsel Mr. Buddy A. Rangnadhan appearing for the Appellant have contended that TNERC vide the impugned order has transgressed the legislative intent and scope of the Electricity Act, 2003 as well as the Electricity Rules, 2005. It has been specifically placed before us that the prevalent framework of the Act envisages grant of Open Access to be non-discriminatory in all aspects and it is imperative that it be granted within a specified period of time, within the four corners of the Open Access Regulations holding domain in the State of Tamil Nadu, which is TNERC Open Access Regulations, 2014. It has also been submitted before us that the impugned order lacks necessary jurisdiction as it has sought to provide an amendment to Rule 3 of the Rules, which cannot be done within the powers available to TNERC under the Act and the governing Rules framed by it.

10.2 Learned senior counsel, to substantiate his argument on maintaining highest level of probity and to do away with any sort of discrimination, has argued that the Respondent No. 2 cannot be vested with the powers of verification and adjudication by TNERC, so far as the issue of verification of status of captive generating plants and captive users in the State of Tamil Nadu is concerned. Reference has been made to Para Nos. 6.1.4 to 6.1.6 to show that such powers of verification have been vested with Respondent No. 2. In addition, to this argument has also made a reference to Para 7.9.6 to 7.9.10 to show that the Commission has also framed a procedure for the said process of verification.

10.3 Learned counsel further argued that Respondent No. 2 which is a Distribution Licensee in terms of Section 2(17) of the Act, would be a direct beneficiary in the event a generating plant would lose its captive status. In this regard, reference is made to 4th proviso to Section 42 (2) of the Act, which enacts an exception for a generating plant established as captive and seeking open access from payment of Cross-Subsidy Surcharge ("**CSS**"). Further attention of this Tribunal was also drawn to Rule 3 of the Rules, which lays down the requirements to be fulfilled by a generating plant to qualify as captive generating plant. Under this Rule, i.e. Rule 3(1)(a)(i) a CGP to retain its captive status or qualify for the same is required to hold minimum 26% of ownership. Further, as per Rule 3(1)(a)(ii) such CGP is required to consume minimum 51% of the aggregate electricity generated in such plant to be determined on annual basis. If a generating plant seeking open access, is not able to fulfil the aforesaid two conditions within the ambit of Rule 3, then it no longer remains as a captive generating plant and is liable to bear the charges in the form of CSS. The Appellant contends that this payment of CSS

would have to be made to the Distribution Licensee which is Respondent No. 2 in the present case. It has also been submitted that Respondent No. 2 apart from being a direct beneficiary, if vested with the powers of verification and adjudication would result in it being a judge in its own cause. In this regard, reliance has been placed on the following decisions of Hon'ble Supreme Court:

a) *Uma Nath Pandey & Ors. v. State of Uttar Pradesh & Anr. reported in (2009) 12 SCC 40;*

b) *J Mohapatra and Co. & Anr. v. State of Orissa & Anr. reported in (1984) 4 SCC 103.*

10.4 Learned counsel for the Appellant has also laid emphasis on the aspect that verification of captive status can only be done by Respondent No. 1 i.e. State Commission and the direction vesting such powers with Respondent No. 2 is contrary to the settled legal framework of the Act. In this regard, the Appellant has relied upon two decisions of this Tribunal in the cases of:

I. Appeal No. 270 of 2006 titled as ***"Chhattisgarh State Power Distribution Co. Ltd. v. Shri J.P. Saboo, Urla Industries Association Ltd. & Ors".*** The relevant extract of the said judgment is reproduced here-in-below:

> *"34. Admittedly, this cannot be done by the State Transmission Utility or a Distribution Licensee. Similarly, there is no provision in the Act enabling the State Government to do so. Since open access has to be regulated by the State Commission, we feel that the State Commission has to take the responsibility of declaring the generating plant as a captive one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3 of the Electricity Rules. This ratio has already been decided by the Tribunal in appeal No.116/2009 dated 18.5.2010 – CSPDCL Vs. M/s Heera Ferro Alloys.*

> *35. As mentioned in the above judgment, there is no prohibition in the Electricity Act, 2003 or the Electricity Rules, 2005 for the State Commission to determine the Captive Power Plant status. Since the State Commission exercises the regulatory powers in the State to decide about a dispute between the Captive Power Plant and any Licensee in terms of Section 86(1)(f) of the Act, the State Commission alone would be the appropriate authority to decide about the status to monitor the said Captive Power Plant status."*

II. Appeal No. 116 of 2009 titled as ***"Chhattisgarh State Power Distribution Co. Ltd. v. Hira Ferro Alloys Ltd. & Anr***." The relevant extract of the judgment is reproduced here-in-below:

> *"27. A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State.*
>
> *28. In view of the aforementioned discussions we have no manner of doubt that the State Commission has the jurisdiction to determine the captive generating plant status of the first Respondent which in turn will determine whether or not surcharge is payable."*

10.5 Learned counsel for the Appellant vehemently contends that the Respondent Commission, if at all wished to delegate its power/functions under Section 97 of the Act, then it ought to have appointed an authority which would function without any vested interest or have any

foreseeable benefit from the verification process contemplated in the impugned order. The learned Senior Counsel thus emphasizes that power to collect and verify data could have been vested with the Chief Electrical Inspector ("**CEI**") of the State of Tamil Nadu, instead of Respondent No. 2.

10.6 Learned counsel for the Appellant has also taken a strong objection to the stand of the Respondents wherein it has been argued by the Appellant that the order dated 09.10.2018 passed by the Hon'ble Madras High Court (Madurai Bench) did not pass any final direction and mandate upon Respondent No. 1 to appoint Respondent No. 2 as the verifying authority for verification of captive status of the captive users and the CGPs located in the State of Tamil Nadu. Reliance has been placed on Para No. 8 of the aforesaid order to further strengthen the argument that the Appellant never conceded to the issue of appointment of Respondent No. 2 by TNERC. It was also argued that the alleged conceding, if at all, was limited to the extent that the Appellant did not have any legal quarrel with the power of the Respondent Commission to delegate functions as envisaged under Section 97 of the Act. However, the legality of any such act of delegation on the part of TNERC was always open for judicial scrutiny by the Courts to test its reasonability and legality. The Appellant also relied upon directions passed by the Hon'ble Madras High Court (Madurai Bench) in Para 10 (i) of the Order dated 09.10.2018 (supra) to establish the fact that the issue of appointment of an authority for verification of CGPs/ captive users was left open by the said High Court and it was incumbent upon TNERC to have independently applied its mind while deciding such a critical issue which potentially impacts the entire captive industry in the State of Tamil Nadu.

10.7 Learned senior counsel has also argued that Respondent No. 2 has no embedded or inherent right under the framework of the Electricity Act to claim CSS from CGPs/captive users when they are specifically exempted entities in terms of Section 42 (2) of the said Act. In fact, the entire argument of the Respondents revolving around the fact that there are approximately 7,000 to 10,000 captive users in the State of Tamil Nadu, and a majority of them evade liability towards payment of CSS and ASC is only an attempt to create prejudice before this Tribunal. Accordingly, it has been prayed that Para nos. 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10 of the impugned order be set aside, along with the directions contained therein.

10.8 *Per contra, l*earned Senior Counsel Mr. C.S. Vaidyanathan, learned counsel Mr. Sethu Ramalingam, learned counsel Mr. Balaji Srinivasan appearing for the contesting Respondents, on the aforesaid issue, have argued that the present appeal under Section 111 of the Act filed before this Tribunal is not at all maintainable, more so when the generators who have challenged the verification process, directed vide the impugned order have already concurred with the directions passed vide order dated 09.10.2018 by the Hon'ble Madras High Court (Madurai Bench), specifically the directions contained in para 10(v) wherein Respondent No. 2 is allowed to make determination/verification of captive status on receipt of verification particulars from the respective Generating Companies. The Respondents have also contended that in case there arose any difficulty, the said generators should have approached the Hon'ble High Court. It has also been argued before us that in terms of paras 7.9.6 to 7.9.10 of the impugned order, only provisional dues qua a user's liability could be intimated and in case of any dispute TNERC would resolve the same, and till the Commission

passes final orders no coercive action would be taken. It was also contended specifically that Respondent No. 2 has the wherewithal to conduct verification more effectively than the Commission. The following decisions of the Hon'ble Supreme Court have been relied upon by the Respondents on the point(s) that the issue of verification by Respondent No. 2 is hit by doctrine of *Res-Judicata* and *Estoppel,* which are perused by us. The issue of comity and discipline between Courts and Tribunals was also raised. Further, the issue of competence of the Commission delegating its verification power to Respondent No. 2 along with allegations of forum shopping are also argued.

Our Findings:-

10.9 We have critically analysed the contention of Learned Senior Counsel for the Appellant and Learned Senior Counsel/Learned Counsel for Respondents and also taken note of the written submissions as well as the judgments cited/relied upon by the parties.

10.10 It is not in dispute that TNERC undertook an exercise of formulating a procedure for verification of status of CGPs/captive users in the State of Tamil Nadu by means of proceeding in R.A. No. 7 of 2019. It is also an admitted position that the Hon'ble Madras High Court (Madurai Bench) passed directions upon the parties herein, in W.A. MD. 930-931 of 2017 and C.M.P Nos. 5958-5959 of 2019. The *lis* which we endeavour to adjudicate under the present issue is whether TNERC can delegate its powers under Section 97 of the Act, and whether the power to verify captive status in the State of Tamil Nadu can be delegated within the Act, Rules and decisions of this Tribunal to an instrumentality like Respondent No. 2.

10.11 On perusal of the scheme of the Act, it is clear that impetus is upon encouraging the captive industry in India, specifically to cater to the dynamic and dedicated power requirement by the industries spread across the country. In this regard, we intend to peruse the Statement of Reasons of the parent legislation governing the power sector in the country. One of the noble reasons behind enacting the Electricity Act, 2003 is taking adequate measures conducive to the development of electricity industry promoting competition therein and protecting interest of consumers. It is equally important to note that the National Electricity Policy 2005, under Article 5.2.24& 5.2.25 explains the establishment of CGPs as a means of securing reliable, quality and cost-effective power. Reference is also made to the intent enshrined under the National Tariff Policy, 2016 wherein it specifically envisages that appropriate Commission shall be required to create an enabling environment which promotes captive generation as provided under Article 6.3.

10.12 Further, in terms of Section 42(2) of the Act and Rule 3 of the Electricity (Rules) 2005, it is seen that Section 42(2) mandates that open access shall be allowed and granted on payment of a surcharge in addition to charges of wheeling. The said Section also specifically exempts a person who avails open access and has established a captive generating plant, for carrying the electricity to the destination of his own use, from payment of such surcharge. The Act also mandates that open access is to be granted in a non-discriminatory manner.

10.13 Rule 3 provides the conditions to be satisfied by a captive generating plant and its captive users. The said conditions are that the captive users have to hold a minimum of 26% shareholding in the

captive generating plant, and they should collectively consume a minimum of 51% of the power generated by the said plant. For verifying the said conditions, data with respect to shareholding and consumption pattern of captive users is required to be analysed. Once the said conditions are met, then the captive users are exempted from payment of cross subsidy surcharge. In the issue which we are dealing with, it is to be analysed if such verification can be done by the Respondent No. 2, which will stand to benefit if the captive generating plant, and its users, are not able to fulfil the mandate of Rule 3.

10.14 It is necessary to construct a harmonious bridge between the intent of the Statement of Object & Reasons of the Electricity Act, 2003, vision encapsulated in the National Tariff Policy 2016, National Electricity Policy 2005 and the provisions in the Act which promotes captive generation in the country.

10.15 We have no doubt that Section 97 of the Act permits the appropriate Commission to delegate such of its powers and functions except the power to adjudicate disputes under Sections 79 & 86 and power to make Regulations under Sections 178 or 181. However, we cannot lose sight of the fact that it is a settled principle that any action undertaken by a quasi-judicial body, which includes delegation of power by the Commission to any authority, should not wither away the underlying foundation of transparency, unbiasedness and fair play. Vesting critical functions like verification of status of CGPs, captive users in the State of Tamil Nadu by the Commission upon an authority which can be a direct beneficiary of such process, cannot be said to be free and fair on the face of it. In fact, during the course of arguments, Learned Senior Counsel appearing on behalf of the Appellant, for

academic purposes, also apprised us of the fact that certain captive users have been denied open access under Section 9 of the Act without any material cause. We do not wish to dwell upon the said submission, since it is not an issue in the impugned order and the said person always has a remedy under law for such grievance.

10.16 We are impressed by the submission of learned Senior Counsel appearing on behalf of the Appellant, that in the present case, vesting the power and function to verify captive status upon the Respondent No. 2 would in fact be permitting the said Respondent to act as a judge in its own cause, which in turn would lead to dilution of the principle of fair play and transparency. We place reliance in the decisions of Uma Nath Pandey and Ors (supra) and J Mohapatra and Co. &Anr. (supra). We have also been taken to the decisions rendered by this Tribunal in the case of J.P. Saboo (supra) and Hira Ferro Alloys (supra) to construe that verification of captive status is to be done by the concerned Commission.

10.17 We have also considered the contention of the Respondents that the issue of appointment of Respondent No. 2 as a verification authority has already been decided by the Hon'ble Madras High Court. We have also gone through the relevant paragraphs of the order dated 09.10.2018 passed by the said High Court. We note that placing reliance on paragraph No. 10 (v), the Respondents have contended that Respondent No. 2 herein was permitted to make verification of captive status of CGPs, captive users and the said direction has attained finality. However, it is important to note that at Paragraph No. 10 (i) the Hon'ble High Court has specifically left open the issue of jurisdiction and power of Respondent No. 2 to verify and determine CGP status. We have no doubt that the direction contained under Para 10 (v) was not a final

direction but was an interim arrangement. TNERC in terms of the direction in Para 10 (i) was mandated to adjudicate this issue in an independent and an efficient manner. We are not impressed by the submissions of the Respondent that there are approximately 7000-10,000 captive users in the State of Tamil Nadu and a majority of them have evaded their liability in terms of payment of CSS and ASC. We note that this submission is not a relevant issue in the present Appeal nor was considered in the impugned order by TNERC. The impugned order only relates to formulation of procedure for verification of status of CGPs and captive users in the State of Tamil Nadu and the Respondents before us cannot be permitted to improve upon their case. In the present Appeal we are not to decide the liability when certain entities do not furnish data, rather the present Appeal is about deciding as to how verification and documentation needs to be done. As such, we are of the view that once decision on the procedure of verification and documentation is made, then if certain entities do not comply with our directions, the Respondent No. 2 would be free to initiate appropriate proceedings before TNERC against such entities.

10.18 Thus, we are unable to accept the contentions of the Respondents on this issue and set aside the directions of TNERC contained in paragraphs 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10 in the impugned order. However, we hold that Respondent No. 2 can be appointed for undertaking an exercise of collecting and verifying data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, without the powers to itself take any coercive action against any CGP/Captive User(s). It is clarified that any action to be initiated against the CGP/Captive User(s) regarding its captive status or

for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the Respondent No.1 Commission.

11. ISSUE NO. 2.:-

11.1 Learned Senior Counsel arguing for the Appellant has vehemently contended that TNERC has gone beyond the framework of the Electricity Act, 2003 and the directions passed by the Hon'ble Madras High Court vide order dated 17.09.2019 in C.M.P (MD) 5959-5959 of 2019 by linking verification process of CGPs and captive users with grant of wheeling/open access for captive purposes. Reference has been made to para nos. 6.3.8 to 6.3.9 and 7.4 & 7.5 of the impugned order to show the directions mandating requirement of various document ts to be produced before starting wheeling of power in a financial year for captive use. It has been vehemently contented that wheeling/open access is governed and regulated under the TNERC Open Access Regulations, 2014 and the procedure for grant of open access has to follow the Regulations under the aforesaid Open Access Regulations, 2014. It is also argued that there is no amendment in the said Regulations and TNERC could not have varied the procedure established therein, vide the impugned order.

11.2 Learned counsel for the Appellant submits that TNERC Open Access Regulations, 2005 was replaced by the Open Access Regulations, 2014 and it is imperative to see the scheme of Regulation 9(2), 13(2)(a) and 14(2)(a) therein. Further, under the Regulations of 2014, it has been argued that no single provisions exist, which mandates verification of shareholding structure of a CGP before granting of open access for captive use.

11.3 Emphasis has been laid by learned counsel for the Appellant on Section 9 of the Act to contend that open access for captive use is a matter of right, and the Respondents cannot be permitted under law to circumvent such precious right by creating hindrances beyond the ambit of the Act and Regulations. In fact, the Appellant has also produced a list of documents, which were required to be submitted to SLDC/STU for obtaining approval for open access/wheeling in terms of the TNERC Grid Connectivity & Open Access Regulations, 2014, before issuance of the impugned order. These documents are as under:

i. Open Access application as per the format given in aforesaid Regulation, 2014 with list of captive users;

ii. Certificate from a Chartered Accountant or Practicing company secretary providing details of the ownership of the CGP with shareholding details as on the date of the application;

iii. Consent/NoC obtained from DISCOM (Electricity Distribution Circle (EDC)) where the CGP is located. (Consent/NoC needs to be issued within 3 days as per OA Regulation, 2014);

iv. Consent NOC obtained from DISCOM EDC where the captive users are located (for only new users);

v. An undertaking of not having entered into a Power Purchase Agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought from the Captive user;

vi. Applicable Open Access application fee.

11.4 Learned counsel for the Appellant has argued that in terms of the documents as required under Open Access Regulations, 2014 only an intimation or submission of the said documents is mandated while applying for open access to the Nodal Agency and in no case, the Regulations contemplate that such documents are to be furnished to Respondent No. 2. They have also contended that the said documents would suffice the purpose of granting open access for captive use.

11.5 Learned counsel for the Appellant has also sought to nullify the contention of the contesting Respondents that under Regulations 16(2)(a) of the said Open Access Regulations, 2014 any consumer connected to the distribution system while seeking open access is mandated to submit consent from the distribution licensee which in turn empowers Respondent No. 2 to require any document from such consumers or captive users requiring such consent. However, the said contention is wrong as the guidelines for verification of captive status formulated by TNERC under the impugned order cannot be intertwined and linked with wheeling/open access approval.

11.6 In regard to the above submission, it has been further argued before us that the Respondents have erroneously relied on the aforesaid Regulation 16(2)(a) of the Open Access Regulations, 2014 as any person or entity so applying for open access under long, medium or short term within the ambit of said Regulations is mandated to interact only with the SLDC/STU i.e. the Nodal Agency, and not Respondent No.2, and the Nodal Agency is exclusively empowered and authorized to examine the availability in the transmission/ distribution system in the State for ascertaining grant of wheeling/open access. Respondent No. 2 in any case is not empowered to pre-verify documents pertaining to captive structure as per Rule 3, for the purpose of grant of open access.

11.7 In fact, it has been further stressed upon that any interaction with Respondent No. 2, if at all, is within the ambit of Regulation 16(2)(b)(i), (ii) & (iii) only. These Regulations mandate grant of consent by Respondent No. 2 after considering limited factors like existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the State Grid Code in force, availability of capacity in the distribution network and availability of Remote Terminal Unit (RTU) and communication facility to transmit real-time data to the SLDC or Distribution Control Centre (DCC).

11.8 The Appellant has stressed upon the fact that in terms of Regulation 16(c) of Open Access Regulations, 2014 the Respondent No. 2 is mandated to convey its consent to an open access applicant within a period of three working days where existence of necessary infrastructure and availability of capacity in the distribution network has been established. Further as per Regulation 16(f) of the said Regulations, if Respondent No. 2 fails to communicate any deficiency or defect in the application of the open access to the applicant within two working days from the date of receipt of the application, then in such a scenario the requisite consent of Respondent No. 2 will be deemed to be granted.

11.9 In the light of the above, it has been contended by the Appellant that the period of 30/45 days contemplated under the impugned order is beyond the ambit of the aforesaid Open Access Regulations, 2014 as under the said Regulations the maximum period for which Respondent No. 2 has to process the application/grant its consent for open access shall be not more than three days. Therefore, the directions contained in

para 6.3.8 (2) read with para 7.5.2 & 7.5.4 of the impugned order deserves to be set aside.

11.10 Another point which has been raised for our consideration is that the verification of status of CGPs and captive users in terms of Rule 3 of the Rules has to be done at the end of financial year. In this regard the Appellant has contended that the directions contained in para 7.4.1 of the impugned order is bad in law as it is passed in derogation of Rule 3. It has been argued that the shareholding structure as well as the consumption pattern of the CGPs and captive users is to be verified/determined on an annual basis at the end of the financial year. Reliance has been placed by the Appellant on the decision in Appeal Nos. 02 of 2018 and 179 of 2018 to emphasize on the point of verification to be done in terms of Rules 3 of the Rules, at the end of the financial year.

11.11 Learned counsel for the Appellant further submitted that the only ground for grant or denial of open access is the availability of adequate capacity in the distribution or transmission system of the State. Further, as per definition of “wheeling” and “open access” provided under Section 2(75) and 2(47) of the Act, wheeling and open access are part and parcel of the same exercise. The Appellant has also pointed out that TNERC has contradicted itself in the impugned order wherein at Para 7.4.3 it specifies that verification is an annual process to be done at the end of the financial year. However, in Paras 7.6.8 and 7.6.9 it holds that from FY 2020-21 onwards periodic verification is required in case of any change in shareholding. TNERC at para 6.3.8(3) read with para 7.5.5 has burdened CGP(s) in the State by asking them to furnish details with regard to any change in shareholding of existing shareholding in existing

captive users and the proof of documents within 10 days of such change. At paras 6.3.8(2) & 7.5.2, 7.5.4 of the Impugned Order, TNERC has framed a time period for submission of documents for proof of ownership wherein documents are to be furnished within a period of 30 days, when number of captive users are less than and up to 50, and within a period of 45 days when number of captive users are above 50, preceding the date from which wheeling under captive category is sought.

11.12 Learned counsel for the Appellant also argued that the protocol formulated by TNERC with respect to grant of open access was an extraneous issue and during the public hearing before TNERC, the issue of criteria for open access and related issues were not even on its agenda. They submitted that judicial propriety demands that TNERC ought not to have decided an issue which was not presented before it for adjudication. In this regard, they have relied on two decisions of Hon'ble Supreme Court namely, "***Bachhaj Nahar v. Nilima Mandal & Anr.***", reported in (2008) 17 SCC 491 and "***V.K. Majotra v. Union of India & Ors.***" reported in (2003) 8 SCC 40.

11.13 *Per contra*, learned counsel for the Respondents have contended that verification is necessary to ensure that those who are availing open access under captive status are rightfully doing so and that those who are not, are being billed for CSS. They also argued that Open Access has to be provided without any discrimination under two different categories., viz., Captive Open Access and Non-Captive Open Access and for both the categories, the non-discriminatory use of Transmission Lines or the Distribution System have been mandated. Emphasis has been laid on the aspect that Open Access Regulations prescribe this non- discriminatory use of Transmission Lines or the Distribution System

with the payment of Certain charges viz., Transmission Charges, System Operating Charges, Scheduling Charges, Cross Subsidy Surcharge etc.

11.14 Learned counsel for the Respondents have argued that when non-captive Open Access is sought for, the non-discriminatory use of Transmission Lines or the Distribution System is provided with the levy of all charges including Cross Subsidy Surcharge as per Regulation 23 of the Open Access Regulations issued by the State Commission. On the other hand, in case of Captive Open Access being sought for non-discriminatory use of Transmission Lines or the Distribution System is again provided with the levy of all charges excluding Cross Subsidy Surcharge as per Regulation 9 (6) of the Open Access Regulations issued by the State Commission which states that Open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and in these Regulations.

11.15 Much weightage has been put behind the fact that CSS forms a major source of revenue for the Respondent and in this regard, they have relied upon the judgment of the Hon'ble Supreme Court in ***"Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission"*** reported in (2014) 8 SCC 444.

11.16 Further, it has also been argued before us that verification before a captive user avails of open access through captive category is imperative to uphold the integrity of the concession as it will ensure that only those who maintain not less than 26% stake in the CGP avail the concession of not paying CSS. The Respondents have submitted that most of the Appellants members (Non-RE) are Medium-term OA Customers.

11.17 Learned counsel for the Respondents thus submit that in terms of the impugned order, before submitting an application for Captive Open Access, an applicant needs to furnish documents prescribed in the impugned order to Respondent No. 2 for establishing ownership as per Rule 3 of the Electricity Rules, 2005 to avail the exemption of CSS by Respondent No. 2 upon the user's monthly HT Bills. They have also argued that the average time taken for carrying out the verification of ownership is 3 working days for where there is one user, 7 working days where there is more than one user but less than 50 users and 10 working days where the number of users is more than 50 except few instances. It is therefore, contented that no prejudice will be caused to the Appellants by verifying the ownership before commencement of captive open access, and if no verification is done, then prejudice will be caused to the Respondents No. 2.

Our Findings:-

11.18 In order to decide the controversy, we proceed to analyse Rule 3 of the Rules, as enshrined by the legislature:

> *"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 cooperative 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."*

It is observed from the aforesaid that Rule 3 envisages two primary conditions for a captive generating plant to be fulfilled in terms of Section 9 of the Act. These conditions are firstly, that not less than 26% of ownership is to be held by the captive users and secondly, not less than 51% of the aggregate electricity generated in such plant determined on an annual basis, is consumed for the captive use. The rest of the Rule mandates what would be the manner of compliance qua a CGP established by a SPV, Association of persons and a cooperative society etc. What is material here is that the legislature in its wisdom has framed the process for determination of the status of CGP to be done annually, at the end of the financial year. It is equally important to point out that Rule 3 does not deal with grant of open access. The open access is governed by Sections 2(47), 9 and 42(2) of the Act. Therefore, verification of Rule 3 conditions qua shareholding, cannot be made mandatory pre-condition for grant of open access. Further, we also see that essentially between Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) there is no exclusivity and the two conditions are dependent on each other. We agree with the submission of the Appellant that verification of the criteria

mentioned under Rule 3(1)(a)(ii) cannot be done on a stand-alone basis, by ignoring Rule 3(1)(a)(i). Consumption of 51% of the aggregate electricity generated by Captive User(s), annually, can only be done by considering and verifying as to whether the captive users hold 26% of ownership.

11.19 The short question which arises next is, when verification under Rule 3(1)(a)(ii) has to be done along with the verification mandated under Rule 3(1)(a)(i), then whether this process has to be undertaken annually i.e. at the end of Financial Year or not?

11.20 To answer this question, we see the decision in Appeal No. 02 and 179 of 2018 titled as "Prism Cement Limited v. MPERC &Ors.," wherein this Tribunal had the occasion of considering the said issue, as to whether the twin requirements under Rule 3 have to be determined at the end of the financial year together or only the requirement under Rule 3(1)(a)(ii) can be so determined with the exception of Rule 3(1)(a)(i) which can be verified at any given point of time. At para 9.6 of the said judgment, the following has been held by us:

> *"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."*
>
> [Bold & underline supplied]

11.21 This Tribunal has taken a decision in the aforesaid case of Prism Cement Limited (Supra). In terms of this decision, we see that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. We have to give mandate to the legislative intent as well as the law settled by us on the said issue.

11.22 We accordingly hold that verification of minimum shareholding and minimum consumption on proportionate basis for CGPs and Captive Users has to be done strictly in terms of Rule 3 of the Rules, without any deviation and the said Rule envisages verification under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) to be at the end of financial year only. If the Distribution Licensee delays or denies open access, in a manner to defeat the concept of captive generation and consumption, then the question of verification under the above Rules will have no meaning and purpose. Accordingly, we observe that in such a scenario, Respondent No. 2 cannot benefit by its own default, and in the event, it is found that the open access was wrongfully denied or delayed, then Respondent No. 2 cannot seek to claim CSS at the end of financial year.

11.23 On the issue of documents to be provided by the CGPs/ captive users for availing open access under Section 9 of the Act, we have noted the arguments of the parties and the relevant Regulations prevalent in

the State of Tamil Nadu namely TNERC Open Access Regulations, 2014.

11.24 That, Regulation 9(2), 13(2)(a) and 14(2)(a) of the said Regulations provide as under:

> *"9. Eligibility for Open Access and conditions to be satisfied. –*
> *…*
>
> *(2) Subject to the provisions of these Regulations, the licensees, generating stations, captive generating plants and consumers shall be eligible for open access to distribution system of a distribution licensee on payment of the wheeling and other charges as may be determined by the Commission from time to time.*
> *…"*
>
> ***13. Procedure for Long Term Access. –***
> *…*
> *(2) Involving only intra-State transmission system. - Subject to the provisions of sub regulation (1), intra-State long-term open access involving intra- State transmission system shall be in accordance with the provisions below: -*
>
> *(a) Every application for grant of long-term open access shall contain details such as name of the entity or entities from whom electricity is proposed to be procured along with the quantum of power and such other details as may be laid down by the State Transmission Utility in the detailed procedure specified in Regulation 43:*
>
> *Provided that in case augmentation of transmission system is required, the applicant shall also have to bear the transmission charges for the same as per these Regulations:*
>
> *Provided further that in cases where there is any material change in location of the applicant or change by more than 10 percent in the quantum of power to be interchanged using the intra-State transmission system, a fresh application shall be made, which shall be considered afresh in accordance with these Regulations.*
>
> ***14. Procedure for medium-term open access. -***
> *…*

(2) Involving only intra-State transmission system: Subject to the provisions of sub regulation (1), intra-State medium-term open access involving intra-State transmission system shall be in accordance with the provisions of clauses (a) to (f);

(a) The application for grant of medium-term open access shall contain such details as may be laid down under the detailed procedure and shall, in particular, include the point of injection into the grid, point of drawal from the grid and the quantum of power for which medium- term open access has been applied for;
…

*"**15. Procedure for short-term Open Access. –***

(2) Involving only intra-State transmission system. - Subject to the provisions of sub regulation (1), intra-State short-term Open Access shall be in accordance with the provisions of clauses (a) to (f):
…
(iii) Every application to the Nodal agency shall be in the specified format [FORMAT ST-1] containing such details like capacity needed, generation planned or power purchase contracted, point of injection, point of drawal, duration of availing open access, peak load, average load and such other additional information as may be required by the Nodal agency. The application shall be accompanied by a non-refundable application fee as per Schedule 1 and 2 in cash or by demand draft in favour of the officer so notified by Nodal agency;
…"

11.25 From the above, we see that there is nothing contained in the TNERC Grid Connectivity and Intra-State Open Access Regulations, 2014, which mandates verification of shareholding structure of CGPs/captive users before/prior to grant of open access for captive use and we have to agree with the contentions of the Appellant. It is a settled position of law with regard to interpretation of statutes and regulations that a provision of law enacted under legislation of the Parliament or delegated legislation has to be read and interpreted in the manner they have been enacted. A quasi-judicial body or a State Instrumentality is not permitted under law to read into a legal provision

and invent a requirement which is completely alien to such provision. When Rule 3 of the Rules and the provisions of the TNERC Grid Connectivity and Intra-State Open Access Regulations, 2014 do not provide for verification of shareholding of CGPs/ captive users to be done before grant of open access under Section 9 of the Act, then grant/ approval cannot be made subject to such a condition by way of an order of the Commission.

11.26 Further, we also opine that the above statutory provisions do not envisage that documents for availing open access have to be furnished to Respondent No. 2, and that such documents need to be provided to only the nodal agencies, i.e. SLDC/ STU. When Respondent No. 2 is not entitled to collect any documents for providing open access at the first place, surely the Respondent No. 2 cannot then withhold open access subject to prior verification of shareholding criterion mentioned in Rule 3(1)(a)(i) of the Rules. It is an established rule of law that quasi-judicial bodies like the Respondent is bound by the provisions of the Electricity Act, 2003, the Electricity Rules, 2005 and various Regulations as it is a creature of Statute, and it is mandatorily required to function within the ambit of such Act, Rules and Regulations. In this regard, we place reliance on the finding of the Hon'ble Supreme Court in the case of ***"Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co.(India) (P) Ltd.,"*** (2017) 16 SCC 498 at para 39:

> *"39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act."*
>
> (Underlines Supplied)

11.27 We also need to emphasize the judicial dicta that even though the Respondent No. 1 is an "expert body" in the Electricity Sector, still it needs to strictly function within the confines of the Electricity Act, 2003 and its related Rules and Regulations. In this regard, we refer the decision of the Apex Court in ***"N.C. Dhoundial v. Union of India"***, (2004) 2 SCC 579 at para 14:

> *"14. We cannot endorse the view of the Commission. The Commission which is a "unique expert body" is, no doubt, entrusted with a very important function of protecting human rights, but, it is needless to point out that the Commission has no unlimited jurisdiction nor does it exercise plenary powers in derogation of the statutory limitations. The Commission, which is the creature of statute, is bound by its provisions. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory functionary, it undoubtedly has incidental or ancillary powers to effectively exercise its jurisdiction in respect of the powers confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and the confines of jurisdiction vested in it by the Act. The Commission is one of the fora which can redress the grievances arising out of the violations of human rights. Even if it is not in a position to take up the enquiry and to afford redressal on account of certain statutory fetters or handicaps, the aggrieved persons are not without other remedies. The assumption underlying the observation in the concluding passage extracted above proceeds on an incorrect premise that the person wronged by violation of human rights would be left without remedy if the Commission does not take up the matter."*
>
> *(Underlines Supplied)*

11.28 Accordingly, in view of the above discussion, we hold that for the purpose of granting open access approval for captive purpose the documents referred to by us in Para 11.23 (supra) should suffice. These documents are within the framework of the TNERC Grid Connectivity and Intra-State Open Access Regulations, 2014 and also do not violate the ambit of Rule 3 of the Rules.

11.29 To this extent, we also set aside the directions of TNERC contained in paragraphs 6.3.8 to 6.3.9 and 7.4 & 7.5 in the impugned order.

12. ISSUE NO. 3:-

12.1 Learned counsel for the Appellant has expressed concern and gave lengthy arguments on the issue of application of the requirement of fulfilling proportionate consumption, as applicable to an Association of Person (AOP) in the terms of Rule 3 of the Rules, upon a Special Purpose Vehicle (SPV) vide the Impugned Order. The Appellant's counsel has taken us through Para 6.4.4 of the impugned order submitting that TNERC has equated a SPV with an AOP and this has resulted in the directions, so contained, to be in the teeth of Rule 3 of the Rules.

12.2 Learned counsel for the Appellant has further submitted that Rule 3(1)(b), which deals with a SPV specifically provides that CGPs and captive users have to comply with the conditions mentioned under Rules 3(1)(a)(i) and 3(1)(a)(ii). That, from the scheme of Rule 3 of the Rules, it is apparent that the legislature in its wisdom has enacted the 2nd Proviso to Rule 3(1)(a) as a stand-alone provision, and it cannot be intermingled with sub-rule (b). The Appellant also submitted that in the case of an AOP, the requirement to be fulfilled for qualifying as Captive is stipulated under the second proviso to Rule 3(1)(a). This Proviso bears semblance of an independent, standalone provision. In other words, Sub-Rule (b) which deals with unit or units of a generating station and the 1st Proviso to Rule 3(1)(a) which deals with a power plant set-up by a registered co-operative society specifically resort to the twin conditions mentioned under Rule 3(1)(a)(i) & (ii). However, the 2nd

Proviso to the aforesaid Rule 3(1)(a), which deals with a power plant as a whole, in the case of AOP, self-envisages that the captive user(s) shall hold not less than 26% ownership of the plant in aggregate and shall not consume less than 51% of the electricity generated, determined on an annual basis, in proportion to their ownership of the power plant.

12.3 Learned counsel for the Appellant has placed reference on the judgment passed by this Tribunal in the case of:

a) Appeal Nos. 32 of 2007, 164, 165 of 2006, titled as "***Malwa Industries Ltd. v. PSERC & Anr"***.

> *16. It was submitted that while Rule 3(1)(a) determines status of power plant as captive, based on ownership, Rule 3(1)(b) deals with status of captive power plant set up by a company formed as special purpose vehicle. It was further submitted that the word 'ownership' in Explanation 1(c) to Rule 3 of the Rules of 2005 applies to CPP set up by a company formed as special purpose vehicle only and not to the CPP owned by association of persons. The term 'ownership' is defined by Explanation 1(c) to Rule 3 of the Rules of 2005. The explanation reads as under:- "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant".*
>
> *17. First part of the Explanation 1(c) applies to a company or any other body corporate which has set up a generating station. Since the appellant is a company incorporated under the Companies Act, therefore, the first part of Explanation1(c) shall apply and ownership shall mean equity share capital with voting rights. First part will apply to all captive power plants in the ownership of a company notwithstanding the fact that the company has not been constituted by a special purpose vehicle. No limitation can be read into the first part of explanation 1(c). It cannot be held that the first part only applies to companies formed by a special purpose vehicle and not to any other company or body corporate. Reading a*

limitation will do violence to the language of Explanation 1(c). First part of Explanation 1(c), therefore, is applicable to the case of the appellant. Rule 3(1) (a) (i) read with Explanation 1(c) requires that not less than twenty-six per cent of the ownership shall be held by the captive user(s). Letter 's' in brackets has been suffixed with the word 'user' indicating that the captive users collectively or singly must have not less than twenty-six per cent of the ownership in the power plant. In case there is one captive user, it should be minimum twenty-six per cent and in case there are two or more than two captive users, still it should be twenty-six per cent. Minimum twenty-six per cent of the ownership in the power plant is to be held collectively by the captive user(s) and not individually. Otherwise the provision [Rule 3(1)(a)(i) of the Rules] would have been to the following effect:

> 'No power plant shall qualify as a captive generating plant under Section 9 read with clause (8) of Section 2 of the Act of 2003 unless- (a) in case of power plant not less than twenty six per cent of the ownership is held by a captive user'….

18. The framers of the rules have not used the letter 'a' before captive user in Rule 3 rather it has used the letter 's' in brackets suffixed to the word 'user', thereby clearly indicating that the ownership of the captive users in the power plant collectively should not be less than twenty-six per cent…"

b) Appeal No. 116 of 2009, titled as "***CSPDCL v. Hira Ferro Alloys Ltd. & Anr"***.

31. The State Commission has determined the captive generating plant status of the first Respondent and the captive user status of its three sister concerns by relying upon this Tribunal's judgment in Malwa Industries (Supra) case facts of which squarely apply to the case in hand. In view of this we agree with the decision of the State Commission and hold that the first Respondent's generating plant is a captive plant and its three sister concerns are captive users along with the first Respondent who is the main captive user.

32. On the next issue raised by the Appellant on the principle of proportional consumption, the State Commission has in the impugned order held that the principle of proportionality of consumption to the shareholding does not apply in the case of a company

and that the principle is restricted in its application only to an 'Association of Persons'. The relevant part of the impugned order on this issue reads as under:

> *"9. As to the question that quantum of electricity in use should be in proportion to the shareholding, this is applicable only in case of a plant* which has been set up by 'an association of persons' as per second proviso to rule 3(1)(a). The ownership of a CGP set up by a company or any other body corporate means the equity share capital with voting rights as per explanation 1(c) to section 3 and this is the main provision of the rules which is only qualified by the second proviso."

33. In the case of Kadodara Power Private Limited & Others vs. Gujarat Electricity Regulatory Commission &Ors, 2009 ELR 1037 decided on 22.9.2009, this Tribunal has held that the principle of proportional consumption applies to a company formed as a Special Purpose Vehicle and has interpreted that the shareholders of a Special Purpose Vehicle company consuming electricity for captive use are an Association of Persons and thus having to adhere to the consumption of electricity in proportion to their shareholding in the company.

…

34. In the above decision, the Tribunal has taken the view that the principle of proportional consumption is applicable to the consumption of electricity by the shareholders of a company being a Special Purpose Vehicle. The above decision is in the context of a Special Purpose Vehicle only and not in the context of an operating company which acts as a captive generator for its own use and also generates and supplies electricity to its shareholders. Such a combination was considered in Malwa Industries' case as to be permissible and valid.

35. We are not inclined to agree with the contentions of the Appellant that in view of this Tribunal judgment in appeal Nos. 171 of 2008 and Kadodara Power Ltd. &Ors., 2009 ELR (APTEL) 1037, the principle of proportional consumption should be applied even if the shareholding sister concerns were considered as captive users."

12.4 Learned counsel for the Appellant has argued that TNERC, while equating a SPV with an AOP in the impugned order, has placed reliance

on the judgment rendered by this Tribunal in Appeal Nos. 171, 172, 10 of 2008 and Appeal No. 117 of 2009 titled as Kadodara Power Pvt. Ltd. v. GERC &Ors. Learned counsel for the Appellant has vehemently argued that in the said judgment it has been held that the SPV is covered by the definition of AOP and as such a CGP based on a SPV model, is required to consume 51% of the generation collectively of the captive generating plant by adhering to the principle of proportionality of consumption, that is in accordance with their shares respectively. The Appellant's counsel has also submitted that on this count, the said observation of this Tribunal being against Rule 3 of the Rules itself, it ought to be held per-incuriam.

12.5 Learned counsel for the Appellant has endeavoured to persuade us on the aforesaid argument by contending that in the Kadodara Judgment (Supra) this Tribunal did not consider the mandate of Rule 3 of the Rules. That, under the said Rule an 'Association of Persons' and 'Special Purpose Vehicle' cannot be equated together and both are distinct entities. SPV is a Company incorporated under the provisions of the Companies' Act, 1956. Furthermore, consumption of energy proportionate to shareholding is not provided in the case of a Special Purpose Vehicle setting up a captive generating plant. It has been further contended that this Tribunal did not consider that SPV as a 'company' and an Association of Persons is an unincorporated entity. An Association of Persons when incorporated, becomes a 'company'. Further, a 'Company' is called an 'SPV' because the company is incorporated only for a special purpose or a specific object and will function in furtherance of only that object. An AOP is a recognized tax entity, which is not an incorporated entity. Also, an association of persons is akin to a partnership, wherein an association of persons,

comes together for a common purpose or object. For this proposition, learned counsel for the Appellant has relied upon the following judgments:

a) In re. B.N. Elias. (1935) I.L.R. 63 Cal. 538; CIT v. Laxmidas Devidas (1937) 39 BOM LR 910; and In re. Dwaraknath Harishchandra Pitale, [1937] 5 ITR 716 (Bom)

> *"In B.N. Elias, Derbyshire, C.J. rightly pointed out that the word "associate" means, according to the Oxford dictionary, "to join in common purpose, or to join in an action". Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income profits or gains. This was the view expressed by Beaumont, C.J. in CIT v. LaxmidasDevidas at p. 589 and also in Re. Dwaraknath Harishchandra Pitale.*
>
> *In re. B.N. Elias Costello, J. put the test in more forceful language. The same is as follows:*
>
> *"It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership…. When we find …. that there is a combination of persons formed for the promotion of a joint enterprise …. then I think no difficulty arise in the way of saying that these persons did constitute an association…."*

b) In "***Ramanlal Bhailal Patel v. State of Gujarat"***, (2008) 5 SCC 449, at page 462, the Hon'ble Supreme Court held as follows:

> "Question (i) — Who is a "person"?
>
> *"22. The extent of land that could be held by the appellants depends upon the interpretation of the word "person" in Section 6(1) of the Ceiling Act which provides that "no person shall … be entitled to hold … land in excess of the ceiling area". If the ten co-owners are*

considered as an "association of persons" or "body of individuals", and consequently as a "person", then the ten co-owners together as a person, will be entitled to only one unit of land which is the ceiling area per person. But if "association of persons" or "body of individuals" is not a "person", or if a co-ownership is not an association of person/body of individuals, then each co-owner or the family of each co-owner, as the case may be will be a separate "person" having regard to the definition of person in Section 2(21) of the Ceiling Act, in which event, each family will be entitled to hold one unit of land.

23. The word "person" is defined in the Act, but it is an inclusive definition, that is, "a person includes a joint family". Where the definition is an inclusive definition, the use of the word "includes" indicates an intention to enlarge the meaning of the word used in the statute. Consequently, the word must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Thus, where a definition uses the word "includes", as contrasted from "means", the word defined not only bears its ordinary, popular and natural meaning, but in addition also bears the extended statutory meaning (see S.K. Gupta v. K.P. Jain, AIR1978SC734 following Dilworth v. Commr. of Stamps, [1899] A.C. 99 and Jobbins v. Middlesex Country Council, [1949] 1 K.B. 142.).

24. The ordinary, popular and natural meaning of the word "person" is "a specific individual human being". But in law the word "person" has a slightly different connotation and refers to any entity that is recognised by law as having the rights and duties of a human being. Salmond defines "person" as "any being whom the law regards as capable of rights and duties" or as "a being, whether human or not, of which rights and duties are the attributes" (Jurisprudence, 12th Edn., p. 299). Thus, the word "person", in law, unless otherwise intended, refers not only to a natural person (male or female human being), but also any legal person (that is an entity that is recognised by law as having or capable of having rights and duties). The General Clauses Act thus defines a "person" as including a corporation or an association of persons or a body of individuals whether incorporated or not. The said general legal definition is, however, either modified or restricted or expanded in different statutes with reference to the object of the enactment or the context in which it is used. For instance, the definition of the word "person" in the Income Tax Act, is very wide and

includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not, a local authority and every other artificial juridical person. At the other extreme is the Citizenship Act, Section 2(f) of which reads thus:

"Person" does not include any company or association or body of individuals whether incorporated or not.' Similarly, the definition under Section 2(g) of the Representation of People Act, 1950, is "person" does not include a body of persons."

25. Both definitions of the word "person", in the General Clauses Act and the Ceiling Act, are inclusive definitions. The inclusive definition of "person" in the General Clauses Act applies to all Gujarat Acts unless there is anything repugnant in the subject or the context. The inclusive definition of "person" in Section 2(21) of the Ceiling Act, does not indicate anything repugnant to the definition of "person" in the General Clauses Act, but merely adds "joint family" to the existing definition.

Therefore, the definition of person in the Ceiling Act, would include the definition of person in Section 3(35) of the General Clauses Act. The resultant position can be stated thus: the definition of person in the General Clauses Act, being an inclusive definition, would include the ordinary, popular and general meaning and those specifically included in the definition. The inclusive definition of "person" in the Ceiling Act, in the absence of any exclusion, would have the same meaning assigned to the word in the General Clauses Act, and in addition, a "joint family" as defined. Thus, the word "person" in the Ceiling Act will, unless the context otherwise requires, refer to:

(i) a natural human being;

(ii) any legal entity which is capable of possessing rights and duties, including any company or association of persons or body of individuals (whether incorporated or not); and
(iii) a Hindu Undivided Family or any other group or unit of persons, the members of which by custom or usage, are joint in estate and residence."

c) In ***"CIT v. Buldana Distt. Main Cloth Importer Group"***, (1961) 1 SCR 181 it has been held as follows:

> *"6. As to what constitutes an association of persons was laid down by this Court in CIT v. Indira Balkrishna, [1960]3SCR513 and in Mohamed Noorullah v. CIT, AIR1961SC1043 decided on 18-1-1961, where the business was carried on as one unit and by the consent of all the parties who were heirs of deceased Mohammad Omer Sahib and during the period when an administration suit between them was being fought in courts of law. In the present case the Tribunal has found that the import and distribution of cloth which was the business carried on by the respondent was done on a joint basis. The purchases were joint, so were the sales and the profits were ascertained on a joint basis and then distributed according to the capital contributed by each member of the group. This finding which is one of fact makes the respondent an "association of persons" and it makes no difference that the business was carried on because the Deputy Commissioner of the district had appointed the members constituting the group to import and distribute the cloth in the district.*
>
> *7. The respondent, it is not disputed, worked the scheme which was framed by the Deputy Commissioner and the working of the scheme produced profits and it made no difference that the scheme was at the instance of or under the control of the Deputy Commissioner. Dealing with the argument of similar control Sarkar, J. in CIT, v. Vyas and Dhotiwala 3 observed as follows:*
>
> *"The Tribunal thought that since the scheme was completely under the control of the Deputy Commissioner, the assessees could not be said to have carried on business by working the scheme. We are unable to see that the fact of the control of the Deputy Commissioner can prevent the working of the scheme by the assessees from being a business carried on by them. In our view, it only comes to this that the assessees had agreed to do business in a certain manner."*
>
> *We are in respectful agreement with this observation. In our view the respondent was an association of persons and was rightly so assessed to Income tax and excess profits tax."*

d) In "***Mohd. Noorulla v. CIT"***, (1961) 3 SCR 515, it was held that:

> *"6. This Court in CIT v. Indira Balkrishna considered the question as to what an association of persons means. The test laid down in three cases: In re B.N. Elias; Commissioner of Income Tax v. Laxmi Das Devi Das and in re DwarikanathHaris Chandra Pitale was accepted by this Court as correctly laying down the crucial test for determining what is an association of persons and that in each case the conclusion has to be drawn from the circumstances. In the first case the test was laid down as applying to combinations of individuals who were engaged together in some joint enterprise but not constituting a partnership Such a combination of persons formed for the promotion of a joint enterprise banded together as if they were co-adventurers it was held would constitute an association of individuals. In the second case, that is, CIT v. Laxmi Das Devi Das Beaumont, C.J., at p. 589 laid down the test as follows:*
>
> *"In my opinion, the only limit to be imposed on the words "other association of individuals" is such as naturally follows from the fact that the words appear in an Act imposing a tax on income, profits and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words 'other association of individuals' in Section 3; and under Section 9 of the Act, the association of individuals is the owner of the property and as such is assessable."*

12.6 Learned counsel for the Appellant has also argued that in the Kadodara Judgment (supra) this Tribunal further did not consider that Rule 3(1)(a) of the Rules consists of two provisos and it is a settled principle of law that provisos are exceptions to the general rule, and are applicable only if the conditions mentioned therein, or the situation, arises. Appellant, on this point of law, has placed reliance on the following judgments:

e) "***State of Punjab v. Kailash Nath***" reported in (1989) 1 SCC 321

9. Even on a plain reading of Rule 2.2, it is apparent that the intention of framing the said rule was not to grant immunity from prosecution to a Government servant, if the conditions mentioned therein are satisfied. As seen above, Rule 2.2 is in Chapter II of the Punjab Civil Service Rules which deal with ordinary pension. There can be no manner of doubt that making provision with regard to pension falls within the purview of "conditions of service". The embargo on prosecution spelt out by the High Court is not to be found in the main Rule 2.2 but in the third proviso to the said rule. It is the third proviso which enjoins that no judicial proceedings, if not instituted while the officer was in service, whether before his retirement or during his re-employment shall be instituted in respect of a cause of action which arose or an event which took place more than four years before such institution. The scope of a proviso is well settled. In Ram Narain Sons Ltd. v. Asst. CST [AIR 1955 SC 765 : (1955) 2 SCR 483 : (1955) 6 STC 627] , it was held: (SCR p. 493)

"It is a cardinal rule of interpretation that a proviso to a particular provision of statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

10. The same view was reiterated in Abdul Jabar Butt v. State of J&K [AIR 1957 SC 281 : 1957 SCR 51 : 1957 Cri LJ 404] where it was held that a proviso must be considered with relation to the principal matter to which it stands as a proviso.

11. With regard to scope of a proviso, it was urged by the learned counsel for the respondents relying on the decision of this Court in IshverlalThakorelalAlmaula v. MotibhaiNagjibhai [AIR 1966 SC 459 : (1966) 1 SCR 367] that even though the proper function of a proviso is to except or qualify something enacted in the substantive clause which but for the proviso would be within that clause, there is no rule that the proviso must always be restricted to the ambit of the main enactment. It may at times amount to a substantive provision. This submission too does not advance the case of the respondent inasmuch as even if in a given case a proviso may amount to a substantive provision, making of such a substantive provision will have to be within the framework of Article 309. If a rule containing an absolute or general embargo on prosecution of a Government servant after his retirement for grave misconduct or negligence during the course of the service does not fall within the purview of laying own

conditions of service under Article 309, such a provision cannot in the purported exercise of power under Article 309 be made by either incorporating it in the substantive clause of a rule or in the proviso thereto. In view of what has been said above and keeping in mind the scope of rule making power under Article 309 of the Constitution, the third proviso to Rule 2.2 cannot be interpreted as laying down an absolute or general embargo on prosecution of a Government servant if the conditions stated therein are satisfied. Even if on first impression the said rule may appear to be placing such an embargo it has to be interpreted by taking recourse to the well-settled rule of reading down a provision so as to bring it within the framework of its source of power without, of course, frustrating the purpose for which such provision was made. Clause (b) of Rule 2.2 which can be called the substantive clause reserves to the Government the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if, in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement.

12. The purpose of the third proviso thereto is, as is the scope of a proviso, to carve out an exception to the right conferred on the Government by the substantive clause if the conditions contemplated by the proviso are fulfilled. This purpose can be achieved if the said proviso by adopting the rule of reading down is interpreted to mean that even if a Government servant is prosecuted and punished in judicial proceedings instituted in respect of cause of action which arose or an event which took place more than four years before such institution the Government will not be entitled to exercise the right conferred on it by the substantive provision contained in clause (b) with regard to pension of such a Government servant. The word "such" in the beginning of the third proviso also supports this interpretation.

(underline supplied)

f) "***Union of India v. Sanjay Kumar Jain***" reported in (2004) 6 SCC 708

11. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey [(1880) 5 QBD170 : 42

LT 128] (referred to in Shah BhojrajKuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha [AIR 1961 SC 1596] and Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta [AIR 1965 SC 1728]), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso" said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. [1897 AC 647 : 66 LJ Ch 726 : 77 LT 284 (HL)] Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See A.N. Sehgal v. Raje Ram Sheoran [1992 Supp (1) SCC 304 : 1993 SCC (L&S) 675 : (1993) 24 ATC 559 : AIR 1991 SC 1406] , TribhovandasHaribhaiTamboli v. Gujarat Revenue Tribunal [(1991) 3 SCC 442 : AIR 1991 SC 1538] and Kerala State Housing Board v. Ramapriya Hotels (P) Ltd. [(1994) 5 SCC 672]]

> *"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton, 18th Edn., p. 146).*
>
> *"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails. … But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. Git [(1922) 1 AC 256 : 1921 All ER Rep Ext 770 : 126 LT 616 (PC)]).*

> 13. *A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (see Jennings v. Kelly [1940 AC 206 : (1939) 4 All ER 464 : 162 LT 1 (HL)]).*
>
> *15. Though several documents were referred to to contend that the intention of the employer was to exclude certain establishments, a bare perusal thereof shows that they have no relevance and do not in any way fulfil the requirements of the proviso to sub-section (2) of Section 47. It goes without saying that if a notification in this regard is issued by the appropriate Government, the same shall be operative in respect of the establishment which is specifically exempted. That is not the position so far as the present case is concerned. Therefore, on the facts of the case, the order of the Tribunal as affirmed by the High Court by the impugned judgment suffers from no infirmity to warrant our interference. The appeal fails and is accordingly dismissed with no order as to costs.*
>
> *(underline supplied)*

12.7 In terms of the foregoing decisions, learned counsel for the Appellant reiterated that under Rule 3(1)(b) of the Rules, the unit(s) of a generating station as set up by a special purpose vehicle, identified for captive use and not the entire generating station, is required to satisfy the conditions contained in paragraphs (i), (ii) of sub clause (a) above. This specifically excludes provisos. It thus envisages that not less than 26% of the ownership of the power plant is held by captive users and not less than 51% of the aggregate electricity generated by the unit(s) of the generating station identified for captive use, is consumed by the special purpose vehicle and clause (b) makes no reference to the two provisos of clause (a) of sub-rule (1) of Rule 3.

12.8 Learned counsel for the Appellant has submitted that this Tribunal, in Kadodara's case (supra) imparted a very restrictive interpretation to the case of a special purpose vehicle and if the same is applied to a captive generating plant, set up by a special purpose

vehicle, the same results in causing unnecessarily grave and severe hardships to the shareholders of the special purpose vehicle, who shall have to scale down their production plans, if one of the captive user is not able to adhere to the proportionate consumption. The Appellant has also given the following illustration to illustrate the said circumstance:

> *Illustration: A shareholder entitled to draw 20 MW from a 40 MW group captive power generating plant, set up as an SPV comprising of 4 shareholders, goes on an outage for one year, due to flood, etc. the captive generating plant would have to operate at a reduced capacity to enable the other three shareholders who are entitled to draw the power in proportion to their equity contribution with a deviation of +/- 10% as has been envisaged under the order dated 22.09.2009 passed by this Tribunal.*

12.9 Learned counsel for the Appellant emphasized that in terms of the aforesaid there would also exist technical constraints in operating the plant at a reduced load if the major shareholder goes on outage. The same would also be economically unviable to run the plant at such part load on a regular basis as the same would affect the health of the machinery and the plant itself. Hence, the Appellant contends that the Kadodara judgment (supra) to the extent of the issue of treating SPV as an AOP is concerned, ought to be treated as per-incuriam.

12.10 Learned counsel for the Appellant has placed reliance on a decision of this Tribunal passed in Appeal No. 250 of 2016. In the said case, this Tribunal while deliberating on an issue of treating Delayed Payment Charges (DPC) as non-tariff income, held its previous judgment on the same issue, rendered in Appeal No. 250 of 2015 and in Appeal No. 242 of 2016, as per-incuriam. The Appellant submits that the same principle be applied by this Tribunal in the present case, in order to treat the decision in the Kadodara Case (Supra), to the extent of treating SPV as equivalent to AOP, as per-incuriam.

12.11 Another fact which has been argued before us is with reference to the directions contained in para 6.4.5 of the impugned order. In the said para, TNERC has exempted the operating companies owning CGP (i.e. non-SPV and non-AOP) from the test of proportional consumption and a non-operating SPV will not be required to fulfil the test of proportionate consumption of power, as it is only required to fulfil the requirements of 26% minimum equity share capital and consumption of minimum 51% energy generated by CGP. TNERC has based this direction on the decisions of Malwa Industries Ltd. (supra) and Hira Ferro Alloys Ltd. &Anr. (supra). The Appellant's counsel, made a submission without prejudice to his contention that for a non-operating SPV, the Company which owns the CGP is also consuming captive power itself. This is different from the SPV model, in which the Company which owns the CGP, does not consume captive power. Therefore, rule of proportionate consumption should not be made applicable upon a non-operating SPV.

12.12 **Per Contra**, on the issue of SPV equated as an AOP, learned counsel for the Respondents have relied on the decision in Kadodara judgement (supra) which has been followed up in the cases of Prism Cement (supra) and JSW Steel Limited v. Maharashtra State Electricity Distribution Co Ltd., Appeal No. 311 of 2018 and according to the Respondents, the aforesaid decision holds the field.

Our Findings:-

12.13 We have analysed the submissions of the parties on the issue of treatment of an SPV as an AOP. As seen before, Rule 3 of the Rules deals with the requirements to be fulfilled to qualify as a captive. In the

said rule, SPV as a CGP is given under Rule 3(1)(b). Further, it is also seen that Rule 3(1)(a)(i) has two provisos contemplating the manner in which the requirements to qualify as a CGP is to be fulfilled by a registered Co-operative society and an AOP. It is also seen that the said two provisos do not relate to Rule 3(1)(b) which deals with a SPV.

12.14 We agree with the submission put forward by the Appellant that second proviso to Rule 3(1)(a) is a stand-alone provision and as such does not relate to Rule 3(1)(b). The Parliament in its wisdom has created an intelligible differentia under Rule 3, between a SPV and an AOP. It is clear from a reading of Rule 3 that second proviso to Rule 3(1)(a) which exclusively deals with an AOP, lays down that the captive user(s) shall hold not less than 26% ownership of the plant in aggregate and shall not consume less than 51% of the electricity generated, determined on an annual basis, in proportion to their ownership of the power plant.

On the other hand, Rule 3(1)(b) exclusively deals with a SPV, and it only provides that the conditions mentioned in Rule 3(1)(a)(i) and (ii) are applicable to a SPV, with the second proviso not mandated to be applied to it. Thus, we find force in the argument of the Appellant that second Proviso to Rule 3(1)(a) is a stand-alone provision.

12.15 The above argument of the Appellant is further strengthened on the principles enunciated by the Hon'ble Supreme Court with regard to interpretation of statutes by Courts. The Hon'ble Supreme Court has time and again held that Courts cannot rewrite or recast legislation, they should not act as law makers where there is no ambiguity in the language in a piece of legislation then such legislation ought to be

literally interpreted without any deviation. The Hon'ble Supreme Court has also held that provisos are exceptions to the general rule. In this regard, we refer to the following judgments:

a. ***"Vemareddy Kumaraswamy Reddy v. State of A.P.***," (2006) 2 SCC 670;

> "*15. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so". (See Frankfurter "Some Reflections on the Reading of Statutes in 'Essays on Jurisprudence'", Columbia Law Review, p. 51.)."*

b. "***Mohd. Shahabuddin v. State of Bihar"***, reported in *(2010) 4 SCC 653*

> *"179. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is a determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to a recent decision of this Court in Ansal Properties & Industries Ltd. v. State of Haryana [(2009) 3 SCC 553].*
>
> *180. Further, it is a well-established principle of statutory interpretation that the legislature is specially precise and careful in its choice of language. Thus, if a statutory provision is enacted by the legislature, which prescribes a condition at one place but not at some other place in the same provision, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that the provision was consciously enacted in that manner. In such cases, it will be wrong to presume that such*

> *omission was inadvertent or that by incorporating the condition at one place in the provision the legislature also intended the condition to be applied at some other place in that provision."*

c. "***ESI Corpn. v. TELCO***", reported in (1975) 2 SCC 835

> *"8. Again, we find that where the Legislature intends to include apprentice in the definition of a worker it has expressly done so. For example, the Industrial Disputes Act, 1947, which is a piece of beneficial labour welfare legislation of considerable amplitude defines "workman" under Section 2(s) of that Act and includes apprentice in express terms It is significant that although the legislature was aware of this definition under Section 2(s) under the Industrial Disputes Act, 1947, the very following year while passing the Employees' State Insurance Act, 1948, it did not choose to include apprentice while defining the word "employee" under Section 2(9) of the Employees' State Insurance Act, 1948. Such a deliberate omission on the part of the Legislature can be only attributed to the well-known concept of apprenticeship which the Legislature assumed and took note of for the purpose of the Act. This is not to say that if the Legislature intended it could not have enlarged the definition of the word "employee" even to include the "apprentice" but the Legislature did not choose to do so."*

12.16 From the principles drawn from the above judgments, we observe that TNERC vide the impugned order particularly in para 6.4.4 has endeavoured to add an intention to Rule 3(1)(b) which was otherwise absent from its construction. By holding that the second proviso to Rule 3(1)(a) is applicable to Rule 3(1)(b) thereby equating a SPV with an AOP, the impugned order has committed an error in interpreting the said Rule in the manner in which it has been enacted by the Parliament. We also concur with the principles laid down in the cases of Kailash Nath (supra) and Sanjay Kumar (Supra) that a proviso is an exception and it cannot travel beyond the provision to which it is a proviso. We therefore, find that the same are applicable in the facts of the present Appeal. It is settled law that the function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the

enactment. Applying this clear jurisprudence, TNERC could not have applied the second proviso to Rule 3(1)(a) to Rule 3(1)(b). Hence, the requirement of consuming minimum of 51% electricity generated on an annual basis and the requirement of the captive users holding 26% of the ownership of the plant in aggregate, and such consumption being in proportion to the shares of ownership of the power plant can only be applicable to power plants set-up by an AOP but cannot be applied to power plants set-up by SPV.

12.17 Learned counsel for the Appellant has also challenged the reliance placed by TNERC on the decision of this Tribunal in Kadodara Judgment (supra). The Appellant's counsel has argued that the said decision ought to be treated as per-incuriam to the extent that it has ignored the basic and established principles of law that a SPV cannot be equated with an AOP. We concur with the said contention and find that this Tribunal in Kadodara judgment (supra) indeed did not consider this established legal tenet that an AOP and a SPV under general law as well as Rule 3 cannot be equated on a similar footing. It was also not considered that SPV is a 'company' and an AOP is an unincorporated entity and, once an Association of Persons is incorporated, it becomes a 'company'. We also observe that the aforesaid decision also ignored the settled ratio to the effect that 'association of persons' is a recognized tax entity, which is not an incorporated entity and is akin to a partnership, wherein, an association of persons, comes together for a common purpose or object.

12.18 Learned counsel for the Appellant has also taken us through a number of judgments capturing the position of law on per-incuriam. We have examined the decisions rendered by the Hon'ble Supreme Court, Calcutta High Court and this Tribunal in the cases of "***Delhi Municipal***

Corporation v Gurunam Kaur", reported in AIR 1989 SCC 38, "***Seema Begum & Anr v Maryum Bibi &Ors"*** (2012) 1 ICC 321 Cal (DB) (para 34) and Appeal No. 250 of 2016 titled as "***Adani Transmission Limited v. Maharashtra Electricity Regulatory Commission***". The Hon'ble Calcutta High Court in Seema Begum v. Marium Bibi (supra) held as follows, while dealing with per-incuriam principle:

> *34. We are not unmindful of the settled proposition of law that a judgment of a Co-ordinate Bench should be respected and applied by another Co-ordinate Bench and in respect of a disagreement the judicial discipline demands that the later Co-ordinate Bench should refer the matter to a larger Bench. It is also settled law that the judgment of a Co-ordinate Bench, if fails to take into consideration the amendments and/or provision of the statute such judgment suffers from doctrine of per incurium and the later Co-ordinate Bench may not be bound by such judgment.*
>
> ***35.*** *The doctrine of per incurium is defined in Halsbury's Laws of England, 4th Edition, Vol. 26 in following terms :*
>
> > *"A decision is given per incurium when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force,*
> >
> > *(emphasis supplied)*
>
> …….
>
> ***38.*** *In a recent judgment the Apex Court in case of Vijay Narayan Thatte v. State of Maharastra, reported in 2009 (9) SCC 92, observed that in a case where the relevant statute has not been brought to the attention of the Court for its consideration and the Court has in ignorance of such statute decides the cause the said decision would be rendered as per incurium.*
>
> ***39.*** *If the principle of per incurium as decided in the different cases as stated above is applied we have no hesitation to hold that the decision rendered by a Co-ordinate Bench in case of Dipak Kumar Singh (supra) is not a binding precedent but looses its effect as per incurium. This is precisely so that the co-ordinate Bench did not consider the amendment brought by the legislature by West Bengal Premises Tenancy (Amendment) Act, 2009 'by incorporating section 12A and Schedule IV to the said Act. The said judgment thus cannot be said to have laid down any law so as to create a binding precedent upon the Co-ordinate Bench.*

(underline supplied)

This Tribunal, in a judgment dated 29.05.2019 in Appeal No. 250 of 2016, held a previous judgment as per-incuriam. The relevant portion of the said judgment is reproduced below:

> ***"6.12** In view of the above, it is apparent that DPC is in the nature of compensatory charges. This has been recognised by Hon'ble Supreme Court in its judgement dated 14.11.2000 in M/s Consolidated Coffee Ltd. Vs. The Agricultural Income-Tax Officer, Madikeri&Ors AIR 2000 SC 3731. as under ……..*
>
> Accordingly, if DPC is to be treated as Non-Tariff Income the interest cost towards requirement of additional working capital ought to be allowed in tariff by the Commission. This is needed to prevent creation of a vicious circle by TSUs where they may keep delaying the payment through-out the year and get the benefit of reduction of ARR through deduction of delayed payment surcharge. It is evident that this interpretation of the Regulation by MERC results in recovery of tariff lower than what is legitimately due to the Transmission licensee under Section 62 of the Act. Further, the interpretation of MERC to allow DPC as Non- Tariff Income without the provision for pass through of interest on additional working capital due to delay in payment beyond 45 days is also against the principle of 'recovery of the cost of electricity in a reasonable manner' laid down in Section 61(d) of the Act.
>
> ***6.13** The Respondents have relied on this Tribunal's judgement dated 11.5.2017 in Appeal No. 250 of 2015 and in Appeal No. 242 of 2016 wherein the Appellant Jaigad Power Transco Limited had made similar contentions with respect to denial of DPC under MYT Regulations, 2011. The relevant extract of the judgement is reproduced below:*

> *"From the above, it can be seen that the State Commission has in general defined NTI at 2.1(1) 42 of Regulations, 2011 as income related to regulated business other than tariff with some specific exclusions like income from other business, wheeling charges and cross-subsidy surcharge/ additional surcharge for on wheeling charges for discoms.*

The definition of NTI under Generation Business and Transmission Business is similar except that the indicative list of income to be considered under NTI is given under Generation Business which includes interest on delayed or deferred payment of bills i.e. DPC.

The DPC is arising out of from the following provisions of the Regulations, 2011:

> *"68.3 All TSUs shall ensure timely payment of Transmission Tariff to STU so as to enable STU to make timely settlement of claims raised by Transmission Licensees.*
>
> *68.4 Where there is delay in payment by any TSU, late payment surcharge at the rate of 1.25% per month or part thereof shall be applicable."*
>
> *Further, the definitions at Regulation 43.1 and 62.1 make it clear that after its prudent check, amount of NTI needs to be approved by the Commission.* ***Although there is no specific reference to DPC as non-tariff income in the definition of NTI under clause 62.1, the State Commission is empowered to approve DPC income as NTI under the said clause of the Tariff Regulations, 2011 as it deemed fit.*** *Moreover, this is important for the State Commission to have harmony in various provisions of the said regulations. ……*
>
> *Though in the present case,* ***it has not been clearly spelt out that the DPC is to be treated as NTI but the State Commission is empowered to approve the NTI and in its due diligence considered DPC as NTI****."*

What thus transpires is that in the above judgement, the Tribunal ought not to have ignored its judgement dated 30.07.2010 in Appeal No. 153 of 2009 (North Delhi Power Ltd. vs Delhi Electricity Regulatory Commission) and allowed interest on additional working capital requirement as compensation for delayed payment. In the alternative, DPC could not have been interpreted as NTI against the principle of Section 61(d) and recovery of tariff under Section 62 of the Act.

Therefore, in terms of the judgement of Delhi Municipal Corporation v Gurunam Kaur reported in AIR 1989 SCC 38, the above decision of the Tribunal is to be treated as given 'per incuriam' as it was given in ignorance of the judgement of the Tribunal in case of North Delhi Power Ltd. vs DERC and principles of Section 61 and 62 of the Act.

***6.14** Further, it is observed that DPC can be clearly differentiated from other NTI sources specified in Regulation 43.1 for Generation Business. While the source of income from other components do not affect the recovery of Tariff from licensed business, DPC affects the total recovery of tariff from licensed business. The Black's Law Dictionary defines Reimbursement as 'To pay back; to make return or restoration of an equivalent for something paid, expended or lost'. According to the dictionary meaning, reimbursement can be considered as repayment of what has already been spent or incurred. Thus, DPC is in fact a compensation in the nature of reimbursement and must not be treated as NTI. In case it is treated as NTI for deduction from ARR, the licensee must be compensated for interest on delayed payment separately.*

***6.15** As regards statutory provision, MYT Regulations, 2011 does not specifically provide that DPC shall be Non-Tariff Income in case of Transmission Business. Hence, in our view, it is bereft of any statutory backing. Since the said Regulation is silent, taking recourse of similar provision in generation business does not help. We are of the view that under such circumstance, the Respondent Commission ought to have followed the correct principle based on correct logic and interpretation. The Respondent Commission attempted to support its argument that the list of NTI for transmission business is indicative and therefore treatment similar to that of Generation Business was considered. We cannot accede to such argument. Having open end in the Regulation does not mean that Respondent Commission can apply any Regulation. If the intention was to consider DPC as NTI even for Transmission Business, the Commission would have included the same in the Regulations 46.1 as well. When there is vacuum in the Regulations, the Respondent Commission could have drawn analogy from MYT Regulations, 2015 which has recognized the issue and appropriately incorporated the provision to exclude DPC from NTI.*

***6.16** Also considering provisions of Section 61, it is incumbent on the Respondent Commission not to disregard the determination of tariff following the commercial principles. Considering DPC as Not-tariff Income is clearly against such principle. All the more when there is no explicit Regulation framed under MYT Regulations 2011.*

***6.17** In view of above, there is no doubt that such treatment to consider DPC as not tariff income is incorrect. Also, in such a situation a pragmatic way to ensure that Principle of Equity prevails would be to not consider DPC as Non-Tariff Income. Accordingly we decide that DPC shall not be considered as Non-Tariff Income."*

(emphasised and underline supplied)

12.19 In line with the approach adopted by us in the above judgment, wherein the previous judgment of this Tribunal holding that DPC is part of Non-Tariff Income, was declared by us as 'per incuriam', we proceed to apply the same principle in the present appeal. We opine that the decision of this Tribunal in Kadodara judgment (supra) is given without taking into consideration the provisions of Rule 3 of the Rules to the extent that Second Proviso to Rule 3(1)(a) being an exception under law could not have been applied to Rule 3(1)(b). The said decision was also given in ignorance of the judgments referred by the Appellant, namely B.N. Elias. (1936) I.L.R. 63 Cal. 538; CIT v. LaxmidasDevidas (1937) 39 BOM LR 910; and Dwaraknath Harishchandra Pitale, [1937] 5 ITR 716 (Bom), RamanlalBhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. Buldana Distt. Main Cloth Importer Group, (1961) 1 SCR 181 and Mohd. Noorulla v. CIT, (1961) 3 SCR 515 which establish that an 'association of persons' is a recognized tax entity and not an incorporated entity. We cannot permit unreasonable hardship to be caused to a captive generating plant, set up by a special purpose vehicle, by applying the above judgment of this Tribunal in ignorance of vital facets governing the framework of Rule 3 and also important judicial decisions as noted above. In the light of this, we have no hesitation to hold that the decision of the Tribunal in Kadodara judgment (supra) to the extent it equates a SPV and an AOP is 'per incuriam'. Consequently, the decisions referred to by the Respondents for the aforesaid issue do not lend any assistance. Therefore, the directions contained under 6.4.4, 6.4.5 and 7.6.4 of the impugned order are set aside.

13. ISSUE NO. 4:-

13.1 Learned counsel for the Appellant has submitted that Para 6.4.8 and 7.6.8 of the impugned order mandated that verification of ownership and consumption for any change in the group captive structure shall be done for each corresponding period of such change. It has been further argued that the said directions have been passed by TNERC based on the proposed draft amendment to Electricity Rules particularly proviso to Clause 3(6) of such draft. The Appellant has submitted that the said proposed draft Amendment has not attained the force of law and has never been notified.

13.2 Learned counsel for the Appellant pointed out the contradiction in the impugned order wherein, TNERC at para 6.4.5 exempted itself from following the draft amendments issued by the Ministry of Power in Rule 3 of the Rules, 2005, because they are at draft stage. By applying the same principle, TNERC could not have given effect to the directions contained in paras 6.4.8, 7.4.3, 7.6.2, 7.6.7 and 7.6.8. The Appellant's counsel has further submitted that the Respondents sought to justify reliance on draft amendment and relied upon a judgment of Hon'ble Supreme Court on the proposition of declaratory versus clarificatory laws while ignoring that a draft legislation as a document has no force of law.

13.3 ***Per Contra,*** learned counsel for the Respondents have contended that the Commission has not implemented any of the changes proposed in the draft amendments. They have also contended that if the proposed guidelines do not contravene pre-amended provisions, then there cannot be any challenge to the order of TNERC on the aforesaid ground.

<u>Our Finding</u>:-

13.4 We have considered the submissions of the parties and have no hesitation in holding that the Appellant has not challenged any vires of the proposed guidelines or any law before this Tribunal. The Clause 3(6) of the proposed draft amendment, shows the following:

> "*Provided that the test of proportionality as per fourth proviso to sub-rule (1) of rule (3) shall be made applicable separately for the period(s) of maintaining the same share holding pattern by the captive users."*

13.5 We have observed that the directions referred to in the foregoing paragraphs of the impugned order mandate verification of ownership and consumption for any change in the group captive structure for each corresponding period of such change. In the present Judgment, we have already held that any verification for determining ownership and consumption for CGPs and captive users under Rule 3 of the Rules, being an interdependent exercise, has to be done on an annual basis, at the end of financial year.

13.6 Hence, the aforesaid directions for verification of ownership and consumption for any change in the group captive structure for each corresponding period of such change, cannot be sustained and are set aside. Accordingly, we also set aside the directions contained in para 6.4.8, 7.4.3, 7.6.2, 7.6.7 and 7.6.8 of the impugned order. We also reiterate our direction to the effect that any verification of status of CGPs and captive users has to be done on an annual basis, at the end of the financial year in terms of Rule 3 of the Rules.

14. ISSUE NO. 5*.:-*

14.1 Learned counsel for the Appellant has submitted that TNERC at Paras 6.6.3 read with 7.8.2 of the impugned order has held that where

the minimum requirement of 26% shareholding and 51% consumption are met, however, if any captive user fails to fulfil the proportionality consumption criteria, such user is to be declared as non-captive while the other users who fulfil the above test would remain as captive. As such, the said directions are contrary to Rule 3 of the Rules.

14.2 Learned counsel for the Appellant has made a two-fold submission that Rule 3, provides that the requirement of having 26% equity share capital with voting rights, and consumption of 51% of the electricity generated, by the captive users, is the minimum condition, and after that, no requirement arises for fulfilment of the test of proportionate consumption. Further, beyond 51% consumption, the captive user(s) can consume power in any quantity or ratio, whatsoever and any power consumed by the captive users, qua the balance 49% power generated by the Captive Generating plant, shall have to be treated as captive consumption.

14.3 In support of the aforesaid contention that once the two conditions of minimum requirements are met, then there is no need for the other captive users to comply with the said conditions, learned counsel for the Appellant has placed reliance on the judgments of this Tribunal set out below:

a) ***Appeal No. 252 of 2014*** titled as "***Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission &Anr".***

"17.9 According to the generating company, respondent No.2, the real contention of the appellant is that the consumption and shareholding are to be considered even for the balance over and above 51% consumption and 26% shareholding. The said contention is misconceived and cannot be accepted. However, the proportionality criteria, given in Rule 3 of the Electricity Rules 2005, is an individual

compliance, namely, to be complied with individually by shareholders consuming electricity and in case one shareholder/captive consumer does not consume in a proportionate manner, he loses the captive status. However, the other shareholders/captive users who consume in proportion to their shareholding, do not lose their captive status if one shareholder fails to consume his proportion of electricity.

17.11 We are unable to accept this contention of the appellant that served the two consumers had applied for open access but did not consume any electricity, hence, the entire consumption by the other captive consumers would be of non-captive because the said two consumers did not even form part of the 26% shareholding. Excluding the said two consumers, both the conditions of the 51% consumption and 26% shareholding have been fulfilled and hence, there is no requirement to consider other consumers or shareholders as rightly held by this Appellate Tribunal in the Kadodara case. Further, Court-I and Court-II of this Appellate Tribunal, as mentioned above, in the two separate appeals filed by the two aforementioned consumers against the same Impugned Order passed in the very same petition, after going through the merits of the Impugned Order and the relevant aspect have allowed/disposed of the aforesaid appeals, being Appeal Nos. 27 of 2015 and 288 of 2014, vide judgments/orders dated 17.03.2015 and 08.03.2016, respectively. The relevant part of which judgment we have cited above. In the aforesaid appeals, this Appellate Tribunal has already set aside the observations made in paragraphs 31 and 32 and consequential paragraphs being Nos. 33 and 34 while allowing the appeal."

b) *Appeal No. 316 of 2013* titled as "***M/s Sai Wardha Power Co. Ltd. v. Maharashtra Electricity Regulatory Commission & Anr."*** (Refer Para 15.2 point vii)

This Appellate Tribunal in its judgment dated 18.02.2013, in Appeal No.33 of 2012, in the matter of "***M/s Godawari Power & Ispat Ltd. Vs. The Chhattisghar State Electricity Regulatory Commission & Ors.***" while dealing with the question of providing relaxation in the norms of captive consumption of at least 51% for being qualified as captive power plant/CGP on account of force majeure conditions namely, on account of

collapse of the shed of its steel melting plant leading to shut down for repair and maintenance work for a few months enabling or disabling the CGP to achieve the prescribed requirement of minimum 51% consumption of the total generation clearly held that if anyone of the conditions prescribed in Rule 3 of Electricity Rules 2005 is not fulfilled, the captive power plant/CGP will lose its CGP status and become a generating plant or independent power producer and accordingly the State Commission cannot relax the provisions of Rule 3 of Electricity Rules 2005 under its power to relax. The relevant part of the said judgment dated 18.02.2013 in Appeal No.33 of 2012 (supra), is quoted as under:

> *"30.* ***To Sum Up***
>
> *(a) Rule 3 of Electricity Rules 2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not have any powers to relax the provisions of the Electricity Act, 2005.*
>
> *(b) In the present case, the Appellant could not satisfy one of the conditions of Rule 3 viz consumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules, 2005. The State Commission does not have any power to relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant's power plant for captive use."*

14.4 With the support of the above judgments of this Tribunal, Learned counsel for the Appellant has contended that if a set of captive users have 26% shareholding and consumed 51% of electricity generated, then the captive users who own shares beyond 26% have no obligation to fulfil any of the conditions provided under Rule 3, and there

cannot be any liability to make payment of CSS by defaulting captive users if the rest of the captive users fulfil the minimum requirements of 26% shareholding and 51% of consumption.

14.5 *Per Contra,* learned counsel for the contesting Respondents though not having argued anything specific, have supported the directions of TNERC at Paras 6.6.3 and 7.8.2.

Our Finding:-

14.6 We have considered the submissions of the parties and agree with the arguments advanced on behalf of the Appellant on the present issue. In the scheme of Rule 3 of the Rules and in light of the decisions referred in Appeal No. 252 of 2014 and Appeal No. 316 of 2013, we have already settled this aspect that the requirement of 26% shareholding and 51% captive consumption are the minimum requirements to be fulfilled by a set of captive users, and once the same is done, the rest of the captive users not fulfilling the above conditions will have no impact to the overall captive structure. As such, we have no hesitation in holding that as per the aforesaid judgments, there cannot be any liability to make payment of CSS by defaulting captive users if the rest of the captive users fulfil the minimum requirements of 26% shareholding and 51% of consumption.

14.7 Hence, we hold that the directions passed in Paras 6.6.3 and 7.8.2 have been done so in disregard of Rule 3 of the Rules and our judgments in the aforesaid appeals. Thus, these directions cannot be sustained under law and are hereby set-aside. We also hold that there is no requirement of payment of CSS by any defaulting captive users, if the rest of the captive users in a CGP fulfil the minimum requirements of

26% shareholding and 51% of consumption in terms of Rule 3 of the Rules.

15. ISSUE NO. 6*:-*

15.1 Learned counsel for the Appellant has argued that TNERC at Paras 6.2.5. & 7.2.4 while prescribing the applicability of the procedure for verification of CGP status, made it applicable "retrospectively" i.e. from the previous Financial year 2014-15 for the CGPs and its users in the State of Tamil Nadu.

15.2 Learned counsel for the Appellant has drawn our attention to a settled principle of law that delegated legislation can be retrospective in nature, only in the event, such retrospectivity is permitted by the Parent Act. The Appellant's counsel further contended that under the scheme and provisions of the Electricity Act, 2003, which is the Parent Act in the present case and the power sector, it nowhere contemplates promulgation of any delegated legislation, with retrospective effect. In this regard the Appellant's counsel has relied upon following judgments of the Apex Court :

a) "***Panchi Devi v. State of Rajasthan"***, (2009) 2 SCC 589

> ***"9.*** *A delegated legislation, as is well known, is ordinarily prospective in nature. A right or a liability which was created for the first time, cannot be given a retrospective effect. Furthermore, the intention of the State in giving a prospective effect to that Rule is clear and explicit; the amendment in Rule 22-A was also to be effective from 1-9-1982 itself. No relief can be granted to the appellant herein on the basis of the decision in Prabhati Devi (See para 5 above). The said decision did not lay down the correct law. Article 14 of the Constitution of India has a positive concept. Equality, it is trite, cannot be claimed in illegality. Even otherwise the writ petition as also the review petition have rightly not been entertained on the ground of delay and laches on the part of the appellant.*

b) "***M.D. University v. Jahan Singh***," (2007) 5 SCC 77

> ***"19.*** *The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect."*

c) ***"*State of Rajasthan v. Basant Agrotech (India) Ltd.,**" (2013) 15 SCC 1

> ***"22.*** *In MRF Ltd. v. CST [(2006) 8 SCC 702] the question arose whether under Section 10(3) of the Kerala General Sales Tax Act, 1963 power was conferred on the Government to issue a notification retrospectively. This Court approved the view expressed by the Kerala High Court in M.M. Nagalingam Nadar Sons v. State of Kerala [(1993) 91 STC 61 (Ker)] , wherein it has been stated that in issuing notifications under Section 10, the Government exercises only delegated powers while the legislature has plenary powers to legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only those powers which are specifically conferred. In the absence of such conferment of power the Government, the delegated authority, has no power to issue a notification with retrospective effect.*

15.3 Learned counsel for the Appellant has thus contented that the impugned order, having been passed in total disregard to the above settled position of law, renders it illegal.

15.4 ***Per Contra***, learned counsel for the Respondents have contended that many generators who are part of the Appellant association have not been submitting documents since at least 2014 despite notices issued by the Respondent No.2 intimating the liability to pay CSS in the event of non-fulfilment of Captive Status and that there is wide spread non-compliance on the part of many generators. Consequently, show cause notices for FY 2014-17 have been issued by

the Respondent No. 2 to those entities which have not furnished necessary documents to the Respondent No. 2.

Our Finding:-

15.5 We have given our consideration to the submissions made on behalf of the Appellant and the Respondents on the present issue. We have noted the submissions of the Respondents and observe that while they are at liberty under law to take appropriate legal remedy, however the appeal before us emanates from the limited issue of challenge to formulation of procedure by TNERC for verification of status of CGPs and captive users in the State of Tamil Nadu. We also cannot lose sight of the crucial fact brought to our knowledge that what is being sought to be done vide the impugned order is an attempt to open the already concluded transactions by requiring additional documents, over and above the documents already furnished by CGPs and captive users who have availed open access in the past.

15.6 Another aspect related to issuance of show cause notices, as already recorded above, needs a mention in the present judgement. The Respondent No. 2 has already submitted that it has issued such notices to many captive users and CGPs in the State of Tamil Nadu since the year 2014 till 2017, as also in the year 2020. In this regard, we are constrained to observe that the Respondents are endeavouring to reopen and verify the already closed and concluded transactions of availing open access for captive purposes. For such concluded transactions, the documents have already been submitted with the Respondents and on the basis of the said documents, the Respondents permitted open access for wheeling of captive power.

15.7 To require additional documents for such concluded transactions now would amount to changing the rules of the game after the game has started, which is impermissible under law. In this regard, we refer to the decision of the Hon'ble Supreme Court in the case *of "K. Manjusree v. State of Andhra Pradesh & another,"* (2008) 3 SCC 512. The relevant extract of this decision is set-out as under:

> *27. But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them — P.K. Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214] , Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and DurgacharanMisra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148] .*

15.8 Furthermore, we are convinced with the contention and have a concurring view with the settled position of law that a piece of delegated legislation cannot have a retrospective applicability unless the parent legislation under which it came into existence permits such retrospective applicability. In this regard, we have gone through the judgments of the Hon'ble Supreme Court in the cases of Panchi Devi (supra), M.D. University (supra) and Basant Agrotech (India) Ltd. (supra). The essence of these decisions is that in the absence of any provision contained in

the legislative Act, a delegate cannot make a delegated legislation with retrospective effect. We have examined the provisions of the Electricity Act, 2003 and it is observed that no provision of law is enacted therein which permits retrospectivity. Accordingly, we set-aside the directions contained in Paras 6.2.5. & 7.2.4, and hold that there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGPs and captive users in the State of Tamil Nadu. We however clarify that for the past years, the Respondent No. 2 can verify data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, on the basis of the data already furnished by CGP/Captive User(s) while availing open access.

16 ISSUE NO. 7*:-*

16.1 Learned counsel for the Appellant with regard to the issue of methodology for verification of change in ownership and consumption has submitted that TNERC, at para 7.6.8 of the impugned order mandated that verification of ownership and consumption for any change in the group captive structure, shall be done for each corresponding period of such change. This issue has already been discussed and decided by us at Para 13.4 to 13.6 keeping in view the submissions of all parties and we don't see the need to repeat the said direction at this juncture, as it automatically applies to the present issue and submissions.

16.2 Learned counsel for the Appellant has also submitted that the Respondents have raised a contention alleging that with regard to the requirement envisaged under Rule 3(1)(a)(i) of the Electricity Rules, 2005, i.e. shareholding, the same is open for the Respondent No. 2 to

verify at any given point of time qua any CGP/ Captive User and they are not mandated by law to undertake such verification process at the end of the financial year/ annually. However, it has also been contended that with regard to the requirement envisaged under Rule 3(1)(a)(ii) of the Rules, 2005, i.e. 51% consumption, the same can only be verified at the end of the financial year/ annually. This issue has also been discussed, considering the submissions of all parties and decided by us at Para 11.20 to 11.23 of this judgment. These directions are reiterated for the present issue and submissions.

16.3 Learned counsel for the Appellant has vehemently submitted that the direction passed in para 7.6.9 of the impugned order, wherein it has been held that in the event the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within 10 days to the Respondent No. 2, otherwise the said licensee would proceed to verify captive status without considering weighted average of shareholding. The Appellant has submitted that providing documents on account of change of shareholding of existing captive users, without adding any new shareholder, as a captive user, does not at all arise when verification is to be done annually, at the end of the Financial Year. It is only in the case that a new captive user is introduced, then only documents qua shareholding have to be furnished, as fresh open access is required to be granted.

16.4 Learned counsel for the Appellant has also submitted that the concept of weighted average of shareholding is *dehors* the provisions of Rule 3 of the Rules and prorated consumption by each shareholder can only be determined based on their ownership at the end of the Financial Year. That weighted average shareholding is considering the ownership

at different periods during the Year which is impermissible in terms of the said Rule.

16.5 *Per contra,* learned counsel for the Respondents submitted that the Respondents have relied on an order passed by the Maharashtra Electricity Regulatory Commission in the case of Sai Wardha, with regard to weighted average calculation in terms of shareholding, as well as generation for FY 2015-16 &2014-15 which was reviewed by the Maharashtra Electricity Regulatory Commission in Case No.132 & 133 of 2018.

Our Finding:-

16.6 We have considered the submissions of the Parties and already recorded the directions passed therein on issues which are overlapping.

16.7 We however need to consider the argument advanced with regard to the concept of weighted average which is applied to the requirement of shareholding vide the impugned order. We also note that the said order of MERC regarding weighted average calculation in terms of shareholding is under challenge before this Tribunal in A. No. 340 & 341 of 2018, which is pending adjudication. Hence, concept of weighted average cannot be applied.

16.8 It is critical for us to note the practical difficulties staring down at the face of the captive users and CGPs in the event the concept of weighted average is applied. We agree with the submissions of the Appellant that the nature of shareholding in a captive structure is fluid and dynamic. That, existing captive users within the said captive structure can choose to give-up its ownership along with consumption of

captive power at any point of time if it considers no usage for the same. In such a scenario, if no new captive user(s) is added then the shareholding along with consumption is accordingly adjusted. A CGP cannot foresee the future and predict as to how many of its shareholders may give up their ownership along with consumption of captive power, neither can it be predicted, if any new/ how many captive user(s) will be inducted within the structure. In such a scenario, if in terms of Rule 3 of the Rules verification of minimum shareholding along with minimum consumption is not done annually, at the end of the financial year but done considering ownership at different periods during the year, then same would create unforeseen difficulties for a CGP to maintain its captive structure. As such, we opine that the verification mandated under the Rule 3 has to be done annually, by considering the shareholding existing at the end of the financial year. This is also evident from a perusal of Format-5 formulated by TNERC as a part of the impugned order, which also specifically contemplates verification to be done as per the shareholding existing at the end of the financial year. Similar view has already been taken by us in Appeal No. 02 and 179 of 2018 titled as ***"Prism Cement Limited v. MPERC & Ors"*** (supra).

16.9 We also note that the Act nowhere prescribes that a CGP once set up by an entity cannot be transferred to another owner or on transfer of ownership, the CGP loses its character of being captive despite fulfillment of all other conditions requiring it to be so, under Rule 3 of the Rules. 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) and this can be done within the confines of a financial year. For this, we extract the relevant para of the Kadodara judgment (supra):

> *"21. It is submitted that the words "set up" 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 fulfillment 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). The Regulation quoted above lays down further restrictions on the user of the power generated by a CGP. If all the provisions of the Act and Regulations governing captive generation and consumption from the CGP are specified a plant will be a CGP notwithstanding the fact that the plant at present is not owned by the person who originally set up the plant."*
>
> *(Underlines Supplied)*

16.10 In light of our findings, we also observe that suppose there are ten (10) captive users who avail open access for captive use under Section 9 of the Act at the start of the financial year, and in the event three (3) of such captive users stops sourcing captive power after six months, and instead three new captive users are introduced within the captive structure by subscribing equity shareholding with voting rights immediately thereafter, then when the verification of captive status will be done annually on the basis of the shareholding existing at the end of such financial year, in that case the total number of captive users throughout the financial year would be treated as thirteen (7+3+3) and not 10. This is because the shareholding of the three captive users who stopped sourcing captive power, cannot have a zero/nil shareholding, as they sourced captive power for the first six months. While verifying the

condition under Rule 3(1)(a)(i) and (ii) of the Rules, the consumption of captive power has to be done by captive users holding a minimum of 26% shareholding. Therefore, in the event shareholding of a captive user is considered as zero/nil after a few months into the financial year, then such user cannot be permitted to take benefit of availing captive power thereby seeking exemption from payment of CSS. In any event, the applicability of CSS will also depend upon the observations made by us in Appeal No. 38 of 2013 titled as ***"M/s. Steel Furnace Association of India v. PSERC & Anr."***

16.11 We also put emphasis on the discussion we have recorded where impetus has been given to encourage and develop the captive industry in the country, which specifically enables catering to the dedicated high-power demands of various industries. The Statement of Object and Reasons of the Electricity Act, 2003 along with the intent behind the National Electricity Policy, 2005 and the National Tariff Policy, 2016 lend assistance to our observations of promoting the captive industry without any unnecessary hindrances or obstacles. We also refer back to our observations made in the present judgment with regard to the case of Prism Cement (supra) to hold that the twin requirements under Rule 3 of the Rules have to be determined at the end of the financial year together, and there cannot be application of the concept of weighted average for verifying shareholding at any given point of time in a financial year.

16.12 Accordingly, we set-aside the direction contained in para 7.6.9 of the impugned order, wherein TNERC has held that, in the event the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within 10 days to the

Respondent No. 2, otherwise the said licensee would proceed to verify captive status without considering weighted average of shareholding.

17. **Summary of Findings**:-

Based on issue-wise discussion & analysis, stated supra, we sum up our findings as under:-

17.1 **Issue No.1**:- We hold that the second Respondent/TANGEDCO can be entrusted with the exercise of collecting & verifying data for the purpose of verification of captive plant status only. However, any coercive action to be initiated against the CGP /captive users regarding its captive status or for recovery of CSS, as per law, it shall be decided by the first Respondent / State Commission.

17.2 **Issue No.2**:- We hold that for the purpose of granting open access for captive purpose, the document as recorded at Para 11.3 shall be adequate/sufficient. Needless to mention that these documents, as specified therein, are within the framework of TNERC Grid Connectivity & Intra State Open Access Regulations, 2014 and also do not violate the provisions of Rule 3 of the Electricity Rules, 2005.

17.3 **Issue No.3**:- We hold that as per provisions stipulated under the Rule 3 of the Electricity Rules, 2005, the SPV & AOP are two distinct entities and cannot be equated at par for computation of annual power consumption for determining the captive status.

17.4 **Issue No.4**:- We hold that the verification for determining ownership & consumption for CGP /captive users under Rule 3, being an independent exercise, has to be done on annual basis, at the end of financial year.

17.5 **Issue No.5**:- We hold that the directions contained in Paras 6.6.3 and 7.8.2 of the impugned order passed by the State Commission are in disregard to Rule 3 of the Electricity Rules and hence, cannot be sustained.

17.6 **Issue No.6**:- We hold that as per settled principles of law, there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGP/captive users. However, it is clarified that for the past years, the second Respondent/TANGEDO can verify data for the purpose of determination of captive plant status on the basis of data already furnished by CGP/Captive users while availing the open access.

17.7 **Issue No.7**:- We set aside the directions contained in Para 7.6.9 of the impugned order wherein the State Commission has held that, in the event, the weightage average of shareholding of captive users changes within a financial year, then the same has to be intimated within ten days to the second respondent/TANGEDCO, otherwise the said licensee would proceed to verify captive status without considering weightage average shareholding.

ORDER

For the forgoing reasons, as stated supra, we are of the considered opinion that the Appeal is partly allowed.

The impugned order dated 28.01.2020 passed by Tamil Nadu Electricity Regulatory Commission in R.A. No. 07 of 2019 is set

aside to the extent of our findings and directions as indicated above under Para 17.1 to 17.7.

In view of the disposal of the Appeals, the relief sought in the IA No. 425 of 2020, IA No. 426 of 2020, IA No. 1210 of 2020 & IA No.1215 of 2020 does not survive for consideration and accordingly stand disposed of. There shall be no order as to costs.

Pronounced in the Virtual Court on this the 7th day of June, 2021.

(Ravindra Kumar Verma)
Technical Member(Electricity)

(Justice Manjula Chellur)
Chairperson

ts/tpd