N./265/2018

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 17.09.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

OP No.109/2018

BETWEEN:

1. Green Infra Wind Power Generation Limited,
   No.515 & 514, Tolstoy House,
   Tolstoy Marg,
   New Delhi-110 001.
   (Through authorized representative)

2. TVS Motors Company Ltd.,
   Bayathahalli, Kadakola,
   Mysore-571311,
   Karnataka.
   (Through authorized representative) **…..Petitioners**

   (Petitioners are represented by
   Sri Sanjay Sen, Senior Advocate, for Hemant Singh,
   of M/s Charter Law Chambers, New Delhi)

And

Chamundeshwari Electricity Supply Company Limited,
#29, Vijayanagara,
2nd Stage, Hinkal,
Mysuru-570017.
(Represented by its Managing Director) **… Respondent**

[Represented by Sri S. Sriranga and Ms. Medha M. Puranik
for Justlaw, Advocates, Bengaluru.]

ORDERS

1. The present Petition is filed under Section 9(2), 42, 57, 60, 86(1)(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003, seeking for the following reliefs:

   a) To declare that the Harapanahalli Captive Generation Plant (CGP) of the Petitioner No.1, as a captive generating plant for FY 2017-18;

   b) To quash the impugned letters dated 17.07.2018, 15.09.2018, 20.09.2018 and 22.10.2018 and the impugned invoice dated 01.11.2018 (Annexures P-17, P-16, P-19, P-20, P-23 and P-25), issued by the respondent;

   c) To declare that the determination of liability on account of loss of captive status, can only be determined by State Commission by validating the data collected and certified by Chief Electrical Inspector;

   d) Declare that the Respondent has abused its dominant position as brought out in the present petition;

   e) The Petitioners crave leave to claim compensation from the Respondent, through a separate petition, in the event this Commission grants prayer (d) in favour of the said Petitioners; and

   f) Pass such other order or orders as this Commission deems fit and proper, under the facts and circumstances of the present case.

2. The brief facts of the case urged by the Petitioners, are as hereunder:

   a) The Petitioner No.1 i.e., Green Infra Wind Power Generation Limited (Green Infra) is a generating company established as a Special Purpose Vehicle (SPV) having an installed capacity of 36 MW wind power project situated at Harapanahalli. The Petitioner owns and operates four wind based renewable power projects, including the

Harapanahalli power project which is identified as a captive generating plant in terms of the Government Order dated 04.03.2016.

b) The power generated from the captive plant is being consumed by twenty-one (21) captive users for their self-consumption.

c) CESC has wrongfully imposed Cross-Subsidy Surcharge and Electricity tax upon the captive users of the Harapanahalli CGP for FY2017-18 vide letters dated 17.07.2018 (Annexure P-14), 20.09.2018 (Annexure P-19) and 22.10.2018 (Annexure P-22) and the invoice dated 01.11.2018 (Annexure P-24), despite the fact that the said CGP, and the captive users, fulfilled the requirements of a captive generating plant as provided under Rule 3 of the Electricity Rules, 2005. Further, the Petitioner No. 1 had provided all the required document/data to CESC which categorically demonstrated that the Harapanahalli CGP is a captive generating plant as per the above Rules for FY2017-18. It is submitted that Harapanahalli CGP is operating within the meaning of Section 2(8) and Section 9 of the Electricity Act, 2003, read with Rule 3 of the Electricity Rules, 2005. According to Section 42(2) of the Electricity Act, 2003, if the power from a captive generating plant is consumed by captive users, then no CSS or any other surcharge or tax is leviable upon such users.

d) According to Rule 3 of the Electricity Rules, 2005, the captive users have to hold a minimum of 26% equity share capital with voting rights in the captive generating plant. Further, the said captive users

constituting such 26% shareholding have to consume minimum 51% of the electricity generated by the captive generating plant, in proportion to their shareholding, within a variation of ±10%. It is clear from the above said provision that the said proportionate consumption has to be maintained only for 51% of total energy generated, by the captive users constituting minimum 26% of equity shareholding in the Harapanahalli CGP. Once the above minimum requirements are satisfied, then all the captive users are free to consume electricity generated by the captive generating plant/Petitioner in any proportion whatsoever. In other words, the 49% remaining power generated by the captive generating plant can be used by any of the captive users in any proportion, or the power can be sold to in the open market to non-captive consumers/beneficiaries.

e) CESC had issued the impugned letters imposing CSS and Electricity Tax on the captive users of the Harapanahalli CGP, by wrongfully interpreting Rule 3 of the Electricity Rules, 2005, so as to mean that entire power consumption, even the consumption over and above 51%, has to be in proportion to their shareholding. The Petitioners have stated that the Respondent has no business to consider the pattern of consumption for remaining 49% of the power generated for the purpose of verification of captive status.

f) It is also submitted that Petitioner No. 2 M/s TVS Motors Co. Ltd., is a company registered in India under the provisions of Companies Act

1956 (2013) is a captive user of Harapanahalli CGP. The Respondent and GESCOM, vide their letters dated 24.06.2016 (AnnexureP-3) and 24.06.2016 (Annexure P-4) respectively, certified that the Harapanahalli CGP of the Petitioner No. 1 is not having any Power Purchase Agreement with the said licensees. On 01.08.2016 (Annexure P-7), KPTCL executed the Wheeling and Banking Agreement (WBA) with the Petitioner No. 1. On 21.01.2017 (Annexure P-9), the Respondent granted its consent for wheeling of electricity from Harapanahalli CGP of Petitioner No. 1 to the captive users situated in the licensed area of the said Respondent. On 17.02.2017 (Annexure P-10), KPTCL accorded its approval of the request of the Petitioner regarding addition of certain captive consumers in the WBA.

g) After completion of FY2017-18, the Respondent requested the Petitioner No.1 to submit shareholding details of the Harapanahalli CGP and the captive users. The Petitioner supplied the requisite data relating to shareholding pattern of the Harpanahalli CGP of the Petitioner No. 1, its generation and consumption data vide emails dated 07.04.2018 (Annexure P-12), 27.04.2018 and 03.05.2018 (Annexure P-13) (colly.). The Respondent did not reply to the said letter of the Petitioner No. 1, and instead, decided to treat Harapanahalli CGP as non-captive generating plant. The Respondent has exceeded its jurisdiction by straightaway issuing the impugned letters to the captive users treating them as non-captive for FY2017-18.

h) Subsequently, the Respondent on 17.07.2018 (Annexure P-14) intimated the Petitioner No. 1 that few captive consumers were not consuming electricity in proportion to their shareholding with respect to the Harapanahalli CGP. As such, the Harapanahalli CGP of Petitioner No. 1 was held as a non-captive generating plant for FY2017-18.

i) The Petitioner No.1 vide its letter dated 27.07.2018, had clearly demonstrated the Respondent that the captive users of the Harpanahalli CGP of the Petitioner No.1 were holding 35% equity shareholdings in FY 2017-18 and were consuming almost 99% of the electricity generated by the Harapanahalli CGP in proportion to their shareholding. Hence even if two consumers, namely M/s Anjaneya Agrotech Pvt. Ltd. and Wadhawan Holdings Pvt. Ltd. are ignored, then also the Harapanahalli CGP of the Petitioner No. 1 will be fulfilling the requirements prescribed under Rule 3 of the Electricity Rules, 2005 for FY2017-18. Hence, the Harpanhalli CGP and its captive users are not at all in violation of the Electricity Rules, 2005 and accordingly are exempted from imposition of the charges as per Section 42(2) of the Electricity Act, 2003. This aspect has been completely ignored by the Respondent while issuing the impugned letters.

j) The respondent has wrongfully, arbitrarily, in abuse of its dominant position, as well as to arm-twist the captive users into compulsorily procuring power from Respondent and/or paying CSS and Electricity

Tax to the said licensee. Accordingly, the respondent is also liable to pay a compensation to the Petitioner No. 1 against the abuse of its dominant position. Under section 57 read with Section 60 of the Act, the Commission has the necessary jurisdiction to decide upon the abuse of dominant position by a licensee and to provide adequate compensation. Accordingly, the Petitioners have sought intervention of the Commission in the matter.

3. Upon issuance of the notice, the Respondent appeared through their Counsel and submitted the detailed statement of objections and the gist of the points urged by the Respondent are as follows:

   a) A combined reading of Section 9 of the Electricity Act, 2003 along with Rule 3 of the Electricity Rules, 2005 clearly states that in order to consider an entity as a captive consumer, a consumer has to own at least 26% of the share capital in the captive generating company and consume in aggregate not less than 51% of the power generated by the captive generating company, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent.

   b) The respondent has submitted that the consumers of Petitioner No.1 are not consuming energy proportionate to their shareholding. For example, M/s Bhoruka Extrusion Ltd. has a shareholding of 1.43% and therefore was required to consume energy between 3.62% to 4.42% of the energy generated by Respondent No.2, whereas it is consuming

4.44%. Therefore, as Petitioner No. 1 has wheeled energy without considering the proportionality principle laid in Rule 3 of the Electricity Rules 2005 and cannot be considered to be captive Generator.

c) As per the Rule3(2) of the Electricity Rules 2005, even in case one consumer is not consuming energy proportionate to their shareholding, then entire energy generated shall be treated as if it is a supply of electricity by a generating company and not by a captive generating company. In the present case, consumers of the Petitioner no. 1 are not consuming energy in accordance with the requirements of the Rule. It is submitted that the Petitioner No 1 therefore cannot be considered to be a captive generating company. The Respondent has produced a table (Annexure R-1) to indicate that Petitioner No. 1 has not wheeled energy in proportion to percentage of share allocation.

d) Further, the Petitioner No. 2 cannot be considered to be captive user since the Petitioner No. 1 is no longer a captive generator. However, the Petitioner No. 2 has been consuming the energy that is being generated by Petitioner No.1 and being wheeled to them under Open Access. Therefore, it is submitted that the Petitioner No. 2 is liable to pay Cross Subsidy Surcharge to the distribution company in terms of Section 42 of the Electricity Act 2003. Further, the demand for payment of cross subsidy surcharge has been computed in keeping with the tariff determined by the Commission from time to time, depending

upon the category in which the respective Petitioner falls. Further, the Respondent, in accordance with the Karnataka Electricity (Taxation on Consumption or Sale) (Amendment) Act 2018, has computed the electricity tax that is payable at 6% of the bill amount by the Petitioner No. 2. Thus, there is absolutely no infirmity in the same.

e) The respondent has submitted that a power plant can qualify to be a captive generating plant, when it is set up by consumers primarily for their self-consumptions. It is submitted that subsequently EHT/HT consumers cannot acquire right in an already established Captive generating plant and same has been clarified by this Commission in its letter dated 18.09.2019 and the Government of Karnataka Order dated 17.07.2019. In the present case, Petitioner No. 2 i.e., TVS Motors Company Ltd. and other consumers have acquired right in the Petitioner No. 1 company subsequent to incorporation of the Petitioner No. 1 company and same is evident from the perusal of affidavit filed by the Petitioner on 01.08.2019. Therefore, the Petitioner No.1 failed to qualify as a captive generating plant.

f) On perusal of the Chartered Accountant's (CA) certificates certifying the shareholding pattern of the 36MW Harapanahalli Project as on 31.03.2018 and on 27.05.2016, it is evident that there has been a change in share allotment in this duration which has not been updated to the Respondent. In the year 2016, the Petitioner was wheeling to 9 Consumers. However, in the year 2018, the Petitioner is

wheeling to 21 consumers and same proves that said consumers are added subsequent to the incorporation of the company. The addition or deletion of consumers was not notified to the Respondent.

g) Rule 3(1)(a) read with explanation 1(c) of the Electricity Rules 2005 provides that a captive consumer has to own equity shareholding along with voting rights in a captive generating company. In the present case, the Petitioner No.1 has not produced any material to prove that its consumers own equity shares in the Petitioner company. Accordingly, the impugned action against Petitioner is sustainable.

h) As regards the contention of the Petitioner regarding lack of jurisdiction is concerned, it is submitted that Section 42 of the Electricity Act, 2003 specifically empowers the ESCOM to levy and collect cross-subsidy surcharge. The review of captive status has to be done at regular interval year on year. The question of adjudicating the issue would not arise at all. The Commission would only come into picture if a dispute arises between the parties. Further, the Respondent denied all other averments made in the Petition.

4. The Petitioner in its Rejoinder has reiterated its submissions made in its Petition. It has further submitted that the Respondent itself, vide its letter dated 21.10.2017 (Annexure P-9) has identified the Harapanahalli generating plant of the Petitioner No. 1 as a captive generating plant. Hence, the Respondent after accepting the Petitioner No. 1 as CGP, is estopped from reneging qua the above factual position. It is also the

contention of the Respondent that the EHT/HT consumers cannot acquire shareholding for the purpose of becoming captive status in an already established captive generating plant. The said contention wrong and devoid of merits. It is stated that under Electricity Rules, 2005, there is no provision which prohibits any consumer from becoming a captive user. In fact, the above contention of the respondent is in the teeth of the principles laid down by the Hon'ble APTEL in the Kadodara Judgement.

5. The Petitioner in its 'Additional note' dated 16.06.2021 has relied on the Judgement of the Hon'ble ATE in Appeal No. 252 of 2014 in Maharashtra State Electricity Distribution Company Limited Versus MERC and Another, Appeal No. 316 of 2013 in M/s Sai Wardha Power Company Ltd. Versus MERC and Others, Kadodara Power Pvt. Ltd. and Others Versus GERC and Another, Crawford Bayley & Co. and Others Versus Union of India and Others and the recent Judgement of the Hon'ble ATE dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the case of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others along with other Orders. The Petitioner has submitted that in Appeal No. 252 of 2014, certain shareholders were not consuming power from the CGP and the distribution licensee declared that the said CGP failed the captive test provided under Rule 3 of the Electricity Rules, 2005. The Hon'ble ATE in its judgement in Appeal No. 252 of 2014 had categorically held that once the aforesaid "minimum" conditions of 26% shareholding and 51%

consumption are fulfilled, then there is no requirement of the other captive users to satisfy the said conditions.

6. The Respondent has also relied on the KERC Order dated 06.02.2020 in the matter of Apollo Hospitals Enterprise Ltd. and Others Versus BESCOM.

7. We have heard the learned counsel for the parties. From the pleadings and the written/oral submissions made by the parties, the following issues arise for our consideration:

   Issue No.1: Whether the Petitioner No. 1 Green Infra Wind Power Generation Limited (Green Infra) proves that it is a captive generating plant and the other Petitioners as its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2017-18?

   Issue No.2: Whether the Respondent has followed proper procedure for verification of the captive status of the Petitioners as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?

   Issue No.3: What Order?

8. Since Issues No. 1 and 2 are related to the provisions of the Electricity Act, 2003 & Rules, 2005 regarding the captive status, they are answered together:

   a) Issue No.1: Whether the Petitioner No. 1 Green Infra Wind Power Generation Limited (Green Infra) proves that it is a captive generating plant and the other Petitioners as its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2017-18?

b) Issue No.2: Whether the Respondent has followed proper procedure for verification of the captive status of the Petitioners as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?

i) The definitions and Rules governing the captive status under the Electricity Act, 2003 and Electricity Rules, 2005 are necessary to be considered before proceeding to analyze the issues to be answered. Section 2(8) of the Act of 2003 defines a captive generating plant. Section 9 defines the rights and duties of captive generating plants. Rule 3 of the Electricity Rules, 2005 specifies the conditions to be fulfilled with respect to share-holding pattern and consumption pattern in order to be qualified as captive generator/users. Thus, any generating plant/consumers has to be established in accordance with Section 2(8) and has to fulfil Rule 3 of the Electricity Rules, 2005 with respect to share-holding pattern and consumption pattern in order to be qualified as a captive generator/users. Section 2(8) and Section 9 of the Electricity Act, 2003 are enunciated below:

> *"Section 2(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;*
>
> ……..
>
> *Section 9. (Captive generation):*

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

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

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licencee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.

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

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

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

ii) Further, a generating company established under Section 2(8) has to comply with Rule 3 of the Electricity Rules, 2005 w.r.t. holding of equity

shares and consumption of electricity by its shareholders to qualify as a captive plant. Rule 3 of the Electricity Rules, 2005 is as follows:

> *"3. Requirements of Captive Generating Plant: -*
>
> *(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-*
>
> *(a) in case of a power plant -*
>
> *(i) not less than twenty-six percent of the ownership is held by the captive user(s), and*
>
> *(ii) not less than fifty-one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:*
>
> *Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;*
>
> *(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating*

station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -

Explanation: -

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

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

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

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

Explanation.- (1) For the purpose of this rule.-

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

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

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

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

Thus, for any generating unit/plant (established under Section 2(8) of the Electricity Act, 2003) to qualify as a 'captive generating unit/plant' for any financial year, it has to satisfy the following conditions as specified under the Electricity Rules, 2005 with regards to consumption and share-holding pattern on an annual basis:

(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, in proportion to their shares in ownership of the power plant within

a variation not exceeding ten per cent is to be consumed for the captive use.

iii) It is to be noted that Rule 3 of the Electricity Rules, 2005 broadly deals with the following types of captive users namely:

a. Individual;
b. Registered co-operative society;
c. Association of persons;
d. Company formed as Special Purpose Vehicle' (SPV);

The basic conditions regarding minimum ownership of 26% and consumption of 51% of the electricity generated on an annual basis has to be complied with by all the captive users in a manner as is specified under Rule 3 of the Electricity Rules, 2005. Whereas, the consumption by any share-holder in proportion to their shares in ownership (within a variation not exceeding 10%) shall depend on the type of captive consumer.

iv) Thus, in case of an individual setting up of captive plant, he would be the 100% owner of the captive plant and he has to comply only with the conditions of consumption of more than 51% of the generation on an annual basis from the captive plant. In case of a registered co-operative society, the twin conditions have to be satisfied collectively by the members of the co-operative society. In case of association of persons, the Hon'ble ATE in its Order in Appeal No. 171 of 2008, Appeal No. 172 of 2008 & IA Nos. 233/08 and 234/08, Appeal No. 10 of 2008 and Appeal No. 117 of 2009 in the matter of Kadodara

Power Pvt. Ltd. and Others Versus Gujarat Electricity Regulatory Commission and Another, dated 22nd September, 2009 had held that a 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 the ownership of the power plant within a variation not exceeding ten percent. The relevant part of the said judgement is extracted below:

> *"Decision with reasons:*
> *Is a company formed as a special purpose vehicle an association of person?*
>
> *15) The question has arisen because the word 'association of persons' is not defined anywhere in the Act or in the Rules. The proviso to Rule 3 (1)(a)(ii) makes two special conditions for cooperative societies and association of persons. If the CGP is held by a person it is sufficient that the person consumes not less than 51% of the aggregate electricity generated in such plant. In case the plant is owned by a registered cooperative society then all the members together have to collectively consume 51% of the aggregate electricity generated. In case the CGP is owned by an association of persons the captive users together shall hold not less than 26% of the ownership of the plant in aggregate and shall consume not less than 51% of the electricity generated in proportion to their shares of the ownership of the plant within a variation not exceeding + 10%."*

V) In case of company formed as a SPV as in this case, the Hon'ble ATE in its recent Order dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others has held the following:

> *"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."

vi) Accordingly, the requirement of consuming minimum of 51% electricity generated on an annual basis 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 a Company formed as a SPV.

vii) Thus in view of the above discussion, it is to be analyzed whether ESCOMs have correctly assessed the captive status of the generating plant of Petitioner No. 1 and its consumers in accordance with the Rule 3 of the Electricity Rules, 2005. Before answering the above issue, it needs to be clarified whether the ESCOMs have the authority to assess the captive status of the generating plant of Petitioner No. 1 and its consumers. It may be noted that Section 42 of the Electricity Act, 2003, provides for the conditions for grant of Open Access by the ESCOMs. Section 42 of the Electricity Act, 2003 is enumerated below:

"Section 42. (Duties of distribution licensee and open access): --- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

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

Provided that 1[such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

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

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

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

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

viii) Section 42 of the Electricity Act, 2003 exempts a captive generating plant from payment of CSS for carrying the electricity to the destination of his own use. Thus, in order to qualify for getting exemption from paying cross-subsidy surcharge under Section 42 of the Electricity Act, 2003, a generating company has to qualify as a captive generating company under Rule 3 of Electricity Rules, 2005 and its captive users to claim the benefits in terms of reduced CSS extended under Section 42 of the Electricity Act, 2003.

ix) Further, the Hon'ble ATE in its Order dated May 18, 2010 in Appeal No116 of 2009 and IA No. 218 and 219 of 2009 in the matter of Chhattisgarh State Power Distribution Co. Ltd. V/s. Hira Ferro Alloys Ltd. and Others on whether a State Commission can determine the captive status of generators/consumers had held that the State Commission has the jurisdiction to determine the status of captive generating plant of the first Respondent which in turn will determine whether or not surcharge is payable. The relevant portion of the Order is enunciated 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."

x) Accordingly, for monitoring the captive generators and its consumers in the State of Karnataka, the Commission vide its letter No. KERC/Group Captive/CT-2/18-19/923 dated 18.09.2018 had directed all the ESCOMs to monitor the status of group captive generation, in their respective jurisdiction and enforce the said Rules to safeguard their revenues in view of substantial increase in the number of EHT/HT consumers of the ESCOMs opting for procurement of power from group captive generating plant under the powers conferred under Section 97 of the Electricity Act, 2003 which deals with the delegation of powers by an Electricity Regulatory Commission. Section 97 of the EA, 2003 is as follows:

"Section 97. (Delegation):

The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be

specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under Section 79 and Section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary."

xi) Further, with regards to monitoring of Group captive consumers by the ESCOMs, the Hon'ble ATE in its Order dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others had stated the following:

"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."

xii) Thus, it can be construed from the above judgement of the Hon'ble ATE that the ESCOMs can be appointed by the Commission under the power conferred under Section 97 of the EA, 2003 for undertaking an exercise of collecting and verifying data for the purpose of verification of captive status of a generating plant in the State. However, initiating any coercive action against any 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 Commission.

xiii) Accordingly, it is opined that the ESCOMs have to collect and verify the data of generating plants claiming captive status and submit it to the Commission for verification and can issue provisional demand notices to the generators/consumers flouting the captive status. Any coercive action against any CGP/Captive User(s) for recovery of CSS, Additional Surcharge, enhanced electricity tax, etc., as per law, needs to be done through appropriate proceeding initiated before the Commission.

xiv) As regards determination of captive status of the generating plant of the Petitioner No. 1 'Green Infra', the Commission, in O.P. No. 01/2020 in the matter of Green Infra Wind Power Generation Ltd. and M/s Bright Packaging Pvt. Ltd. versus MESCOM, has observed that the Petitioner has submitted that the 36MW Harapanahalli project was commissioned in four phases. The commissioning dates of the four phases are as follows:

- Phase I(10MW): 12.08.2016 at locations HRG-2,4,7,8 &11;
- Phase-2(06 MW): 21.09.2016 at locations HRG-1, 16 &19;
- Phase-3(04 MW): 02.11.2016 at locations HRG-3 & 17;
- Phase-4(16 MW): 13.01.2017 at locations HRG-5, 6, 9,10, 12, 14, 15 & 18

Thus, the last phase of 36MW Harapanahalli generating plant consisting of HRG-5, 6, 9,10, 12, 14, 15 & 18 was commissioned on 13.01.2017.

xv) The Respondent has contended that a power plant can qualify to be a captive generating plant, when it is set up by persons primarily for their self-consumptions. It is submitted that subsequently EHT/HT consumers cannot acquire right in an already established Captive generating plant and same has been clarified by this Commission in its letter dated 18.09.2019 and the Government of Karnataka in its order dated 17.07.2019. Since, M/s TVS Motors Company Ltd. and other consumers have acquired rights in the Petitioner company subsequent to the incorporation of Petitioner No.1 company and

same is evident from the perusal of affidavit filed by the Petitioner on 1.08.2019. Therefore, the Respondent has contended that the Petitioner No.1 failed to qualify as a captive generating plant.

xvi) In this regard, it may be noted that the Commission in its letter mentioned above, had intended that unless a Power Plant is set up by Group Captive Users themselves, primarily for their own use, they cannot claim the status of 'Group Captive Generators/Group Captive Users'. In other words, if a group of EHT/HT consumer acquires the right in an already set up Power Plant (which has not been established as a captive unit), it cannot claim the status of 'Group Captive Power Plant Owners/Group Captive Users. The spirit of the letter is that an IPP or merchant power plant, cannot be converted into a CGP by merely purchasing the ownership or any part of the ownership of IPP or merchant plant by certain consumers primarily for their own use. It may further be noted that the Commission's letter dated 18.09.2018 does not specifically say that subsequent acquisition of a right in captive generating plant does not confer the captive status. The Government letter dated 17.07.2019 does not deal with acquisition of captive status by subsequent acquisition of shares in an already set up power plant. Therefore, the contention of the respondent that consumers cannot acquire right in an already established Captive generating plant and the same has been clarified by this Commission in its letter dated

18.09.2019 and by the Government of Karnataka in its order dated 17.07.2019 is not correct.

xvii) The share-holding pattern of the Harapanahalli project as on 27th May, 2016 (Annexure R-4) as submitted by the Respondent is enunciated as below:

Sl. No.	Name and Address of the Shareholder	RR no.	No. of Equity Shares	% of Equity Capital
1	Sri. Anjaneya Cotton Mills Limited	HTAVP-5	60,500	20.44%
2	Ultra Tech Cement Limited	MHT-42	60,500	20.44%
3	Ramkumar Mills Pvt. Ltd.	N1HT-1	13,600	4.59%
4	Subadra Textile Pvt. Ltd.	N3HT-1	21,200	7.16%
5	Karanja Industries Pvt. Ltd. Bidar	HKHT-5	30,200	10.20%
6	Karanja Industries Pvt. Ltd. Mahadev Colony, Bidar	KHT-6	15,100	5.10%
7	Mfar Developers Private Limited	Applied for	55,500	18.75%
8	Roxy Roller Flour Mills Pvt. Ltd.	HKHT-118	18,200	6.15%
9	Bhoruka Extrusion Pvt. Ltd.	HT-71	2 1,200	7.16%
	Total		2,96,000	100%

xviii) The Petitioners, in its affidavit, dated 01.08.2019 have submitted that the authorised share capital of the company as on 31.03.2018 is Rs.75,00,00,000 which comprises of equity shares amounting to Rs.35,10,00,000 (3,51,00,000 equity shares @ Rs.10 each) and Preference shares amounting to Rs.39,90,00,000 (3,99,00,000 preference shares @ Rs.10 Each). The total subscribed and paid up capital of the Petitioner No. 1 company is 35,18,000 equity shares of Rs.10 each is allotted to the 36 MW Harapanahalli CGP. Petitioner No. 1 has also submitted that the equity shares of the company issued by the Petitioner No. 1 for the 36MW Harapanahalli, CGP carry the voting

rights. The shareholding pattern of Green Infra Wind Power Generation Limited, certified by Chartered Account, as submitted by Petitioner No. 1 on 31st March, 2018 (Annexure P-15 (colly.))(P-176, 177), is as follows:

Sl. No.	Name and Address of the Shareholder	RR no.	No. of Equity Shares	% of Equity Capital
1	Sembcorp Green Infra Limited		22,65,200	64.39%
2	Subadra Textile Pvt. Ltd.	N3HT-1	50400	1.43%
3	Sri. Anjaneya Cotton Mills Limited	HTAVP-5	1,44,000	4.09%
4	Ramkumar Mills Pvt. Ltd.	N1HT-1	32,400	0.92%
5	Ultra Tech Cement Limited	MHT-42	1,44,000	4.09%
6	Karanja Industries Pvt. Ltd. Humnabad, Kolar	HKHT-5	72,000	2.05%
7	Karanja Industries Pvt. Ltd. Kolhar Industrial Area, Bidar	KHT-6	36,000	1.02%
8	Bhoruka Extrusion Pvt. Ltd.	HT-71	50,400	1.43%
9	Roxy Roller Flour Mills Pvt. Ltd.	HKHT-118	43,200	1.23%
10	Universal Air Products Pvt. Ltd.	KGHTP26	72,000	2.05%
11	SJR Infrastructure Pvt. Ltd.	E4HT291	43,200	1.23%
12	Vibgyor Net Connections Kudlu Gate Bengaluru	S8HT399	28,800	0.82%
13	Vibgyor Net Connections Gajendra	S3HT185	7,200	0.20%
14	Bright Packaging Pvt. Ltd.	EHT-170	48000	1.36%
15	TVS Motor Company limited	NREHT-1	2,16,000	6.14%
16	Mysore Polymers & Rubber Products Limited	HT-77	57,600	1.64%
17	Mysore Polymers & Rubber Products Limited	HT-213	36,000	1.02%
18	Mysore Polymers & Rubber Products Limited	VVHT-161	14,400	0.41%
19	Parshvanath Filaments	RNHT-109	39,600	1.13%
20	Wadhawan holdings Pvt. Ltd.	VVHT-180	21,600	0.61%
21	Maris Spinners Limited	HT-6	60,000	1.71%
22	Bharat Hotels Limited	W4HT-13	36,000	1.02%
	Total (2-13)		35,18,000	100%

xix) Thus, it is evident from the share-holding pattern dated 27.05.2016 and 31.03.2018, that there has been an increase in number of shareholders in the Harapanahalli generating plant of the Petitioner No. 1 as on 31.03.2018. From the CA certified share-holding certificate dated 27th

May, 2016, it is also noted that Sri Anjeneya Agro-tech Pvt. Ltd. held 43,200 shares of the Harapanahalli generating plant as on 27th May, 2016. From the share-holding certificate dated 31.03.2018, it is clear that Sri Anjeneya Agro-tech Pvt. Ltd. was not a share-holder of the Harapanahalli generating plant as on 31.03.2018. Thus, there has been sale and purchase of shares by the consumers during the period between May 2016 to 31st March, 2018. Due to the absence of details of exact date of sale or purchase of shares by the consumers, the Commission is unable to ascertain the date of sale and purchase of shares by the captive consumers. Thus, for determining the exact shareholding pattern to be considered for ascertaining the captive/group captive status of the consumers, the Commission has relied on the Judgement of the Hon'ble ATE dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others which states 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. The relevant portion of the Judgement of the Hon'ble ATE is enunciated below:

> *"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."

xx) As regards the methodology to be adopted for determining the captive status of a power plant during a financial year, the Hon'ble ATE in its recent Order dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 as mentioned above has held as follows

"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."

xxi) Thus, relying on the abovementioned Order of the Hon'ble ATE, and conjoint reading of the portions of the Order of the Hon'ble ATE enunciated above, we have considered the shareholding pattern of the Petitioners as on 31st March, 2018 for determination of captive status of the Petitioners. Further, the Commission also notes that as per the share holding pattern dated 31.03.2018 (Annexure P-15) (colly.) (P-

176, 177), Sri Anjaneya Agrotech Pvt. Ltd. does not hold any shares in the Harapanahalli generating plant as on 31.03.2018 but the company has consumed energy in April, 2017 (Annexure R-1). In absence of the exact details of the date of sale of shares by Sri Anjaneya Agrotech Pvt. Ltd., we have considered that Sri Anjaneya Agrotech Pvt. Ltd. held the shares till April, 2017. Thus, relying on the abovementioned Order of the Hon'ble ATE, we have considered the share held by Sri Anjaneya Agrotech Pvt. Ltd. for determining the share-holding pattern held by the consumers during FY2017-18. Accordingly, the total paid up equity share considered by the Commission for FY2017-18 is 3561200 (35,18,000+43200) and the shares held by share-holders work out to 36.39% which is more than minimum 26% of shares required to be held by the users/consumers in accordance with Rule 3 of the Electricity Rules, 2005.

xxii) Now, as regards verification of consumption pattern by the consumers of a captive generating plant, we note that the respondent has issued the impugned demand notices as the Petitioners have consumed energy in excess of their equity share-holding pattern. In this regard, it may be noted that the Hon'ble ATE in its Order in Appeal No. 171 of 2008, Appeal No. 172 of 2008 & IA Nos. 233/08 and 234/08, Appeal No. 10 of 2008 and Appeal No. 117 of 2009 in the matter of Kadodara Power Pvt. Ltd. and Others Versus Gujarat Electricity Regulatory

Commission and Anr. dated 22nd September, 2009 had held the following:

> *"The 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership. The rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CGP owners themselves. Further such calculation has to be done on an annual basis i.e. for a financial year."*

xxiii) Accordingly, the proportionality criterion has to be satisfied only for the 51% of the total generation, the rest 49% of the generation could be sold to anyone including CGP owners themselves.

xxiv) The Respondent has contended that the energy generated annually should be consumed by the consumers in proportion to the shares in ownership of the power plant within a variation not exceeding ten percent. In this regard, it may be noted that the Petitioners during the hearing, have submitted that the Harapanahalli generating plant is a Special Purpose Vehicle (SPV) owing to the fact that it has no business other than maintaining a generating station primarily for supplying electricity to its captive consumers as can be seen from its financial statements and according to the recent Order of the Hon'ble ATE dated 7th June, 2021 in Appeal No. 131 of 2020 & IA Nos. 425, 426, 1210 & 1215 of 2020 in the matter of Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others, 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 Association of Persons but it cannot be applied to power plants set-up by SPV. The definition of Special Purpose Vehicle (SPV) as per the explanation provided under Rule 3 of Electricity Rules, 2005 is as follows:

> Rule 3(2)(*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.*"

xxv) During arguments, the learned counsel for the Respondent Sri. S. Sriranga has submitted that Petitioner No.1- Green Infra is not a SPV as defined under the Rule-3 which specifies that an SPV is created for operating and maintaining a generating station and with no other business or activity, owing to the fact that the main Objects to be pursued by the company on its Incorporation are as follows:

> "*1. To carry on in India and elsewhere either on its own or in alliance with any other Persons, Body/Bodies Corporate incorporated in India or abroad either under strategic alliance or joint venture or any other arrangement the business to set up, install, lay, design, draw, commission, develop, operate, service, maintain, buy, sell, purchase take or give on rent, hire, enter into, undertake turnkey projects of wind Power Generation Plants, Wind Farms, Wind Mills, wind turbines, Wind Energy Equipment, related equipments, tools and accessories including Wind Turbines,*

Hydro Turbines, Thermal Turbines, Solar Modules and Solar panels.

2. To carry out on in India and elsewhere either on its own or in alliance with any other Persons, Body/Bodies Corporate incorporated in India or abroad either under strategic alliance or Joint Venture or any other arrangement the business of developing on its own, as well providing development and management services for wind power plants which may inter-alia include wind resource assessment, wind speed monitoring and data analysis, simulated studies on wind power potential, feasibility studies, land acquisition either through purchase or lease, preparing techno economic evaluations, getting necessary government approvals, acquire on its own or arranging finances through financial institutions and investors, undertaking engineering-procurement-construction contracts for such projects, entering into arrangement for sale of electricity generated, operations and maintenance of wind power plant, trading and manufacturing of wind energy equipment as well as development of new designs/configurations and components for wind energy plants or to undertake turnkey projects for manufacturing, installing, laying, commissioning of wind energy plants and Equipment relating to wind power plants xxxxxxxxxxxxxx"

xxvi) The Counsel for Respondent contended that it is evident from the 'Object of Incorporation' of Green Infra that it has not been established only to commission, operate and maintain wind power generation projects for supplying electricity to its captive consumers.

It can also carry out other businesses like to set up, install, lay, design, draw, commission, develop, operate, service, maintain, buy, sell, purchase take or give on rent, hire, enter into, undertake turnkey projects of wind Power Generation Plants, Wind Farms, Wind Mills, wind turbines, Wind Energy Equipment, related equipments, tools and accessories, providing development and management services for wind power plants which may inter-alia include wind resource assessment, wind speed monitoring and data analysis, simulated studies on wind power potential, feasibility studies, etc., as specified under the 'Objects of Incorporation'. Thus, according to the Explanation (1)(d) under Rule 3(2) of the Electricity Rules 2005 where, SPV is defined as 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, Green Infra cannot be treated as a SPV.

xxvii) Senior Learned Counsel for the Petitioners, Sri. Sanjay Sen, submitted that, the broad business objectives as stated under 'Objects of Incorporation' does not hold any ground as it can be modified with majority consensus of the board of directors and as of now the Petitioner is operating and maintaining the CGP as a SPV.

xxviii) Thus, in order to determine whether Petitioner No.1- Green Infra is an AOP or SPV, the Commission has relied upon the Explanation (1)(d) of the Rule 3(2) of Electricity Rules 2005 which specifies the definition of

SPV and Order of the Hon'ble ATE dated 7th June, 2021 in the matter, where the Hon'ble ATE has stated that SPV is a 'company' and an AOP is an unincorporated entity and once an Association of Persons is incorporated, it becomes a 'company'. The recent judgement of the Hon'ble ATE dated 07.06.2021 is enunciated as below:

> *"12.5 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."*

xxix) We note that the Petitioner no. 1 'Green Infra Wind Power Generation Limited' is a company incorporated and registered with Registrar of Companies having CIN: U40108DL2011PLC221871. Further, on perusal

of Form No. MGT 9 'Extract of Annual Returns of financial year ending on 31.03.2018' furnished by the Petitioner No-1, the Commission has noted that the 100% of the total turnover of the company for FY2017-18 is from 'Generation of electricity by setting up and operation of wind power projects'. Since the Harapanahalli project does not have any PPA with any ESCOM nor it is selling power to any third party, it can be inferred that the revenue generated by Green Infra during FY2017-18 is solely from the selling the power to its captive consumers.

xxx) Thus, even though the respondent has contended that Green Infra cannot be considered as a SPV owing to the fact that Green Infra in its 'Object of Incorporation' has stated that it can also carry out other businesses as mentioned above, the Commission is of the considered view that the Petitioner No. 1-Green Infra Wind Power Generation Limited is a SPV as it has not undertaken any business other than selling of power to its consumers during FY2017-18 and relying on the Order of the Hon'ble ATE dated 07.06.2021 in the matter, the requirement of consuming minimum of 51% electricity generated on an annual basis in proportion to the shares of ownership of the power plant cannot be applied to power plants set-up as a SPV. Thus, 'the contention of the Respondent that as the consumers have consumed more than the proportion to their shares in ownership, the consumers of the Harapanahalli generating plant have failed to meet the requirement

set out in Rule 3(b) of the Electricity Rules, 2005 and as such they cannot be considered as captive users', is not correct. Accordingly, the other contention of the respondent that as the Petitioner No. 1 has wheeled energy without considering the proportionality principle laid in Rule 3 of the Electricity Rules 2005, it cannot be considered to be captive Generator is also not correct.

xxxi) Further, on a perusal of the data with regards to energy wheeled during FY 2017-18, as submitted by the Respondent, the Commission notes that all the consumers (except Sri. Anjaneya Agrotech Pvt. Ltd. and Wadhawan Holdings Pvt. Ltd.) have consumed energy in excess when compared to the proportion to the shares of ownership in the power plant. The Petitioner, in its Petition, has submitted that the facts submitted by the Respondent clearly shows that even due to non-consumption of the power by the captive consumers namely (Sri. Anjaneya Agrotech Pvt. Ltd. and Wadhawan Holdings Pvt. Ltd.) the energy consumption by the other captive users is approx. 99% who own and control 35% of the equity shares-holding in the Harapanahalli CGP during FY2017-18. Since, the said contention/facts were not contested by either of the parties, they are being considered as admitted facts.

xxxii) In view of the above facts, we conclude that the Petitioner no. 1 has installed the generating unit in accordance with Section 2(8) of the Electricity Act, 2003 and both generating plant and its captive

consumers satisfy the criteria specified under Rule 3 of the Electricity Rules, 2005 with respect of minimum share-holding pattern and consumption pattern, considering the fact that the energy generated by the Harapanahalli generating plant was solely consumed by its consumers and the Harapanahalli generating plant does not have PPA with any ESCOM, the Commission is of the considered opinion that the Petitioner No. 1 along with its consumers is captive generator and captive consumers respectively for FY2017-18. It may further be noted that in accordance with the decision of the Hon'ble ATE in its recent Order dated 07.06.2021, 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. The relevant para of the said Judgement of the Hon'ble ATE is extracted below:

> *"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."*

xxxiii) Thus, for the reasons stated above, we set aside the impugned demands notices issued by the Respondent as prayed in this Petition.

xxxiv) For the reasons stated above, we hold issue No. 1 in affirmative and issue No. 2 in negative.

9. Issue No.3: What Order?

For the above reasons, we pass the following:

O R D E R

The Petitions are partly allowed holding that:

a) Harapanahalli power project of Green Infra Wind Power Generation Limited, along with their consumers (except Sri. Anjaneya Agrotech Pvt. Ltd. and Wadhawan Holdings Pvt. Ltd.) are captive generators/consumers for FY2017-18.

b) The demand notices dated 17.07.2018 (Annexure P-14), 15.09.2018 (Annexure P-16) (to the extent of captive consumers of Petitioner No. 1), 20.09.2018 (Annexure P-19) and 22.10.2018 (Annexure P-22) and the impugned invoice dated 01.11.2018 (Annexure P-24), issued by the Respondent in are set aside.

c) The amount received towards Cross-Subsidy Surcharge, Additional Surcharge and the differential electricity tax by the Respondent from Petitioners, in accordance with Interim Order of the Commission dated 18.12.2018, shall be refunded within three months from the date of this Order.

d) All pending I.As also doesn't survive for consideration, accordingly they stands disposed of.

e) All other reliefs sought for are rejected.

Sd/-	**Sd/-**	**Sd/-**
(SHAMBHU DAYAL MEENA) Chairman	(H.M. MANJUNATHA) Member	(M.D. RAVI) Member