

No. N/280/2018

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**  
**No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.**

**Dated: 02.05.2023**

**Present**

<b>Shri P. Ravi Kumar</b>	<b>.. Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>.. Member (Legal)</b>
<b>Shri M.D. Ravi</b>	<b>.. Member</b>

**OP No.120/2018**

**BETWEEN:**

**M/s. Clean Wind Power (Manvi) Private Ltd.**

202, Third Floor, Okhla Industrial Area, New Delhi

Represented by Sri. Avijeeth Lala, Sri. K.N. Chowdary,

Advocates for Neeti Niyaman Advocates, New Delhi]

**... PETITIONER**

**AND**

1) **Chamundeshwari Electricity Supply Corporation Limited,**

Commercial Section No. 29,

Vijayanagara 2nd Stage, Hinkal.

Mysore-570017.

**... CONTESTING RESPONDENT**

2) **Bangalore Electricity Supply Company**

BESCOM K.R. Circle

Bangalore-560001.

**... CONTESTING RESPONDENT**

3) **Mangalore Electricity Supply Company**

MESCOM Bhavan, Kavour Cross Road, Bejai,

Mangaluru, Karnataka 575004.

**... CONTESTING RESPONDENT**

[R-1 to R-3 represented by Sri. Shahbaaz Husain,

Ms. Stephania Pinto, Advocates for Precinct Legal)

- 4) **M/s Rane (Madras) Limited,**  
Maithri, 132,  
Cathedral Road,  
Chennai-600. **... PROFORMA RESPONDENT**
- 5) **M/s DM South Hospitality Limited**  
Indiranagar extension,  
Nazarabad Mohalla,  
M.G Road, Mysore-570010. **.... PROFORMA RESPONDENT**
- 6) **M/s Klene Paks Limited**  
PB No.7611, 7<sup>th</sup> Mile,  
Arekere Gate, Bannerghata Road,  
Bangalore-560076. **... PROFORMA RESPONDENT**  
(Notice served on R-4 to R-6, no representation)

### **ORDER ON REMAND**

1. The Hon'ble APTEL vide its Order dated 27.09.2022 in Appeal No. 342 of 2021, had partially set aside the Karnataka Electricity Regulatory Commission's (KEREC) Order dated 11.10.2021 in OP No.120 of 2018, with the following conclusions:

*"8. In the above facts and circumstances, the view taken by KEREC that a generating plant "should be established as a captive generating plant" so as to be entitled to relief in terms of section 2(8) and section 9 of Electricity Act, 2003 as indeed Rule 3 of the Electricity Rules 2005, is incorrect.*

*9. In the above view, there is no requirement for ascertaining the shareholding pattern of the entity claiming to be captive user at the time of establishment of the generating unit. The requisite material for purposes of FY 2017-18, in which respect the declaration was sought, has already been submitted by the appellant before the Commission. It is bounden duty of the*

*Commission to consider the same and apply the law as declared by this tribunal in the aforementioned decisions. We order accordingly."*

2. The Hon'ble ATE in its Order has stated that, the findings of the Commission in its Order dated 11.10.2021 in OP No.120 of 2018, with regards to establishing the equity shareholding pattern of the captive users by Petitioner at the time of setting up of the generating unit for ascertaining that the generating unit was set up as a captive generating unit under Section 2(8) of the Electricity Act, 2003, was not correct for determining the captive status for FY2017-18 for which the Petitioner had requested declaration of captive status. Accordingly, the matter was remitted to the Commission for afresh decision.
3. After the matter was remanded, the parties were issued notice, the parties appeared and made their submissions.
  - a. The respondent No. 2 on 08.11.2022, has submitted that the judgement passed by the Hon'ble APTEL in Appeal No. 342/2021 and the judgements relied upon therein are 'per incuriam' to the judgement of the Hon'ble Supreme Court dated 12.05.2022 in Civil Appeal No. 2578-2579 of 2008 in Chhattisgarh State Power Distribution Company Limited Vs. Chhattisgarh State Electricity Regulatory Commission and Another, whereby the Hon'ble Supreme Court had categorically held that a captive generation plant must be one which is established for the personal use of the captive generator. The relevant extract of the judgement is produced hereunder:

“16. It is thus clear that a person, to get benefit under Section 9 of the said Act, could be an individual or a body corporate or association or body of individuals, whether incorporated or not. It could thus be seen that even an association of corporate bodies can establish a captive power plant. The only requirement would be that the said plant must be established primarily for their own use. The fourth proviso to sub-section (2) of Section 42 of the said Act would also reveal that surcharge would 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.”

Thus, in order to be classified as a captive generating plant, a plant should be set up by such persons, primarily for their own use or for their members. When a plant is not set up or established primarily for its own use or of its members, but for the sale of electricity to third parties, such generating plant cannot be treated as 'Captive generating plant'. Thus, the view taken by the Hon'ble Supreme Court mentioned above, shall be binding and ought to be followed by the Hon'ble APTEL as per Article 141 of the Constitution which fortifies the Doctrine of Precedents and lays down the general principle that the judgement declared by the Hon'ble Supreme Court are laws which are binding on all the courts and each individual including the one who is not a party to an order. Wherefore, the Hon'ble APTEL ought to have passed Order in accordance with the decision and observation of the Hon'ble Supreme Court in the above cited judgement dated 12.05.2022. Thus, the judgement of the Hon'ble APTEL in Appeal No. 342/2021 is per

incuriam and hence cannot operate as a precedent and is not binding on the KERC.

Further, the Petitioner was incorporated on 14.04.2014 to carry on the business of generating, accumulating, distributing and supply energy from non-conventional and renewable sources of energy or connected with any other form of energy and to generate, buy and sell, supply and exchange distribute, deal in and share the energy to Government, Companies, industrial units, State Electricity boards for its own use or distribution or otherwise to other types of consumers of energy. Subsequently, the Petitioner only in order to avail the benefits given to a captive generating plant, vide passing a special resolution on 01.04.2019, altered its Memorandum of Association to enable it to only to generate, and distribute electricity for its own consumption and of its shareholders. Thus, when the generating plant was established as commercial generation plant, it cannot be classified as a captive generating plant. Thus, satisfying twin criteria stipulated under Rule 3 of the Electricity Rules, 2005 would not be applicable when the plant itself does not satisfy the condition of being a Captive generating plant set up at its initium as a captive generating plant.

It is further submitted that the dispute in the case of Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission and others in Appeal no. 131 of 2020, involves challenging of various circulars issued by Tamil Nadu Generation and Distribution Corporation

(TANGEDCO) by various 'Captive Users' and 'Captive generators' and subsequent order of the TNERC issuing various directions for verification of status of captive generating plants by TANGEDCO where the concerned parties have established and operating as captive generators/users, unlike the Petitioner in the present case. Further, Appeal no. 131 of 2020 did not deal with the precondition of a plant to be classified as a captive generating plant under Section 9 read with Section 2(8) of the Act.

- b. The Petitioner on affidavit dated 08.12.2022 has submitted its denial and disputed all the allegations/averments made by the respondents. The Petitioner reiterated and adopted all its contentions that has been stated by it in the Petition filed before the Commission. It is submitted that the present matter has been remitted back by the Hon'ble APTEL to the KERC to adjudicate upon the limited issue w.r.t. the relief of declaration claimed by the Petitioner for FY2017-18 and to determine whether the Petitioner fulfils the twin criteria provided under Rule 3, 2005 and hence, qualifies as a captive generating plant for FY2017-18. Hon'ble APTEL in its judgement dated 27.09.2022, has also observed that the "requisite material for purposes of FY 2017-18, in which respect the declaration was sought has already been submitted" by the Petitioner before this Commission and hence "it is bounden duty of the Commission to consider the same and apply the law as declared by this tribunal in the aforementioned decision." Hence, the scope of

adjudication of this present matter is narrow and the Commission is duty bound to do no more than apply the law as is, to determine whether the Petitioner is qualified as a captive generating plant in FY2017-18, while considering the relevant documents that have already been placed on records by the parties. However, the Petitioner also submitted that the Respondent vide its Statement of Objection has in effect, assailed the Hon'ble APTEL's Order dated 27.09.2022 and is exhorting the Commission to ignore the same which cannot be countenanced in law. The Respondent no. 2 cannot assail the order of Hon'ble APTEL before this Commission. The Petitioner submitted that the facts in the Hon'ble Supreme Court case are clearly distinguishable to the facts in hand. As the issue before the Hon'ble Supreme Court was for determination whether the open Access for transmitting electricity from Shri. Bajrang Power and Ispat Ltd. to its sister concern through transmission system of Chhattisgarh State Power Distribution Company Ltd. (CSPDCL), would be for own use or not. Thus, the decision of the Hon'ble Supreme Court is not relevant and has no bearing on the determination of captive status for which the limited remand has been made by the Hon'ble APTEL.

4. Accordingly, we have heard the learned counsels 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 has proved that it is a captive plant for 2017-18?

**Issue No. (2):** Whether the impugned notices are sustainable?

We have already dealt with this issue holding that the impugned notices are not in accordance with the law and they are liable to be set aside. This finding is not set aside by the Hon'ble ATE.

**Issue No. (3):** What Order?

5. **Issue No. (1):** Whether the petitioner has proved that it is a captive plant for 2017-18?

i. Brief facts of the case are as follows:

- a. The Petitioner in its Original Petition filed before the Commission had sought declaration as a captive generating plant for FY2017-18, challenging the unlawful actions of the Respondent No.1 of imposing Cross Subsidy Surcharge ("CSS") on some of the captive users of the Petitioner's captive generating plant. The Petitioner submitted that it is a Special Purpose Vehicle ("SPV") of Hero Wind Energy Private Limited and is a registered company under the provisions of the Companies Act, 2013. The Petitioner owns, operates and manages a 50MW Wind Power Plant located at Topaladoddi, Hussainpur and Hira Village in Manvi Taluk and Hosur & Anwari Villages in Lingasur Taluk, Raichur District in Karnataka.
- b. Respondent No.1, Respondent No.2, Respondent No.3 are power distribution companies formed under the Companies Act, 1956.



Respondent No.4, Respondent No.5 and Respondent No.6 are captive users of the captive generating plant of the Petitioner.

- c. The Petitioner has twelve (12) shareholders out of which eleven (11) shareholders are captive users who consume 100% of the electricity generated from the WPP. The one remaining shareholder is Hero Wind Energy Private Limited.
- d. The Petitioner contended that under the Act and the Electricity Rules, 2005 ('Rules'), the captive status of a power plant has to be determined annually at the end of the financial year considering the quantum of generation and supply of electricity. The Petitioner has claimed that it has fulfilled the qualifying requirements of captive generating plant as prescribed under the Electricity Rules, 2005 for FY 2017-18. Accordingly, the Petitioner submitted that all the electricity supplied from WPP to its captive users during FY2017-18 shall be exempted from payment of Cross-Subsidy Surcharge (CSS) in accordance with second proviso to Section 42(2) of the Act. The Petitioner also contended that Rule 3 of the Electricity Rules, 2005, sets out different legal dispensation for the Captive Generating Plant (CGP) being set up by different legal entities. The 2nd proviso sets out the requirements for CGP set up by an 'association of persons' wherein it is specified that in case a CGP is being set up by association of persons, the captive user(s) shall hold not less than twenty-six percent of the ownership of the plant in aggregate and 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 (Rule of Proportionality (RoP)). Since, the Hon'ble Appellate Tribunal of Electricity (ATE) in various orders, has observed that a company formed as a SPV is nothing more than an "association of persons". Thus, the Petitioner being a SPV, is bound to comply with the RoP for qualifying as a CGP. Based on the equity shareholding and consumption by various captive users of the CPP, and upon applying the principles prescribed in Rule 3 of the Electricity Rules, following is discernible:

Sl. No	Name of the Shareholder	No. of Class A- Equity Shares of Rs.10/- each		Inter-se proportion in ownership	Gross generation of the WPP (after wheeling and banking charges)	51% of the gross generation (after wheeling and banking charges)	Actual Consumption	Permissible Range for shareholding pattern of 51% consumption criterion		
		As per share certificates as on 31.03.2018	% of shares in Ownership					With variation		
								0%	-10%	+10%
								Units	Units	Units
a	B	c								
1	M/s Sri. Krishna Spinning & Pvt Ltd.	1,50,000	3.54%	10.76%	9,97,40,724	5,08,67,769	1,14,75,000	54,73,372	49,26,035	60,20,709
2	M/s Regalia build Tech & Services Private Limited	78,000	1.84%	5.59%			52,15,000	28,43,508	25,59,157	31,27,859
3	M/s DM South India Hospitality Private Limited	52,800	1.25%	3.79%			39,70,000	19,27,888	17,35,100	21,20,677
4	M/s. Techno Rings	60,000	1.42%	4.32%			46,75,000	21,97,488	19,77,739	24,17,236
5	M/s. Manipal Technologies Limited Unit-5	1,68,000	3.97%	12.07%			1,20,80,000	61,39,740	55,25,766	67,53,714
6	M/s Bill Forge Private Limited	4,20,000	9.92%	30.15%			2,96,50,000	1,53,36,632	1,38,02,969	1,68,70,296

7	M/s. Rane Engine Valve Limited	43,200	1.02%	3.10%			33,00,000	15,76,901	14,19,211	17,34,591
8	M/s Rane (Madras) Limited	60,000	1.42%	4.32%			43,50,000	21,97,488	19,77,739	24,17,236
9	M/s Klene Paks Limited	3,00,000	7.09%	21.55%			2,10,00,000	1,09,62,004	98,65,804	1,20,58,205
10	M/s Elixir Enterprises	48,000	1.13%	3.43%			31,81,000	17,44,764	15,70,288	19,19,241
11	M/s Hyagreeva Hotels	12,600	0.30%	0.91%			8,60,000	4,62,897	4,16,607	5,09,186
		13,92,600	32.90%	100%	9,97,40,724	5,08,67,769	9,97,56,000	NA	NA	NA

e. Accordingly, for FY 2017-18, the Petitioner submitted that the total generation from the WPP is 9,97,40,724 Units and the total Consumption by the captive users is 9,97,56,000 Units. Thus, the captive users have consumed 100% of the energy generated during FY2017-18. The Petitioner also submitted a shareholding certificate certified by a Chartered Accountant certifying 32.90% shareholding of the captive users in the Petitioner's generating plant.

f. The Petitioner has submitted that Hon'ble APTEL 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, whilst applying Rule of Proportionality, had held that the status of CGP has to be determined only on 51% of the annual generation of a power plant rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CGP owners themselves. Thus, the CGP status has to be determined only on 51% of the annual generation of a power plant.

- g. The Petitioner submitted that it has also complied with the twin requirement under the Electricity Rules, 2005 i.e., ownership criteria and the consumption criteria. Also, the Petitioner has complied with the Rule of Proportionality and consumed the electricity within the permissible range. Accordingly, the Petitioner has fulfilled all the requirements of a captive generating plant during FY2017-18 and shall be exempted from payment of Cross Subsidy Surcharge (CSS). However, the Respondent No. 1 overlooking all the facts, issued Demand notices to Respondent 4, 5 and 6 for paying CSS for FY2017-18 stating that the Petitioner was not in compliance with the Electricity Rules, 2005 and the entire energy generated by the Wind Power Project shall be treated as if it is supplied by a non-captive generating company. Respondent-1 issued demand notices on 06.07.2018, 25.09.2018 and a revised demand notice on 23.11.2018 and a letter dated 11.12.2018 providing clarification for levy of the CSS.
- h. The Petitioner contended that Respondent No.1 has clearly overlooked the fact that each fiscal year has to be assessed separately for the purposes of verification of captive status in terms of the requirements as stipulated under Rule 3 of the Electricity Rules, 2005 and the assessment has to be done at the end of each financial year.
- i. Upon issuance of the notice, the Respondents appeared through their Counsel and submitted that the Petitioner has failed to meet

the criteria set out in the Electricity Act, 2003 and Electricity Rules, 2005. The main contention of the Respondent (apart from other contentions which were dealt issue-wise in the impugned Order dated 11.10.2021 in O.P. No. 120 of 2018) was that the consumers of the Petitioner were not consuming energy in proportion to their share-holding in the Petitioner's company as required under the Rule 3 of the Electricity Rules, 2005. For example, consumer M/s DM South Hospitality Pvt. Ltd. has a share-holding of 1.7% and therefore was required to consume energy between 5.20% and 6.35% of the energy wheeled to Group consumers by the Petitioner. However, it consumed only 3.98% during FY2017-18 (Annexure R-2). As per Rule 3 (2) of the Electricity Rules 2005, even if one of the consumers is not consuming energy in proportion 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. Therefore, Respondent No.1 vide letters dated 06.07.2018 (Annexure-1 colly.) directed the Respondent No.4, Respondent No.5 and Respondent No.6 to pay cross subsidy surcharge and electricity tax.

- j. After hearing the parties, the Commission issued the impugned Order on 11.10.2021 observing that no material evidence was submitted by the Petitioner illustrating the equity shareholding pattern of the captive users at the time of setting up of the generating unit for ascertaining that the generating unit was set

up as a captive generating unit under Section 2(8) of the Electricity Act, 2003. Thus, due to lack of material evidence, the Commission in its impugned Order was unable to ascertain the shareholding pattern of the captive users at the time of establishment of the generating unit. Thus, the Commission could not ascertain as to whether the generating plant was established as a captive generating plant under Section 2(8) read with Section 9 of the Electricity Act, 2003 in order to declare the generating plant as a captive generating unit for FY2017-18. Thus, in the absence of the above facts, the prayer of the Petitioner for declaration of the captive status of its generating plant for FY2017-18 was dismissed by this Commission.

- k. However, the same was challenged by the Petitioner before the Hon'ble APTEL in Appeal No. 342 of 2021. The Hon'ble APTEL vide its Order dated 27.09.2022, had partially set aside the KERC's Order dated 11.10.2021 in OP No.120 of 2018, observing that the view taken by KERC, that a generating plant "should be established as a captive generating plant" so as to be entitled to relief in terms of section 2(8) and section 9 of Electricity Act, 2003 as indeed Rule 3 of the Electricity Rules 2005, is incorrect and there is no requirement for ascertaining the shareholding pattern of the entity claiming to be captive user at the time of establishment of the generating unit. The Hon'ble APTEL ordered that the requisite material for purposes of FY 2017-18, in which respect the

declaration was sought, has already been submitted by the appellant before the Commission. Thus, it is bounden duty of the Commission to consider the same and apply the law as declared by this tribunal in the aforementioned decisions.

- I. Thus, the impugned Order was set aside to the above extent and the matter was remanded back to the Commission for afresh decision regarding grant of relief as claimed by the Appellant for FY 2017-18.
- ii. Accordingly, the parties were served notice and following submissions were made:
- iii. **a.** The Commission notes that the Respondent in its statement of objections has contended that the Order issued by the Hon'ble APTEL is per incuriam' owing to the fact that Hon'ble Supreme Court in its Order dated 12.05.2022 in Civil Appeal No. 2578-2579 of 2008 in Chhattisgarh State Power Distribution Company Limited Vs. Chhattisgarh State Electricity Regulatory Commission and Another, whereby the Hon'ble Supreme Court had categorically held that a captive generation plant must be one which is established for the personal use of the captive generator. Further, the Respondent has submitted that the view taken by the Hon'ble Supreme Court mentioned above, shall be binding and ought to be followed by the Hon'ble APTEL as per Article 141 of the Constitution which fortifies the Doctrine of Precedents and lays down the general principle that the judgements declared by the Hon'ble Supreme Court are laws which

are binding on all the courts and each individual including the one who is not a party to an order. Thus, the judgement of the Hon'ble APTEL in Appeal No. 342/2021 is per incuriam and hence cannot operate as a precedent and is not binding on the KERC. However, the Commission, from the cause title of Appeal no. 342 of 2021, infers that the present respondents had appeared before the Hon'ble ATE. Therefore, the order dated 27.09.2022 passed by the Hon'ble ATE is binding on them. In the event that the Order dated 27.09.2022 in Appeal no. 342 of 2021 was passed in ignorance of the judgement dated 12.05.2022 of the Hon'ble Supreme Court, the respondents should have filed a review Petition before the Hon'ble APTEL for review of the Order dated 27.09.2022, or they could have preferred Appeal before the Hon'ble Supreme Court. In the absence of these steps, the Commission is of the considered view that, the respondents could not take the contention that the Hon'ble ATE has passed the Order dated 27.09.2022 in Appeal No. 342 of 2021 in ignorance of the above referred Order of the Hon'ble Supreme Court. Further, this Commission holds 'Ratio Decidendi' that a party to a judgement is bound by the judgement and order, unless it is corrected or set aside as provided under law, though such judgement and order is wrong or contrary to law.

- b.** The Commission notes that the Hon'ble ATE by its Order dated 27.09.2022, has set aside the view taken by this Commission that a generator claiming captive status for any subsequent year should prove that it had established the plant as a captive plant at the time of



commissioning of the plant and holding that the Commission is required to verify the captive status of the generating plant with reference to the year for which the generator claims captive status. In this regard, the Hon'ble ATE has relied mainly on the decision of Prism Cement Limited versus Madhya Pradesh Electricity Regulatory Commission (decision dated 17.05.2019, passed in Appeal No. 2 of 2018) and also the earlier judgements of Kadodara Power Private Limited and Others versus Gujarat Electricity Regulatory Commission and Ors., 2009 ELR (APTEL) 1037 and Tamil Nadu Power Producers Association vs. Tamil Nadu Electricity Regulatory Commission & Ors. in Appeal No. 131 of 2020 (judgement dated 07.06.2021 passed in Appeal No. 131 of 2020). Therefore, we proceed, to decide this case in the light of the directions given in the above judgements.

- c.** 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 wherein it is stated 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."

Thus, relying on the abovementioned Order of the Hon'ble ATE, we have considered the shareholding pattern of the Petitioners as on 31<sup>st</sup> March, 2018 for determination of captive status of the Petitioners and according to the share-holding pattern existing as on 31.03.2018, the captive consumers held 32.90% of the equity shares.

- d. The Commission also notes that the company is an SPV of Hero Wind Energy Private Limited and is a company registered on 14.07.2014 under the provisions of the Companies Act, 2013. Thus, with regards to applicability of proportionality criteria to Companies (SPVs), the Hon'ble APTEL in its judgement 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 stated the following:

*“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.*

....

*12.16 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."

Thus, placing reliance on the judgement of the Hon'ble APTEL in Tamil Nadu Power Producers Association Versus Tamil Nadu Electricity Regulatory Commission and Others, it can be concluded that companies which are operating as SPVs cannot be equated to AoPs and the proportionality cannot be made applicable on SPVs. Thus, the proportionality criteria cannot be made applicable in case a company is functioning as a SPV i.e., 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. As such, an SPV needs to fulfil only the twin criteria provided under Rule 3 of the Electricity rules, 2005 w.r.t. share-holding pattern and minimum consumption for declaration of captive status.

- e. Thus, on perusal of the facts submitted by the Petitioner and also the demand notices served by the Respondent, the Commission holds that the consumer of the Petitioner satisfies the twin conditions w.r.t. share-holding pattern and minimum consumption by holding 32.90% of the equity shares and by consuming 100% of the total energy generated by Petitioner. Accordingly, the Commission declares that the Petitioner qualifies as a Captive Generating plant for FY 2017-18;

6. Issue No. (2): Whether the impugned notices are sustainable?

We have already dealt with this issue holding that the impugned notices are not in accordance with the law and they are liable to be set aside. This finding is not set aside by the Hon'ble ATE.

7. Issue No. (3): What Order?

**ORDER**

The Petition is allowed holding that:

- a. It is declared that Petitioner qualifies as a Captive Generating plant for FY 2017-18;
- b. The remaining reliefs already granted as per order dated 11.10.2021 holds good.

sd/-  
(P. RAVI KUMAR)  
Chairman

sd/-  
(H.M. MANJUNATHA)  
Member (Legal)

sd/-  
(M.D. RAVI)  
Member