

No.N/280/2018

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

Dated: 11.10.2021

Present

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

OP No.120 of 2018

BETWEEN:

M/s. Clean Wind Power (Manvi) Private Ltd.,
202, Third Floor, Okhla Industrial Area,
New Delhi.

... PETITIONER

[Represented by Senior Counsel Shri. M.G. Ramachandran
on behalf of Neeti Niyaman Advocates, New Delhi]

AND

1) Chamundeshwari Electricity Supply
Corporation Limited,
Commercial Section No. 29,
Vijayanagara 2nd Stage, Hinkal.
Mysore-570 017.
(Through its Managing Director)

... CONTESTING RESPONDENT

2) Bangalore Electricity Supply Company,
BESCOM, K.R. Circle
Bangalore-560 001.

... CONTESTING RESPONDENT

3) Mangalore Electricity Supply Company,
MESCOM Bhavan, Kavoor Cross Road, Bejai,
Mangaluru, Karnataka 575 004.

...CONTESTING RESPONDENT

[All the contesting Respondents are
represented by Sri. Sriranga and
Ms. Medha M. Puranik for
M/s JUSTLAW Advocates, Bengaluru]

4) M/s Rane (Madras) Limited,
Maithri, 132,
Cathedral Road,
Chennai-600 086.

...PROFORMA RESPONDENTS

5) M/s DM South Hospitality Limited,
Indiranagar extension,
Nazarabad Mohalla,
M.G Road, Mysore-570 010.

...PROFORMA RESPONDENTS

6) M/s Klene Paks Limited,
PB No.7611, 7th Mile,
Arekere Gate, Bannerghata Road,
Bangalore-560 076.

...PROFORMA RESPONDENTS

ORDERS

1. The present Petition is filed by the Petitioner under Sections 42(2), 86(1)(f), 86(1)(k) and other applicable provisions of the Electricity Act, 2003, for seeking the following reliefs to:

- a) Declare that Petitioner qualifies as a Captive Generating plant for FY 2017-18;
- b) Declare that the Respondent No.4, Respondent No.5 and Respondent No.6 / Captive Users have complied with the requirements as stipulated under Electricity Rules for their captive consumption for FY2017-18 from Petitioner's WPP.
- c) Quash the Disputed Notices issued by the Respondent No.1 wherein CSS for FY2017-18 has been imposed on Respondent No.4, Respondent No.5 and Respondent No.6/ Captive Users of the Petitioner.
- d) Condone any inadvertent omissions/errors/ shortcomings and permit the Petitioner to add/change/modify/alter this filing and make further submissions as may be required at a future date;
- e) Pass such other order(s) as the Commission may deem fit and proper in the facts and circumstances of the case.

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

- i) The Petitioner has sought declaration of the Petitioner as a captive generating plant during FY2017-18 and 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.
- ii) The Petitioner is a registered company under the provisions of the Companies Act, 2013 and owns, operates and manages a 50MW Wind Power Plant in Karnataka.
- iii) Respondent No.1, Respondent No.2, Respondent No.3 are power distribution company formed under the Companies Act, 1956.
- iv) Respondent No.4, Respondent No.5 and Respondent No.6 are captive users of the captive generating plant of the Petitioner.
- v) The Petitioner is a Special Purpose Vehicle ("SPV") of Hero Wind Energy Private Limited which owns and operate a 50 MW Wind Power Plant ("WPP") located at Topaladoddi, Hussainpur and Hira Village in Manvi Taluk and Hosur & Anwari Villages in Lingasur Taluk, Raichur District, Karnataka.
- vi) 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.

- vii) Under 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 after considering the particulars of the generation and supply of electricity.
- viii) As per Rule 3 of the Electricity Rules, there is different legal dispensation for the Captive Generating Plant being set up by different legal entities. 1st proviso to Rule 3 sets out the requirements to be fulfilled by the CGP set up by a co-operative society and the 2nd proviso sets out the requirements for CGP set up by an 'association of persons'. In case the 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 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. The Hon'ble Appellate Tribunal of Electricity (ATE) under its various orders, has observed that a company formed as an SPV is nothing more than an association of persons'. Considering that the Petitioner is a SPV, it is bound to comply with the RPO for qualifying as a CGP. Based on the equity shareholding and consumption by various captive users of the WPP and upon applying the principles prescribed in Rule 3 of the Electricity Rules, following is discernible:

Sl. No.	Name of the Share holder	No. of Class A- Equity Shares of Rs.10/- each		Inter-se proportion in owner ship	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 Owner ship					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

ix) From the above shareholding of the Petitioner with regards to its captive users as on 31.03.2018 and the consumption of electricity by them, the following can be discerned:

- a) Total generation from the WPP in FY 2017-18: 9,97,40,724 Units
 - b) Total Consumption by the captive users-9,97,56,000 Units
 - c) % of consumption by the captive users for FY2017-18- 100%
 - d) % shareholding of the captive users in the Petitioner-32.90%
- x) In light of the Order of the Hon'ble ATE 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, the status of CGP whilst applying Rule of Proportionality has to be determined only on 51% of the annual generation of a power plant.
- xi) In FY 2017-18, the Petitioner has fulfilled the qualifying requirements of captive generating plant as prescribed under the Electricity Rules, 2005. Accordingly, all the electricity supplied from WPP to its captive users during FY 2017-18 shall be exempted from payment of Cross-Subsidy Surcharge (CSS) in accordance with second proviso to Section 42 (2) of the Act.
- xii) It is submitted that Respondent No.4 Respondent No.5 and Respondent No.6 are captive users of the WPP and they wheel power from WPP through open access on Respondent No.1's distribution network. The Respondent No. 1 on 06.07.2018 issued Demand notices to captive users for paying CSS for FY2017-18 purportedly stating to have carried out verification exercise on the Petitioner and have observed that the Petitioner was not in compliance with the Electricity

Rules, 2005 and the entire energy generated by the WPP shall be treated as if it is supplied by a non-captive generating company. Accordingly, Respondent-1 issued demand notices to Respondent 4, 5 and 6.

- xiii) The Petitioner vide its letter dated 18.07.2018 (Annexure -2 colly.) and 31.08.2018 had clarified Respondent-1 that it has been sincerely maintaining the norms so as to qualify as a captive generating plant as required under the Electricity Rules. The Petitioner also submitted the relevant documents to the Respondent No.1 which showed that the consumption of the captive users was in proportion to the shareholding pattern for FY2017-18 and was within the permissible variation range of $\pm 10\%$ as prescribed under the Electricity Rules, 2005.
- xiv) On 18.09.2018 (Annexure-3), the Commission issued a letter to all the Distribution Companies wherein the Commission had directed the Distribution Companies to monitor the status of group captive generators/consumers and ensure that the group captive generators and consumers are fulfilling requirement of the Electricity Rules. The Petitioner has submitted that the Respondent No. 1 issued a letter dated 11.12.2018 (Annexure-7) to the captive users providing clarification for levy of Cross-Subsidy Surcharge on captive consumption for FY2017-18. Thus, the Petitioner has submitted that it has complied with the twin requirement under the Electricity Rules i.e., Ownership Criteria and the Consumption Criteria. Further, the

Petitioner has also complied with Rules of Proportionality and consumed the electricity within the permissible range of +/- 10%. The Petitioner has demonstrated its compliance with the Rule 3 of the Electricity Rules for the purpose of calculating the captive status of its plant and of its captive users for FY 2017-18.

xv) The Petitioner has contended that only the appropriate State Commission has the jurisdiction to determine captive status of a plant and thereafter levy of surcharge if applicable. Therefore, the Respondent No.1 had no authority to unilaterally levy CSS on its assumption of the Petitioner and Captive Users not complying with the permissible variation as provided under Electricity Rules.

xvi) Further, the 1st and 2nd Demand Notices, Revised Notice and the Letter (hereinafter collectively referred to as "Disputed Notices") have been issued by the Respondent No.1 on their own assumption that the Petitioner and the Captive Users have not been complying with Electricity Rules.

xvii) 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.

3. Upon issuance of the notice, the Respondents appeared through their Counsel and submitted the detailed statement of objections and the gist of the points urged by the Respondents No. 1 and 2 are as follows:
- i. The Petitioner owns a 50MW wind power plant at Raichur district and has executed a Wheeling and Banking agreement with the Respondents on 26.05.2015 in order to wheel energy to its captive consumers or third parties.
 - ii. For financial year 2017-18, it was observed by the Respondents that the Petitioner has failed to meet the criteria set out in the Electricity Act, 2003 and Electricity Rules, 2005 with regard to Captive Generating plants. It was further observed that the consumers of the Petitioner are 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. 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.
 - iii. Respondent No.1 vide letter dated 11.12.2018 (Annexure-7) has clarified to the Respondent No. 4 Respondent No.5 and Respondent No.6 by attaching a statement of energy consumption by consumers of Petitioner for FY 2017-18, indicating that the Petitioner has not wheeled energy in proportion to its shareholdings.

- iv. As regards, the contention of the Petitioner that the demand raised towards cross-subsidy surcharge and electricity tax by the Respondent is without any basis and that the Respondent has no authority to levy cross-subsidy surcharge and electricity tax on its consumers i.e., Respondent 4, 5 and 6, the respondent has submitted that Rule 3 of the Electricity Rules, 2005 clearly states that in order to be considered as a captive consumer, an entity 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. In addition, the captive power has to be consumed by the consumers in proportion to their share capital within $\pm 10\%$ variation. In the present case, the consumers of the Petitioner are not consuming in proportion to their shareholding. 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). Therefore, the Petitioner cannot be considered as a captive generating company as its consumers are not consuming energy in proportion to their shareholding.
- v. As per Rule 3 (2) of the Electricity Rules 2005, even if one of the consumer 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. In the present case, consumers of the Petitioner are not consuming energy in accordance with the requirements of the Rule. It is submitted that the Petitioner therefore cannot be considered to be a captive generating company.

- vi. It is submitted that a power plant can qualify to be a captive generating plant, when it is set up by consumers primarily for their own consumption. It is submitted that subsequently EHT/HT consumers cannot acquire a right in an already established Captive generating plant. This aspect has been clarified by this Commission in its letter dated 18.09.2018 (mentioned by the Respondent as Annexure-A2 but it is submitted as Annexure-A3 along with the Petition) and the Government of Karnataka Order dated 17.07.2019 (Annexure R-3). In the present case, many consumers have acquired equity in the Petitioner company subsequent to the incorporation of Petitioner No.1 company. Therefore, the Petitioner No.1 fails to qualify as a captive generating plant.
- vii. Further, the Petitioners and its consumers are liable to pay CSS to the distribution company in terms of 4th proviso to Section 42 of EA, 2003. The demand for CSS and Electricity Tax has been impugned in the Petition, is issued in accordance with law. It is submitted that the electricity tax has computed in accordance with the Karnataka

Electricity (Taxation on Consumption or Sale) (Amendment) Act, 2018 and there is absolutely no infirmity in the same.

- viii. It is submitted that the Petitioner has submitted CA certificates to the Respondent certifying the shareholding pattern of the Petitioner Company as on 31.07.2017 and as on 31.03.2018. However, the change in share allotment in this duration has not been updated to the Respondent. It is submitted that from the perusal of CA certificate as on 31.07.2017 and as on 31.03.2018, it is clear that change in shareholding pattern among the consumers has been happening at regular intervals in order to meet the requirements of Rule 3 of the Electricity Rules, 2005, to satisfy the captive status of the generating plant. Therefore, it is submitted that the Petitioner's conduct is unsavoury and is opposed to the intent of the Act and Electricity Rules, 2005. The Petitioner has deliberately altering its share holding pattern merely to meet the requirements of the Rules, which is impermissible in law.
- ix. Rule 3 (1)(a) read with explanation 1(c) of the Electricity Rules 2003 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 has not produced any material to prove that its captive consumer owns equity shares with voting rights.
- x. So far as the contention with regard to 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. In

order to exercise the said power, the ESCOM examines the material available on record to come its conclusion. 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 the picture if a dispute arises between the parties.

- xi. It is submitted that the Petitioner herein has no locus to seek quashing of demand for cross subsidy surcharge and electricity tax raised against Respondent No.4 Respondent No.5 and Respondent No.6 in the present petition wherein the said consumers have been arrayed as Respondents. Had they been aggrieved they ought to have initiated appropriate legal recourse to espouse their cause. It is pertinent to note that the Respondent No.4, Respondent No.5 and Respondent No.6 have challenged the demand for cross subsidy surcharge and electricity tax in a separate Writ Petition before the High Court of Karnataka in W.P.No.9695 of 2019, WP No 9696 of 2019 and WP No. 9697 of 2019 which are pending adjudication and on this ground also, present petition deserves rejection.
- xii. Averment that Petitioner is a special purpose vehicle of Hero Wind Energy Pvt. Ltd. is not within the knowledge of the answering Respondents. The Petitioner is put to strict proof of the same.
- xiii. Averment that Petitioner has 12 share-holders is not within the knowledge of the answering Respondents. The Petitioner is put to strict proof of the same.

- xiv. Averment that for verifying the Rule of Proportionality, 51% of the gross generation of energy by the Petitioner is to be reckoned is untenable. Respondents have submitted that no reliance can be placed on the judgement of the Hon'ble ATE in Kadodara Power Pvt. Ltd. Vs. GERC and Others as same is not applicable to the facts and circumstances of the present case. The Respondents have denied all the other averments raised by the Petitioner.
4. The Petitioner in its "Note of Submission" dated 04.02.2021 through ANP Advocates has submitted that the Petitioner 'M/s Clean Wind Power (Manvi) Private Limited' is a company incorporated under the Companies Act, 2013. Out of the total share-holders, eleven (11) shareholders are holding 32.90% of the total issued, subscribed and paid-up equity capital of the Petitioner. Clause 2 of the main object under the Memorandum of Association of the Petitioner specifically provides for sharing and use of electricity by the Petitioner, its constituents, industrial units etc. as under:

"To carry on the business of generating, accumulating, distributing and supply energy from sun using Solar cell and other related equipment and from other non-conventional and renewable sources of energy or connected with any other form of energy including without limitation wind, heat, hydro, waves, tidal, geo-thermal and bio-mass 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 according to the Law for the time being in force."

- (i) The Petitioner has also relied on the Order of this Commission dated 06.02.2020 in O.P. No. 12 of 2019 in Apollo Hospitals Enterprise Limited Vs Bangalore Electricity Supply Company Limited (Apollo Case). The Petitioner has submitted that in the Apollo case, the Commission has clearly stated that the character or incidents of IPP or merchant plant remains same irrespective of the subsequent transferee primarily utilising the power for himself.
- (ii) The Petitioner has submitted that the object clause in the Memorandum of Association clearly establish that the Petitioner had provided for the establishment of the captive power plant. Accordingly, the 50MW power plant has been established for the purpose of supplying electricity to its captive users. This is distinguishing feature of the Petitioner's case from the decision in the Apollo case. Therefore, the Petitioner's power plant is required to be considered as a captive power plant covered within the Statement of Law. Thus, any change in the shareholding of the captive users will not affect the CGP status as held by the Commission in the decision quoted above in the Apollo Case. In Apollo decision, the Commission has held that, it is bound by the full bench decision of the Hon'ble ATE dated 06.12.2007 in the Appeal No. 32 of 2007 in Malwa Case and this case of the Petitioner is fully consistent with the decision of the Hon'ble ATE in the Malwa case. The Hon'ble ATE in Malwa Case, had held that a shareholder of a company setting up a power plant can be a captive

user within the scope of the Explanation to Rule 3, defining the term 'Ownership'. Malwa case clearly lays down that the equity shareholders for the time being or/can be a captive user and reference may be made to Paras 18 and 19 of the Malwa case. Paragraphs 18 and 19 of the Malwa case is enunciated below:

"18. The framers of the rules have not used the letter 'a' before captive user in Rule 3 rather it has used the letter 's' in brackets suffixed to the word 'user', thereby clearly indicating that the ownership of the captive users in the power plant collectively should not be less than twenty-six per cent. In the amended application, the share-holding of the promoters in the appellant company has been given. The share-holding is as follows: -

Shareholder Category	Equity Shares owned	
	Number	%
Promoters		
Malwa Cotton Spinning Mills Limited	9,630,700	23.93
Rishi Growth Fund Private Limited	9,390,000	23.33
Neelam Growth Fund Private Limited	9,323,000	23.17
Jangi Growth Fund Private Limited	9,302,600	23.12
Sub Total (A)	37,646,300	93.55
Promoter Group		
S.A. Growth Fund Private Limited	185,400	0.46
Sub Total (B)	185,400	0.46
Total Promoter and Promoter Group holdings (C=A+B)	37,831,700	94.01
Other Investors		
Aeneas Evolution Portfolio Limited	1,417,000	3.52
Minivet Limited	750,000	1.86
Prime Holding Private Limited	150,000	0.37
Divoja Investment	47,000	0.12
And Finance Private Limited		
Sub Total (D)	2,364,000	5.87
Others (E)	45,600	0.11
Total share capital (F=C+D+E)	40,241,300	100.00

19. It is well settled that a company is a legal entity, separate and independent of its shareholders. It owns hundred percent ownership of its assets. This being so, CPP in question is owned by the appellant. Besides the appellant is also a captive user of the generating plant. Though the ownership of the CPP is that of the company but for the purpose of Rule 3 (1) (a) read with explanation (1) (c) ownership in relation to the CPP will mean the equity share capital with voting rights of captive users. As seen from above, the total shareholding of the main promoters is 93.55%. Therefore, their ownership/voting rights for the purposes of the Rule are to the extent of 93.55%, which is obviously much more than 26% of the ownership in the power plant. The other criteria laid down in Rule 3 (1) (a) (ii) which requires not less than fifty-one per cent of the aggregate electricity generated in such plant, determined on an annual basis must be consumed for the captive use is also being fulfilled as per the averments made in the amended petition. It is categorically stated therein that the consumption of power is 100% by the appellant herein and its sister concern and 100% of the CPP ownership is held by the captive users."

- (iii) The Petitioner has submitted that in the Malwa case, there is no such stipulation to the effect that the term 'set-up' should be construed to the extent that only the shareholders at the time of the incorporation of the company or establishment of the captive power plant will alone be considered to be CGP qualifies for captive purposes. In the said case the Hon'ble ATE has not held that a captive power plant established by a company is required to supply power primarily only to

those persons who participated in the setting up of the captive power plant. The Hon'ble ATE in Malwa Case did not lay down any distinction of the power plant being established as captive power plant in contrast to a power plant being established as an IPP or merchant power plant.

- (iv) The decision in the Malwa Case clearly recognises 93.55% of the shareholder were the captive users of electricity. This is after taking into account that Malwa Industries is the owner of the captive power plant and is also the captive user of the electricity from the power plant and additionally, the shareholders are captive users.
- (v) Accordingly, Malwa Case cannot be construed of having laid down the law that at the time when the power plant is set-up, there has to be a declaration of it to be a captive power plant as considered by the Commission in the Apollo case.
- (vi) Further, in Kadodara Case, the Malwa case has been specifically referred to. The principle laid down by the Hon'ble ATE in Kadodara Case is after considering the factual aspects of the Malwa Case. The Full bench decision in Malwa case has therefore, been explained and applied by the Hon'ble ATE and the inferences drawn by the Hon'ble ATE in regard to the Malwa case is a binding precedent of an Appellate Authority.
- (vii) Similarly, the Hon'ble ATE in its Order dated 17.05.2019 in M/s Prism Cement Limited and Another versus Madhya Pradesh Electricity

Regulatory Commission and Others in Appeal No. 02 of 2018 & IA Nos. 10, 1096 & 1283 of 2018 and Appeal No. 179 of 2018 has referred Kadodara Case. The Hon'ble ATE has decided the said Prism Case after considering in detail the Kadodara Case which considers the decision of the Hon'ble ATE in the Malwa Case. The interpretation and application of law by the Hon'ble ATE in the Prism case is again a binding precedent. It is submitted that the application of the principles of binding precedents including in the context of a larger full bench decision of an Appellate Court being applied, ignoring the division bench judgements, are well settled. Firstly, it is well settled that, the judgement a precedent for what it decides namely, as a ratio decidendi and not obiter dicta, per incurium or sub-silentio. These cannot be treated as precedents by inferences drawn, particularly when there was no such specific issue for decision before the full bench, there was no arguments on such issues, there was no point of law involved in the said process of decision and there is no specific reference to any rule or any discussion in the full bench decision on the specific aspects of differentiation in treating a power plant as IPP or merchant generator in contrast to a captive power plant'; and secondly the factual findings or directions issued in the context of the Malwa Case cannot be construed as precedent. As mentioned, in Malwa Case the Hon'ble ATE was concerned with the issue as to whether the group captive of Malwa Industries Limited and its shareholders in a power plant set up by Malwa Industries Limited can

validly exist under the Electricity Act, 2003 and the Rules notified thereunder. This has been answered positively that, even where the captive power plant was 100% owned by Malwa Industries Limited, the shareholders of Malwa Industries Limited can also be a captive user to the extent of 93.55%. In other words, the ownership by way of proprietary interest of Malwa Industries Limited (100%) and ownership by way of equity shareholdings in Malwa Industries Limited were both considered cumulatively. The Petitioner has submitted that in context of the above the Malwa Case having not dealt with the issue of power plant being IPP or merchant generator vis-à-vis a captive power plant, the decision of the Hon'ble ATE cannot be held to be a decision that can be ignored by this Commission. It is also settled principle that even if there are two decisions apparently conflicting but not directly opposite to each other on the applications of principles of ratio-decidenti, the lower court should follow the one which deals with the same or identical situation rather than the decision which deals with a similar but non-identical situation, even if the latter is by a larger bench.

(viii) In view of the above, the Commission may consider the decision of the Hon'ble ATE in Prism Case which has duly considered the various developments in relation to captive generation and captive use, the decision in the Kadodara Case and other cases. The Kadodara case considered the Malwa case and the binding nature of the precedents have to be by application of the principles laid down in all such cases.

In fact, Prism case laid down the law more elaborately and cannot be said to be in conflict with the Malwa Case. In this regard to the above it is relevant to apply the following well settled propositions laid down by the Hon'ble Courts which are as under:

- (a) Any 'law declared' must be construed as a legal principle emanating from a judgement, interpretation of a law or any judgement of the Hon'ble Supreme Court, upon which, the case is decided. In other words, the 'law declared' is the principle extracted out of a judgement upon which a case is decided.
- (b) A binding precedent is necessary to be followed in order to maintain consistency in judicial decision and enable an organic development of the law. It provides an assurance to an individual as to the consequence of transactions forming part of the daily affairs.
- (c) There is a need for following the precedents of the Hon'ble ATE and not to proceed on the basis that the Hon'ble ATE has failed to take notice of full Bench decisions in Malwa Case.
- (d) Binding precedents needs to be followed;
- (e) The 'ratio decidendi' or the rationale/reasoning behind a judgement 'consists in the reasons formulated by the court for resolving an issue arising for determination and not in what may logically appear to flow from observations on non-issues.' Meaning, a decision is an authority merely for what it decides and not for what logically follows from it.
- (f) The decision of a smaller bench prevails, which deals with and explains the decision of larger Bench.

(ix) The Petitioner has also relied upon various Orders of the Hon'ble Supreme Court of India and the Hon'ble ATE which are listed below:

- (a) Judgement of the KERC in Apollo Hospitals Enterprise Limited Vs. BESCO;
- (b) Judgement of the Hon'ble ATE in Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission & Others.
- (c) Judgement of the Hon'ble ATE in Malwa Industries Limited Vs. Punjab State Electricity Regulatory Commission & Others;
- (d) Judgement of the Hon'ble ATE in Kadodara Power Limited & Others Vs. Gujarat Electricity Regulatory Commission & Others;
- (e) Judgement of the Hon'ble ATE in Prism Cement Limited Vs. Madhya Pradesh Electricity Regulatory Commission & Others;
- (f) Law of Precedent dated 14.09.2018 issued by Justice Dr. B.S. Chauhan;
- (g) Judgement of the Hon'ble Supreme Court in Fida Hussain Vs. Moradabad Development Authority, (2011) 12 SCC 615;
- (h) Judgement of the Hon'ble Supreme Court in Ambica Quarry Works Vs. State of Gujarat and Others (1987) 1 SCC 213;
- (i) Judgement of the Hon'ble Supreme Court in CIT Vs. Sun Engineering works;
- (j) Judgement of the Hon'ble Supreme Court in Union of India Vs. Raghubir Singh (1989) 2 SCC 754;
- (k) Judgement of the Hon'ble Supreme Court in State of U.P. Vs. Ajay Kumar Sharma (2016) 15 SCC 289;
- (l) Judgement of the Hon'ble Supreme Court in Union of India Vs. Meghmani Organics Ltd. (2016) 10 SCC 28;
- (m) Judgement of the Hon'ble Supreme Court in ITC Limited Vs. CIT (TDS) Delhi (2016) 6 SCC 652;
- (n) Judgement of the Hon'ble Supreme Court in Union of India Vs. Nirala Yadav (2014) 9 SCC 457;
- (o) Judgement of the Hon'ble Supreme Court in M. Natarajan Vs. State (2008) 8 SCC 413;

We have perused the case laws cited above pertaining to the interpretation of statutes and applicability of "Principle of Ratio-decidenti" and some of the rulings are not related to the facts of the instant case.

5. 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 Clean Wind Power (Manvi) Pvt. Ltd. proves that it is a captive generating plant and the Respondents No. 4, 5 and 6 are its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2017-18?

Issue No. (2): Whether the Respondents No. 1, 2 and 3 have followed proper procedure for verification of the captive status of the Petitioner and Proforma Respondents as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?

Issue No. (3): What Order?

6. 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:
7. **Issue No. (1):** Whether the Petitioner Clean Wind Power (Manvi) Pvt. Ltd. proves that it is a captive generating plant and the Respondents No. 4, 5 and 6 are its captive users as per the Rule 3 of the Electricity Rules 2005 for FY2017-18?

Issue No. (2): Whether the Respondents No. 1, 2 and 3 have followed proper procedure for verification of the captive status of the Petitioner and Proforma Respondents as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005?

- i. A 'captive generating plant' is defined under Section 2(8) of the Electricity Act, 2003. 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 has to be established in accordance with Section 2(8) of the Electricity Act, 2003 and has to fulfil conditions under 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 licensee 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. A generating company established under Section 2(8) has to comply with provisions under Rule 3 of the Electricity Rules, 2005 with respect to 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."*

iii. The Commission in para 9(i) of its Order dated 06.02.2020 in OP No.12/2019 in Apollo Hospitals Enterprise Limited and Others versus Bangalore Electricity Supply Company Limited had clearly stated the following:

"9(i) In Malwa Industries Limited case (Annexure-P9), the 3rd para of Case Note reads thus: -

“Captive Generating Plant – Meaning thereof – Section 2 (8) of the Electricity Act, 2003:

Held, expression “Captive Generating Plant” as defined in the Act, specifies what it means and what it includes ‘ use of the word ‘means’ in the definition Clause indicates that the definition is meant to be exhaustive but the use of the word “includes” in the definition Clause explains its meaning – It does not in any way curtail the width of the opening part of the definition of “captive Generation Plant”, which means a power plant set up by any person to generate electricity primarily for its own use – It merely enlarges the meaning of the expression being defined without changing or altering its basic meaning – Thus, a captive Generating plant is one which is set up by any person for generating electricity primarily for his own use – Therefore, any person claiming to have set up a captive generating plant must use the power generated by it mainly for its own use”

In Kadodara Power Private Limited case (Annexure-P10), the Case Note relating to – CGP – Transfer of - reads thus: -

“Captive Generating Plant – Transfer of – Appellant contented that once a captive generating plant is set up it cannot be transferred to another owner and in case such a transfer takes place the CGP will lose its character – Can the ownership of the CGP be transferred after its set up.

Held, Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner – Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfilment of all other conditions requiring it to be so –

Therefore, captive generating plant does not lose its character by transfer of the ownership or any part of the ownership provided the generating plant produces power primarily for the use of its owner(s).

The decision in Kadodara Power Private Limited also does not support the case of the petitioners. The statement of law stated regarding the transfer of ownership of CGP merely points out that CGP does not lose its character by transfer of the ownership or any part of the ownership from the person who sets up CGP to any subsequent transferee provided the generating plant produces power primarily for the use of its owner(s). The above statement of law does not imply that an IPP or merchant plant, can 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. Therefore, the character or incidents of IPP or Merchant plant remains same irrespective of the subsequent transferee primarily utilising the power for himself."

- iv. Hence, in order to qualify as a 'captive generating unit/plant', a generating unit/plant should be established under Section 9 read with Section 2 (8) of the Electricity Act, 2003 and should satisfy the criteria for shareholding pattern and consumption pattern in accordance with Rule 3 of the Electricity Rules, 2005. Thus, conjoint reading of the definition of CGP with Rule-3 of the Rules, 2005 makes it clear that to claim the status of CGP, it should be set up by any person, co-operative society or association, etc., primarily for their own use. In other words, one should invest and setup power plant for his own use or for the use of the members of the co-operative society or association as explained in Rule 3 of the Rules, 2005. That is to say in the event, a generating plant is setup or established primarily not for the use of the person setting up of such plant but for the sale of electricity to others, such generating plant cannot be termed as CGP.

- v. Thus, the underlying objectives of allowing to set up captive plants were to attract bulk consumers to set up power plants, primarily for their own use when there was severe power shortage in the country and to entice competition in the sector. The beneficial provision with respect to captive power plant has been provided in the Act, 2003, with a view to add capacity and to secure reliable, quality and cost effective power and facilitate creation of employment opportunities through speedy and efficient growth of industries. The provision relating to captive power plants to be set up by group of persons is primarily to enable small and medium industries that may not individually be in a position to set up plant in a cost effective manner.
- vi. Of late, the Commission has noticed that, generating plants, which were set up with an intention of selling the power generated (as IPPs or merchant plants) to third parties are being converted into the so called group captive plants to claim the benefits given to captive plants under the Act, 2003. Due to this, the ESCOMs are losing the CSS, etc.
- vii. Accordingly, the Commission had issued a letter dated 18.09.2018, directing all the ESCOMs to monitor the captive status of generators/users under their jurisdiction. The Commission in its letter dated 18.09.2018 had stated the following:

“From the definition of ‘CGP, as defined in Section 2 (8) of the Act, it is clear that, unless the Power Plant, set up by a person to generate electricity, is primarily for his own use, it does not qualify as a ‘Captive Generating Plant’. Therefore, 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 a EHT/HT consumer acquires the right in the already set up Power Plant, he cannot claim the status of 'Group Captive Power Plant Owners/Group Captive Users. Once it is established that the EHT/HT consumers have acquired the right in the status of Group Captive Generators/Group Captive Users by setting up the captive plants themselves, it should be verified as to whether their consumption of Electricity is as laid down in the Rule-3 of the Electricity Rules, 2005."

viii. Thus, 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.

ix. The respondents, in their statement of Objections, have stated that in accordance with the Commission's letter dated 18.09.2018 and the Government of Karnataka Order dated 17.07.2019, the consumers

cannot acquire right in an already established Captive generating plant to claim the status of captive user. In this context it may 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 in this regard is not correct.

- x. On perusal of Certificate of Incorporation of M/s Clean Wind Power (Manvi) Pvt. Ltd., the Commission notes that the company was incorporated on 14th July, 2014 under the Companies Act, 2013. The Commission also notes that the Petitioner passed Special Resolution in the Annual/Extra Ordinary General Meeting held on 01st April, 2019, altered the provision of its Memorandum of Association (MoA) with respect to its objects and complied with Section 13(1) of the Companies Act, 2013. As per the MoA submitted by the Petitioner, the Objectives of the company are enunciated hereunder:

“1. To generate, accumulate, transmit, distribute, purchase, sell and supply of clean and green energy from non-conventional energy sources like Solar, Wind, Bio-mass, Waste, Hydro, Hydel, Geo-Hydel, Tidal Waves, Oil and/or such other sources as well as hybrid solutions as are available or will be available or introduced or invented in future on a commercial basis and to construct, lay down, establish, operate and maintain power energy generating stations including buildings, structures, works, machineries,

equipments, cables and to undertake or to carry on the business of managing, owning, controlling, erecting, commissioning, operating, running or transferring to third person/s, power plants and plants based on non-conventional energy sources, solar energy plants, wind energy plants, mechanical, electrical, hydel, gas air, sea energy, naphtha, bio-gas, civil engineering works and similar projects.

.....

4. To carry on business of providing operation and maintenance facilities relating to power generation plants of all kinds and/or to provide professional consultancy services in the power sector including renewable energy, bio fuel, hydel, solar and other conventional and non-conventional energy sources."

xi. Further, the Petitioner in its "Note of Submission" dated 04.02.2021 has submitted that the object Clause in the Memorandum of Association clearly establish that the Petitioner had provided for the establishment of captive power plant. On perusal of the Objects mentioned in the Memorandum of Association as submitted by the Petitioner, the Commission notes that the Objects are generic in nature and not confined to illustrate that the generating plant was established by the Petitioner as a captive generating unit.

xii. Further, on perusal of Memorandum and Articles of Association as submitted by the Petitioner, we note that during the incorporation of the company in 2014, Hero Wind Energy Private Limited held 49,994

equity shares out of total of 50,000 equity shares (as on 27th June, 2014). The Commission also observed that as per the Memorandum and Articles of Association as submitted by the Petitioner, the authorized share capital of the company is Rs.95,23,28,000 (Rupees Ninety-Five Crores and Twenty-three Lakhs and Twenty-Eight Thousand Only) divided into 42,32,800 (Forty-Two Lacs Thirty-Two thousand & Eight Hundred) Equity Shares of Rs.10 each and 9,10,00,000 (Nine Crore & ten Lakhs) Redeemable Preference Shares of Rs.10 each. According to the Director's Report for FY2017-18, the paid-up share capital of the company as on March 31, 2018, stood at Rs.90,83,78,000 comprising of 42,32,800 equity shares and 8,66,05,000 (14% Cumulative Redeemable) Preference Shares of Rs.10 each.

- xiii. On perusal of the statement of objections submitted on 10.12.2019 by Respondent No.1 at Annexure R-2 wherein the shareholding pattern existing as on 31.07.2017 has been exhibited, and the shareholding pattern as per CA certificate dated 31.03.2018 as submitted by the Petitioner, the Commission notes that there is change in the number of shares held by the consumers as on July, 2017 and that on March, 2018 but the total no. of 42,32,800 Equity shares remains the same. Thus, there has been a change in the share-holding pattern in FY2017-18 as compared to equity share-holding pattern during incorporation of the company in July, 2014. It is to be noted that a generating plant should be established as a 'captive generating plant' under Section 2 (8) read with Section 9 of the Electricity Act, 2003. In this case the

Commission notes that no material evidence has been 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 is unable to ascertain the shareholding pattern of the captive users at the time of establishment of the generating unit. Hence, the Petitioner should have produced material evidence with respect to the proprietorship of the captive users not less than 26% of the ownership in the CGP at the time of establishment of the captive unit. Until and unless the Petitioner places the required evidence to prove the captive status of the generating plant at the time of establishment, the Commission is unable to declare the generating plant as a captive generating unit for FY2017-18. Thus, in view of the above discussions, we are unable to come to a conclusion 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 the absence of establishing the above facts properly, the prayer of the Petitioner for declaration of the captive status of its generating plant is to be dismissed by the Commission.

- xiv. Further, the Commission notes that Respondent No.4, Respondent No.5 and Respondent No.6 had challenged the demand for cross subsidy surcharge and electricity tax before the Hon'ble High Court of

Karnataka in W.P.No.9695 of 2019, WP No 9696 of 2019 and WP No. 9697 of 2019. The Hon'ble High Court of Karnataka in its Order dated 5th February, 2020 has disposed of the matter stating that the dispute in the Writ Petitions is substantially being treated by the KERC in O.P. No. 120/2018. Thus, the Hon'ble High Court disposed of the Writ Petitions with the liberty reserved to the Petitioners to participate in the hearing before the KERC.

- xv. As regards contention raised by the Petitioner as to whether ESCOMs have the authority to levy CSS on the Petitioner and its consumers, it may be noted that Section 42 of the Electricity Act, 2003, provides the conditions for grant of Open Access by the electricity Distribution Companies (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."

xvi. 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 EA, 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 exemption from payment of Cross Subsidy Surcharge (CSS) as provided under Section 42 of the Electricity Act, 2003.

xvii. Further, the Hon'ble ATE in its Order dated May 18, 2010 in Appeal No. 116 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 above 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.”

xviii. Accordingly, for monitoring the captive generators and its consumers in the State of Karnataka, this 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.”

xix. 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 as follows:

“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."

- xx. 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 powers 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 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.
- xxi. 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 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.
- xxii. The Commission notes that CESC in its letter dated 06th July, 2018, addressed to M/s Rane (Madras) Limited, M/s DM South Hospitality Limited and M/s Klene Paks Limited (as submitted by the Petitioner as Annexure-1 (colly.)), has submitted that on verification of M/s Clean Wind Power (Manvi) Pvt. Ltd., it is observed that the wheeled energy is not in proportion to their shares in ownership of the power plant within a variation of 10%. Therefore, the entire energy generated shall be

treated by the Respondent No.1 as if it is supplied by a non-generating company. In response to the above mentioned letter of the ESCOM, the Respondents 4, 5 and 6 vide their letters to Respondent No.1, has submitted that the claims made by the Respondent No.1 is against principles of natural justice. Respondent No.1 has unilaterally decided to claim CSS without according any opportunity to the Respondents no. 4, 5 and 6 to showcase that their consumption is within the permissible deviation of $\pm 10\%$. Further, Petitioner vide its letters dated 18.07.2018 [Annexure-2 (colly.)] and 31.08.2019 [Annexure-2 (colly.)] have submitted documents which clarifies that the twin requirement under the Electricity Rules to qualify as a captive plant, i.e., Ownership criteria and Consumption criteria have been met for FY 2017-18. The said documents establish that our consumption during FY2017-18 is within the permissible range of deviation as per the Electricity Rules, 2005. Also, as per the Orders of the Hon'ble ATE, only a State Electricity Regulatory Commission (SERC) has the jurisdiction to determine and monitor the captive status of a generating station. Accordingly, the Respondents 4, 5 and 6 requested Respondent No.1 to refrain from taking any action against them. The Respondent No.1 vide its letter dated 11th December, 2018 (Anexure-7) had informed the Respondents 4, 5 and 6 that the intention of issuing letter dated 06th July, 2018 by Respondent No.1 was to inform the consumers about the norms and conditions specified in the Electricity Rules, 2005 and under Section 9 read with Clause (8) of Section 2 of the Act. As regards not considering the CA certificate

dated 28.03.2018 and CA certificate 31.03.2018 was explained to the representative of M/s Clean Wind Power (Manvi) Pvt. Ltd. that for most of the part of the year CA certificate dated 31.03.2017 was in force and hence, the same was considered for the purpose of verifying the conditions to be satisfied to be a group captive generator. Hence, the accusation of not giving an opportunity is false.

xxiii. The Commission notes that CESC in its letter dated 06th July, 2018, mentioned above, addressed to M/s Rane (Madras) Limited, DM South Hospitality Limited and M/s Klene Paks Limited (as submitted by the Petitioner as Annexure-1 (colly.)), has stated that on verification of M/s Clean Wind Power (Manvi) Pvt. Ltd., it is observed that the wheeled energy is not in proportion to their shares in ownership of the power plant within a variation of 10%. Hence, Respondent 1 had issued the impugned demand notices as the consumers of the Petitioner have consumed energy in excess of their equity share-holding pattern. Thus, it is to be analyzed as to whether the ESCOMs have correctly assessed the captive status of the generating plant of the Petitioner and its consumers in accordance with the Rule 3 of the Electricity Rules, 2005 with regards to the consumption of energy from the generating plant with respect to their share-holding pattern while issuing their demand notices. 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:

“17).....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.”

- xxiv. Accordingly, the proportionality criterion for consumption 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. Thus, relying on the above mentioned decision of the Hon'ble ATE, we are of the view that applying the Rule of Proportionality by the Respondent No. 1, 2 and 3 for determining whether the energy consumed by the consumers of the generating plant of the Petitioner in proportion to their share-holding pattern on 100% energy generated by the generating plant is not correct is not correct.
- xxv. As regards shareholding pattern to be considered for ascertaining the captive/group captive status of the consumers, it may be noted that the Hon'ble ATE 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 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."

xxvi. The Hon'ble ATE in the aforesaid Order also specified the methodology to be adopted for determining the captive status of a power plant, in its Order mentioned above which is 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.

xxvii. Hence, relying on the decision of the Hon'ble ATE mentioned above, the Commission is of the view that the ESCOMs should conduct verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) annually, i.e. with respect to minimum equity share-holding considering the shareholding pattern existing at the end of the financial year. Hence, considering the CA certificate dated 31.03.2017 for verifying the share-holding pattern of the Petitioner by Respondent No. 1 for determination of captive status for FY2017-18 is not correct.

xxviii. Accordingly, we set aside the impugned demands notices issued by the Respondent No.1 to Respondent No.4, Respondent No.5 and Respondent No.6/Captive Users of the Petitioner as prayed for in this petition.

xxix. For the reasons stated above, we hold both the issues in negative.

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

For the above reasons, we pass the following:

ORDER

The Petition is partly allowed holding that:

- a. Demand Notices issued by the Respondent No.1 wherein CSS for FY2017-18 has been imposed on Respondent No.4, Respondent No.5 and Respondent No.6/ Captive Users of the Petitioner are set aside. The respondent is at liberty to verify the captive status of Petitioner in the light of the observations made in this Order.
- b. The Petitioner is not entitled to relief of declaration that it is a captive generating plant for FY2017-18.
- c. The amount received if any towards cross-subsidy surcharge, Additional Surcharge and the differential electricity tax by the respondent from the consumers of the Petitioner (Respondent No. 4, 5 and 6), the same shall be refunded within two months from the date of this Order.
- d. All other reliefs sought for are rejected.
- e. All pending I.A's. also doesn't survive for consideration, accordingly stands disposed off.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member