

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 23rd Day of May 2024

PRESENT:

Thiru M.Chandrasekar Chairman
Thiru K.Venkatesan Member
and
Thiru B.Mohan Member (Legal)

M.P. No. 23 of 2022

Tamil Nadu Generation and Distribution
Corporation Limited
144, Anna Salai
Chennai – 600 002.
Represented by its Chief Financial Controller /
Deposits and Documentation

... Petitioner
Thiru N.Kumanan and
Thiru A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO

Vs.

M/s. Bull Machines Pvt. Ltd.
SF 5/1-A, Trichy Road
L&T By Pass Road
Chinthamanipudur
Coimbatore– 641103.

....Respondent
Thiru.R.S.Pandiyaraj
Advocate for the Respondent

The Miscellaneous Petition No.23 of 2022 filed under the Electricity Act, 2003 to declare that M/s. Bull Machines Pvt. Ltd., WEG No. 79201720597, EDC Tirunelveli is not a Captive Generating Plant for the FYs 2014-15 and 2015-16.

This petition coming up for final hearing on 27-02-2024 in the presence of Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Petitioner and Thiru R.S.Pandiyaraj, Advocate for the Respondent and on consideration of the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

ORDER

1. Contentions of the Petitioner:-

1.1. The present Miscellaneous Petition seeks to declare that M/s. Bull Machines Pvt. Ltd., WEG No.79204720597, EDC Tirunelveli is not qualified as a Captive Generating Plant for the FYs 2014-15 and 2015-16. As per the Hon'ble APTEL order in A.No.131 of 2020 dated 07.06.2021, TANGEDCO could 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 exercising the power to take any coercive action against any CGP/Captive User(s). 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 Commission. Hence, TANGEDCO filed this Miscellaneous Petition.

1.2. The Electricity Act, 2003 defines the Captive Generating Plant under section 2(8) as follows:

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.”

1.3. The Section 42 of the Electricity Act, 2003 reads as follows:

“42. Duties of distribution licensees and open access

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

Provided that such open access may be allowed before the cross subsidies are eliminated 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 utilized 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 and eliminated 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.

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

Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to

meet the fixed cost of such distribution licensee arising out of his obligation to supply."

1.4. The Tamil Nadu Electricity Regulatory Commission had issued Grid Connectivity and Intra-State Open Access Regulations, 2014 reads as follows:-

23. Cross subsidy surcharge:

(1)If open access facility is availed of by a subsidizing consumer of a Distribution Licensee, then such consumer, in addition to transmission and/or wheeling charges shall pay cross subsidy surcharge as determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access. The amount of surcharge shall be paid to the distribution licensee of the area of supply from whom the consumer was availing supply before seeking open access."

From the above, it could be clearly observed that if the above provisions are read in conjunction with each other, Cross Subsidy 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.

1.5. In exercise of powers conferred by section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government issued Electricity Rules-2005 for requirements of Captive Generating Plant. The regulation 3 envisages the requirements of Captive Generating Plant which are 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(ies)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 percent 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 50MW each, namely, Units A and B, one unit of 50MW 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 within 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 setup 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."

From the above, it can be understood that the twin rules of "Ownership" and "Consumption" have to be satisfied as per the Electricity Rules-2005 in order to qualify as a Captive Generating Plant. If the status of a Captive generating plant is lost due to non-fulfilment of anyone of the conditions or both, the entire electricity generated from such plant in a year shall be treated as a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by the respective Generating Plant, as per the proviso 4 of Section 42 (2) of the Electricity Act, 2003 which clearly states 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.

1.6. M/s. Bull Machines Pvt. Ltd. WEG No.79204720597, EDC Tirunelveli has submitted the documents for CGP verification. Hence, CGP verification was carried out with:

- (i) the documents submitted by the generator at the time of obtaining captive wheeling approval;
- (ii) the documents submitted by the generator pursuant to directions by the Commission's Order in R.A. No. 7 of 2019; and
- (ii) the documents downloaded from MCA website.

1.7. As per the Auditor certificate dated 28.10.2020 the generator M/s. Bull Machines Pvt. Ltd. holds total of 25,000 paid up equity shares with voting rights of Rs.100 each amounting to Rs.25,00,000 only.

1.8. As per the Memorandum of Association, the Authorized share capital of M/s. Bull Machines Pvt Ltd is divided into 5,000 Equity shares of Rs.100 each amounting to Rs.5,00,000 and the Subscribed capital is divided into 200 Equity shares of Rs.100 each amounting to Rs.20,000.

1.9. As per latest Annual Return MGT 7 filed in the MCA portal with reference to the Company's CIN, the Authorized Equity share capital of the Generator, M/s. Bull Machines Pvt Ltd is Rs.4,00,00,000/- (Four Crores only) and the Issued and paid-up Equity share capital is Rs.25,00,000 (Twenty-Five Lakhs only). In the page No.9 of the MGT 7 all the paid-up equity share capital with voting rights is held by the Promoter & Promoter group of the company. From the above, it is clear that the promoter

& promoter group themselves are holding 100% ownership in the Generator, M/s.Bull Machines Pvt Ltd, hence the Generator fulfils the criteria of 'ownership' stated in Rule 3 of Electricity Rules, 2005.

1.10. The aggregate consumption of the plant, M/s.Bull Machines Pvt Ltd for the FYs2014-15 and 2015-16 as follows:

Financial Year	Generator HTSC	Consumption Details	
		Gross Generation in units	Captive Consumption in units
(1)	(2)	(3)	(4)
2014-15	79204720597	1,270,056	524,166
2015-16		1,028,848	509,477

In accordance with Electricity Rules-2005, the "Ownership" condition is fulfilled. In respect of the "Consumption" criteria, the Rule-3 of Electricity Rules, 2005 stipulates that not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. In this regard, the aggregate electricity generated means Gross generation minus auxiliary consumption. In this connection, the computation of the "Consumption" criteria for the said financial year is arrived as follows:

Financial Year	Consumption Details WEG No. 79204720597			
	Generator HTSC	Gross Generation	Captive Consumption	Percentage of captive consumption on aggregate generation
(1)	(2)	(3)	(4)	(5) = (4 / 3)
2014-15	79204720597	1,270,056	524,166	41.27%
2015-16	79204720597	1,028,848	509,477	49.52%

From the above, it could be clearly observed that Respondent has not fulfilled "Consumption" criteria for the FYs 2014-15 and 2015-16 as its captive consumption was 41.27%, and 49.52% i.e. below the requirements of 51%. As Respondent failed to fulfil the "Consumption" criteria as per the Electricity Rules-2005 for the FYs 2014-15 and 2015-16, it is liable to pay Cross-Subsidy Surcharge for the self-captive consumed units during the said financial year.

1.11. As per the Commission's Order in R.A. 7 of 2019, in the case of wind energy, if the CGP having multiple generating units have separate Energy Wheeling agreements, aggregate energy of all generating units of the CGP shall be considered irrespective of separate wheeling agreement provided the captive users of each EWA are the same holding same proportion of Ownership.

1.12. M/s. Bull Machines Pvt. Ltd. has lost the 'ownership' criteria for FYs 2014-15 and 2015-16. Hence, the wheeling approval during March 2009 and April 2012 are deemed to be cancelled and energy adjusted to be treated as third party for FYs 2014-15 and 2015-16.

2. Contentions of the Respondent:-

2.1. The Petitioner has filed Miscellaneous Petition to initiate action against the Respondent for recovery of CSS on the ground that the Respondent's WEG No. 79204720597 is not a Captive Generating Plant for the FYs 2014-2015 & 2015-16. The

present petition has been wrongfully and erroneously filed as a Miscellaneous Petition in contravention to the regulations framed by the Commission. In this regard, it is necessary to point out that the instant petition ought to be numbered and listed as a Dispute Resolution Petition, owing to the fact that the Petitioner/TANGEDCO has alleged a dispute with the Respondent with respect to the determination of captive status of the said Respondent. The Petitioner / TANGEDCO at para 9 & 10 of its petition has claimed that the Respondent is liable to pay cross subsidy surcharge. Though the Petitioner has cleverly not calculated and stated that amount, it is evident that there is a "dispute" as per the TNERC-Fees and Fines Regulations, 2022. The relevant regulation is reproduced below for ready reference:

"For the purpose of Regulation 10 of these Regulations the terms "amount in dispute" and "claim" shall mean and include:

- (a) All monetary claims expressly stated in the prayer or any part of the petition or found in the documents filed thereto.*
- (b) A specified claim in the demand notice.*
- (c) The value of Bank Guarantee or Performance Guarantee or Liquidated Damages which is sought to be not enforced.*
- (d) Any dispute not amounting to monetary claim but requires adjudication by the Commission subject to payment of minimum fee."*

2.2 The Commission vide its Order dated 02.03.2023 in P.R.C. No.1 of 2022 has further explained the above and held that:

"8. If Regulation 10 is read in conjunction with the relevant explanation, it would be abundantly clear that the term "amount in dispute" and "claim" occurring in the Explanation shall include reference to any monetary claim made in any part of the petition or found in the document filed along with the petition. The Explanation to Regulation 10 has been offered with the object of obliterating any difficulty that might arise either in classifying the petition filed or quantifying the proper fee due on the petition and also to prevent petitions which are adjudicatory in nature

being filed under the colour of regulatory relief through astute drafting of the petition.”

2.3 On the above ground alone, the present petition ought to be dismissed at the very threshold, and the Petitioner be directed to determine the "amount in dispute" and re-file the present petition under the category of dispute resolution petition, thereby also paying the requisite court fee towards filing of such petition.

2.4. Twin rules of 'ownership' and 'consumption' have to be satisfied as per Rule 3 of the Electricity Rules, 2005 in order to qualify as a Captive Generating Plant in a given financial year. The petitioner TANGEDCO has admitted that the Respondent is holding 100% share in WEG No. 79204720597 and hence the criteria of 'ownership' is fulfilled as per Rule 3 of the Electricity Rules, 2005 for the FY 2014-15 & 2015-16.

2.5. The Respondent admits that as stated by Petitioner, the TANGEDCO, the Respondent has not complied with the minimum 51% consumption norms from the windmill having WTG HTSC No. 79204720597, during the years 2016-17 and, accordingly, failed to demonstrate the CGP norms in view of its failure to consume minimum 51% of the energy generated during the above years.

2.6. To explain the same, the following Table is provided.

Name of the Generator/ Captive User:			M/s. Bull Machines P. Ltd.	
HTSC No. / EDC			376 / Coimbatore Metro	
WEG HTSC No. / EDC			79204720597	
Sl. No.	Year	Units Generated	Units Consumer	Percentage of Consumption
1	2014-15	1240603	558336	45.01%

2.7. Since the Respondent has not consumed the generated energy at the level of 51% for the year 2014-15, as stated by the Petitioner, the Respondent has to face the consequences as stipulated under Rule 3 (2) of the Electricity Rules 2005, to the extent extracted below.

"Rule 3(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. "

2.8. Therefore, according to the above Rule, the units captively consumed by the Respondent, during 2014-15, have to be treated as supplied by the Generating Company and accordingly, the same may be charged with Cross Subsidy Surcharges, at the applicable rates, from the failed captive user, for the reason of not demonstrating the captive status of his CGP on the reason of consuming the captive energy at below 51% level, in all the above three years. Accordingly, the Respondent hereby admits the liability on Cross Subsidy Surcharge, as demanded by the Petitioner TANGEDCO in this regard.

2.9. However, when the Respondent is ready to pay to the Petitioner TANGEDCO the Cross Subsidy Surcharge, the Petitioner TANGEDCO is also having an equal obligation to allow the encashment of the unutilized units as on 31st March, for the above year, at the rates applicable. As per clause 6 "Billing" of the EWA dated 23-04-2012 executed between petitioner TANGEDCO and the Respondent for WEG No. 79204720597, the

unutilized balance energy after monthly consumption shall be paid at Rs.2.75/- per unit to the Respondent by TANGEDCO and accordingly, which is worked out as follows:-

Sl. No.	Year	Unutilized Units as on 31 st March	Feed in Tariff Rate	Amount (Rs.)
1	2014-15	631496	Rs.2.75	17,36,614/-

2.10. The Respondent prays that the amount of Rs.17,36,614/- may be ordered to be paid towards encashment of unutilized energy at the end of 31stMarch on each year as stated above, within a period specified in this regard.

2.11. According to the calculation of the Respondent, the TANGEDCO can claim the Cross Subsidy Surcharges, at a maximum from the Respondent to the extent as stated below at 40% of the Cross Subsidy Surcharge of Rs.3.2508 as applicable to the 11 kV Injection / 11 kV Drawal Voltage.

Sl. No.	Year	Units Captively Consumed	Rate of CSS as applicable at 40% of Rs.3.2508	Amount (Rs.)
1.	2014-15	558336	Rs.1.30	7,25,836/-
Total				7,25,836/-

The above CSS calculation submitted by the respondent is only an approximate figure subject to confirmation by the petitioner TANGEDCO. The respondent reserves its right to change / alter / modify its stand on the CSS payable based on the reply to be filed by the petitioner TANGEDCO.

2.12. Therefore, from the above, it could be seen that the TANGEDCO has to make a payment of Rs.10,10,778/- [Rs.17,36,614/- (-) Rs.7,25,836] to the Respondent. The Commission may issue an order, directing the Petitioner TANGEDCO to pay a sum of Rs.10,10,778/- to the Respondent, on the declaration that the Respondent's CGP is not qualified to be a CGP during year 2014-15.

2.13. However, in para 9, the Petitioner TANGEDCO has illegally alleged that the Respondent in WEG No. 79204720597 has not fulfilled the 'consumption' criteria i.e., not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use for the FY 2015-16. The Petitioner has alleged that the Respondent's captive consumption for the FY 2015-16 in WEG No. 79204720597 is 49.52% only i.e., below 51 % and hence liable to pay CSS for the self-captive consumed units during the said financial year. The method calculation adopted by the Petitioner TANGEDCO at para 9 to arrive at 49.52% i.e., the 'consumption' criteria is illegal, arbitrary and contrary to the order passed by the Commission in M.P. No. 24 of 2020 dated 07-12-2021.

2.14. The Commission at para 9.7(ii)(a)(c) in M.P.No. 24 of 2020 dated 07-12-2021 has held as follows:-

"c.For a CGP with wind generating units, Net generation to be considered for the purpose of verification shall be:

Net generation for wind = Gross generation (-) banking charges in kind (in units) (-) start up power (in units)(no auxiliary consumption for wind)

For captive user, the consumption to be considered for verification shall be =adjusted units grossed up with applicable T&D losses.”

The above mentioned method of calculating Net generation (i.e. gross generation - banking charges in kind - start up power in units) has not been adopted/followed by the Petitioner TANGEDCO at para 9. Similarly the Petitioner TANGECO has not added T&D losses to the actual adjusted units. Such an action is clearly contrary to para 9.7(ii)(a)(c) of the order passed by the Commission in M.P. No. 24 of 2020 dated 07-12-202. Hence the present Petitioner is liable to be dismissed in this ground alone.

2.15. The actual captive consumption by the Respondent from its WEG No. 79204720597 for FY 2015-16 is as follows:-

Net Generation Units (less EB import)	1028848 Units
Adjusted Units from 04/2016 to 03/2017	509477 Units
Add: T & D Loss	33213 Units
Add: Banking Charges in kind	0 Units
Total Adjusted Units	5,42,690 Units
CGP Consumption %	52.75 %

From the above, it is clear that the Respondent has fulfilled the 'Consumption' criteria for the FY 2015-16 in its WEG No. 79204720597. The percentage works out to 52.75% for the period 2015-2016 is well within the norms for consumption.

3. Rejoinder filed by the Petitioner:

3.1. The petitioner seeks to declare that M/s.Bull Machines P. Ltd., has lost captive status for the financial year 2014-15 and 2015-16. In the counter filed, the respondent

admits the minimum 51% consumption norms has not been met for the FYs 2014-15 and hence the CGP norms have not been fulfilled.

3.2. The Respondent is also ready to pay the Cross Subsidy Surcharge amount as demanded by the Petitioner TANGEDCO.

3.3. In order T.P No 1 of 2013, Determination of Tariff for Generation & Distribution of TANGEDCO dated 20.06.2013, the Cross Subsidy Surcharge for HT consumers having Injection Voltage of 33KV and Drawal Voltage of 11KV for Industry is Rs.3.4014/KWH. In SMT Order No.9 of 2014 dated 11.12.2014 the Cross Subsidy Surcharge is Rs.3.2508/KWH. In order No 6 of 2012, Comprehensive Tariff order on Wind Energy dated 31.07.2012 the Commission has ordered to levy 50% of the Cross Subsidy Surcharge. Hence for the FY 2014-15, the applicable rate of Cross Subsidy Surcharge up to 11.01.2014, 50% of Rs.3.4014 i.e. Rs.1.7007 & from 12.01.2014, 50% of Rs.3.2508 i.e. Rs.1.6254 has been levied. During the month of December 2014, the adjusted units divided proportionately for the number of days and the respective rate of CSS applied to calculate the amount to be claimed from the respondent.

FY 2014-15

Months	Units Adjusted	CSS Rate	Amount (Rs.)
Apr -14	31236	1.7007	53123.065
May-14	42144	1.7007	71674.301
Jun-14	45764	1.7007	77830.835
Jul-14	52144	1.7007	88681.301
Aug-14	50628	1.7007	86103.04
Sep-14	59712	1.7007	101552.2

Oct-14	40368	1.7007	68653.858
Nov-14	39102	1.7007	66500.771
01.12.2014 To 11.12.2014	32800*11/31 11639	1.7007	19794.45
12.12.2014 to 31.12.2014	32800*20/31 21161	1.6254	34395.09
Jan-15	37532	1.6254	61004.513
Feb-15	55212	1.6254	89741.585
Mar-15	37524	1.6254	60991.51
Total	524166		880046.51

3.4. The contention of the respondent in Para 10 of the counter filed that the CGP norms fulfilled for the FY 2015-16 is accepted. The Hon'ble APTEL in Appeal No.56 of 2022, dated 26.05.2022 has passed an order that *"The payment for the unutilized energy and collection of Cross Subsidy Surcharge are two different issues which cannot be interlinked as they operate on different spheres."*

Hence the contention of the respondent in para 6 of the counter filed is not acceptable.

4. The submissions made by both the parties and contentions raised by the Counsel for the Petitioner and the Respondents considered in the back drop of the respective pleadings. Legal precedents pressed into service on either side traversed.

5. The seminal issue which arises for determination of this Commission in the instant case is as follows:-

Whether the amounts due from the Petitioner in respect of Unutilised Units can be

set off against the claim for the Cross Subsidy Surcharge from the Respondent?

6. Findings of the Commission:-

6.1. Let us take up the preliminary issue raised by the Respondent in regard to the classification of the petition. To answer this question, it is necessary to refer to para 7.9.10 of the order passed by the Commission in R.A. No. 7 of 2019 which reads as follows:-

“7.9.10. All cases of disputes on the status verification of CGPs conducted by the Licensee shall be referred to the Commission by the Licensee by filing a petition (Miscellaneous Petition in view of the directions of the Hon’ble High Court of Madras in the W.A.No.930 & 931 dated 09-10-2018) before the Commission for adjudication and till such time final orders are passed by the Commission no distraint proceedings or coercive action shall be taken. Upon filing of such petition, the Commission shall decide the issue after giving opportunities to both parties, as soon as possible, but not later than six months from the date of filing of such petition.”

6.2. It is clear from the above that the classification of the instant petition as Miscellaneous Petition cannot be faulted and the contention made by the Respondent at this stage for classification of the same as Dispute Resolution Petition is not tenable. Let us now proceed to discuss the main issue.

6.3. For the purpose of rendering findings on the main issue formulated, it is necessary to set out the facts relating to the said case and the Rules governing the requirements for a captive plant. It is necessitated in view of the fact that the respondent fails to qualify for the status of CGP only for a particular period and satisfies the criteria for another period in question. Accordingly, we proceed to set out the facts as below:-

6.4. The undisputed facts concerning the requirement of a captive generating plant are as follows:-

The Central Government issued Electricity Rules-2005 for requirements of Captive Generating Plant, In exercise of powers conferred by section 176 of the Electricity Act,2003 (Act 36 of 2003). The Rule-3 envisages the requirements of Captive Generating Plant 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(ies)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.”*

From the above, it can be understood that the twin rules of “Ownership” and “Consumption” have to be satisfied as per the Electricity Rules-2005 in order to qualify

as a Captive Generating Plant. If the status of a Captive generating plant is lost due to non-fulfilment of any one of the conditions or both, the entire electricity generated from such plant in a year shall be treated as a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by the respective Generating Plant, as per the proviso 4 of Section 42 (2) of the Electricity Act, 2003 which clearly states 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.

6.5. The short question which arises for consideration is whether the twin rules of “Ownership” and “Consumption” were satisfied as per the Electricity Rules-2005 in the instant case by the respondent in order to qualify as a Captive Generating Plant.

6.6. In this connection, it is seen that in para-8 of the Petition, the Petitioner itself has admitted that the “Ownership” criterion is fulfilled by the Respondent and hence, the issue narrows down to consumption criteria alone.

6.7. As far as the “Consumption” criterion is concerned, the Petitioner submitted the details as under:

Financial Year	Consumption Details WEG No.79204720597			
	Generator HTSC	Gross Generation	Captive Consumption	Percentage of captive consumption on aggregate generation
(1)	(2)	(3)	(4)	(5) = (4)/(3)
2014-15	79204720597	1,270,056	524,166	41.27%
2015-16	79204720597	1,028,848	509,477	49.52%

6.8. In view of the above, the Petitioner claims that the Respondent has not fulfilled the “Consumption” criterion for FY 2014-15 and FY 2015-16.

6.9. Per Contra, the “Consumption” details submitted by the Respondent are as under:

Financial Year	Consumption Details WEG No.79204720597			
	Generator HTSC	Net Generated Units	Captive Consumption	Percentage of captive consumption on aggregate generation
(1)	(2)	(3)	(4)	(5) = (4)/(3)
2014-15	79204720597	1,240,603	558,336	45.01%

6.10. In para-7 of the Counter, the Respondent himself admitted that the other criteria “Consumption” is not satisfied for the FY 2014-15. In para-9 of the Counter, the

Respondent has also agreed to pay the Cross Subsidy Charges for the FY 2014-15 as demanded by the Petitioner.

6.11. On scrutinizing the data submitted by both the Petitioner and the Respondent, it can be concluded that the Respondent has not fulfilled the “Consumption” criterion of 51.00% for the FY 2014-15.

6.12. As regards the FY 2015-16, the Respondent submitted the “Consumption” details as under:

Financial Year	Consumption Details WEG No.79204720597					
	Generator HTSC	Net Generated Units	Captive Consumption	T&D Loss	Total Adjusted Units	Percentage of captive consumption on aggregate generation
(1)	(2)	(3)	(4)	(5)	(6) = (4)+(5)	(7) = (6)/(3)
2015-16	79204720597	1,028,848	509,477	33,213	5,42,690	52.75%

6.13. The above data furnished by the respondent for the Financial Year 2015-2016 is not disputed by the petitioner. If the T & D loss is taken into consideration, it is manifest that the consumption criterion of 51.00% stand complied with by the respondent for the FY 2015-2016. The egregious omission on the part of the petitioner to reckon the T&D loss for the FY 2015-2016 make abundantly clear that the contention of the petitioner that the respondent failed to comply with the twin test of ‘ownership’ and ‘consumption’ for the FY 2015-2016 is not sustainable either on facts or law.

6.14. The learned counsel for the petitioner at the time of advancing arguments fairly conceded that in regard to the FY 2015-2016, the twin requirement envisaged under Rule 3 of the Electricity Rules 2005 is very much satisfied by the respondent. In the light of the above vital facts, this Commission decides that the respondent has not lost its CGP status for the FY 2015-2016.

6.15. The respondent, while conceding that it had lost its CGP status in regard to the FY 2014-2015, had pleaded set-off by quantifying the amounts due from the petitioner towards encashment of the unutilized units as on March 2015 at the applicable rate and the amount payable by it to the petitioner TANGEDCO towards cross subsidy surcharges for the relevant period. According to the respondent while the amount payable by it to the petitioner towards CSS is Rs.7,25,836/-, the amount due from the petitioner towards encashment of unutilized units is Rs.17,36,614/-. Contending so, the respondent prayed for passing an order directing the petitioner to pay a sum of Rs.10,10,778/- to the respondent by setting off Rs.7,25,836/-.

6.16. In the rejoinder filed by the petitioner, the plea of set-off pleaded by the respondent in the counter statement is sought to be jettisoned by referring to the earlier order passed by this Commission in D.R.P.No.67 of 2014 dated 22.09.2020 which came to be upheld by the Hon'ble APTEL vide order passed in Appeal No.56 of 2022. The bone of the contention of the petitioner is that since the cross subsidy surcharge and payment of unutilized energy are two different subjects they cannot be interlinked and as

such the plea of set-off pleaded by the respondent cannot be entertained even for a moment.

6.17. The fact that for the FY 2014-2015, the petitioner is liable to pay the respondent for the unutilized energy units cannot be disputed by the petitioner in view of Rule 3 (2) of the Electricity Act Rules 2005. But the million dollar question that arises in the instant case is as to whether the plea of set-off pleaded by the respondent can be legally entertained on the given facts and circumstances.

6.18. To deal with the above referred vital legal issue, this Commission deem it seemly to begin by first reproducing the relevant provision of law which govern the plea of set-off. Rule 6 of the Order VIII of Code of Civil Procedure reads as follows:-

“6. Particulars of set-off to be given in written statement:- (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.”

6.19. Under Order VIII Rule 6 of CPC a set-off can be availed by the defendant in suits for recovery of money where

- a) the sum due from the plaintiff to the defendant is definite
- b) the sum is legally recoverable (and is not a contested amount) and

c) does not exceed the pecuniary jurisdiction of the Court before which the suit is filed.

6.20. From the above discussion it is manifest that the plea of set-off can be raised only in money suits. In the case in hand, the petitioner TANGEDCO has preferred a petition seeking a prayer for declaration that the respondent is not a CGP for the FY 2014-2015 and 2015-2016. Hence it is manifest that the instant application is not a money claim. Situated thus as per the rigour of Rule 6 (1) of Order VIII CPC, the plea of set-off cannot be entertained in the instant case. Merely because the respondent quantified certain amounts that is claimed to be payable by the petitioner to the respondent and vice versa, the same cannot change the nature of claim made in the original petition. Since the very foundational fact for projecting the plea of set-off (i.e.) existence of money claim, has not been established by the respondent, this Commission decides that the plea of set-off projected by the respondent cannot be entertained by the Commission in the instant case.

6.21. Pertinent here to point out that this Commission vide Order dated 22.09.2020 passed in the case of M/s. Arulmozhi Spinning Mills Pvt. Ltd. Vs. The Superintending Engineer and others (DRP No.67 of 2014) has categorically held that payment of unutilized banked energy and collection of Cross Subsidy Surcharges are two different issues which cannot be interlinked as they operate on different spheres. This Commission further observed that it would not be appropriate for the Distribution Licensee to withhold the payment due on the unutilized banked energy to the Generator

on the ground of non-payment of cross subsidy surcharges. The above order passed by this Commission later on came to be affirmed by the Hon'ble APTEL vide Order dated 26.05.2022 passed in Appeal No.56 of 2022.

6.22. In the backdrop of the Order dated 22.09.2020 passed in DRP No.67 of 2014, this Commission hereby hold that the respondent is entitled for payment on the unutilized banked energy as contended in its counter affidavit. The respondent in its counter affidavit has quantified the amount payable by it to the petitioner towards CSS and also the amount due to it from the petitioner on the unutilized banked energy. In the rejoinder filed by the petitioner, the calculation tabulated in the counter affidavit in regard to cross subsidy surcharge and payment on unutilized banked energy is neither admitted nor denied. However this issue, in the considered opinion of this Commission, can be resolved by the petitioner and the respondent through reconciliation and deliberation across the table.

6.23. On a conspectus evaluation of all facts and circumstances emanating from the material records in the light of the settled principles of law governing the subject, this Commission decides that the petitioner is entitled to an order of declaration as prayed for in the petition partly.

6.24. In the result, this Commission pass the following order:-

- a) It is hereby declared that the respondents WEG No.79204720597 EDC Tirunelveli is not qualified as a Captive Generating Plant for the Financial Year 2014-2015.
- b) The prayer of the petitioner to declare that the respondent's WEG No.79204720597 EDC, Tirunelveli is not qualified as Captive Generating Plant for the Financial Year 2015-2016 is dismissed.
- c) Both parties directed to bear their respective cost.

Petition disposed of accordingly.

(Sd.....)
Member (Legal)

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**