

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar Chairman
Dr.T.Prabhakara Rao Member
and	
Thiru K.Venkatasamy Member (Legal)

M.P.No.11 of 2020

M/s. Aiki Eco Power LLP
No.9, 1st Cross Street
CIT Colony
Mylapore
Chennai – 600 004.

... Petitioner
(Thiru Ramaswamy Meyappan
Advocate for the Petitioner)

Versus

TANGEDCO
Rep. by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002.

..... Respondent
(Thiru M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 09-06-2020; 14-07-2020; 21-07-2020;
28-07-2020; 25-08-2020; 01-09-2020

Date of Order : 22-12-2020

The M.P.No.11 of 2020 came up for final hearing before the Commission on 01-09-2020 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

ORDER

1. Prayer of the Petitioner in M.P. No.11 of 2020:-

The prayer of the Petitioner in M.P. No.11 of 2020 is to clarify the Order dated 28-01-2020 passed in R.A.No.7 of 2019 in the matter of *TANGEDCO Ltd., vs. Sugapriya Paper and Boards (P) Ltd.*, by deleting/removing the column "Profit Sharing Ratio" in Table-A in Format-III, taking into account the provisions of the Limited Liability Partnership Act, 2008 and the Rules framed thereunder and to pass such further or other orders as this Commission may deem fit in the facts and circumstances of the case.

2. Facts of the case:

The present petition has been filed praying for clarification to the Order dated 28-01-2020 passed in R.A.No.7 of 2019 in the matter of *TANGEDCO Ltd., vs. Sugapriya Paper and Boards (P) Ltd.*, and Others with regard to the applicability of the Procedure for Verification of Status of Captive Generating Plants and Captive Users *vis-à-vis* Limited Liability Partnerships (LLPs).

3. Contention of the Petitioner:

3.1. The Petitioner Company was incorporated on 27-01-2012 as a Limited Liability Partnership registered under the provisions of the Limited Liability Partnership Act, 2008 (*hereinafter referred to as "LLP Act, 2008"*). The Petitioner is engaged in the business of generating electricity and selling of electricity through Group Captive Scheme as envisaged under the provisions of the Electricity Act, 2003 and Rules framed thereunder relating to captive generation and consumption of power. The Petitioner is presently running and operating windmills of various capacities

located in different parts of Tamil Nadu, generating power and selling to captive consumers. The following are the details of the windmills of the Petitioner:

Sl. No.	HTSC No.	Land Survey No. of Wind Mill	Location of Wind Mill	Make	Model	Date of installation by Alki Eco Power Ltd.
1.	1050	S.F.No.925/2B	Dhanakarkulam Village, Radhapuram Taluk, Tirunelveli-627 111.	ENERCON-1x600 KW	E-40	7.7.2011
2.	1051	S.F.No.998/6C	Dhanakarkulam Village, Radhapuram Taluk, Tirunelveli-627 111.	ENERCON-1x600 KW	E-40	7.7.2011
3.	4072	S.F.No.131/7	Kuruchikulam Village, Tirunelveli-627 357.	ENERCON-1x800 KW	E-53	29.3.2012
4.	4073	S.F.No.150 (PART)	Kuruchikulam Village, Tirunelveli-627 357.	ENERCON-1x800 KW	E-53	29.3.2012
5.	184/90	S.F.No.163/2C (PART)	Bogampatty Village, Edayarpallayam, Palladam, Coimbatore – 641 658.	ENERCON-1x230 KW	E-30	20.4.2013
6.	164/179	S.F.No.165/2B	Bogampatty Village, Edayarpallayam, Palladam, Coimbatore – 641 658.	ENERCON-1x230 KW	E-30	20.4.2013
7.	2127	S.F.No.139/3, 139/4, & 140/1	Sambhavar Vadakarai Village, Tenkasi, Tirunelveli 627 856.	NEG MICON-1 x 70 KW	NM48/750	10.10.2013
8.	4234	S.F.No.235/1	Kanarpatti Village, Tirunelveli 627 201.	GAMESA 1x850 KW	G-58	26.3.2014
8.	4235	S.F.No.236/1A	Kanarpatti Village, Tirunelveli 627 201.	GAMESA 1x850 KW	G-58	26.3.2014
Total				5.71 MW		

3.2. The present petition is filed seeking clarification of the Order dated 28-01-2020 passed in R.A.No.7 of 2019 passed by this Commission, in so far as it relates to Limited Liability Partnerships.

3.3. The Electricity Rules, 2005 notified vide Notification No. G.S.R 379(E) dt.8.6.2005 lays down the following requirements for a Captive Generating Plant:

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

(1) not less than twenty six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use.'

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent:

*(b) In case of a generating station owned by a Company formed as special purpose vehicle for such generating station, a unit or units of such generating stations identified for captive use and not the entire generating station satisfy (s) the conditions contained in paras (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 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 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."*

The provisions in the Electricity Act, 2003, that relate to Captive Generation and the definitions of Generating Company, generating station are extracted 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 2 (28): "generating company" means any company or body corporate or association or body of individuals, whether incorporated or

not, or artificial juridical person, which owns or operates or maintains a generating station,

Section 2 (30). "Generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch-yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station.

Section 9: Captive Generation

"(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate 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 license 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.”

3.4. The Captive Generating Plants are required to comply and act in accordance with the provisions of the Electricity Act, 2003 and the Rule 3 of Electricity Rules 2005. It is submitted that a power plant to qualify as a Captive Generating Plant (CGP) has to satisfy the following two basic conditions:

- i) The captive user(s) consuming the power generated from the captive generating plant for captive use must necessarily hold not less than 26% of the ownership in the captive generating plant; and*
- ii) Not less than 51% of the aggregate electricity generated in such plant, determined on annual basis, should be consumed for the captive use.*

3.5. The provisos under Rule 3(1) (a) reads as follows:

- “(i) In case of a power plant set up by registered Cooperative Society, the conditions in sub clauses (i) and (ii) of clause (a) of sub rule (1) of Rule 3 shall be satisfied collectively by the members of the Cooperative Society, and*
- (ii) in case of Association of Persons, the captive user(s) shall hold not less than 26% ownership of the plant in aggregate and such captive user(s) shall consume not less than 51% of electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding 10%.”*

3.6. In order to ensure compliance of requirements of Rule 3 of Electricity Rules 2005, this Commission has been pleased to issue certain directions for verification of captive status of CGPs and captive users vide Order dated

28-01-2020 passed in R.A.No.7 of 2019. In so far as it concerns the Petitioner which is a Limited Liability Partnership registered under the provisions of the LLP Act, 2008, the directions are at Paragraph No.7.4.4 (ii.) and the same is extracted below:

“ii. Where the generating company is a Partnership firm / LLP

- 1. A certificate issued by the Firm’s Chartered Accountant who signs the annual financial statement of the Company / Tax Auditor, as the case may be, showing breakup details of total capital of the Firm, the capital held by the captive users, the percentage of proprietary interest and control over the generating plant by the captive users in the Format-III.*
- 2. A certificate regarding extent of “Ownership” in the Captive Generating Plant by the captive user duly certified by the Chartered Accountant who signs the annual Financial Statement / Tax Auditor of the firm / LLP in Format-IV.*
- 3. Relevant extract of Latest Annual Financial Statement of Accounts/Annual Return/ Tax Audit Return of the firm and the captive users showing details of ownership. (To be furnished by the end of November for the purpose of cross verification.)*
- 4. A copy of the agreement/nomination by all partners in a Partnership/ members in an LLP authorizing the signatory of the Partnership Firm/LLP.*
- 5. A certified copy of the Partnership deed/agreement for a Partnership Firm/LLP along with Form A issued by the Registrar of Firms for a Partnership firm and by the ROC in case of LLP and its amendments issued from time to time.*
- 6. The authorized signatory of the Partnership Firm/LLP shall furnish the documents in (1) to (5) above.”*

3.7. As regards an LLP, the Order of the Commission states that an LLP has to file Format-III and Format-IV as referred to in the Annexure to the Order. In Format –III, Table-A contains 7 columns. Column No. 5 in Table-A relates to “Profit Sharing”. The Petitioner is a Limited Liability Partnership governed by the provisions of LLP Act, 2008 and the Rules framed thereunder.

3.8. Section 23 and 33 of the LLP Act, 2008 reads as follows:

23. Relationship of partners-

(1) Save as otherwise provided by this Act, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners.

(2) The limited liability partnership agreement and any changes, if any made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be presented.

(3) An agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership, provided such agreement is ratified by all the partners after the incorporation of the limited liability partnership.

(4) In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule.

33. Obligation to contribute-

(1) The obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement.

(2) A creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.”

3.9. As per Section 23(1) of the LLP Act, 2008, the profit-sharing pattern of an LLP shall be governed by the LLP Agreement and shall not be related to the contribution of partners. It is further submitted that in the event that the LLP Agreement is silent on the profit-sharing aspect, the provisions of the First Schedule of the LLP Act, 2008 shall be looked into. The First Schedule of the LLP Act, 2008 provides that in the absence of express provisions relating to profit sharing in the LLP agreement, the profits shall be shared equally among the Partners.”

3.10. As per Section 33(1) of the LLP Act, 2008, extracted above, the LLP Agreement shall govern the obligations of a partner to contribute towards the LLP. It is further submitted that the voting rights of partners in the LLP are also provided for in the LLP Agreement and regarding voting rights, the provisions of the LLP Act, 2008 do not state that the voting rights of a partner is based on his / her contribution. It is an established practice to provide for the voting rights in the LLP Agreement itself.

3.11. In accordance with Regulation 8 of the First Schedule of the LLP Act, 2008, if the LLP Agreement is silent about the voting rights of partners, each partner shall be entitled to one vote irrespective of capital brought in by him/her.

3.12. Regarding “profit sharing ratio”, the partners in an LLP can determine the same taking into account various aspect to arrive at the final profit-sharing ratio. The two main factors that are generally looked into are: (1) Responsibility and (2) Capital contribution.

3.13. The “profit-sharing ratio” in an LLP can be any number which is agreed between the partners. As stated above, profit-sharing ratio can be agreed between the partners and provided for in the LLP Agreement or in the absence of a specific provision in the LLP Agreement regarding profit sharing ratio, the profits can be shared equally. In view of the above factual and legal position, the column 'Profit Sharing Ratio' in Table-A in Format-III referred to above, will have a direct effect on the ownership rights vis-à-vis the rights envisaged under Rule 3 of the Electricity Rules, 2005, particularly when the provisions of the LLP Act, 2008 provide for flexibility among partners of an LLP.

3.14. The Petitioner therefore filing the present petition seeking for a clarification to the Order dated 28-01-2020 passed in R.A.No.7 of 2019 in the matter of *TANGEDCO Ltd., vs. Sugapriya Paper and Boards (P) Ltd.,* and Others with regard to the applicability of the Procedure for Verification of Status of Captive Generating Plants and Captive Users *vis-a-vis* Limited Liability Partnerships (LLPs.) A partnership firm and a Limited Liability Partnership are fundamentally different in their constitution. A registered Partnership Firm is governed by the provisions of Indian Partnership Act, 1932 and an LLP is governed by the provisions of the LLP Act, 2008. In view of the above, the column “Profit sharing Ratio” in Table-A in Format-III may kindly be removed to avoid any confusion, taking into account the provisions of the Limited Liability partnership Act, 2008 and the Rules framed thereunder.

4. Counter Affidavit of the Respondent:

4.1. The averments made in the Petition filed by the Petitioner herein are denied as false and baseless except those that are specifically admitted. The present petition has been filed praying for clarification to the Order dated 28.01.2020 passed in R.A.No.7 of 2019 in the matter of TANGEDCO Ltd, vs Sugapriya Paper and Boards (P) Ltd, and other with regard to the applicability of the Procedure for Verification of Status of Captive Generating Plants and Captive Users vis-a-vis Limited liability Partnership (LLPs), in so far as it concerns the column 'Profit Sharing Ratio' in Table —A in Format-III may kindly be removed to avoid any confusion.

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

"xxx

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.

Xxx"

4.3. In exercise of powers conferred by section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government issued rules for requirements of Captive Generating Plant and the same is called the Electricity Rules -2005 which 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(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."

4.4. 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 any one of the conditions (or) for both the conditions, the entire electricity generated from such plant in the year shall be treated as if it is 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, since proviso 2 of Section 42 of the Electricity Act, 2003 clearly states that surcharge is not to be levied only in case of Captive Consumption.

4.5. During April-May 2017, notices were issued to all the Generators and their Users (HT consumers) calling for submission of details for verification of the twin conditions. But these were opposed by the Generators and several writ petitions were filed against TANGEDCO in the Hon'ble High Court of Madras, Principal Bench and at Madurai. After several legal issues and court proceedings based on directions of the Hon'ble High Court of Madras, the Commission has issued procedure for verification of status of a captive generating plant vide R.A.No.7 of 2019 dated. 28.01.2020 wherein, the relevant portion at Paragraph No.7.4.4 (ii) and the same is extracted below:

"ii. Where the generating company is a Partnership firm/LLP

- 1. A certificate issued by the Firm's Chartered Accountant who signs the annual financial statement of the company/Tax Auditor, as the case may be, showing breakup details of total capital of the Firm, the capital held by the captive users, the percentage of proprietary interest and control over the generating plant by the captive users in the Format—III.*
- 2. A certificate regarding extent of "Ownership" in the Captive Generating Plant by the captive user duly certified by the Chartered Accountant who signs the annual financial statement /Tax Auditor of the firm /LLP in Format -IV.*
- 3. Relevant extract of Latest Annual Financial Statement of Accounts/annual return/tax audit return of the firm and the Captive Users showing details of ownership. (To be furnished by the end of November for the purpose of cross verification)*
- 4. A copy of the agreement/nomination by all partners in a Partnership/ members in an LLP authorizing the signatory of the Partnership Firm/LLP.*

5. A certified copy of the Partnership deed/agreement for a Partnership Firm/LLP along with Form A issued by the Registrar of Firms for a Partnership firm and by the ROC in case of LLP and its amendments issued from time to time.
6. The authorized signatory of the Partnership Firm/LLP shall furnish the documents in (1) to (5) above.

FORMAT-III

**To be submitted by THE GENERATOR WHICH IS A FIRM]
CERTIFICATE ON 'OWNERSHIP' AS PER RULE 3 OF ELECTRICITY RULES,
2005
FOR WHEELING UNDER CAPTIVE CATEGORY**

We hereby certify that M/'s..... a Partnership Firm having its principal office at

..... satisfy the requirements under Rule 3 of Electricity Rules, 2005 for qualifying as a Captive Generation Plant with reference to "Ownership" criteria as per the Partnership Deed datedwith HTSC No. of Electricity Distribution Circle as given in the annexure. We confirm that the captive consumers are holding proprietary interests and control over the Captive Generation Plant. The detailed breakup of the ownership of each partner in the Partnership Firm has been tabulated below in Table A. Further, specific breakup of the proprietary interest and control in relation to Captive Generation Plant held by captive user vis-à-vis other users has been tabulated below in Table B.

TABLE A:

S.No.	Name of the	Capital Contribution	% Capital contribution	Profit sharing Ratio	Whether Control Proportionate to capital contribution?	Remarks on control pattern

* Please provide remarks in the relevant column whether control is proportionate to the capital contribution.

TABLE B:

<i>Ownership of the Captive Generation Plant of the Partnership Firm as on</i>					
<i>Type of Owner</i>			<i>% of proprietary interest in the Captive Generating Plant</i>	<i>Whether Control Proportionate to Proprietary interest?</i>	<i>Remarks on control pattern *</i>
<i>Captive User</i>	<i>HT.SC.No.</i>	<i>EDC</i>			
<i>o t h e r</i>					
<i>T O T A L</i>					

* please provide remarks in the relevant column whether control is proportionate to the Proprietary interest, with specific reasons as to how the ownership threshold under Rule 3 of the Electricity Rules, 2005 is being satisfied.
Xxxxx"

4.6. According to section 6 of the Act every LLP shall have at least two partners and as per section 7 of the Act LLPs shall have at least two Designated Partners who are individual and at least one of them be a resident in India. In other words, Designated Partners shall necessarily be individuals. Section 8 of the Act provides the liabilities and responsibilities of Designated Partners in LLP. According to the said Section, Designated Partners of LLP are responsible for doing all the acts, matters and things that are required to be done by LLP in respect of compliance of the provisions under the Act and the Designated Partners are also liable for all penalties for any contravention of provisions under the Act.

4.7. As per Section 23 of the Act, the mutual rights and duties of partners of LLP shall be governed by the LLP Agreement between the Partners. Section 23(1) reads as under -

"23. Relationship of partners.—(1) Save as otherwise provided by this Act, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners.

x x x "

4.8. As per sub-section (1) of the Section 23 of the Act, the rights and duties of partners of LLP shall be governed by the LLP Agreement that is entered between the partners.

4.9. It is submitted that regarding "profit sharing ratio" the partners in an LLP can determine the same taking into account various factors to arrive at the final profit-sharing ratio. The two main factors that are generally looked into are (1).Responsibility and (2) Capital contribution. Therefore, Profit Sharing Ratio will have a direct effect on the ownership rights vis-a-vis the- rights envisaged under Rule-3 of the Electricity Rules, 2005. Therefore, the column 'Profit Sharing Ratio' in Table-A in Format-III need not be removed.

4.10. The profit-sharing ratio in an LLP can be any number which is agreed between the partners, the above contention of the petitioner may be correct. Generally, the 'Profit Sharing Ratio' shall be arrived based on two main factors (1).Responsibility and (2) Capital contribution. However, as per the Electricity Rules, 2005, the proprietary interest and control will have to be arrived based on the

remarks furnished in FORMAT-III all columns (i) % of capital contribution (ii) Profit sharing Ratio. (iii) whether control Proportionate to capital contribution, (iv) remarks on control pattern in TABLE-A and also TABLE-B and also relevant clauses of LLP Agreement in connection with responsibility and capital contribution. Therefore, Profit Sharing Ratio also will have a direct effect on the ownership rights vis-a-vis the rights envisaged under Rule-3 of the Electricity Rules, 2005. Therefore, the column 'Profit Sharing Ratio' in "Table" A in Format-III need not be removed.

4.11. The contention of the petitioner that the column "Profit Sharing Ratio" in Table —A in Format —III referred to above, will have a direct effect on the ownership rights vis-à-vis the rights envisaged under Rule 3 of the Electricity Rules, 2005, particularly when the provisions of the LLP Act, 2008 provide for flexibility among partners of an LLP. The Petitioner may also be put strict proof of the same.

4.12. The petitioner has no prima facie case to further pursue the above Petition. Therefore, the petitioner is not entitled to any relief as prayed for in the above petition. The balance of convenience is clearly in favour of the respondent herein. Hence, the above petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as Format-III which provided in R.A.No.7 of 2019 is correct in accordance with law and in the manner known to law.

5. Reply Affidavit filed by the Petitioner:-

5.1. The Petitioner is a Limited Liability Partnership formed under the provisions of the Limited Liability Partnership Act, 2008 (hereinafter 'LLP Act, 2008). Section 2(n) of the

LLP Act, 2008 defines an LLP as *"Limited liability partnership means a partnership formed and registered under this Act;"*

Section 2(d) of the LLP Act, 2008 defines a "Body Corporate" as follows:

"(d) "Body Corporate" means a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) and includes-

(i) a limited liability partnership registered under this Act;

(ii) a limited liability partnership incorporated outside India; and

(iii) a company incorporated outside India"

5.2. Section 3 of the LLP reads as follows:-

"3. Limited liability partnership to be body corporate

(1) A limited liability partnership is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners.

(2) A limited liability partnership shall have a perpetual succession

(3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership."

5.3. A Captive Generating Plant is defined *under Section 2(8) of the Electricity Act, 2003 as follows:*

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."

5.4. In the Electricity Rules, 2005 the requirements for a Captive Generating Plant have been mentioned. *The relevant portion is extracted below:*

"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:

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

'Annual Basis" shall be determined based on a financial year:

"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

"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;

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.'

5.5. A perusal of the following position is clear on a perusal of the above provisions:

“A. Under the provisions of the Electricity Rules, 2005 makes it very clear that a power plant to qualify as a Captive Generating Plant (CGP) has to satisfy the following two basic conditions:

"(I) The captive user(s) consuming the power generated from the captive generating plant for captive use must necessarily hold not less than 26% of the ownership in the captive generating plant; and

(ii) Not less than 51% of the aggregate electricity generated in such plant, determined on annual basis, should be consumed for the captive use."

B. *An LLP is a body corporate and it is an independent legal entity.*

C. *In Explanation (c) to Rule 3, it is stated that ownership in relation to a generating plant set up by a company or "any other body corporate". The words used are 'any other body corporate'. An LLP is a body Corporate as stated above.*

5.6. A bare perusal of the above stated provisions makes it abundantly clear that, a Limited Liability Partnership is a *body corporate* and such body corporate to demonstrate ownership will only have to evince equity interest with voting rights and nothing more.

5.7. In so far as it concerns the Petitioner which is a Limited Liability Partnership registered under the provisions of the *LLP Act, 2008*, the directions at Paragraph No. 7.4.4 (ii.) of the Order of this Commission dated 28.01.2020 may be read as part hereof

5.8. The Petitioner was incorporated on 27-01-2012 as a Limited Liability Partnership registered under the provisions of the Limited Liability Partnership Act, 2008. The Petitioner is engaged in the business of generating electricity and selling of electricity through Group Captive Scheme as envisaged under the provisions of the Electricity Act, 2003 and Rules framed thereunder relating to captive generation and

consumption of power. The operations which are carried on presently by the Petitioner have been stated in Paragraph No.5 of the Petition and the same may kindly be read as part hereof.

5.9. The provisions of the LLP Act, 2008 have been referred to and the same may kindly be read as part hereof. The Petitioner reiterates that an LLP is a body corporate and is an independent legal entity.

5.10. As regards an LLP, the Order of the Commission states that an LLP has to file Format-III and Format-IV as referred to the Order. In Format-III, Table-A contains 7 columns. Column No. 5 in Table-A relates to "*profit sharing*". The Petitioner is a Limited Liability partnership governed by the provisions of the LLP Act 2008 and the rules framed thereunder.

5.11. Section 23 and 33 of the LLP Act 2008 deal with relationship of partners and their obligations. As per Section 23 (1) of the LLP Act, 2008 the profit sharing pattern of LLP shall be governed by the LLP Agreement and Shall not be related to the contribution of Partners.

5.12. In an event that the LLP Agreement is silent on the profit-sharing aspect, the provisions of the First Schedule of the LLP Act, 2008 shall be looked into, The First Schedule of the LLP Act,. 2008 provides that in the absence of express provisions relating to profit sharing in the LLP Agreement, the profits shall be shared equally among the partners.

5.13. As per Section 33(l) of the LLP Act. 2008, the LLP Agreement shall govern the obligations of a partner to contribute towards the LLP. These are admitted facts and position of law. The position is admitted.

5.14. Regarding 'profit sharing ratio', the partners in an LLP can determine the same taking into account various factors to arrive at the final profit-sharing ratio. The two main factors that are generally looked into are: (1) Responsibility and (2) Capital contribution. It is relevant and pertinent to point out that this has been admitted in Paragraph No. 11 of the Counter Affidavit. The allegation that profit sharing will have a direct effect on the ownership rights vis-à-vis the rights envisaged under Rule 3 of the Electricity Rules. 2005 is denied. The further allegation that the column profit sharing ratio in Table-A in Format-III need not be removed is a vague and evasive allegation. LLP being a body corporate is fundamentally distinct in its constitution, particularly in the light of the provisions of the LLP Act, 2008 referred to hereinabove.

5.15. The 'Profit sharing ratio' in an LLP can be any number which is agreed between the partners and is not indicative of their rights and ownership requirements of the body corporate. Profit-sharing ratio can be agreed between the partners and provided for in the LLP Agreement or in the absence of a specific provision in the LLP Agreement regarding profit sharing ratio, the profits can be shared equally.

5.16. The column 'Profit Sharing Ratio in Table-A in Format-III referred to above will have a direct effect on the ownership rights vis-à-vis the rights envisaged

under Rule 3 of the Electricity Rules, 2005, particularly when the provisions of the LLP Act, 2008 provide for flexibility among partners of LLP.

5.17. The clarification as prayed for in the Petition, is in accordance with the provisions of the LLP Act, 2008 and it does not contravene or overlap with any of the provisions of the Electricity Act, 2003 and the Rules framed thereunder. The allegations contra in Paragraph No.12 are denied. A body corporate ought not be treated on par with a partnership firm as under the Partnership Act as it is distinct in its form and organization.

5.18. The Respondent has admitted the averments in the Petitioner and has only stated that *"the petitioner may also be put strict proof of the same"* and there is no denial.

5.19. The Petitioner has made out a strong case on merits and the balance of convenience is in favour of the Petitioner and against the Respondent. If column 'Profit Sharing Ratio' in Table-A in Format-III is not removed, the Petitioner and such other body corporate as under the LLP Act, 2008 will be put to irreparable loss, damage and hardship. On the other hand, absolutely no prejudice will be caused to the Respondent.

5.20. A partnership firm and a Limited Liability Partnership are fundamentally different in their constitution and profit sharing ratio is not relevant particularly in view of the provisions of the LLP Act, 2008 referred to above. A Limited Liability Partnership being a body corporate akin to a company as defined in

Section 3 of the Companies Act, 1956 or any other corporate entity and the only factors that concern the Ownership of a Limited Liability partnership such as that of the Petitioner is the equity interest with voting rights and categorically states that it is not the profit share that determines ownership interest and profit sharing is extraneous to the consideration of Ownership in a Limited Liability Partnership. In view of the above, the column 'Profit Sharing Ratio' in Table-A in Format III, may kindly be removed to avoid any confusion, taking into account the provisions of the Limited Liability Partnership Act, 2008 and the Rules framed thereunder.

6. Findings of the Commission:-

6.1. We have heard the submissions of learned Counsel appearing for the Petitioner and the Respondents. The Petitioner has filed this petition for removal of the Column "Profit Sharing Ratio" in Format-III of Table-A in the Procedure for verification of status of a captive generating plant in accordance with R.A. No.7 of 2019 dated 28-01-2020.

6.2. The Commission issued the aforesaid procedure to be adopted by the Distribution Licensee for verification of the Captive status in order to enable the Distribution Licensee to collect the Cross Subsidy Surcharge from the Captive Generating Plant who has not satisfied the twin norms as specified in Rule 3 of the Electricity Rules, 2005.

6.3. Before issue of the aforesaid Procedure in R.A. No.7 of 2019, the Commission has invited the stakeholders' comments on the Draft Procedure on verification of status of a captive generating plant and

issued a Public notice thereon followed by a public hearing in the Court Hall of the Commission. During the said hearing the stakeholders / their counsels, participated and expressed their views, objections and suggestions. Thus, the Commission has provided the due legal process of "Opportunity of Being Heard".

6.4. After considering the views, objections and suggestions, the Commission has issued the Procedure for verification of status of a captive generating plant vide R.A. No.7 of 2019 dated 28-01-2020, to be adopted by the distribution licensee and the Captive Generating Plants.

6.5. Now, the Petitioner M/s Aiki Eco Power LLP filed the instant petition vide M.P. No.11 of 2020 in R.A. No.7 of 2019 for removal of the Column "Profit Sharing Ratio" in Format-III of Table-A of the CGP Verification Procedure Order in R.A. No.7 of 2019 dated 28-01-2020 stating that the Profit Sharing Ratio will have a direct effect on the ownership rights vis-à-vis the rights envisaged under Rule 3 of the Electricity Rules, 2005, particularly when the provisions of the LLP Act, 2008, provide for flexibility among partners of an LLP.

6.6. However, the Respondent has objected for removal of the "Profit Sharing Ratio" column in Format-III of Table-A of the CGP Verification Procedure Order in R.A. No.7 of 2019 dated 28-01-2020 and prayed for retention of the same.

6.7. In this connection, it is appropriate to refer rule 3 of the Electricity Rules, 2005, which provides as under:

“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”.

6.8. In order to ascertain the fulfillment of the aforesaid criteria, the Commission has scrutinized the Schedule 5 of the LLP Agreement submitted by M/s Aiki Eco Power LLP and observed the Capital Contribution by Partners as under:

Sl. No.	Name of Partner	Cash or in Kind	Value (Rs.)	Percentage
1.	Mr. P. Namasivayam	Cash	50,000/-	36.11%
2.	Mrs. Senthilmani Namasivayam	Cash	52,460/-	37.89%
3.	Senthilkumar Textile Mills Pvt. Ltd.	Cash	36,000/-	26.00%
		Total	1,38,460/-	

From the above, it is observed that the Petitioner's total Capital is Rs.1,38,460/- only. The total capacity of Windmills shown by the Petitioner is 5.71 MW. With a small capital of Rs.1.38 Lakhs, the possibility of acquiring 5.71 MW is unimaginable. Under these circumstances, the Commission is unable to come to a conclusion, whether the Petitioner's LLP as a whole has satisfied the first condition that captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate, due to non-submission of documents / details with respect to the wind mills. Hence, the TANGEDCO has to ensure the criteria of fulfilling the twenty six percent of the ownership of plant in aggregate. As regards the voting rights of Partners of LLP, it is given in para (k) of the LLP Agreement under the head "Article 2 – Definitions".

6.9. Regarding the fulfillment of the second condition, TANGEDCO has to ascertain the percentage of captive power consumption.

6.10. While scrutinizing Schedule 6 of the LLP Agreement of M/s Aiki Eco Power LLP, the Profit Sharing Ratio of the Partners are observed by the Commission as under:

Sl. No.	Name of Partner	Percentage
1.	Mr. P. Namasivayam	48.31%
2.	Mrs. Senthilmani Namasivayam	50.69%
3.	Senthilkumar Textile Mills Pvt. Ltd.	1.00%

6.11. From the above, the Commission observed that the Non-Designated Partner i.e. M/s. Senthilkumar Textile Mills Pvt. Ltd., who holds 26% of

Capital in the LLP, just share a mere 1% of profit in the LLP business, which is something fishy.

6.12. The Commission is of the opinion that for the same reason only, the Petitioner is seeking the removal of the column "Profit Sharing Ratio" as stated in Format-III of Table-A of the CGP Verification Procedure Order in R.A. No.7 of 2019 dated 28-01-2020.

6.13. Since the Petitioner claims that the Profit Sharing Ratio will have a direct effect on the ownership rights vis-à-vis the rights envisaged under Rule 3 of the Electricity Rules, 2005, the Commission has gone through the provisions of LLP relating to the Rights, Liabilities and Duties of Designated Partners, to understand the provisions of the LLP Act, 2008 in detail.

6.14. The role of Designated Partners, their Rights, Liabilities and Duties are stated in the LLP Act, 2008 are as under:

The role of designated partners in case of LLP is on same footage as of Directors in the case of a Company. The designated partners as provided in section 8 are directly responsible for the compliances of all provisions provided under LLP Act and the provisions specified in the LLP Agreement. Unlike normal partners, designated partners are responsible for doing all acts, matters, and things as are required to be done by LLP in respect of compliances of the provisions of the LLP Act.

6.15. A designated partner shall be liable to all penalties imposed on an LLP for any contravention of those provisions. Responsibility for compliances under other Acts and laws is to be determined as per the agreement between the partners. However, the designated partners shall be solely responsible for all compliances and penalties under the LLP Act.

6.16. A managing partner may also be appointed as per an LLP agreement, for managing the business of the firm apart from the designated partners and therefore it is not necessary that a designated partner is also a managing partner & vice versa.

6.17. Rights of Designated Partner are same as of other partners. Similar to other partners, they are not entitled to any remuneration for their participation in the management of LLP unless otherwise specifically provided in the LLP Agreement, yet they have additional responsibilities to comply with and will become liable for all penalties under the LLP Act for contravention/ non-compliance of the provisions of the LLP Act.

6.18. Under section 10 of the LLP Act, if any LLP contravenes the provisions of section 7 (1) of the LLP Act relating to appointment of at least two designated partners, such an LLP and its every partner shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees. Further, contravention of sections 7(4) [filing of particulars of designated partners with Registrar], 7(5) [non-fulfillment of conditions and requirements for eligibility to be a

designated partner], 8 [Liabilities of designated partners] and 9 [Changes in designated partners] of the LLP Act shall entail penalty of fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees to the LLP and its every partner.

Major duties of designated partner

Major duties of a designated partner include:-

- Notify any changes in the LLP's to Registrar of Companies.
- Notify any changes in the Partners names & residential addresses to Registrar of Companies.
- Notify any change in Registered Office Address to Registrar of Companies.
- Filing of any Annual return, Statement of Accounts and other documents specified under the provisions of LLP Act with the Registrar of Companies.
- Statement of Accounts & Solvency to be signed by the Designated Partners of the Company.
- to preserve and to produce before an inspector or any person authorised by him in this behalf with the previous approval of the Central Government, all books and papers of, or relating to, the limited liability partnership or, as the case may be, the other entity, which are in their custody or power

- Responsible for signing all the e-forms filed with the Registrar of Companies.

In view of the above, the Commission holds that procedure for verification of status of a captive generating plant vide R.A. No.7 of 2019 dated 28-01-2020 has been made after following the due process of law and also the Petitioner did not utilise the opportunity of being heard at the time of issue of the aforesaid procedure. As such, the "Profit Sharing Ratio" Column in Format III of Table-A shall be retained in the said Procedure. However, the respondent has to ensure that the consumption of energy is in proportion to the control over the plant and Proprietary interest of the LLP Partners and the Profit Sharing Ratio need not be given weightage.

With the above orders, this petition is finally disposed of.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission