TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the13th Day of July 2023

PRESENT:

Thiru M.Chandrasekar .... Chairman

Thiru K.Venkatesan …. Member

and

Thiru B.Mohan …. Member (Legal)

M.P. No.36 of 2020

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

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

Vs.

The Chettinad Cement Corporation
Private Limited
CCCPL, Rani Meyyammai Nagar
Karikkali, Gujilamparai (Via)
Dindigul District – 624 703

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

This Miscellaneous Petition stands preferred by the Petitioner The Chettinad Cement Corporation Private Limited, Dindigul District – 624 703with a prayer to declare that M/s Chettinad Cement Corporation Private Limited, HT.SC.No.345, Dindigul EDC is not a Captive Generating Plant for the Financial Years 2014-15 and 2015-16 and they are liable to pay Cross Subsidy Surcharge for an amount of Rs.95,02,09,269/- for disqualification of Captive status.

This petition coming up for final hearing on 02-03-2023in the presence of Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Petitioner and ThiruR.S.Pandiyaraj, Advocate for the Respondent and on consideration of the submission made by the Counsel for the Petitioner and Respondent, this Commission passes the following:

ORDER

1. Contentions of the Petitioner:-

1.1. The present Miscellaneous Petition seeks to declare that M/s Chettinad Cement Corporation Private Limited, HT.SC.No.345, Dindigul EDC is not a Captive Generating plant for the Financial Years 2014-15 and 2015-16 and they are liable to pay Cross Subsidy Surcharge for an amount of Rs.95,02,09,269/- for disqualification of Captive status.

1.2. 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 "

In this connection, Section 42 of the Electricity Act, 2003 describes as follows:

42. Duties of distribution licensees and open access:

"xxxx

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 utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:
Provided also that such surcharge and cross subsidies shall be progressively reduced 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.

(3) 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 .

(4) 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. XXXX"

1.3. Further, the Tamil NaduElectricity Regulatory Commission had issued Grid Connectivity and Intra-State Open Access Regulations, 2014 which reads as follows:

23.Crosssubsidysurcharge:

"(1)If open access facility is availed of by a subsidizing consumer of a DistributionLicensee,then such consumer, in addition to transmissionand/or wheeling charges, shall pay cross subsidy surcharge asdetermined by the Commission. Cross subsidysurchargedeterminedonPerUnitbasisshallbepayable,on monthlybasis,bytheopenaccesscustomersbasedon the actualenergy drawnduring themonththrough openaccess.Theamount ofsurchargeshallbepaid tothedistributionlicenseeof theareaof supplyfromwhomtheconsumerwas availingsupplybeforeseekingopenaccess."

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.

1.4. 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 Rule-3 envisages the requirements of Captive Generating Plant as follows:

" 3. Requirements of Captive Generating Plant:

(1) Nopowerplantshallqualifyasa'captivegeneratingplant'underSection 9 read with clause (8) of section 2 of the Act unless-

(a) in case of a power plant –

(i). notlessthantwentysixpercentof theownershipisheldbythecaptive user(s), and

(ii). notlessthanfiftyonepercentoftheaggregateelectricity generated in such plant,determined on an annualbasis, is consumed for the captive use:

Providedthatincaseofpower plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfiedcollectivelyby the members of the co- operative society:

Provided further that in case of association of persons, the captiveuser(s)shallholdnotlessthan 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, determinedon an annualbasis, in proportionto theirshares in ownershipofthepowerplantwithin a variation not exceeding ten percent;

(b). incaseofageneratingstationownedbyacompanyformedasspecial purpose vehicle for such generating stationidentifiedforcaptiveuseandnottheentiregeneratingstationsatisfy(ies)the conditions contained in paragraphs (i) and (ii) of sub-

clause (a) above including –

Explanation:-

(1) Theelectricityrequiredtobeconsumedbycaptiveusersshallbe determinedwithreferencetosuch generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) theequitysharestobeheldbythecaptiveuser(s)inthegenerating stationshallnotbelessthantwenty six per cent of the proportionate of the equityof thecompanyrelatedtothegeneratingunitorunitsidentifiedas the captive generating plant.

Illustration:Inageneratingstationwithtwounitsof50MW eachnamely UnitsAandB,oneunitof50MWnamelyUnitAmaybeidentifiedasthe Captive GeneratingPlant. The captive users shall hold not less than thirteenpercentoftheequityshares inthecompany(beingthetwentysix percent proportionate to Unit A of 50 MW) and not less than fifty one percentoftheelectricitygeneratedinUnitAdeterminedonanannual basis is to be consumed by the captive users.

(2). Itshallbetheobligationofthecaptiveuserstoensurethattheconsumptio n bytheCaptiveUsersatthepercentagesmentioned in sub-clauses (a) and (b) of sub-rule(1)aboveismaintainedandincasetheminimum percentageofcaptive useisnotcompliedwithinanyyear,theentireelectricitygeneratedshallb e 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. *"CaptiveUser"shallmeanthe enduserof theelectricity generatedinaCaptiveGeneratingPlantandtheterm "Captive Use" shall be construed accordingly;*

c. *"Ownership"inrelationtoageneratingstationorpowerplant setupbyacompanyoranyotherbodycorporateshallmean the equityshare capitalwith voting rights. In other cases ownership shallmeanproprietaryinterestandcontroloverthe generating station*

or power plant;

d. "SpecialPurposeVehicle"shallmeanalegalentityowning, operatingandmaintainingageneratingstationandwithno 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.

1.5. The Commission issued R.A.No.7 of 2019 dated.28.01.2020, wherein the relevant portion which held as follows:

"xxx

7.5.6. The ownership details have to be provided by the CGP that supplies to the captive user co-located in its premises also before the commencement of such supply

xxx "

Pursuant to the above, the notice has been issued to the respondent herein to submit the documents with regard to verification of captive status for the Financial years 2014-15 onwards vide letter dated. Lr. No.SE/ DEDC/ DFC/ AO/ R/F.CGP Status/ WEG No/D. /20, dt..03.2020.But, they have not yet submitted the said documents for verification of Captive status. In this connection, the relevant clause of R.A.No.7 of 2019 dated.28.01.2020, is extracted below:-

xxx

7.9.11. Failure to furnish data, the documents for the purpose of annual verification within the time frame affixed in this procedure for verification of CGP status would empower the Licensee determine the status of the plant with the available data with the Licensee.

xxx"

1.6. It is stated that though the notice to them has been issued on 12.03.2020 may be due to time extension given by TNERC due to Covid-19 lockdown, the said documents have not been submitted. However, as per G.O.(Ms) No.324 Revenue and Disaster Management (DM-III) Department dated: 30.06.2020 industries and Commercial establishments have started to function with 100% employees from 06.07.2020. Therefore, the time ends on 05.08.2020.

1.7. In so far as "Ownership" criteria are concerned, the following is stated as below:

(i) As per Auditor Certificate with UDIN no. 19211403AAAABY1736 dated 29.07.2019, Equity Share Capital with voting rights of M/s. Chettinad Cement Corporation as on 30.06.2019 is Rs.44.08 Crores (2,204 shares of Rs.2 lacs each).

(ii) Further, in the Auditor Certificate voting rights of the Equity Shareholders is mentioned as 13.

(iii) But, the AOA of the Generator states about the voting rights of the Generator in page number 22, which is reproduced below,

Subject to any rights or restrictions for the time being attached to any class or classes or classes of shares:

a) On a show of hands, every member present in person shall have one vote;

b) On a poll, the voting rights of members shall be in proportion to his share in the paid-up equity share capital of the company.

(iv) Further, the MOA of the Generator have been verified and the Authorized share capital of the Generator is Rs.500,00,00,000/- divided in to 25,000 shares of Rs.2 lacs each.

(v) In the Annual Report for 2017-2018 submitted by the Generator, the following points are noted and verified,

a) In Page No. 16 - Shareholding pattern reveals that the Generator hold 2,204 shares as on 31.03.2018, which constitutes 2,143 shares (97.230%) by promoter & promoter group and 61 shares (2.770%) by Financial Institutions/Banks.

b) In Page No. 69 - Consolidated Balance Sheet as on 31.03.2018 reveals that the Equity share capital is Rs.4,408lacs.

c) In Page no. 85 – Point No. 9 of the Notes to Consolidated Balance Sheet reveals that the Issued share capital is 2204 shares with an amount of Rs.4,408lacs.

(vi) Further, MGT-7 downloaded from MCA website for FY 2018-2019, which states that the paid up equity share capital as on 31.03.2019 is Rs.4408 lacs with 2,204 shares.

(vii) From the above, it is clear that the promoter & promoter group themselves are holding 97.230% in the Generator, M/s. Chettinad Cement Corporation Private Limited, hence the Generator fulfils the criteria of 'Ownership' stated in Rule 3 of Electricity Rules, 2005.

1.8. In respect of Respondent's plant at Karikkali, the self consumption of the plant details furnished by Respondent in letter dated.31.07.2019 are as follows:

Financial Year	MW	CONSUMPTION DETAILS		
		Gross Generation in units	Auxiliary Consumption In units	Self Consumption In units
(1)	(2)	(3)	(4)	(5)
2012-13	75	188299982	16845756	171147026
2013-14	75	205499465	16766377	140956288
2014-15	75	354549508	28109534	153139774
2015-16	75	277061760	23452624	120861136
2016-17	45	162123792	15398522	120217270
2017-18	45	142158728	13761656	114753072
2018-19	45	217041126	36303593	167737833

1.9. In accordance with Electricity Rules-2005, the “Ownership” criteriaisfulfilled. In respect of the “Consumption” criteria, the Rule-3 of Electricity Rules-2005 stipulates that notlessthanfiftyonepercentoftheaggregateelectricitygeneratedin such plant,determined on an annualbasis, 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:

CONSUMPTION DETAILS						
Financial Year	HT SC 345					
	MW	Gross Generation	Auxiliary Consumption	Aggregate Generation = Gross - Auxiliary consumption	Self [captive] Consumption	Percentage of captive consumption on aggregate generation
(1)	2	3	5	5 = (3-4)	6	7 = (6/5)
2012-13	75	188299982	16845756	171454226	171147026	99.82
2013-14	75	205499465	16766377	188733088	140956288	74.69
2014-15	75	354549508	28109534	326439974	153139774	46.91
2015-16	75	277061760	23452624	253609136	120861136	47.66
2016-17	45	162123792	15398522	146725270	120217270	81.93
2017-18	45	142158728	13761656	128397072	114753072	89.37
2018-19	45	217041126	36303593	180737533	167737833	92.81

1.10. From the above, it is seen that Respondent have consumed 81.93%; 89.37; and 92.81% fulfilling the criteria of consumption of not less than 51% of the aggregate generation in the financial years 2016-17, 2017-18 and 2018-19. Therefore, the “Consumption” criteria as per the Electricity Rules-2005 has been fulfilled for the Financial years 2016-17, 2017-18 and 2018-19 said financial years. Therefore, the Generating plant is declared as Captive Generating for the said financial years. On the other hand, it is clearly observed that the Respondent have not fulfilled “Consumption” criteria for the Financial years 2014-15 and 2015-16 as their self-consumption was 46.91% and 47.66% respectively during 2014-15 and 2015-16 i.e below the requirements of not less than 51%. As you failed to fulfil the “Consumption” criteria as per the Electricity Rules-2005 for the Financial years 2014-15 and 2015-16, the Respondent is liable to pay the Cross Subsidy Surcharge for the self- captive consumed units during the said financial years.

1.11. The drawal and injection voltage of the CGP is 110 KV. Therefore, the rate of Cross Subsidy for the period from 04/2014 to 11.12.2014 is Rs.3.5405/ unit. Similarly, the rate of Cross Subsidy Surcharge for the period from 12.12.2014 to 31.03.2015 and from 01.04.2015 to 31.03.2016 is Rs.3.4191/ unit as per the respective Tariff order of the Commission. As the split up of consumption details for the period from 1.12.2014 to 11.12.2014 is not available with TANGEDCO/Petitioner, therefore, self-consumption for the month of 12/2014 is

taken proportionately in order to compute the consumption for the period of 01.12.2014 to 11.12.2014 as follows:-

Month FY 2014-15	Self-Consumption in Units	CSS Rate Rs.Per Unit	Total CSS Payable Amount in Rs.
April 2014	10890099		
May 2014	15891182		
June 2014	14087034		
July 2014	14880860		
August 2014	14997877		
September 2014	12133450		
October 2014	13427526		
November 2014	10454661		
01-12-2014 to 11-12-2014	3391828		
Total	110154517	3.5405	39,00,02,067
12-12-2014 to 31-12-2014	6166960		
January 2015	14530428		
February 2015	7466808		
March 2015	14821061		
Total	42985257	3.4191	14,69,70,892
Total FY 2014-15	153139774		53,69,72,959
Month FY 2015-16			
April 2015	8955116		
May 2015	11599732		
June 2015	10782001		
July 2015	12308023		
August 2015	8559185		
September 2015	11031912		
October 2015	7791674		
November 2015	10986805		
December 2015	8343238		
January 2016	11295668		
February 2016	8043310		
March 2016	11164472		

Total	120861136	3.4191	41,32,36,310
	Grand Total		95,02,09,269

1.12. From the above, it is stated that the Respondent is liable to pay the Cross Subsidy Surcharge amount of Rs.95,02,09,269/- as they fail to fulfil the consumption criteria as per the Rule-3 of the Electricity Rules-2005 for Financial years 2014-15 and 2015-16.

1.13. TANGEDCO issued show cause notice on 23.09.2020 based on above lines wherein it has been that Respondent has been requested to furnish their reply for Show Cause Notice within 15 days from the date of receipt of this intimation failing which, it will be construed that Respondent no objections to disqualification and consequential dues to be remitted which is of Rs.95,02,09,269/-.

1.14. The Respondent furnished reply on 06.10.2020. In this connection, the following is submitted that the Commission has discussed in detail in R.A.No.7 of 2019 dated.28.01.2020, the applicability of procedure, the relevant portion which held as follows:

> *"6.2 Applicability of procedure -*
>
> *6.2.1 All stakeholders with the exception of TANGEDCO have requested to include the date of applicability of the procedure for verification of captive status of CGP, in the scope, as prospective from the date of final order. On the question of applicability of procedure, retrospective or not, the learned AAG has submitted that*

Commission is only framing an administrative procedure under the regulatory powers and not an adjudicatory function and how to apply and when to apply shall come only when action takes place. Some of the stakeholders have requested to delete the term „captive users" and some of the others have stated that even if procedure is applied retrospectively, the period of implementation of R&C measures be excluded and the conditions of force majeure be dealt in the procedure.

6.2.2 The Electricity Rules 2005 has been in vogue from 8.6.2005. From the date of coming into force of the Electricity Rules, the CGPs are bound to comply with the rules. It is the bounden duty of TANGEDCO who accords permission for wheeling to verify the CGP status and accordingly collect dues of CSS in the context of compliance of the provisions in the Electricity Act 2003 and Electricity Rules 2005. Only matters of dispute are settled by the SERCs and on further appeal by APTEL.

6.2.3 The writ appeal Nos. 930 & 931 have been filed against the judgement issued in W.P Nos. 9304& 9305 of 2017 dt.25.5.2017.These writ petitions are against the notices issued by TANGEDCO during the period 2014-15 to 2016-17.

6.2.4 Since the disputes arose from the date of notices issued in 2017 which relates to the period from 2014-15 FY and the writ petitions filed challenge the notices issued covering the period from 2014-15, the cause of action would be from the impugned period i.e from FY 2014-15.

6.2.5 Therefore, we decide that Applicability of this procedure for verification of CGP status will be from the Financial year 2014-15 for the CGPs and its users. All matters of adjudication shall be brought before the Commission by TANGEDCO.

6.2.6 In the case of Writ petitioners, since the Hon"ble High Court in its order in Writ Appeal has specified time limit for submission of documents by the CGPs for the impugned period (point (iv) and (v) of para 10 of the High Court order), the petitioners shall submit the documents as detailed in this procedure for verification, for the period from 2014-15 to 2016-17 within four weeks from the date of receipt of notice from the Distribution licensee. The Distribution licensee shall verify the status covered for the above period within 3 months and in the event of disputes place them before the Commission for adjudication.

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1.15. Hence, the contention of the Respondent that the provisional demand is for the period 2014-15 and 2015-16 and that the demand could not be for a period beyond three years and therefore, the provisional demand made on 23.09.2020 can never be issued for a position that has already been concluded in the past nor can a monitory demand be made for a period prior to 24.09.2017 as the same is barred by limitation is a misconceived one. Similarly, the contention of the Respondent that the entire basis of the demand is misconceived and their status as a Captive Generating Plant cannot be reopened resorting to an order of the TNERC which declares in no uncertain terms that it was intended to be prospective from FY 2020-21 i.e from 01.04.2020 is also a misleading one.

1.16. The copy of the letter dated.31.07.2019 furnished by Respondent is annexed with the petition, therefore, the contention of the Respondent that the show cause notice refers to a letter submitted by the Company on 31.07.2019, and their statement that no letters were sent by the Company on such date providing details as alleged in the show cause notice, to that extent the data cannot be relied upon as true and conclusive is a misconceived one.

1.17. The Hon'ble Supreme Court of India in M/s. SesaSterlite Ltd Vs Orissa Electricity Regulatory Commission &Ors reported in (2014) 8 SCC 444 held that the Cross Subsidy Surcharge is a compensation to the distribution licensee

irrespective of the fact whether it's line is used or not. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. It is submitted that in view of the law laid down by the Hon'ble Supreme Court of India, Respondent is liable to pay Cross Subsidy Surcharge for disqualification of captive status as per the Electricity Rules-2005. Therefore, the contention of the Respondent that they are not an open access consumer, *strictuosenso* is irrelevant one.

1.18. As per the Respondent's reply M/s. Chettinad Cement Corporation Private Limited is having three Captive Generating Plants located in Puliyur, HT.SC.No.101, Karuur EDC, Ariyalur, HT.SC.No.70, perambalur EDC and Karikkali , HT.SC.No.345, Dindigul EDC. The above three captive generating plants executed the Grid Connectivity with Parallel Operation agreement with TANGEDCO/ TANTRANSCO separately. The energy generated in each of the above three Captive generating plants are self consumed by the receptive Cement plant Co-located therein. Since therein in-house self consumption there is no separate Energy Wheeling Agreement executed by three captive generating plants. Therefore, the energy generated from Puliyur Captive Generating Plant, HT.SC.No.101, has to be self consumed only by the Co-located Puliyur Cement

plant only and generated energy therein could not be wheeled to other cement plants located in Ariyur and Karikkali respectively. Similarly, the energy generated from Ariyaur Captive Generating Plant has to be self consumed only by the Co-located Ariyalur Cement plant only and generated energy therein could not be wheeled to other cement plants located in Puliyur and Karikkali respectively. Similarly, the energy generated from Karikkali Captive Generating Plant has to be self consumed only by the Co-located Karikkali Cement plant only and generated energy could not be wheeled to other cement plants located in Ariyur and Puliyur respectively. 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 "

1.19. The Electricity Rules, 2005 prescribes qualification requirements for a Captive Generating Plant. Further, above three Captive Generating Plants are not located in the same premises, on the other hand it is located in different places. Therefore, as per the law, each plant is a separate CGP and the captive status has to be determined for each plant separately. Hence, the contention of the Respondent that their generation is spread over in Tamil Nadu, several units, 3 of the locations, viz.Ariyalur, Karkalli and Puliyur and therefore, no meaningful

assessment can be made by the Dindigul circle without data being collected from Karur and Ariyalur circles and stating that to that extent the methodology adopted is wrong is a misconceived one. In other words, the request of Respondent only the aggregate energy generated by the Company, for all three plants put together, needs to be always considered as not as per law and hence not acceptable one. There is no Energy Wheeling Agreement executed by three Captive Generating Plants and each of the three captive generating plants are located in different places and not located in the same premises. Each captive generating plant is independent of others. Therefore, the contention of the Respondent that para 7.7.1 and 7.7.2 in R.A.No.7 of 2019 is applicable to the present case is misconceived one. The said clause is applicable only to WEG as per the orders of the Commission.

1.20 The Hon'ble APTEL order in Appeal.No.252 of 2015 (Salasar Steel and Power Ltd Vs Chhattisgarh State Electricity Regulatory Commission and others) is not squarely applicable to the present case. Since, in the said case, the Units TG-1(15 MW) and TG- 2 (65 MW) are located in the same premises. Therefore, the Hon'ble APTEL ordered that aggregate generation and consumption of the TG-1(15 MW) and TG- 2 (65 MW) have to be considered as per the provision of Rule-3(1)(b) of the Electricity Rules-2005. In the case of respondent herein, three Captive Generating Plants are located in different places and hence, the said Appeal is not applicable to the present case. Therefore, as per the law, each plant

is a separate CGP and the captive status has to be determined for each plant separately.

1.21. The Electricity Rules, 2005 prescribes qualification requirements for a Captive Generating Plant. Further, above three Captive Generating Plants are not located in the same premises, on the other hand it is located in different places. Therefore, as per the law, each plant is a separate CGP and the captive status has to be determined for each plant separately. The Respondent reliance on the observation made in W.P.11694 of 2020 is not relevant to the issue on hand and it is an entirely different matter. Further, it is stated that all other contention raised in their reply especially that relating to lifting of lockdown for submission of documents timeline for submission of documents for Financial year 2017-2018, 2018-2019 etc. are not relevant to the issue on hand. The petitioner has verified based on the documents produced by the respondent at an earlier point of time along with documents filed by the Company with MCA.

2. Contentions of the Respondent:-

2.1. The Respondent is a Company incorporated under the Companies Act, 1956 (since repealed and consolidated under the Companies Act, 2013) and is presently a company limited by shares in terms of the provisions of the Companies Act, 2013. The registered office of the Respondent is at Chettinad Towers, 603, Anna Salai, Chennai – 600 006.

2.2. The Respondent had established Cement Plants and Captive Generating Plants (CGPs), all as a part of the corporate entity of the Respondent in the State of Tamil Nadu. The CGPs of the Respondent areas per the following Table:-

1	Chettinad Cement Corporation Private Limited	CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District- 639114	HTSC No. 101, Karur EDC
2	Chettinad Cement Corporation Private Limited	CCCPL, AriyalurTrichy Road, Keelapalur Post, Ariyalur, Ariylaur District- 621 707	HTSC No. 70, Perumbalur EDC
3	Chettinad Cement Corporation Private Limited	CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703	HTSC No. 345, Dindigul EDC

2.3. The CGPs mentioned in Table A above have been owned, operated and maintained by the Respondent with the electricity generated at the CGPs being primarily captively consumed in the operation of the Cement Plants. The Respondent is the only captive user of the Electricity and the no other company or person has claimed the captive user status in respect of such electricity generated at the CGPs. The surplus Electricity available from the CGPs after such captive use by the Respondent, is supplied to TANGEDCO or third parties, without claiming any benefit applicable to Captive Generation and Captive use under the provisions of the Electricity Act, 2003

2.4. The facilities of the Respondent at the above mentioned three places in Table A are connected with the Intra-State Grid in the State of Tamil Nadu.

2.5. The Respondent submits that the Cement Plants and the CGPs are under one Corporate Entity i.e. the Respondent, with one Certificate of Incorporation granted by the Registrar of Companies andare part of the assets of the Respondent Company having common balance sheet. A copy of the Balance Sheet of the Respondent's Company is annexed with the counter for the financial years 2014-15 & 2015-16, which are the disputed periods in the instant petition covered by M.P. No. 36 of 2020. The Equity Shares with voting rights are common to all the Cement Plants the CGPs.

2.6. The Respondent submits that the in terms of the above, the power plants of the Respondent are "Captive Generating Plants" within the scope of the provisions of the Electricity Act, 2003 read with the Electricity Rules, 2005 notified under the Act. Section 2(8) and Section 9 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules which are relevant read as under:

> *"Section 2(8): "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."*
>
> *Section 9:Captive Generation-(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate 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 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."

Rule 3 of the Electricity Rules, 2005

"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 ofthe 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.

<u>Illustration:</u> 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."*

2.7. The Rule 3 of the Electricity Rules, 2005 consciously uses distinct expressions, such as 'Captive Generating Plant' or 'Power Plant'; 'Generating Station', 'Generating Unit' etc., and there is a special objective behind the same. These expressions "Captive Generating Plant", "Generating Station", "Generating Company" and "Company" have been defined in the Electricity Act, 2003 as under:

"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(30):"generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switchgear, 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 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(13)"company" means a company formed and registered under the Companies Act, 1956 and includes any body corporate under a Central, State or Provincial Act;

2.8. The Respondent submits that, on 23.09.2020, TANGEDCO issued a Notice to the Respondent through its Superintending Engineer bearing No. Lr.No.SE/DGL/DFC/AO/ REV/F.CGP/D.No. 826/2020 to show cause as to why the Captive Generating Plants mentioned at Item 3 of Table A at Karikali, Dindigul be not disqualified from having the Captive User Status in respect of the captive consumption, for the financial years 2014-15 and 2015-16 and the Respondent be held to be liable to pay the Cross Subsidy Surcharge to the extent of Rs.95,02,09,269.00. The Petitioner TANGEDCO had proceeded to issue the Show Cause Notice dated 23.09.2020 purporting to treat the above CGP at Karikali, Dindigul separately as a unit for meeting the conditions specified under Rule 3 of the Electricity Rules 2005, without considering the aggregate generation from all the three CGPs mentioned in Table A above and the aggregate quantum of Captive Use thereof by the Respondent.

2.9. On 06.10.2020, the Respondent had duly replied to the Show Cause Notice dated 23.09.2020, placing the legal and factual aspects, as to how the CGPs of the Answering Respondent including the CGP atKarikali, Dindigul duly qualifies as Captive Generating Plant and consequently how the Answering Respondent has become an eligible Captive User.

2.10. TANGEDCO is proceeding on a fundamentally wrong basis by considering the CGP at Karikali, Dindigul, independently instead of considering all the three CGPs together, in determining the Captive Status, with reference to the aggregate generation and aggregate captive use. The claim of the Petitioner - TANGEDCO based on the above computation, treating the CGP at Karikali, Dindigul as an independent and separate unit, is patently erroneous, contrary to the provisions of the Electricity Act, 2003, the Electricity Rules, 2005; the scheme, objective and purpose behind the Act and Rules; the principles laid down by the Hon'ble Appellate Tribunal, the Hon'ble High Court, the Order in RA No. 7 of 2019 dated 28.01.2020 passed by the Commission, and is otherwise arbitrary and capricious. Further, the claim made by the Petitioner pertains to financial years 2014-15 and 2015-16 is therefore time barred and suffers from gross delay/ latches.

2.11. The Scheme under the Electricity Act, 2003 (in contrast to the dispensation in the previous Electricity Laws) is to encourage Captive Generation and Captive Use. The Statement of Objects and Reasons to the Electricity Act, 2003, inter alia, provides *Generation being delicensed and captive generation freely permitted.* The Corporate Entity such as the Answering Respondent should have the freedom to establish its own generating facilities for its power requirement so long such generation is primarily used by the Corporate Entity itself. Section 2 (8) of the Electricity Act, 2003 which defines “Captive Generating Plant” as a power plant set up primarily for his own use, has to be interpreted and applied in the above background of the above objective and purpose.

2.12. The Respondent submits that the concept of what should be considered as primarily for his own use has been further elaborated and provided in Rule 3 of the Electricity Rules, 2003. The objective is that on overall basis the Corporate Entity setting up the facility of captive generation, should use itself in aggregate 51% of the available generation in Million Units.

2.13. The Answering Respondent submits that Section 2(8) of the Electricity Act, 2003 Act uses the expression power plant or captive generating plant in contrast to generating station or generating unit. The expression “a power plant” appearing in Section 2(8) would include Power Plants of Captive Generating Plants as per the provisions of Section 13 of the General Clauses Act, 1897 namely the

singular shall include the plural. In *Commissioner, Trade Tax Uttar Pradesh Vs. DSM Group of Industries*, (2005) 1 SCC 657 the Hon'ble Supreme Court considering the expression "Unit" in relation to exemption provision under the U.P. Trade Tax Act, 1948 had construed the same as applicable to expansion of more than one Unit.

2.14. There is nothing in the provisions of the Electricity Act, 2003 which requires any interpretation to the contrary. On the other hand, considering the objective and purpose of allowing captive generation freely there is a clear basis for construing Power Plants together.

2.15. The Respondent submits that the provisions of Rule 3 of the Electricity Rules, 2005 in the opening part of Rule 3 (1)(a) deals with Captive Generating Plant and thereafter liberalises the consideration of Captive Status to smaller formation of "Generating Station", "Generating Unit" in Rule 3 (1)(b). The objective is clear that in order to facilitate the captive generation and use consideration be not limited to the whole of the power plants with multiple generating station or generating units and smaller formation, be also considered if so desired by the Captive Generator and Captive User. In the circumstances, it will be not consistent with the Act and the Rules, to restrict the consideration of Captive Generation and Captive Use to higher formation of all the Generating Plants of a Corporate Entity. This is particularly in the case, such as the present

one, where both the Captive Generator and Captive user is one entity and it is not a group captive or ownership or captive user status is not being claimed for anyone else or there is no Association of Persons or Society etc.

2.16. The Respondent had placed reliance on decision of the Hon'ble Appellate Tribunal for Electricity in its order in Appeal No. 252 of 2015*(Salasar Steel & Power Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission & Others)* to the extent extracted below.

> *"11. After having a careful examination of all the issues brought before us on the issues raised in this Appeal for our consideration, our observations are as follows:-*
> *……..*
>
> *h) Hence considering the provision of Rule 3 (1) (b) of Electricity Rules, 2005 which prescribes that a generating station can identify a unit or units of such generating stations for captive use, it is clear that Appellant had identified both the Units i.e. TG-1(15 MW) and TG-2 (65 MW) for captive use during FY 2013-14. In view of above for deciding the captive status of the Appellant plant, the aggregated Generation and consumption from both the units i.e. TG-1 (15 MW) and TG-2 (65 MW) has to be considered as per the provision of Rule 3 (1) (b) of Electricity Rules 2005."*

2.17. TANGEDCO is wrong is distinguishing the above decision of the Hon'ble Tribunal by stating that in the said case all the generating units were in the same premises. As mentioned above in the light of the objective and purpose of freeing the captive generation, the principles laid down in the above case will equally apply to more than one CGP, as the objective is that a legal entity establishing the generating plants should be considered for captive status on aggregate basis.

When the legal entity such as the Answering Respondent in the present case has opted for such higher formation, the Petitioner TANGEDCO cannot require the Respondent to sub divide the consideration to lower and multiple formation.

2.18. The Commission, while issuing the procedure for verification of CGP status, in Order in RA No. 7 of 2019 dated 28.01.2020, has also categorically held as below in Para. 7.7.1 & 7.7.2 and however, more particularly in Para 7.7.3:-

> *"7.7 Accounting of aggregate generation and consumption*
>
> *7.7.1 Verification of criteria of consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e gross energy generated less auxiliary consumption. 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 agreements, provided the captive users of each EWA are the same holding same proportion of ownership. The quantum of auxiliary consumption shall be the metered auxiliary consumption or the normative auxiliary consumption whichever is less. The captive consumption (the captive user) may be within the premises where the CGP is located or at a different location. In the absence of measured data on auxiliary consumption, until metering as prescribed in para 7.9.1 of this procedure is completed, the normative auxiliary consumption specified in the Regulations of the Commission may be considered for the purpose of CGP verification status.*
>
> *7.7.2 As per the explanation to Rule 3, „annual basis" refers to determination in a financial year. For determination of captive status on an annual basis, for the first year, the date of grant of open access shall be considered as the start date for the Financial Year(FY). For the subsequent years, generation from 1st April to 31st March of a FY shall be considered for determining captive status.*

7.7.3 The Aggregate Generation for each Generating Plant/Unit identified (in the case of SPV) for captive use on Annual basis shall be calculated as follows:

Aggregate generation =Total generation of the Financial year of all units or units identified (-) Auxiliary consumption."

2.19. The same issue, whether it should be the aggregate of energy to be taken for CGP verification, came before the Hon'ble High Court of Judicature at Madras, in a recent matter concluded on 31.08.2020 in W.P. No.11694 of 2020, the Hon'ble High Court has observed as below and the Ld. Additional Advocate General appeared on behalf of the Petitioner TANGEDCO, has also undertook to comply with the order in RA No. 7 of 2019 dated 28.01.2020, for considering the aggregate energy generated and consumed for the purpose of CGP verification.

"6. Per contra, Mr.P.H.ArvindPandian, learned Additional Advocate General, appearing on behalf of respondents 1,2,4 and 5, submitted that TNERC has already passed an order by laying down the guidelines and fixing the methodology of verification of the consumption annually by the captive users. The learned Additional Advocate General further submitted that in view of the said order, the respondents 4 and 5 can be directed to once again determine the unutilised banked units in line with the order passed by TNERC and, thereafter, pass a fresh order.

7. On a careful consideration of the submissions made on either side, it is clear that the impugned order, dated 06.08.2018, is no longer sustainable in view of the orders passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. Accordingly, the impugned order passed by the fourth respondent, dated 06.08.2018, is hereby quashed. The matter is remanded back to the file of fourth and fifth respondents to determine any payment to be made to the petitioner for the unutilised banked units strictly in accordance with the order passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. The

final orders are to be passed within a period of eight weeks from the date of receipt of a copy of this order."

2.20. All the three Captive Generating Plants owned by the Respondent Company are identified for captive use, the captive generation and consumption should be considered only on the aggregate energy generated by the Respondent. When the Respondent itself had proposed for the above from the beginning and acted so on a consistent basis both before and after the two financial years which are the subject matter of the present petition, there is no basis to take each Captive Generating Plant, as a separate entity for the CGP verification process. When all the three Captive Generating Plants are identified for Captive Use, attempting to select one of the Captive Generating Plants and further attempting to go for a single Plant alone in an isolated manner for the purpose of CGP verification is not permissible in law.

2.21. The Respondent is providing the following Table, year-wise, to demonstrate, as how the Captive Consumption Norms, have been met out, as far as the minimum 51% consumption norms are concerned, which has to be taken always in aggregate.

Table B

Year:2014-15

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Generation in each unit after deducting the auxiliary	Consumption in each unit	Aggregate Consumption ÷ Aggregate Generation	%

		consumption			
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District- 639114 HTSC No. 101, Karur EDC	96284500	84652480	357003220 ÷ 669832931	53.297 or 53.30%
2	Chettinad Cement Corporation Private Limited CCCPL, AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC	277676990	119210964		
3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703 HTSC No. 345, Dindigul EDC	354549508 (Wrongly mentioned as 326439974 in the SCN)	153139774		

2.22. The Answering Respondent submits that therefore, by taking into account the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to the aggregate generation of all three units, it can be seen that the Answering Respondent has consumed to the extent of 53.30% during the year 2014-15 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, (the Answering Respondent) duly satisfies the condition of minimum consumption requirement of 51%, for the year 2014-15.

2.23. The Respondent submits the figures for the year 2015-16 also as below:

Table C

Year:2015-16

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Individual Generation at each Unit	Individual Consumption	Aggregate Consumption ÷ Aggregate Generation	Percentage
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114 HTSC No. 101, Karur EDC	96481900	85598160	311012008 ÷ 529091323	
2	Chettinad Cement Corporation Private Limited CCCPL,	205038421	104552678		

	AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC				58.78%
3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703 HTSC No. 345, Dindigul EDC	277061760	120861136		

2.24. The Respondent submits that by taking into account the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to their aggregate generation of all three, it can be seen that the Answering Respondent has consumed to the extent of 58.78% during the year 2015-16 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, duly satisfies the minimum consumption requirement of 51%, for the year 2015-16 also.

2.25. It should be noted that there are no individual equity shares earmarked or available for each of our three units separately or otherwise, on a unit to unit basis. Only the Corporate Entity, namely M/s. Chettinad Cement Corporation Private Limited, has the share capital, covered by a Common Balance Sheet and a Common Annual Financial Statement. For the purpose of ownership, when the

Company is taken as a whole, to decide the 26% minimum ownership criteria, the rationale of going by individual unit wise generation *vis-à-vis* unit wise consumption, is not valid. In other words, there is no separate set of share capital or shareholders for each of the individual CGPs available in any manner.

2.26. The Respondent submits that while the Commission has issued clear cut orders to take the aggregate generation and aggregate consumption only, for determining the captive status of any Generating Plant(s), the Petitioner TANGEDCO attempting to go by individual unit-wise generation *vis-à-vis* individual consumption-wise, is totally illegal. The Hon'ble Madras High Court has also remanded back W.P.No.11694 of 2020 for reappraisal based on the undertaking provided by the Ld. Additional Advocate General by passing an order on 31.08.2020, strictly in accordance with the procedures laid down as per the order in RA No. 7 of 2019 dated 28.01.2020.

2.27. The Respondent submits that the Superintending Engineer, Dindigul Electricity Distribution Circle of the Petitioner, has wrongly attempted to verify the CGP status of the plant at Karikkali unit alone (HTSC No. 059094500345),treating it as a separate CGP and is wrongly claiming that the Respondent’s CGP Unit at Dindigul be disqualified of the CGP status.

2.28. The Respondent submits that when the Show Cause Notice dated 23.09.2020 was issued by the Superintending Engineer of the Petitioner, there was an unfair demand of Rs.95,02,09,269.00 raised which is not legally maintainable, under the Doctrine of *false uno-false omnibus,* as it is nothing but an action flowing out of a wrong and misconceived method of verification of CGP status in violation of law.

2.29. The Respondent submits that in the facts and circumstances mentioned above, the entire Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the consequential petition filed by the Petitioner in M.P. No. 36 of 2020 are devoid of any merit and therefore, the present petition being M.P. No. 36 of 2020 is liable to be dismissed.

2.30. The Respondent submits that, it is also not out of context to bring it to the knowledge of the Commission that, a writ petition has been filed by Madras Steel Rerollers Association, challenging the order of the Commission in RA No. 7 of 2019 dated 28.01.2020 and the same pending before the Hon'ble High Court of Judicature at Madras and an injunction order has been granted on it on 10.03.2020. Further the matter in RA No. 7 of 2019 is already in challenge in various Forums as submitted in the Table below. Therefore, keeping all the orders not passed and pending, on such challenges and proceeding to adjudicate the matter covered in M.P. No. 36 of 2020, may be deferred. As the matter covered by the challenges may reverse any of the positions covered by the order

in RA No. 7 of 2019 dated 28.01.2020, before adjudicating the matter, at least the Review and Clarification Petitions pending before the Commission may be disposed-off suitably, without which keeping the matter covered by the challenges and proceeding to adjudicate the matter in a separate track would lead to several implications in future. It is therefore humbly submitted that the petitions pending before the Commission may be disposed-off first.

Table

Sl.No.	Name of the Contesting Party	Forum	Reference No.	Jurisdiction
1.	TASMA	Commission	R.P. No. 2 of 2020	Review
2.	TANGEDCO	Commission	R.P. No. 3 of 2020	Review
3.	Sugapriya Paper & Boards (P) Ltd	Commission	R.P. No. 4 of 2020	Review
4.	Madras Steel Re-Rollers Association	Hon'ble High Court	W.P. No. 6160 of 2020	Writ
5.	IWPA	Commission	M.P. No. 24 of 2020	Clarification
6.	TANGEDCO	Commission	M.P. No. 23 of 2020	Clarification
7.	TNPPA	Hon'ble APTEL	Appeal No. 131 of 2020	Appeal

2.31. The Respondent reserves its right to file additional documents by way of additional affidavits / additional written submissions, based on any other new information or new document when emerges in the due course of time while the matter is under adjudication before the Commission as the Answering Respondent is expecting the order of the Hon'ble APTEL in Appeal No. 131 of

2020 very soon which covers the matter of CGP verification more comprehensively in every aspect.

2.32. The petition covered by M.P. No. 36 of 2020 is totally devoid of merits and also fails to consider the legal provisions correctly by adopting a harmonious reading of the legal provisions as contained in the Electricity Rules, 2005 and other connected judgements and orders of both the Hon'ble Appellate Tribunal as well as the Commission, to the extent as submitted below.

(i) The Petitioner has failed to consider as how the verification of CGP status should go, when the Company has multiple Captive Generating Plants identified for its own captive use, without the involvement of any other second or more captive users other than the Company itself and on this score alone, having attempted to identify one among the power plants selectively taken for the purpose of verification, in an isolated manner, is basically wrong and such a procedure is nowhere provided either in the Electricity Rules 2005 or in the binding judgements of the Hon'ble Tribunal or even by the order of the Commission in RA No. 7 of 2019 dated 28.01.2020. Therefore, the entire petition covered under M.P. No. 36 of 2020 needs to be quashed in toto.

(ii) By all reasons, both the Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the

consequential petition filed by the Petitioner in M.P. No. 36 of 2020 before the Commission, is neither maintainable to law nor maintainable to facts as well and therefore, the said Show Cause Notice has to be quashed in all possibilities and the subsequent and consequential petition in M.P. No. 36 of 2020 filed by the Petitioner before the Commission, needs to be dismissed for all reasons, without any further proceedings.

(iii) The Respondent is therefore not liable to pay the cross subsidy surcharge of Rs.95,02,09,269.00 as demanded in the Show Cause Notice and also by the petition covered in M.P. No. 36 of 2020 and accordingly, the Respondent prays that the Commission may be pleased to quash the Show Cause Notice and also to dismiss the petition filed by the Petitioner in M.P. No. 36 of 2020 and accordingly, declare that the demand of Rs.95,02,09,269.00 is not maintainable to law as well as on facts and consequentially dismiss the whole petition covered in M.P. No. 36 of 2020 as not maintainable to law

3. Written Submission filed by the Petitioner:-

3.1. The present Miscellaneous Petition seeks to declare that M/s.Chettinad Cement Corporation Private Limited, HT.SC.No.345, Dindigul EDC is not a Captive Generating plant for the Financial Years 2014-15 and 2015-16 and they

are liable to pay Cross Subsidy Surcharge for an amount of Rs.95,02,09,269/- for disqualification of Captive status.

3.2. 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 Rule-3 envisages the requirements of Captive Generating Plant as follows:-

" 3. Requirements of Captive Generating Plant:

(1) Nopowerplantshallqualifyasa'captivegeneratingplant'underSection 9 read with clause (8) of section 2 of the Act unless-

(a). in case of a power plant –

(i). notlessthantwentysixpercentof theownershipisheldbythecaptive user(s), and

(ii). notlessthanfiftyonepercentoftheaggregateelectricity generated in such plant,determined on an annualbasis, is consumed for the captive use:

Providedthatincaseofpower plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfiedcollectivelyby the members of the co- operative society:

Provided further that in case of association of persons, the captiveuser(s)shallholdnotlessthan 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, determinedon an annualbasis, in proportionto theirshares in ownershipofthepowerplantwithin a variation not exceeding ten percent;

(b). incaseofageneratingstationownedbyacompanyformedasspecial purpose vehicle for such generating station, a unit or units of such

generating stationidentifiedforcaptiveuseandnottheentiregeneratingstationsatisfy(ies)the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

Explanation:-

(1) Theelectricityrequiredtobeconsumedbycaptiveusersshallbe determinedwithreferencetosuch generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) theequitysharestobeheldbythecaptiveuser(s)inthegenerating stationshallnotbelessthantwenty six per cent of the proportionate of the equityof thecompanyrelatedtothegeneratingunitorunitsidentifiedas the captive generating plant.

Illustration:Inageneratingstationwithtwounitsof50MW eachnamely UnitsAandB,oneunitof50MWnamelyUnitAmaybeidentifiedasthe Captive GeneratingPlant. The captive users shall hold not less than thirteenpercentoftheequityshares inthecompany(beingthetwentysix percent proportionate to Unit A of 50 MW) and not less than fifty one percentoftheelectricitygeneratedinUnitAdeterminedonanannual basis is to be consumed by the captive users.

(2). Itshallbetheobligationofthecaptiveuserstoensurethattheconsumption bytheCaptiveUsersatthepercentagesmentioned in sub-clauses (a) and (b) of sub-rule(1)aboveismaintainedandincasetheminimum percentageofcaptive useisnotcompliedwithinanyyear,theentireelectricitygeneratedshallbe 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. "CaptiveUser"shallmeanthe enduserof theelectricity generatedinaCaptiveGeneratingPlantandtheterm "Captive Use" shall be construed accordingly;

c. "Ownership"inrelationtoageneratingstationorpowerplant

setupbyacompanyoranyotherbodycorporateshallmean the equityshare capitalwith voting rights. In other cases ownership shallmeanproprietaryinterestandcontroloverthe generating station or power plant;

d. "SpecialPurposeVehicle"shallmeanalegalentityowning, operatingandmaintainingageneratingstationandwithno other business or activity to be engaged in by the legal entity."

3.3. 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.

3.4. In so far as "Ownership" criteria are concerned, the following is stated as below:-

(i) As per Auditor Certificate with UDIN no. 19211403AAAABY1736 dated 29.07.2019, Equity Share Capital with voting rights of M/s. Chettinad

Cement Corporation as on 30.06.2019 is Rs.44.08 Crores (2,204 shares of Rs. 2 lacs each).

(ii) Further, in the Auditor Certificate voting rights of the Equity Shareholders is mentioned as 13.

(iii) But, the AOA of the Generator states about the voting rights of the Generator in page number 22, which is reproduced below,

"Subject to any rights or restrictions for the time being attached to any class or classes or classes of shares:

(a) On a show of hands, every member present in person shall have one vote;
(b) On a poll, the voting rights of members shall be in proportion to his share in the paid-up equity share capital of the company."

(iv). Further, the MOA of the Generator have been verified and the Authorized share capital of the Generator is Rs. 500,00,00,000/- divided in to 25,000 shares of Rs.2 lacs each.

(v) In the Annual Report for 2017-2018 submitted by the Generator, the following points are noted and verified:-

(a) In Page No. 16 - Shareholding pattern reveals that the Generator hold 2,204 shares as on 31.03.2018, which constitutes 2,143 shares (97.230%) by promoter & promoter group and 61 shares (2.770%) by Financial Institutions/Banks.

(b) In Page No. 69 - Consolidated Balance Sheet as on 31.03.2018 reveals that the Equity share capital is Rs.4,408lacs.

(c) In Page no. 85 – Point No. 9 of the Notes to Consolidated Balance Sheet reveals that the Issued share capital is 2204 shares with an amount of Rs.4,408lacs.

(vi). Further, MGT-7 downloaded from MCA website for FY 2018-2019, which states that the paid up equity share capital as on 31.03.2019 is Rs.4408 lacs with 2,204 shares.

(vii) From the above, it is clear that the promoter & promoter group themselves are holding 97.230% in the Generator, M/s. Chettinad Cement Corporation Private Limited, hence the Generator fulfils the criteria of 'Ownership' stated in Rule 3 of Electricity Rules, 2005

3.5. In respect of Respondent's plant at Karikkali, the self-consumption of the plant details furnished by Respondent in letter dated.31.07.2019 are as follows:

Financial Year	MW	CONSUMPTION DETAILS		
		Gross Generation in units	Auxiliary Consumption In units	Self-Consumption In units
(1)	(2)	(3)	(4)	(5)
2012-13	75	188299982	16845756	171147026
2013-14	75	205499465	16766377	140956288
2014-15	75	354549508	28109534	153139774
2015-16	75	277061760	23452624	120861136
2016-17	45	162123792	15398522	120217270
2017-18	45	142158728	13761656	114753072

2018-19	45	217041126	36303593	167737833

3.6. In accordance with Electricity Rules-2005, the “Ownership” criteria is fulfilled. In respect of the “Consumption” criteria, the Rule-3 of Electricity Rules-2005 stipulates that notlessthanfiftyonepercentoftheaggregateelectricitygeneratedin such plant,determined on an annualbasis, 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:-

CONSUMPTION DETAILS						
Financial Year	HT SC 345					
	MW	Gross Generation	Auxiliary Consumption	Aggregate Generation = Gross - Auxiliary consumption	Self [captive] Consumption	Percentage of captive consumption on aggregate generation
(1)	2	3	5	5 = (3-4)	6	7 = (6/5)
2012-13	75	188299982	16845756	171454226	171147026	99.82
2013-14	75	205499465	16766377	188733088	140956288	74.69
2014-15	75	354549508	28109534	326439974	153139774	46.91
2015-16	75	277061760	23452624	253609136	120861136	47.66
2016-17	45	162123792	15398522	146725270	120217270	81.93

2017-18	45	142158728	13761656	128397072	114753072	89.37
2018-19	45	217041126	36303593	180737533	167737833	92.81

3.7. From the above, it is seen that Respondent have consumed 81.93%; 89.37; and 92.81% fulfilling the criteria of consumption of not less than 51% of the aggregate generation in the financial years 2016-17, 2017-18 and 2018-19. Therefore, the “Consumption” criteria as per the Electricity Rules-2005 has been fulfilled for the Financial years 2016-17, 2017-18 and 2018-19 said financial years. Therefore, the Generating plant is declared as Captive Generating for the said financial years. On the other hand, it is clearly observed that the Respondent have not fulfilled “Consumption” criteria for the Financial years 2014-15 and 2015-16 as their self-consumption was 46.91% and 47.66% respectively during 2014-15 and 2015-16 i.e below the requirements of not less than 51%. As you failed to fulfil the “Consumption” criteria as per the Electricity Rules-2005 for the Financial years 2014-15 and 2015-16, the Respondent is liable to pay the Cross Subsidy Surcharge for the self-captive consumed units during the said financial years.

3.8. The drawal and injection voltage of the CGP is 110 KV. Therefore, the rate of Cross Subsidy for the period from 04/2014 to 11.12.2014 is Rs.3.5405/ unit. Similarly, the rate of Cross Subsidy Surcharge for the period from 12.12.2014 to 31.03.2015 and from 01.04.2015 to 31.03.2016 is Rs.3.4191/ unit as per the respective Tariff order of the Commission. As the split up of consumption details

for the period from 1.12.2014 to 11.12.2014 is not available with TANGEDCO/Petitioner, therefore, self-consumption for the month of 12/2014 is taken proportionately in order to compute the consumption for the period of 01.12.2014 to 11.12.2014 as follows:-

Month FY 2014-15	Self-Consumption in Units	CSS Rate Rs.Per Unit	Total CSS Payable Amount in Rs.
April 2014	10890099		
May 2014	15891182		
June 2014	14087034		
July 2014	14880860		
August 2014	14997877		
September 2014	12133450		
October 2014	13427526		
November 2014	10454661		
01-12-2014 to 11-12-2014	3391828		
Total	110154517	3.5405	39,00,02,067
12-12-2014 to 31-12-2014	6166960		
January 2015	14530428		
February 2015	7466808		
March 2015	14821061		
Total	42985257	3.4191	14,69,70,892
Total FY 2014-15	153139774		53,69,72,959
Month FY 2015-16			
April 2015	8955116		
May 2015	11599732		
June 2015	10782001		
July 2015	12308023		
August 2015	8559185		
September 2015	11031912		
October 2015	7791674		
November 2015	10986805		
December 2015	8343238		
January 2016	11295668		
February 2016	8043310		
March 2016	11164472		

Total	120861136	3.4191	41,32,36,310
	Grand Total		95,02,09,269

3.9. From the above, the Respondent is liable to pay the Cross Subsidy Surcharge amount of Rs.95,02,09,269/- as they fail to fulfil the consumption criteria as per the Rule-3 of the Electricity Rules-2005 for Financial years 2014-15 and 2015-16.

3.10. The Hon'ble Supreme Court of India in M/s.SesaSterlite Ltd Vs Orissa Electricity Regulatory Commission &Ors reported in (2014) 8 SCC 444 held that the Cross Subsidy Surcharge is a compensation to the distribution licensee irrespective of the fact whether it's line is used or not. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. It is submitted that in view of the law laid down by the Hon'ble Supreme Court of India, Respondent is liable to pay Cross Subsidy Surcharge for disqualification of captive status as per the Electricity Rules-2005. Therefore, the contention of the Respondent that they are not an open access consumer, *strictuosenso*is irrelevant one.

3.11. As per Respondent reply M/s. Chettinad Cement Corporation Private Limited is having three Captive Generating Plants located in Puliyur,

HT.SC.No.101, Karuur EDC, Ariyalur, HT.SC.No.70, Perambalur EDC and Karikkali , HT.SC.No.345, Dindigul EDC. The above three captive generating plants executed the Grid Connectivity with Parallel Operation agreement with TANGEDCO/ TANTRANSCO separately. The energy generated in each of the above three Captive generating plants are self-consumed by the receptive Cement plant Co-located therein. Since therein in-house self-consumption there is no separate Energy Wheeling Agreement executed by three captive generating plants. Therefore, the energy generated from Puliyur Captive Generating Plant, HT.SC.No.101, has to be self-consumed only by the Co-located Puliyur Cement plant only and generated energy therein could not be wheeled to other cement plants located in Ariyur and Karikkali respectively. Similarly, the energy generated from Ariyaur Captive Generating Plant has to be self-consumed only by the Co-located Ariyalur Cement plant only and generated energy therein could not be wheeled to other cement plants located in Puliyur and Karikkali respectively. Similarly, the energy generated from Karikkali Captive Generating Plant has to be self-consumed only by the Co-located Karikkali Cement plant only and generated energy could not be wheeled to other cement plants located in Ariyur and Puliyur respectively. 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 ”

3.12. The Electricity Rules-2005 prescribes qualification requirements for a Captive Generating Plant. Further, above three Captive Generating Plants are not located in the same premises, on the other hand it is located in different places. Therefore, as per the law, each plant is a separate CGP and the captive status has to be determined for each plant separately. Hence, the contention of the Respondent that their generation is spread over in Tamil Nadu, several units, 3 of the locations, viz ., Ariyalur, Karkalli and Puliyur and therefore, no meaningful assessment can be made by the Dindigul circle without data being collected from Karur and Ariyalur circles and stating that to that extent the methodology adopted is wrong is a misconceived one. In other words, the request of Respondent only the aggregate energy generated by the Company, for all three plants put together, needs to be always considered as not as per law and hence not acceptable one. There is no Energy Wheeling Agreement executed by three Captive Generating Plants and each of the three captive generating plants are located in different places and not located in the same premises. Each captive generating plant is independent of others. Therefore, the contention of the Respondent that para 7.7.1 and 7.7.2 in R.A.No.7 of 2019 is applicable to the present case is misconceived one. The said clause is applicable only to WEG as per the orders of the Commission.

3.13. The Hon'ble APTEL order in Appeal.No.252 of 2015 (Salasar Steel and Power Ltd Vs Chhattisgarh State Electricity Regulatory Commission and others) is not squarely applicable to the present case. Since, in the said case, the Units TG-1(15 MW) and TG- 2 (65 MW) are located in the same premises. Therefore, the Hon'ble APTEL ordered that aggregate generation and consumption of the TG-1(15 MW) and TG- 2 (65 MW) have to be considered as per the provision of Rule-3(1)(b) of the Electricity Rules-2005. In the case of respondent herein, three Captive Generating Plants are located in different places and hence, the said Appeal is not applicable to the present case. Therefore, as per the law, each plant is a separate CGP and the captive status has to be determined for each plant separately.

4. Written Submission filed on behalf of the Respondent:-

4.1. The instant matter covered in M.P. No. 36 of 2020 is listed for hearing before the Commission on 15.12.2021 as per the Cause List notified as Item No.21.

4.2. This Written Submission is being filed, in pursuance of the Common Order passed by the Commission, issued in M.P. No. 24 of 2020 dated 07.12.2021, in the matter of verification of CGP status, based on various Review Petitions and Clarification Petition filed by various stakeholders, including the Petitioner

TANGEDCO and also by accommodating the orders of the Hon'ble APTEL dated 07.06.2021 and 26.11.2021.

4.3. By the Daily Order in M.P. No.6 of 2021 dated 15.06.2021, the Commission has directed this Respondent and all other parties arrayed as Respondents in the respective CGP verification matters, to file a Memo, as how the order of the Hon'ble APTEL in Appeal No. 131 of 2020, filed by the Tamil Nadu Power Producers Association (TNPPA), against the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020, influences the matter now under adjudication before the Commission and accordingly, a Memo was filed by the Respondent already before the Commission in compliance of the Daily Order dated 15.06.2021.

4.4. Further to the same, the Hon'ble APTEL in a Batch of 39 Appeals, filed before it by various Stakeholders from various States, has issued a detailed order on 26.11.2021, which is also important to decide the instant case as it has made substantial alterations to the order of the Commission passed in RA No. 7 of 2019 dated 28.01.2020, as far as the Rule of Proportionality and other such important matters are concerned.

4.5. Further to the same, the Commission itself has passed a detailed Common Order based on the Order of the Hon'ble APTEL dated 07.06.2021 in Appeal No.

131 of 2020 and also by taking in to consideration of the various submissions made by the Stakeholders, by way of their Review Petitions / Clarification Petition and accordingly, the Common Order dated 07.12.2021 of the Commission, delivered in M.P. No. 24 of 2020, also makes substantial modifications of the original order passed in RA No. 7 of 2019 dated 28.01.2020. Therefore, it becomes necessary, for the Respondent to consolidate the entire matter, within the scope of the modifications and other orders passed in the matter of CGP verification and accordingly, the present petition filed by the TANGEDCO in the instant Miscellaneous Petition, has not only become infructuous for maintainability and has also become not maintainable on various legal and factual matrix as submitted below.

4.6. The Miscellaneous Petition filed by the Petitioner, in the above matter is exclusively based on the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020 and prior to the passing of orders by Hon'ble APTEL in Appeal No. 131 of 2020 dated 07.06.2021. The Hon'ble APTEL has also delivered an order in a Batch of 39 Appeals on 26.11.2021, which substantially alters the status of the matter of CGP verification. Above all, now the Commission has also passed a Common Order on 07.12.2021, in a Batch of Review Petitions and Clarification Petition and therefore, this Common Order dated 07.12.2021 of the Commission, also makes the entire matter of verification of CGP status fully modified and altered. Therefore, under the changed scenario, as explained

above, the petition filed by the TANGEDCO does not have any merit for consideration and has become totally infructuous both on law as well as on facts and therefore, it has to be dismissed for all reasons. Besides to the same, on the grounds of other merits also, the petition requires no consideration on the reasons submitted below and accordingly, the Respondent prays that the instant petition filed by the TANGEDCO in the above M.P. No. can be dismissed as infructuous and also is not maintainable on the grounds of merit too.

4.7. For the purpose of convenience, the extract of the Daily Order of the Commission issued in M.P. No. 6 of 2021 dated 15.06.2021 is reproduced below:

> *"Thiru.M.Gopinathan, Standing Counsel for TANGEDCO appeared. Thiru.S.P.Parthasarathy, Advocate appeared for the respondent and sought time for filing counter. Thiru.S.P.Parthasarathy, Advocate sought to dismiss the petition as infructuous based on the judgement of APTEL against the order passed by the Commission in the matter of guidelines for verification of CGP. Thiru.RahulBalaji, Advocate submitted that all the matters relating to similar prayer could be listed together. Respondent is directed to file memo. The case is adjourned to 13.07.2021 for filing memo on the applicability of the judgement of APTEL to individual cases pertaining to CGPs."*

4.8. Accordingly, on behalf of the Respondent, suitable Memo has been filed before the Commission in pursuance of the above directions on 09.07.2021. However, there was no reply or response found received from the Petitioner TANGEDCO till today. Therefore, the Respondent feels that the Petitioner has no grounds to object the Memo filed by the Respondent on the matter.

4.9. The order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020, was appealed by the Tamil Nadu Power Producers Association (TNPPA), in Appeal No. 131 of 2020 and accordingly, the final order and judgement in Appeal No. 131 of 2020 was issued by the Hon'ble APTEL on 07.06.2021. The order of the Hon'ble APTEL has set aside, various portions of the Order in RA No. 7 of 2019 of the Commission and also modified the order of the Commission to a greater extent to the extent extracted below:-

(i) Granting Open Access:

4.10. The Hon'ble APTEL observed that for the purpose of granting open access for captive purposes, the document as recorded at Para 11.3 of the Judgement dated 07.06.2021 in Appeal No. 131 of 2020, shall be adequate/sufficient. The said order has also reiterated that these documents, as specified therein, are within the framework of TNERC-Grid Connectivity & Intra State Open Access Regulations, 2014 and also do not violate the provisions of Rule 3 of the Electricity Rules, 2005.

4.11. Para 11.3 of the Judgement dated 07.06.2021 is extracted below.

> *(i) Open Access application as per the format given in aforesaid Regulation, 2014 with list of captive users;*
> *(ii) Certificate from a Chartered Accountant or Practicing company secretary providing details of the ownership of the CGP with shareholding details as on the date of the application;*
> *(iii) Consent/NoC obtained from DISCOM (Electricity Distribution Circle (EDC)) where the CGP is located. (Consent/NoC needs to be issued within 3 days as per OA Regulation, 2014);*

(iv) *Consent NOC obtained from DISCOM EDC where the captive users are located (for only new users);*

(v) *An undertaking of not having entered into a Power Purchase Agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought from the Captive user;*

(vi) *Applicable Open Access application fee.*

4.12. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.2 as below:-

> *"17.2Issue No.2:- We hold that for the purpose of granting open access for captive purpose, the document as recorded at Para 11.3 shall be adequate/sufficient. Needless to mention that these documents, as specified therein, are within the framework of TNERC Grid Connectivity & Intra State Open Access Regulations, 2014 and also do not violate the provisions of Rule 3 of the Electricity Rules, 2005."*

Hence, all other documents obligated / insisted for grant of Open Access by the TANGEDCO or SLDC based on the Order in RA No. 7 of 2019 dated 28.01.2020 of the Commission, which were in bulk and most of them seen unwanted, are now declared as not required for submission before the TANGEDCO / SLDC, whenever Open Access approvals are applied for. Hence, to this extent, the order of the Commission is greatly modified, as far as applying for open access approvals. This is a major change ordered in Order in Appeal No. 131 of 2020 dated 07.06.2021 of the Hon'ble APTEL.

(ii) <u>Differentiating SPVs and AoPs</u>:-

4.13. The Hon'ble APTEL made it very clear that SPVs and AoPs are totally different entities, as defined separately under Rule 3 of the Electricity Rules 2005 and accordingly, in all processes, this concept should be kept in mind. The TANGEDCO, for its own convenience, has however manipulated it, even after the matter dealt with clearly, by the Commission also, through its Order in RA No. 7 of 2019 dated 28.01.2020 and accordingly, the TANGEDCO was insisting to get a forcible declaration that all CGPs are AoPs irrespective of their constitution and status. Now such an approach as adopted by the TANGEDCO has become invalid. Now, by this decision of the Hon'ble APTEL, this position of differentiating the SPVs and AoPs as different entities, was set right to move on the right direction.

4.14. Paras 12.19 & 17.3 of the Judgement of the Hon'ble APTEL dated 07.06.2021 are reproduced below for favour of convenience of reference.

> *"12.19 In line with the approach adopted by us in the above judgment, wherein the previous judgment of this Tribunal holding that DPC is part of Non-Tariff Income, was declared by us as 'per incuriam', we proceed to apply the same principle in the present appeal. We opine that the decision of this Tribunal in Kadodara judgment (supra) is given without taking into consideration the provisions of Rule 3 of the Rules to the extent that Second Proviso to Rule 3(1)(a) being an exception under law could not have been applied to Rule 3(1)(b). The said decision was also given in ignorance of the judgments referred by the Appellant, namely B.N. Elias. (1936) I.L.R. 63 Cal. 538; CIT v. LaxmidasDevidas (1937) 39 BOM LR 910; and DwaraknathHarishchandraPitale, [1937] 5 ITR 716 (Bom), RamanlalBhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. BuldanaDistt.Main Cloth Importer Group, (1961) 1 SCR 181 and Mohd.Noorulla v. CIT, (1961) 3 SCR 515 which*

establish that an 'association of persons' is a recognized tax entity and not an incorporated entity. We cannot permit unreasonable hardship to be caused to a captive generating plant, set up by a special purpose vehicle, by applying the above judgment of this Tribunal in ignorance of vital facets governing the framework of Rule 3 and also important judicial decisions as noted above. In the light of this, we have no hesitation to hold that the decision of the Tribunal in Kadodara judgment (supra) to the extent it equates a SPV and an AOP is 'per incuriam'. Consequently, the decisions referred to by the Respondents for the aforesaid issue do not lend any assistance. Therefore, the directions contained under 6.4.4, 6.4.5 and 7.6.4 of the impugned order are set aside."

4.15. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.3 as below:-

"17.3Issue No.3:- We hold that as per provisions stipulated under the Rule 3 of the Electricity Rules, 2005, the SPV & AOP are two distinct entities and cannot be equated at par for computation of annual power consumption for determining the captive status."

Hence, to this extent, the practice followed by the TANGEDCO / SLDC with utter disregard to the order of the Commission, is greatly modified, as far as applying for open access approvals. This is a major change ordered in Order in Appeal No. 131 of 2020 dated 07.06.2021 of the Hon'ble APTEL.

Whether CGP Verification has to go on an Annual Basis or even with split-up periods:

4.16. The Hon'ble APTEL has made it very clear that the verification for determining the ownership & consumption for CGP/captive users, under Rule 3 of the Electricity Rules 2005, being an independent exercise, has to be done, only

on annual basis, at the end of the financial year. Hence, no verification can happen on any split-up period, within the financial year and it has to go, based on the shareholding pattern of the CGP, as available as on 31st March.

4.17. In this regardParas 13.6 & 17.4 of the Judgement of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020 are reproduced below for the sake of convenience of reference.

> *"13.6 Hence, the aforesaid directions for verification of ownership and consumption for any change in the group captive structure for each corresponding period of such change, cannot be sustained and are set aside. Accordingly, we also set aside the directions contained in para 6.4.8, 7.4.3, 7.6.2, 7.6.7 and 7.6.8 of the impugned order. We also reiterate our direction to the effect that any verification of status of CGPs and captive users has to be done on an annual basis, at the end of the financial year in terms of Rule 3 of the Rules."*

4.18. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.4 as below:-

> *"17.4Issue No.4:- We hold that the verification for determining ownership & consumption for CGP /captive users under Rule 3, being an independent exercise, has to be done on annual basis, at the end of financial year."*

4.19. To support further this view, the Hon'ble APTEL has reiterated the position also again in Para 16.8 of the Judgement dated 07.06.2021.

> *"Para 16.8 It is critical for us to note the practical difficulties staring down at the face of the captive users and CGPs in the event the concept of weighted average is applied. We agree with the submissions of the Appellant that the nature of shareholding in a captive structure is fluid and dynamic. That,*

existing captive users within the said captive structure can choose to give-up its ownership along with consumption of captive power at any point of time if it considers no usage for the same. In such a scenario, if no new captive user(s) is added then the shareholding along with consumption is accordingly adjusted. A CGP cannot foresee the future and predict as to how many of its shareholders may give up their ownership along with consumption of captive power, neither can it be predicted, if any new/ how many captive user(s) will be inducted within the structure. In such a scenario, if in terms of Rule 3 of the Rules verification of minimum shareholding along with minimum consumption is not done annually, at the end of the financial year but done considering ownership at different periods during the year, then same would create unforeseen difficulties for a CGP to maintain its captive structure. As such, we opine that the verification mandated under the Rule 3 has to be done annually, by considering the shareholding existing at the end of the financial year. This is also evident from a perusal of Format-5 formulated by TNERC as a part of the impugned order, which also specifically contemplates verification to be done as per the shareholding existing at the end of the financial year. Similar view has already been taken by us in Appeal No. 02 and 179 of 2018 titled as "Prism Cement Limited v. MPERC &Ors" (supra)."

Failure of one or few captive users whether would disqualify the CGP:

4.20. The Hon'ble APTEL has also set aside the below contents of the order of the Commission in RA No. 7 of 2019 dated 28.01.2020 as found in Paragraphs 6.6.3 & 7.8.2 and accordingly, the said Paragraphs have no more validity as of now and therefore, they cannot be enforced in any manner during the process of verification of the CGP status.

4.21. The portions set aside from the order of the Commission as found in Order No. RA 7 of 2019 dated 28.01.2021 are as below:-

> *"6.6.3 Where the minimum 26% ownership and 51% consumption criteria are met, but one or more captive users do not meet the proportionality principle, such users who do not fulfil the proportionality criteria shall lose their captive status and other captive users who fulfil the proportionality criteria will retain their captive status provided the CGP complies with the twin criteria of 26% ownership and 51% consumption excluding users who lost their captive status."*
>
> *"7.8.2 Where the minimum 26% ownership and not less than 51% consumption criteria are met, but one or more captive users do not meet the proportionality principle, such users who do not fulfil the proportionality criteria shall lose their captive status and other captive users who fulfil the proportionality criteria will retain their captive status provided the CGP complies with the twin criteria of 26% ownership and 51% consumption excluding users who lost their captive status."*

4.22. Accordingly, if any CGP satisfies minimum 26% ownership and minimum consumption of 51%, the failure of the individual captive users, in not satisfying the minimum consumption based on its shareholding pattern, except in the case of AoPs, will not anyway disqualify the CGP status in any manner.

4.23. Accordingly, Paras 14.7 & 17.5 of the Judgement of the Hon'ble APTEL dealing with the above matter are reproduced below for the sake of convenience of reference:-

> *"14.7 Hence, we hold that the directions passed in Paras 6.6.3 and 7.8.2 have been done so in disregard of Rule 3 of the Rules and our judgments in the aforesaid appeals. Thus, these directions cannot be sustained under law and are hereby set-aside. We also hold that there is no requirement of payment of CSS by any defaulting captive users, if the rest of the captive users in a CGP fulfil the minimum requirements*

of 26% shareholding and 51% of consumption in terms of Rule 3 of the Rules."

4.24. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.5 as below:-

"17.5Issue No.5:- We hold that the directions contained in Paras 6.6.3 and 7.8.2 of the impugned order passed by the State Commission are in disregard to Rule 3 of the Electricity Rules and hence, cannot be sustained."

Retrospective Verification:

4.25. The Hon'ble APTEL has categorically held that there cannot be any retrospective application of the procedure, formulated under the impugned order in RA No. 7 of 2019 dated 28.01.2020 of the Commission, for the verification of the status of CGP/captive users. Therefore, the documents, as called for from the prescribed Format I to Format V-B, may not be *Mutatis Mutandis* demanded by the TANGEDCO, for the CGP verification, in respect of the past 6 years and however, such Formats can be insisted from the year 2020-21 onwards, in view of the fact that the order of the Commission was made available and known to all the stakeholders, only on 28.01.2020. Therefore, any verification of the CGP status for the years 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 (6 years), can be verified by the TANGEDCO, for the purpose of determination of the captive plant status, only on the basis of the data already furnished by the CGP/Captive users, while availing the open access or otherwise. Therefore, the formatted data, as demanded through Format I to Format V-B, cannot be insisted by the TANGEDCO, for the above period of 6 years.

4.26. Accordingly, Paras 15.8 & 17.6 of the Judgement of the Hon'ble APTEL, dealing with the above matter is reproduced below for the sake of convenience of reference:-

> *"15.8 Furthermore, we are convinced with the contention and have a concurring view with the settled position of law that a piece of delegated legislation cannot have a retrospective applicability unless the parent legislation under which it came into existence permits such retrospective applicability. In this regard, we have gone through the judgments of the Hon'ble Supreme Court in the cases of Panchi Devi (supra), M.D. University (supra) and BasantAgrotech (India) Ltd. (supra). The essence of these decisions is that in the absence of any provision contained in the legislative Act, a delegate cannot make a delegated legislation with retrospective effect. We have examined the provisions of the Electricity Act, 2003 and it is observed that no provision of law is enacted therein which permits retrospectivity. Accordingly, we set-aside the directions contained in Paras 6.2.5. & 7.2.4, and hold that there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGPs and captive users in the State of Tamil Nadu. We however clarify that for the past years, the Respondent No.2 can verify data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, one the basis of the data already furnished by CGP/Captive User(s) while availing open access."*

4.27. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.6 as below.

> *"**17.6Issue No.6**:- We hold that as per settled principles of law, there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGP/captive users. However, it is clarified that for the past years, the second Respondent/TANGEDO can verify data for the purpose of determination of captive plant status on the basis of data already furnished by CGP/Captive users while availing the Also paras 15.5 to 15.7 of page 157 of the order passed by*

the Hon'ble APTEL which forms basis for arriving at the above conclusion:"

4.28. Also Paras 15.5 to 15.7 of page 157 of the order passed by the Hon'ble APTEL which forms basis for arriving at the above conclusion:-

> *"15.5. We have given our consideration to the submissions made on behalf of the Appellant and the Respondents on the present issue. We have noted the submissions of the Respondents and observe that while they are at liberty under law to take appropriate legal remedy, however the appeal before us emanates from the limited issue of challenge to formulation of procedure by TNERC for verification of status of CGPs and captive users in the State of Tamil Nadu. We also cannot lose sight of the crucial fact brought to our knowledge that what is being sought to be done vide the impugned order is an attempt to open the already concluded transactions by requiring additional documents, over and above the documents already furnished by CGPs and captive users who have availed open access in the past.*
>
> *15.6 Another aspect related to issuance of show cause notices, as already recorded above, needs a mention in the present judgement. The Respondent No. 2 has already submitted that it has issued such notices to many captive users and CGPs in the State of Tamil Nadu since the year 2014 till 2017, as also in the year 2020. In this regard, we are constrained to observe that the Respondents are endeavouring to reopen and verify the already closed and concluded transactions of availing open access for captive purposes. For such concluded transactions, the documents have already been submitted with the Respondents and on the basis of the said documents, the Respondents permitted open access for wheeling of captive power.*
>
> *15.7 To require additional documents for such concluded transactions now would amount to changing the rules of the game after the game has started, which is impermissible under law. In this regard, we refer to the decision of the Hon'ble Supreme Court in the case of "K. Manjusree v. State of Andhra Pradesh & another," (2008) 3 SCC 512.*

4.29. Further, any order has its enforceability only prospectively which has been affirmed as per the Legal Maxim *"Nova Constitutiofuturisformanimponeredebet non practeritis"* and the same principle was followed by the Hon'ble Supreme Court in Shanti Conductors (P) Ltd and ors Vs. Assam state Electricity Board &orsdt 23.01.2019. It was held that,

> *"In the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect".*

and therefore, by the legal maxim of "***Nova Constitutiofuturisformanimponeredebet non practeritis"*** also, such a retrospective verification of the CGP status, based on an order issued by the Commission in RA No. 7 of 2019 dated 28.01.2020, cannot be made *Mutatis Mutandis*for the cases of the Respondent pertaining to retrospective periods. On this score also, the petition filed by the Petitioner TANGEDCO, needs to be dismissed.

Weighted Average:

4.30. The Hon'ble APTEL has also set aside Para 7.6.9 of the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020, which is extracted below for instant reference. The portion of the Para 7.6.9 of the Order of the Commission in RA No. 7 of 2019 dated 28.01.2020 stands set aside by Hon'ble APTEL.

> *"7.6.9 Weighted average of shareholding to verify 26% ownership annually when there is change in ownership structure, shall be considered subject to the condition that change in extent of shareholding of a captive user is intimated to the Licensee within 10 days of such change. Failure to intimate the change within the specified period will render in the Licensee conducting verifications without considering weighted average of shareholding."*

4.31. Accordingly, Paras 16.12 & 17.7 of the Judgement of the Hon'ble APTEL dealing with the above matter is reproduced below for the sake of convenience of reference.

> *"16.12 Accordingly, we set-aside the direction contained in para 7.6.9 of the impugned order, wherein TNERC has held that, in the event the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within 10 days to the Respondent No. 2, otherwise the said licensee would proceed to verify captive status without considering weighted average of shareholding."*

4.32. Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.7 as below.

> *"17.7Issue No.7:- We set aside the directions contained in Para 7.6.9 of the impugned order wherein the State Commission has held that, in the event, the weightage average of shareholding of captive users changes within a financial year, then the same has to be intimated within ten days to the second respondent/TANGEDCO, otherwise the said licensee would proceed to verify captive status without considering weightage average shareholding."*

4.33. Therefore, the judgement and final order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, has made enormous changes with major

modifications and has also set aside various portions of the order of the Commission in very many areas to the extent submitted supra.

4.34. Further to the same, the Hon'ble APTEL, in a Batch of 39 Appeals have also passed orders greatly modifying the orders of various State Commissions and accordingly, delivered a detailed order on 26.11.2021 relating to the Rule of Proportionality and all other Parameters governing the CGP verification process.

4.35. Further to the same, the Commission also passed a detailed Common Order on 07.12.2021, in a Batch of Review Petitions and Clarification Petition, which made the entire matter of CGP verification to new and modified standards than on the scopes already approved by the guidelines provided in the order in RA No. 7 of 2019 dated 28.01.2020.

4.36. Therefore, any Miscellaneous Petition filed by the Petitioner TANGEDCO, solely and exclusively based on the Order in RA No. 7 of 2019 dated 28.01.2020 only, makes the petition fully infructuous as of now, after coming in to force of the order of the Hon'ble APTEL in Appeal No. 131 of 2020 dated 07.06.2021, the order of the Hon'ble APTEL in a Batch of 39 Appeals on 26.11.2021 and also by virtue of the Common Order of the Hon'ble Commission dated 07.12.2021. Accordingly, the whole petition filed by the TANGEDCO, needs to be dismissed as infructuous in all respects.

4.37. The Respondent has made out a strong prima-facie case against the Petitioner and the balance of convenience is also very much available to the Respondent, as the vital portions of the Order in RA No. 7 of 2019 dated 28.01.2020, have been subjected to serious and drastic changes and modifications and even some of the portions of the order in RA No. 7 of 2019 dated 28.01.2020, are set aside fully, which led to the issuance of the Common Order dated 07.12.2021 by the Commission. Therefore, unless the Petition filed by the TANGEDCO, solely and exclusively based on the Order in RA No. 7 of 2019 dated 28.01.2020 is dismissed, owing to the fact of coming in to force of the order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, another order of the Hon'ble APTEL dated 26.11.2021 and also based on the Common Order of the Commission dated 07.12.2021, the Respondent would be facing serious prejudices, if the adjudication is allowed to continue anymore.

4.38. Further, coming to the aspect of factual matrix of the matter, the Respondent submits that the Respondent is a Company, incorporated under the Companies Act, 1956 (since repealed and consolidated under the Companies Act, 2013) and is presently a Company limited by shares in terms of the provisions of the Companies Act, 2013. Further, coming to the aspect of factual matrix of the matter, the Respondent submits that the Respondent is a Company, incorporated under the Companies Act, 1956 (since repealed and consolidated

under the Companies Act, 2013) and is presently a Company limited by shares in terms of the provisions of the Companies Act, 2013. The registered office of the Respondent is at Chettinad Towers, 603, Anna Salai, Chennai – 600 006.

4.39. The Respondent further submits that the Respondent had established Cement Plants and Captive Generating Plants (CGPs), all as a part of the Corporate Entity of the Respondent in the State of Tamil Nadu. The CGPs of the Respondent are as per the following Table:

Table A

1	Chettinad Cement Corporation Private Limited	CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114	HTSC No. 101, Karur EDC
2	Chettinad Cement Corporation Private Limited	CCCPL, AriyalurTrichy Road, Keelapalur Post, Ariyalur, Ariylaur District- 621 707	HTSC No. 70, Perumbalur EDC
3	Chettinad Cement Corporation Private Limited	CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703	HTSC No. 345, Dindigul EDC

4.40. The Respondent further submits that the CGPs mentioned in Table A above, are being owned, operated and maintained by the Respondent, with the electricity generated at the CGPs being primarily and captively consumed in the operation of their Cement Plants. The Respondent is the only captive user of the Electricity and there is no other Company or Person has claimed the captive user status in respect of such electricity generated at the CGPs of the Respondent.

Sometimes, the surplus Electricity available from the CGPs, after such captive use by the Respondent, is being supplied to the TANGEDCO or to the Third Parties, without claiming any benefit applicable to Captive Generation and Captive use as provided under the provisions of the Electricity Act, 2003 and Electricity Rules, 2005.

4.41. The Respondent further submits that the facilities of the Respondent at the above mentioned three places in Table A, are connected with the Intra-State Grid in the State of Tamil Nadu.

4.42. The Cement Plants and the CGPs are under one Corporate Entity i.e. the Respondent, with one Certificate of Incorporation, granted by the Registrar of Companies andare part of the assets of the Respondent Company, having a common balance sheet. A copy of the Balance Sheet of the Respondent's Company was already filed before the Commission while providing the counter in the above matter on 13.03.2021 as Annexures A& B for the financial years 2014-15 & 2015-16, which are the disputed periods in the Petition covered by M.P. No. 36 of 2020. The Equity Shares with voting rights, are common to all the Cement Plants owned by the Company which further owns the CGPs. A copy of the Memorandum of Association and Memorandum of Articles along with Certificate of Incorporation were also filed before the Commission on 13.03.2021 while the

Respondent filed its counter on the matter. Therefore, the Respondent is not filing the said documents again along with this Memo to avoid repetition.

4.43. In terms of the above, the power plants of the Respondent are “Captive Generating Plants”, within the meaning and scope of the provisions of the Electricity Act, 2003 read with the Electricity Rules 2005, as notified under the Act.

4.44. Section 2(8) and Section 9 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules which are relevant read as under:

> *“Section 2(8): "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.”*
>
> *Section 9:Captive Generation-(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate 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."

Rule 3 of the Electricity Rules, 2005

"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 ofthe 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.”*

4.45. The Rule 3 of the Electricity Rules 2005, consciously uses distinct expressions, such as ‘Captive Generating Plant’ or ‘Power Plant’; ‘Generating Station’, ‘Generating Unit’ etc., and there is a special objective behind the same. These expressions “Captive Generating Plant”, “Generating Station”, “Generating Company” and “Company” have been defined in the Electricity Act, 2003 as under:

“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(30):"generating station" or “station” means any station for generating electricity, including any building and plant with step-up transformer, switchgear, 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 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(13)"company" means a company formed and registered under the Companies Act, 1956 and includes any body corporate under a Central, State or Provincial Act;”

4.46. On 23.09.2020, TANGEDCO issued a Notice to the Respondent through its Superintending Engineer bearing No. Lr.No.SE/DGL/DFC/AO/ REV/F.CGP/D.No.826/2020 to show cause as to why the Captive Generating Plants mentioned at Item 3 of Table A at Karikali, Dindigul be not disqualified from having the Captive User Status in respect of the captive consumption, for the financial years 2014-15 and 2015-16 and the Respondent be held to be liable to pay the Cross Subsidy Surcharge to the extent of Rs.95,02,09,269.00. The Petitioner TANGEDCO had proceeded to issue the Show Cause Notice dated 23.09.2020, purporting to treat the above CGP at Karikali, Dindigul, separately as a unit for meeting out the conditions specified under Rule 3 of the Electricity Rules 2005, without considering the aggregate generation from all the three CGPs, mentioned in Table A above and the aggregate quantum of Captive Use thereof, by the Respondent.

4.47. On 06.10.2020, the Respondent had duly replied to the Show Cause Notice dated 23.09.2020, placing the legal and factual aspects, as to how the CGPs of the Respondent including the CGP atKarikali, Dindigul, duly qualify as Captive Generating Plants and consequently, how the Respondent has become

an eligible Captive User.The Respondent craves leave to refer to the reply dated 06.10.2020 sent by the Respondent to the Show Cause Notice dated 23.09.2010.

4.48. TANGEDCO is proceeding on a fundamentally wrong basis, by considering the CGP at Karikali, Dindigul, independently, instead of considering all the three CGPs together, in determining the Captive Status, with reference to the aggregate generation and aggregate captive use. The claim of the Petitioner - TANGEDCO based on the above misunderstanding and consequent computation, treating the CGP at Karikali, Dindigul, as an independent and separate unit, is patently erroneous, contrary to the provisions of the Electricity Act, 2003, the Electricity Rules, 2005; the scheme, objective and purpose behind the Act and Rules; the principles laid down by the Hon'ble Appellate Tribunal, the Hon'ble High Court, the Order in RA No. 7 of 2019 dated 28.01.2020, passed by the Commission, and is otherwise arbitrary and capricious.

4.49. Further, the claim made by the Petitioner pertains to financial years 2014-15 and 2015-16 is therefore time barred and suffers from gross delay/ latches and is also to be declared as infructuous in view of the final order and judgement of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, as far they relate to the past periods.

4.50. The Scheme under the Electricity Act, 2003 (in contrast to the dispensation in the previous Electricity Laws), is to encourage Captive Generation and Captive Use. The Statement of Objects and Reasons to the Electricity Act, 2003, inter alia, provides *Generation being delicensed and captive generation freely permitted.* The Corporate Entity such as the Respondent should have the freedom to establish its own generating facilities for its power requirement, so long such generation is primarily used by the Corporate Entity itself. Section 2 (8) of the Electricity Act, 2003 which defines “Captive Generating Plant” as a power plant set up primarily for his own use, has to be interpreted and applied in the above background of the above objective and purpose.

4.51. The concept of what should be considered as primarily for his own use, has been further elaborated and provided in Rule 3 of the Electricity Rules, 2003. The objective is that on overall basis the Corporate Entity setting up the facility of captive generation, should use itself in aggregate 51% of the available generation in Million Units.

4.52. Section 2(8) of the Electricity Act 2003, uses the expression ‘power plant’ or ‘captive generating plant’ differently from the definition of ‘generating station’ or ‘generating unit’. The expression ‘a power plant’ appearing in Section 2(8), would include Power Plants of Captive Generating Plants, as per the provisions of Section 13 of the General Clauses Act 1897, namely the singular shall include the

plural also. In *Commissioner, Trade Tax Uttar Pradesh Vs. DSM Group of Industries*, (2005) 1 SCC 657 the Hon'ble Supreme Court, considering the expression "Unit" in relation to exemption provision under the U.P. Trade Tax Act 1948, had construed the same as applicable to expansion of more than one Unit.A copy of the above judgement of the Hon'bleSupreme Court of India was already filed with the Counter filed by the Respondent on 13.03.2021 as Annexure F and therefore, it is not re-filed again for the sake of avoiding repetition**.**

4.53. There is nothing in the provisions of the Electricity Act 2003, which requires any interpretation to the contrary. On the other hand, considering the objective and purpose of allowing captive generation freely, there is a clear basis for construing Power Plants together or in an aggregate manner.

4.54. The provisions of Rule 3 of the Electricity Rules 2005, in the opening part of Rule 3 (1)(a), deals with Captive Generating Plant and thereafter liberalises the consideration of Captive Status to smaller formation of "Generating Station", "Generating Unit" in Rule 3 (1)(b). The objective is therefore clear that in order to facilitate the captive generation and use, consideration be not limited to the whole of the power plants, with multiple generating station or generating units and smaller formation, be also considered if so desired by the Captive Generator and Captive User. In the circumstances, it will be not consistent with the Act and the

Rules, to restrict the consideration of Captive Generation and Captive Use, to higher formation of all the Generating Plants of a Corporate Entity. This is particularly in the case, such as the present one, where both the Captive Generator and Captive user, is one entity and it is not a group captive or ownership or captive user status is not being claimed for anyone else or there is no Association of Persons or Society etc., involved in the process of captive consumption.

4.55. The Respondent had placed reliance on the decision of the Hon'ble Appellate Tribunal for Electricity in its order in Appeal No. 252 of 2015*(Salasar Steel & Power Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission & Others)* to the extent extracted below. A copy of the order of the Hon'ble APTEL in Appeal No. 252 of 2015 dated 08.11.2016 was already filed before the Commission while filing the counter on 13.03.2021 as Annexure G and considering the point of repetition, the same has not been re-filed again.

> *"11. After having a careful examination of all the issues brought before us on the issues raised in this Appeal for our consideration, our observations are as follows:-*
> *……..*
>
> *h) Hence considering the provision of Rule 3 (1) (b) of Electricity Rules, 2005 which prescribes that a generating station can identify a unit or units of such generating stations for captive use, it is clear that Appellant had identified both the Units i.e. TG-1(15 MW) and TG-2 (65 MW) for captive use during FY 2013-14. In view of above for deciding the captive status of the Appellant plant, the aggregated Generation and consumption from both the units i.e. TG-1 (15 MW) and TG-2 (65 MW) has to be*

considered as per the provision of Rule 3 (1) (b) of Electricity Rules 2005."

4.56. TANGEDCO is wrong in distinguishing the above decision of the Hon'ble Tribunal, by stating that in the said case, all the generating units were in the same premises. As mentioned above, in the light of the objective and purpose of freeing the captive generation, the principles laid down in the above case, will equally apply to more than one CGP, as the objective is that a legal entity establishing the generating plants, should be considered for captive status on aggregate basis. When the legal entity, such as the Respondent in the present case has opted for such higher formation, the Petitioner TANGEDCO cannot require the Respondent to sub-divide the consideration to lower and multiple formations.

4.57. Even the Commission, while issuing the procedure for verification of the CGP status, in Order in RA No. 7 of 2019 dated 28.01.2020, has also categorically held as below, in Para. 7.7.1 & 7.7.2 and however, more particularly in Para 7.7.3:

"7.7 Accounting of aggregate generation and consumption
7.7.1 Verification of criteria of consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e gross energy generated less auxiliary consumption. 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

agreements, provided the captive users of each EWA are the same holding same proportion of ownership. The quantum of auxiliary consumption shall be the metered auxiliary consumption or the normative auxiliary consumption whichever is less. The captive consumption (the captive user) may be within the premises where the CGP is located or at a different location. In the absence of measured data on auxiliary consumption, until metering as prescribed in para 7.9.1 of this procedure is completed, the normative auxiliary consumption specified in the Regulations of the Commission may be considered for the purpose of CGP verification status.

7.7.2 As per the explanation to Rule 3, „annual basis" refers to determination in a financial year. For determination of captive status on an annual basis, for the first year, the date of grant of open access shall be considered as the start date for the Financial Year(FY). For the subsequent years, generation from 1st April to 31st March of a FY shall be considered for determining captive status.

7.7.3 The Aggregate Generation for each Generating Plant/Unit identified (in the case of SPV) for captive use on Annual basis shall be calculated as follows:

Aggregate generation =Total generation of the Financial year of all units or units identified (-) Auxiliary consumption."

4.58. The same issue, whether it should be the aggregate of energy to be taken for CGP verification, came before the Hon'ble High Court of Judicature at Madras also, in a recent matter concluded on 31.08.2020 in W.P. No.11694 of 2020, the Hon'ble High Court has observed as below and the Ld. Additional Advocate General appeared on behalf of the Petitioner TANGEDCO, has also undertook to comply with the order in RA No. 7 of 2019 dated 28.01.2020, for considering the aggregate energy generated and consumed for the purpose of CGP verification.

"6. Per contra, Mr.P.H.ArvindPandian, learned Additional Advocate General, appearing on behalf of respondents 1,2,4

and 5, submitted that TNERC has already passed an order by laying down the guidelines and fixing the methodology of verification of the consumption annually by the captive users. The learned Additional Advocate General further submitted that in view of the said order, the respondents 4 and 5 can be directed to once again determine the unutilised banked units in line with the order passed by TNERC and, thereafter, pass a fresh order.

7. On a careful consideration of the submissions made on either side, it is clear that the impugned order, dated 06.08.2018, is no longer sustainable in view of the orders passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. Accordingly, the impugned order passed by the fourth respondent, dated 06.08.2018, is hereby quashed. The matter is remanded back to the file of fourth and fifth respondents to determine any payment to be made to the petitioner for the unutilised banked units strictly in accordance with the order passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. The final orders are to be passed within a period of eight weeks from the date of receipt of a copy of this order."

4.59. The Respondent further submits that in terms of the above, as all the three Captive Generating Plants owned by the Respondent Company, are identified for captive use, the captive generation and consumption should be considered only on the aggregate energy generated by the Respondent. When the Respondent itself had proposed for the above from the beginning and acted so on a consistent basis, both before and after the two financial years, which are the subject matter of the present petition, there is no basis to take each Captive Generating Plant, as a separate entity, for the purpose of CGP verification process. When all the three Captive Generating Plants are identified for Captive Use, attempting to select one of the Captive Generating Plants and further attempting to go for a

single Plant alone, in an isolated manner for the purpose of CGP verification, is not permissible in law.

4.60. The Respondent is providing the following Table, year-wise, to demonstrate, as how the Captive Consumption Norms, have been met out, as far as the minimum 51% consumption norms are concerned, which has to be taken always in aggregate as per the above quoted provisions of law and also as per the finding judgement of Hon'ble APTEL, Hon'ble High Court of Judicature at Madras and even by the order in RA No. 7 of 2019 dated 28.01.2020 issued by the Commission for the purpose of the verification of CGP status.

Table B

Year:2014-15

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Generation in each unit after deducting the auxiliary consumption	Consumption in each unit	Aggregate Consumption ÷ Aggregate Generation	%
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114 HTSC No. 101, Karur EDC	88259080	84652480	357003220 ÷ 669832931	53.297 or 53.30 %
2	Chettinad Cement Corporation Private Limited CCCPL,	255133875	119210964		

	AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC				
3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703 HTSC No. 345, Dindigul EDC	326439976 (Wrongly mentioned as 326439974 in the SCN)	153139774		

4.61. By taking into account of the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to the aggregate generation of all three units, it can be seen that the Answering Respondent has consumed to the extent of 53.30% during the year 2014-15 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, duly satisfy the condition of minimum consumption requirement of 51%, for the year 2014-15.

4.62. Likewise, the Respondent submits the figures for the year 2015-16 also as below:

Table C

Year:2015-16

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Generation in each Unit after deducting the auxillary consumption	Individual Consumption	Aggregate Consumption ÷ Aggregate Generation	%
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114 HTSC No. 101, Karur EDC	88871260	85598160	311011974 ÷ 529091323	58.78%
2	Chettinad Cement Corporation Private Limited CCCPL, AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC	186610927	104552678		
3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via),	253609136	120861136		

	Dindigul District- 624 703 HTSC No. 345, Dindigul EDC				

4.63. By taking into account the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to their aggregate generation of all three, it can be seen that the Respondent has consumed to the extent of 58.78% during the year 2015-16 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, duly satisfies the minimum consumption requirement of 51%, for the year 2015-16 also.

4.64. There are no individual equity shares earmarked or available for each of the Respondent's three units, separately or otherwise, on a unit to unit basis. Only the Corporate Entity, namely M/s. Chettinad Cement Corporation Private Limited, has the share capital, covered by a Common Balance Sheet and a Common Annual Financial Statement for all of its assets and liabilities. For the purpose of ownership, when the Company is taken as a whole, to decide the 26% minimum ownership criteria, the rationale of going by individual unit wise generation *vis-à-vis* unit wise consumption, is not legally valid by any means. In other words, there is no separate set of share capital or shareholders for each of the individual CGPs available in any manner.

4.65. The Commission has issued clear cut orders to take the aggregate generation and aggregate consumption only, for determining the captive status of any Generating Plant(s), the Petitioner TANGEDCO attempting to go by individual unit-wise generation *vis-à-vis* individual consumption-wise, is totally illegal. The Hon'ble Madras High Court has also remanded back W.P.No.11694 of 2020 for reappraisal based on the undertaking provided by the Ld. Additional Advocate General by passing an order on 31.08.2020, strictly in accordance with the procedures laid down as per the order in RA No. 7 of 2019 dated 28.01.2020.

4.66 Even while issuing the Common Order on 07.12.2021, the Commission has held as below in Para 9.9.7.1

> *"9.9.7 Accounting of aggregate generation and consumption*
>
> *9.9.7.1 Verification criteria of consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e. gross energy generated less auxiliary consumption."*
> *9.9.7.3The Aggregate Generation for each Generating Plant/Unit identified (unit identification applies to SPV) for captive use on Annual basis shall be calculated as follows:*
>
> *(a) For all generators except wind generator:*
>
> *Aggregate generation =Gross generation of generating plant or * units identified (-) Auxiliary consumption*
>
> ** in case of SPV"*

4.67. The Respondent submits that the Superintending Engineer, Dindigul Electricity Distribution Circle of the Petitioner, has wrongly attempted to verify the

CGP status of the plant at Karikkali unit alone (HTSC No. 059094500345),treating it as a separate CGP and is wrongly claiming that the Respondent's CGP Unit at Dindigul be disqualified of the CGP status. Hence, the action of the Superintending Engineer, Dindigul Electricity Distribution Circle in having verified the Karikali Unit alone as separate CGP, when the Company has two more CGPs and in having failed to consolidate the entire energy generated by all the three CGPs owned by the same Company having common equity shares, not in an aggregate manner as ordered by the Commission and also as available in Electricity Rules 2005, a flaw has been found in the whole process. Therefore, the entire Petition filed by the TANGEDCO before the Commission, besides to the grounds of infructuous, suffers also on the grounds of maintainability. Therefore, the petition filed by the TANGEDCO needs to be dismissed in toto.

4.68. When the Show Cause Notice dated 23.09.2020 was issued by the Superintending Engineer of the Petitioner, there was an unfair demand of Rs.95,02,09,269.00 raised which is not legally maintainable, under the Doctrine of *false uno-false omnibus,* as it is nothing but an action flowing out of a wrong and misconceived method of verification of CGP status in violation of law. Moreover, the show cause notice of TANGEDCO has already determined the liability and prejudged the issue. Hence, any decision post hearing can only be a post decisional hearing and is therefore violative of the principles of natural justice.

4.69. In the facts and circumstances mentioned above, the entire Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the consequential petition filed by the Petitioner in M.P. No. 36 of 2020 are devoid of any merit and therefore, the present petition being M.P. No. 36 of 2020 is liable to be dismissed.

4.70. Based on the various Review Petitions filed by various Stakeholders and also by a Clarification Petition, the Commission has passed a detailed Common Order on 07.12.2021 by accommodating the letter and spirit of the order of the Hon'ble APTEL dated 07.06.2021 and also the other order of the Hon'ble APTEL dated 26.11.2021 and therefore, the impugned petition filed by the Petitioner much prior to the above orders dated 07.12.2021, 26.11.2021 and 07.06.2021, would render itself as infructuous on all reasons including the grounds of merits as submitted above.

4.71. The petition covered by M.P. No. 36 of 2020 is totally devoid of merits both on grounds of law as well as on the grounds of factual matrix and accordingly, also fails to consider the legal provisions correctly, by adopting a harmonious reading of the legal provisions as contained in the Electricity Rules, 2005 and other connected judgements and orders of both the Hon'ble Appellate Tribunal as well as the Commission, to the extent as submitted below.

(i) The Petitioner has failed to consider as how the verification of CGP status should go, when the Company has multiple Captive Generating Plants identified for its own captive use, without the involvement of any other second or more captive users other than the Company itself and on this score alone, having attempted to identify one among the power plants selectively taken for the purpose of verification, in an isolated manner, is basically wrong and such a procedure is nowhere provided either in the Electricity Rules 2005 or in the binding judgements of the Hon'ble Tribunal or even by the order of the Commission in RA No. 7 of 2019 dated 28.01.2020. Therefore, the entire petition covered under M.P. No. 36 of 2020 needs to be quashed in toto.

(ii) By all reasons, both the Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the consequential petition filed by the Petitioner in M.P. No. 36 of 2020 before the Commission, is neither maintainable to law nor maintainable to facts as well and therefore, the said Show Cause Notice has to be quashed in all possibilities and the subsequent and consequential petition in M.P. No. 36 of 2020 filed by the Petitioner before the Commission, needs to be dismissed for all reasons, without any further proceedings.

(iii) The Respondent is therefore not liable to pay the cross subsidy surcharge of Rs.95,02,09,269.00 as demanded in the Show Cause Notice and also by the petition covered in M.P. No. 36 of 2020.

(iv) Further, as the order of the Hon'ble APTEL dated 07.06.2021 issued in Appeal No. 131 of 2020 has made several changes and modifications and also set aside many portions of the order in RA No. 7 of 2019 dated 28.01.2020, the Respondent prays that the Commission may be pleased to quash the Show Cause Notice and also to dismiss the petition filed by the Petitioner in M.P. No. 36 of 2020 as totally infructuous and accordingly, declare that the demand of Rs.95,02,09,269.00 is also not maintainable to law, as well as on facts and consequentially dismiss the whole petition covered in M.P. No. 36 of 2020 as not maintainable to law.

5. Additional Written Submission filed on behalf of the Respondent:-

5.1. The Respondent has made the same averments as was made in the Written Submission in the present Additional Written Submission also and hence it is not necessary to reproduce them.

5.2. The instant matter covered in M.P. No. 36 of 2020 was listed for hearing before the Commission on 11.01.2022 and accordingly, the matter was reserved

for orders as per the Daily Order issued based on the hearing held on 11.01.2022, to the extent extracted below.

> *"Thiru.M.Gopinathan, Standing Counsel for TANGEDCO appeared and sought short adjournment for filing written arguments and posting of the matter thereafter for orders. Thiru.S.P.Parthasarathy, Advocate appeared for the respondent. Commission directed the TANGEDCO to file its written submissions within 3 weeks and the respondent side to file written submissions within a week thereafter. Orders reserved."*

5.3. Accordingly, the TANGEDCO has filed the Written Submission and a copy of the same was received on 16.02.2022 and accordingly, on behalf of the Respondent, this Additional Written Submission is filed in compliance of the Daily Order of the Commission dated 11.01.2022. This Additional Written Submission may be taken on the files of the Commission and this Additional Written Submission can be taken as part and parcel of the documents already filed by the Respondent earlier in the matter.

5.4. The Daily Order in M.P. No. 36 of 2020 dated 15.06.2021, the Commission has directed this Respondent and all other parties arrayed as Respondents in the respective CGP verification matters, to file a Memo, as how the order of the Hon'ble APTEL in Appeal No. 131 of 2020, filed by the Tamil Nadu Power Producers Association (TNPPA), against the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020, influences the matter now under adjudication before the Commission and accordingly, a Memo was

filed by the Respondent already before the Commission in compliance of the Daily Order dated 15.06.2021.

5.5. Further to the same, the Hon'ble APTEL in a Batch of 39 Appeals, filed before it by various Stakeholders from various States, has issued a detailed order on 26.11.2021, which is also important to decide the instant case as it has made substantial alterations to the order of the Commission passed in RA No. 7 of 2019 dated 28.01.2020, as far as the Rule of Proportionality and other such important matters are concerned, more particularly about the Rule of Proportionality to be adopted in the case of SPVs.

5.6. Further to the same, the Commission itself has passed a detailed Common Order based on the Order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020 and also by taking in to consideration of the various submissions made by the Stakeholders, by way of their Review Petitions / Clarification Petition and accordingly, the Common Order dated 07.12.2021 of the Commission, delivered in M.P. No. 24 of 2020, also makes substantial modifications of the original order passed in RA No. 7 of 2019 dated 28.01.2020. Therefore, it becomes necessary, for the Respondent to consolidate the entire matter, within the scope of the modifications and other orders passed in the matter of CGP verification and accordingly, the Respondent has filed already a Detailed and Comprehensive Written Submission on the matter before the Commission on 14.12.2021. With all the above background, the Respondent submits that the

Miscellaneous Petition filed by the TANGEDCO and the Written Submission filed by the TANGEDCO instantly have not only become infructuous for maintainability and have also become not maintainable on various legal and factual matrix as submitted further below, in line with the orders of the Hon'ble APTEL as well as of the Commission also.

5.7. It is therefore submitted that the Miscellaneous Petition filed by the Petitioner, in the above matter is exclusively based on the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020 and prior to the passing of orders by Hon'ble APTEL in Appeal No. 131 of 2020 dated 07.06.2021. The Hon'ble APTEL has also delivered an order in a Batch of 39 Appeals on 26.11.2021, which substantially altered the status of the matter of CGP verification. Above all, now the Commission has also passed a Common Order on 07.12.2021, in a Batch of Review Petitions and Clarification Petition filed by various stakeholders and therefore, this Common Order dated 07.12.2021 of the Commission, also makes the entire matter of verification of CGP status, fully modified and altered. Therefore, under the changed scenario, as explained above, the petition filed by the TANGEDCO, originally before passing of the orders by Hon'ble APTEL and even by the Commission, does not have any merit for consideration and has become totally infructuous both on law as well as on facts and therefore, it has to be dismissed for all reasons. Besides to the same, on the grounds of other merits also, the petition requires no consideration on the reasons submitted below and accordingly, the Respondent prays that the instant

petition filed by the TANGEDCO in the above M.P. No. can be dismissed as infructuous and also is not maintainable on the grounds of merit too.

5.8. Therefore, any Miscellaneous Petition filed by the Petitioner TANGEDCO, solely and exclusively based on the Order in RA No. 7 of 2019 dated 28.01.2020 only, makes the petition fully infructuous as of now, after coming in to force of the order of the Hon'ble APTEL in Appeal No. 131 of 2020 dated 07.06.2021, the order of the Hon'ble APTEL in a Batch of 39 Appeals on 26.11.2021 and also by virtue of the Common Order of the Commission dated 07.12.2021. Accordingly, the whole petition filed by the TANGEDCO, needs to be dismissed as infructuous in all respects.

5.9. While filing the Written Submission, the TANGEDCO has not looked in to and appraised all the various orders, already quoted by the Respondent through its Counter, Memo and Written Submission filed before the Commission from time to time as per the Daily Orders of the Commission issued thereupon during various hearings. Except those averments originally made by the TANGEDCO, when the TANGEDCO filed the Miscellaneous Petition, which were much earlier before the orders of Hon'ble APTEL dated 07.06.2021 and 26.11.2021 and also before the Common Order of the Commission dated 07.12.2021, no new facts and circumstances have been found explained in the recent Written Submission filed by the TANGEDCO in any manner. Therefore, the Written Submission now filed by the TANGEDCO, deserves no reply at all, as there was no material facts

placed in it, for filing reply by the Respondent. However, in compliance of the Daily Order of the Commission dated 11.01.2022, this Additional Written Submission is filed again, reiterating all the facts of the case both in law as well as on merits, in order to provide a complete conspectus of the issue covered in the Miscellaneous Petition and how the matter has been wrongly and illegally presented by the TANGEDCO. Therefore, the whole Miscellaneous Petition has to be dismissed in toto as it weighs no consideration of anything either on law or on facts.

6. Memo filed on behalf of the Respondent:-

6.1. This Memo is being filed, in pursuance of the Daily Order of the Hon'ble Commission, issued in M.P. No. 6 of 2021, in the matter of CFC/Deposits & Documentation, TANGEDCO Vs. Tulsyan NEC Ltd., based on the hearing held on 15.06.2021.

6.2. In M.P. No. 6 of 2021 dated 15.06.2021, the Commission has directed this Respondent and all other parties arrayed as Respondents in the respective CGP verification matters, to file a Memo, as how the order of the Hon'ble APTEL in Appeal No. 131 of 2020, filed by the Tamil Nadu Power Producers Association (TNPPA), against the order of the Commission issued in RA No. 7 of 2019 dated 28.01.2020, influences the matter now under adjudication before the Commission.

6.3. For the purpose of convenience, the extract of the Daily Order of the Commission issued in M.P. No. 6 of 2021 dated 15.06.2021 is reproduced below:

> *"Thiru.M.Gopinathan, Standing Counsel for TANGEDCO appeared. Thiru.S.P.Parthasarathy, Advocate appeared for the respondent and sought time for filing counter. Thiru.S.P.Parthasarathy, Advocate sought to dismiss the petition as infructuous based on the judgement of APTEL against the order passed by the Commission in the matter of guidelines for verification of CGP. Thiru.RahulBalaji, Advocate submitted that all the matters relating to similar prayer could be listed together. Respondent is directed to file memo. The case is adjourned to 13.07.2021 for filing memo on the applicability of the judgement of APTEL to individual cases pertaining to CGPs."*

6.4. Therefore, on behalf of the Respondent, this Memo is being filed, before the Commission, in pursuance of the above directions.

6.5 The Commission issued in RA No. 7 of 2019 dated 28.01.2020, was appealed by the Tamil Nadu Power Producers Association (TNPPA), in Appeal No. 131 of 2020 and accordingly, the final order and judgement in Appeal No. 131 of 2020 was issued by the Hon'ble APTEL on 07.06.2021. The present Respondent in M.P. No. 31 of 2020, is a Member in Tamil Nadu Power Producers Association (TNPPA). The order of the Hon'ble APTEL has set aside, various portions of the Order in RA No. 7 of 2019 of the Commission and also modified the order of the Commission to a greater extent to the extent extracted below under the heading of (A) to (F).

A) Granting Open Access:

The Hon'ble APTEL observed that for the purpose of granting open access

for captive purposes, the document as recorded at Para 11.3 of the Judgement dated 07.06.2021 in Appeal No. 131 of 2020, shall be adequate/sufficient. The said order has also reiterated that these documents, as specified therein, are within the framework of TNERC-Grid Connectivity & Intra State Open Access Regulations, 2014 and also do not violate the provisions of Rule 3 of the Electricity Rules, 2005.

Para 11.3 of the Judgement dated 07.06.2021 is extracted below.

(i) Open Access application as per the format given in aforesaid Regulation, 2014 with list of captive users;

(ii) Certificate from a Chartered Accountant or Practicing company secretary providing details of the ownership of the CGP with shareholding details as on the date of the application;

(iii) Consent/NoC obtained from DISCOM (Electricity Distribution Circle (EDC)) where the CGP is located. (Consent/NoC needs to be issued within 3 days as per OA Regulation, 2014);

(iv) Consent NOC obtained from DISCOM EDC where the captive users are located (for only new users);

(v) An undertaking of not having entered into a Power Purchase Agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought from the Captive user;

(vi) Applicable Open Access application fee.

Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.2 as below.

> *"17.2 Issue No.2:- We hold that for the purpose of granting open access for captive purpose, the document as recorded at Para 11.3 shall be adequate/sufficient. Needless to mention that these documents, as specified therein, are within the framework of TNERC Grid Connectivity & Intra State Open Access Regulations, 2014 and also do not violate the provisions of Rule 3 of the Electricity Rules, 2005."*

Hence, all other documents, obligated / insisted for grant of Open Access by the TANGEDCO or SLDC based on the Order in RA No. 7 of 2019 dated 28.01.2020 of the Commission, which were in bulk and most of them seen unwanted, are now declared as not required for submission before the TANGEDCO / SLDC, whenever Open Access approvals are applied for. Hence, to this extent, the order of the Commission is greatly modified, as far as applying for open access approvals. This is a major change ordered in Order in Appeal No. 131 of 2020 dated 07.06.2021 of the Hon'ble APTEL.

B) Differentiating SPVs and AoPs:

Hon'ble APTEL made it very clear that SPVs and AoPs are totally different entities, as defined separately under Rule 3 of the Electricity Rules 2005 and accordingly, in all processes, this concept should be kept in mind. The TANGEDCO, for its own convenience, has however manipulated it, even after the matter dealt with clearly, by the Commission also, through its Order in RA No. 7

of 2019 dated 28.01.2020 and accordingly, the TANGEDCO was insisting to get a forcible declaration that all CGPs are AoPs irrespective of their constitution and status. Now such an approach as adopted by the TANGEDCO has become invalid. Now, by this decision of the Hon'ble APTEL, this position of differentiating the SPVs and AoPs as different entities, was set right to move on the right direction.

Paras 12.19 & 17.3 of the Judgement of the Hon'ble APTEL dated 07.06.2021 are reproduced below for favour of convenience of reference.

> *"12.19 In line with the approach adopted by us in the above judgment, wherein the previous judgment of this Tribunal holding that DPC is part of Non-Tariff Income, was declared by us as 'per incuriam', we proceed to apply the same principle in the present appeal. We opine that the decision of this Tribunal in Kadodara judgment (supra) is given without taking into consideration the provisions of Rule 3 of the Rules to the extent that Second Proviso to Rule 3(1)(a) being an exception under law could not have been applied to Rule 3(1)(b). The said decision was also given in ignorance of the judgments referred by the Appellant, namely B.N. Elias. (1936) I.L.R. 63 Cal. 538; CIT v. LaxmidasDevidas (1937) 39 BOM LR 910; and DwaraknathHarishchandraPitale, [1937] 5 ITR 716 (Bom), RamanlalBhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. BuldanaDistt.Main Cloth Importer Group, (1961) 1 SCR 181 and Mohd.Noorulla v. CIT, (1961) 3 SCR 515 which establish that an 'association of persons' is a recognized tax entity and not an incorporated entity. We cannot permit unreasonable hardship to be caused to a captive generating plant, set up by a special purpose vehicle, by applying the above judgment of this Tribunal in ignorance of vital facets governing the framework of Rule 3 and also important judicial decisions as noted above. In the light of this, we have no hesitation to hold that the decision of the Tribunal in Kadodara judgment (supra) to the extent it equates a SPV and an AOP is 'per incuriam'. Consequently, the decisions referred to by the Respondents for the aforesaid issue do not lend any assistance. Therefore, the directions contained under 6.4.4, 6.4.5 and 7.6.4 of the impugned order are set aside."*

Further, while concluding the judgement, the Hon'ble APTEL has also observed

in Para 17.3 as below.

> *“17.3 Issue No.3:- We hold that as per provisions stipulated under the Rule 3 of the Electricity Rules, 2005, the SPV & AOP are two distinct entities and cannot be equated at par for computation of annual power consumption for determining the captive status.”*

Hence, to this extent, the practice followed by the TANGEDCO / SLDC with utter disregard to the order of the Commission, is greatly modified, as far as applying for open access approvals. This is a major change ordered in Order in Appeal No. 131 of 2020 dated 07.06.2021 of the Hon'ble APTEL.

C) Whether CGP Verification has to go on an Annual Basis or even with split-up periods:

The Hon'ble APTEL has made it very clear that the verification for determining the ownership & consumption for CGP/captive users, under Rule 3 of the Electricity Rules 2005, being an independent exercise, has to be done, only on annual basis, at the end of the financial year. Hence, no verification can happen on any split-up period, within the financial year and it has to go, based on the shareholding pattern of the CGP, as available as on 31st March.

In this regard Paras 13.6 & 17.4 of the Judgement of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020 are reproduced below for the sake of convenience of reference.

> *“13.6 Hence, the aforesaid directions for verification of ownership and consumption for any change in the group captive structure for each*

corresponding period of such change, cannot be sustained and are set aside. Accordingly, we also set aside the directions contained in para 6.4.8, 7.4.3, 7.6.2, 7.6.7 and 7.6.8 of the impugned order. We also reiterate our direction to the effect that any verification of status of CGPs and captive users has to be done on an annual basis, at the end of the financial year in terms of Rule 3 of the Rules."

Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.4 as below.

"17.4 Issue No.4:- We hold that the verification for determining ownership & consumption for CGP /captive users under Rule 3, being an independent exercise, has to be done on annual basis, at the end of financial year."

To support further this view, the Hon'ble APTEL has reiterated the position also again in Para 16.8 of the Judgement dated 07.06.2021.

"Para 16.8 It is critical for us to note the practical difficulties staring down at the face of the captive users and CGPs in the event the concept of weighted average is applied. We agree with the submissions of the Appellant that the nature of shareholding in a captive structure is fluid and dynamic. That, existing captive users within the said captive structure can choose to give-up its ownership along with consumption of captive power at any point of time if it considers no usage for the same. In such a scenario, if no new captive user(s) is added then the shareholding along with consumption is accordingly adjusted. A CGP cannot foresee the future and predict as to how many of its shareholders may give up their ownership along with consumption of captive power, neither can it be predicted, if any new/ how many captive user(s) will be inducted within the structure. In such a scenario, if in terms of Rule 3 of the Rules verification of minimum shareholding along with minimum consumption is not done annually, at the end of the financial year but done considering ownership at different periods during the year, then same would create unforeseen difficulties for a CGP to maintain its captive structure. As such, we opine that the verification mandated under the Rule 3 has to be done annually, by considering the shareholding existing at the end of the financial year. This is also evident from a perusal of Format-5 formulated by TNERC as a part of the impugned order, which also specifically contemplates verification to be done as per the shareholding existing at the end of the financial year. Similar view has already been taken by us in Appeal No. 02

and 179 of 2018 titled as "Prism Cement Limited v. MPERC &Ors" (supra)."

D) Failure of one or few captive users whether would disqualify the CGP:

The Hon'ble APTEL has also set aside the below contents of the order of the Commission in RA No. 7 of 2019 dated 28.01.2020 as found in Paragraphs 6.6.3 & 7.8.2 and accordingly, the said Paragraphs have no more validity as of now and therefore, they cannot be enforced in any manner during the process of verification of the CGP status.

The portions set aside from the order of the Commission as found in Order No. RA 7 of 2019 dated 28.01.2021 are as below.

"6.6.3 Where the minimum 26% ownership and 51% consumption criteria are met, but one or more captive users do not meet the proportionality principle, such users who do not fulfil the proportionality criteria shall lose their captive status and other captive users who fulfil the proportionality criteria will retain their captive status provided the CGP complies with the twin criteria of 26% ownership and 51% consumption excluding users who lost their captive status."

"7.8.2 Where the minimum 26% ownership and not less than 51% consumption criteria are met, but one or more captive users do not meet the proportionality principle, such users who do not fulfil the proportionality criteria shall lose their captive status and other captive users who fulfil the proportionality criteria will retain their captive status provided the CGP complies with the twin criteria of 26% ownership and 51% consumption excluding users who lost their captive status."

Accordingly, if any CGP satisfies minimum 26% ownership and minimum consumption of 51%, the failure of the individual captive users, in not satisfying the minimum consumption based on its shareholding pattern, except in the case

of AoPs, will not anyway disqualify the CGP status in any manner.

Accordingly, Paras 14.7 & 17.5 of the Judgement of the Hon'ble APTEL dealing with the above matter are reproduced below for the sake of convenience of reference.

> *"14.7 Hence, we hold that the directions passed in Paras 6.6.3 and 7.8.2 have been done so in disregard of Rule 3 of the Rules and our judgments in the aforesaid appeals. Thus, these directions cannot be sustained under law and are hereby set-aside. We also hold that there is no requirement of payment of CSS by any defaulting captive users, if the rest of the captive users in a CGP fulfil the minimum requirements of 26% shareholding and 51% of consumption in terms of Rule 3 of the Rules."*

Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.5 as below.

> *"17.5 Issue No.5:- We hold that the directions contained in Paras 6.6.3 and 7.8.2 of the impugned order passed by the State Commission are in disregard to Rule 3 of the Electricity Rules and hence, cannot be sustained."*

E) Retrospective Verification:

The Hon'ble APTEL has categorically held that there cannot be any retrospective application of the procedure, formulated under the impugned order in RA No. 7 of 2019 dated 28.01.2020 of the Hon'ble Commission, for the verification of the status of CGP/captive users. Therefore, the documents, as called for from the prescribed Format I to Format V-B, may not be Mutatis Mutandis demanded by the TANGEDCO, for the CGP verification, in respect of the past 6 years and however, such Formats can be insisted from the year 2020-

21 onwards, in view of the fact that the order of the Hon'ble Commission was made available and known to all the stakeholders, only on 28.01.2020. Therefore, any verification of the CGP status for the years 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 (6 years), can be verified by the TANGEDCO, for the purpose of determination of the captive plant status, only on the basis of the data already furnished by the CGP/Captive users, while availing the open access or otherwise. Therefore, the formatted data, as demanded through Format I to Format V-B, cannot be insisted by the TANGEDCO, for the above period of 6 years.

Accordingly, Paras 15.8 & 17.6 of the Judgement of the Hon'ble APTEL, dealing with the above matter are reproduced below for the sake of convenience of reference.

> *"15.8 Furthermore, we are convinced with the contention and have a concurring view with the settled position of law that a piece of delegated legislation cannot have a retrospective applicability unless the parent legislation under which it came into existence permits such retrospective applicability. In this regard, we have gone through the judgments of the Hon'ble Supreme Court in the cases of Panchi Devi (supra), M.D. University (supra) and BasantAgrotech (India) Ltd. (supra). The essence of these decisions is that in the absence of any provision contained in the legislative Act, a delegate cannot make a delegated legislation with retrospective effect. We have examined the provisions of the Electricity Act, 2003 and it is observed that no provision of law is enacted therein which permits retrospectivity. Accordingly, we set-aside the directions contained in Paras 6.2.5. & 7.2.4, and hold that there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGPs and captive users in the State of Tamil Nadu. We however clarify that for the past years, the Respondent No.2 can verify data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, one the basis of the data already furnished by CGP/Captive User(s) while availing open access."*

Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.6 as below.

> *"17.6 Issue No.6:- We hold that as per settled principles of law, there cannot be retrospective application of the procedure formulated under the impugned order for verification of status of CGP/captive users. However, it is clarified that for the past years, the second Respondent/TANGEDO can verify data for the purpose of determination of captive plant status on the basis of data already furnished by CGP/Captive users while availing the Also paras 15.5 to 15.7 of page 157 of the order passed by the Hon'bleAPTEL which forms basis for arriving at the above conclusion*:

Also Paras 15.5 to 15.7 of page 157 of the order passed by the Hon'ble APTEL which forms basis for arriving at the above conclusion:

> *"15.5. We have given our consideration to the submissions made on behalf of the Appellant and the Respondents on the present issue. We have noted the submissions of the Respondents and observe that while they are at liberty under law to take appropriate legal remedy, however the appeal before us emanates from the limited issue of challenge to formulation of procedure by TNERC for verification of status of CGPs and captive users in the State of Tamil Nadu. We also cannot lose sight of the crucial fact brought to our knowledge that what is being sought to be done vide the impugned order is an attempt to open the already concluded transactions by requiring additional documents, over and above the documents already furnished by CGPs and captive users who have availed open access in the past*
>
> *15.6 Another aspect related to issuance of show cause notices, as already recorded above, needs a mention in the present judgement. The Respondent No. 2 has already submitted that it has issued such notices to many captive users and CGPs in the State of Tamil Nadu since the year 2014 till 2017, as also in the year 2020. In this regard, we are constrained to observe that the Respondents are endeavouring to reopen and verify the already closed and concluded transactions of availing open access for captive purposes. For such concluded transactions, the documents have already been submitted with the Respondents and on the basis of the said documents, the Respondents permitted open access for wheeling of captive power.*
>
> *15.7 To require additional documents for such concluded transactions now*

would amount to changing the rules of the game after the game has started, which is impermissible under law. In this regard, we refer to the decision of the Hon'ble Supreme Court in the case of "K. Manjusree v. State of Andhra Pradesh & another," (2008) 3 SCC 512."

Further, any order has its enforceability only prospectively which has been affirmed as per the Legal Maxim "Nova Constitutiofuturisformanimponeredebet non practeritis" and the same principle was followed by the Hon'ble Supreme Court in Shanti Conductors (P) Ltd and ors Vs. Assam state Electricity Board &orsdt 23.01.2019. It was held that,

"In the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect".

and therefore, by the legal maxim of "Nova Constitutiofuturisformanimponeredebet non practeritis" also, such a retrospective verification of the CGP status, based on an order issued by the Commission in RA No. 7 of 2019 dated 28.01.2020, cannot be made Mutatis Mutandis for the cases of the Respondent pertaining to retrospective periods. On this score also, the petition filed by the Petitioner TANGEDCO, needs to be dismissed.

F) Weighted Average:

The Hon'ble APTEL has also set aside Para 7.6.9 of the order of the Hon'ble Commission issued in RA No. 7 of 2019 dated 28.01.2020, which is extracted below for instant reference.

The portion of the Para 7.6.9 of the Order of the Commission in RA No. 7 of 2019 dated 28.01.2020 stands set aside by Hon'ble APTEL.

> *"7.6.9 Weighted average of shareholding to verify 26% ownership annually when there is change in ownership structure, shall be considered subject to the condition that change in extent of shareholding of a captive user is intimated to the Licensee within 10 days of such change. Failure to intimate the change within the specified period will render in the Licensee conducting verifications without considering weighted average of shareholding."*

Accordingly, Paras 16.12 & 17.7 of the Judgement of the Hon'ble APTEL dealing with the above matter are reproduced below for the sake of convenience of reference.

> *"16.12 Accordingly, we set-aside the direction contained in para 7.6.9 of the impugned order, wherein TNERC has held that, in the event the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within 10 days to the Respondent No. 2, otherwise the said licensee would proceed to verify captive status without considering weighted average of shareholding."*

Further, while concluding the judgement, the Hon'ble APTEL has also observed in Para 17.7 as below:-

> *"17.7 Issue No.7:- We set aside the directions contained in Para 7.6.9 of the impugned order wherein the State Commission has held that, in the event, the weightage average of shareholding of captive users changes within a financial year, then the same has to be intimated within ten days to the second respondent/TANGEDCO, otherwise the said licensee would proceed to verify captive status without considering weightage average shareholding."*

6.6. Therefore, it is submitted that the judgement and final order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, has made enormous

changes with major modifications and has also set aside various portions of the Commission in very many areas to the extent submitted supra.

6.7. Therefore, it is submitted that any Miscellaneous Petition filed by the Petitioner TANGEDCO, solely and exclusively based on the Order in RA No. 7 of 2019 dated 28.01.2020 only, makes the petition fully infructuous as of now and after coming in to force of the order of the Hon'ble APTEL in Appeal No. 131 of 2020 dated 07.06.2021 and accordingly, the whole petition filed by TANGEDCO, needs to be dismissed as infructuous, by however providing liberty to the Petitioner TANGEDCO to make re-verification of the CGP status for the year(s) concerned, which falls during a past period, prior to the order of the Hon'ble Commission dated 28.01.2020 issued in RA No. 7 of 2019. After making a verification again as per the terms and conditions provided in the Order in Appeal No. 131 of 2020 dated 07.06.2021, the TANGEDCO can dispose off the matter according to the merits and the legal stands provided as above and in case of any CGP not complying with the norms even then, the TANGEDCO may proceed to file fresh petition if it wishes so.

6.8. The Respondent has made out a strong prima-facie case against the Petitioner and the balance of convenience is also very much available to the Respondent, as the vital portions of the Order in RA No. 7 of 2019 dated 28.01.2020, have been subjected to serious and drastic changes and modifications and even some of the portions of the order in RA No. 7 of 2019

dated 28.01.2020, are set aside fully. Therefore, unless the Petition filed by the TANGEDCO, solely and exclusively based on the Order in RA No. 7 of 2019 dated 28.01.2020 is not dismissed, owing to the fact of coming in to force of the order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, the Respondent would be facing serious prejudices. However, the Petitioner having been provided with the liberty to re-verify the CGP status, would not be subjected to any prejudices against its interests.

6.9. Further, coming to the aspect of factual matrix of the matter, the Respondent submits that the Respondent is a Company, incorporated under the Companies Act, 1956 (since repealed and consolidated under the Companies Act, 2013) and is presently a Company limited by shares in terms of the provisions of the Companies Act, 2013.Further, coming to the aspect of factual matrix of the matter, the Respondent submits that the Respondent is a Company, incorporated under the Companies Act, 1956 (since repealed and consolidated under the Companies Act, 2013) and is presently a Company limited by shares in terms of the provisions of the Companies Act, 2013. The registered office of the Respondent is at Chettinad Towers, 603, Anna Salai, Chennai – 600 006.

6.10. The Respondent had established Cement Plants and Captive Generating Plants (CGPs), all as a part of the Corporate Entity of the Respondent in the State of Tamil Nadu. The CGPs of the Respondent are as per the following Table:

Table A

1	Chettinad Cement Corporation Private Limited	CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114	HTSC No. 101, Karur EDC
2	Chettinad Cement Corporation Private Limited	CCCPL, AriyalurTrichy Road, Keelapalur Post, Ariyalur, Ariylaur District- 621 707	HTSC No. 70, Perumbalur EDC
3	Chettinad Cement Corporation Private Limited	CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District- 624 703	HTSC No. 345, Dindigul EDC

6.11. The CGPs mentioned in Table A above, are being owned, operated and maintained by the Respondent, with the electricity generated at the CGPs being primarily and captively consumed in the operation of their Cement Plants. The Respondent is the only captive user of the Electricity and there is no other Company or Person has claimed the captive user status in respect of such electricity generated at the CGPs of the Respondent. Sometimes, the surplus Electricity available from the CGPs, after such captive use by the Respondent, is being supplied to the TANGEDCO or to the Third Parties, without claiming any benefit applicable to Captive Generation and Captive use as provided under the provisions of the Electricity Act, 2003 and Electricity Rules 2005.

6.12. The facilities of the Respondent at the above mentioned three places in Table A, are connected with the Intra-State Grid in the State of Tamil Nadu.

8.13. The Cement Plants and the CGPs are under one Corporate Entity i.e. the

Respondent, with one Certificate of Incorporation, granted by the Registrar of Companies and are part of the assets of the Respondent Company, having a common balance sheet. A copy of the Balance Sheet of the Respondent's Company was already filed before the Commission while providing the counter in the above matter on 13.03.2021 as Annexures A& B for the financial years 2014-15 & 2015-16, which are the disputed periods in the Petition covered by M.P. No. 36 of 2020. The Equity Shares with voting rights, are common to all the Cement Plants owned by the Company which further owns the CGPs. A copy of the Memorandum of Association and Memorandum of Articles along with Certificate of Incorporation were also filed before theCommission as Annexure C on 13.03.2021 while the Respondent filed its counter on the matter. Therefore, the Respondent is not filing the said documents again along with this Memo to avoid repetition.

6.14. In terms of the above, the power plants of the Respondent are "Captive Generating Plants", within the meaning and scope of the provisions of the Electricity Act, 2003 read with the Electricity Rules 2005, as notified under the Act.

6.15. Section 2(8) and Section 9 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules which are relevant read as under:

> *"Section 2(8): "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a*

power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."

Section 9: Captive Generation- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate 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."

Rule 3 of the Electricity Rules, 2005

"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.

6.16. The Rule 3 of the Electricity Rules 2005, consciously uses distinct expressions, such as 'Captive Generating Plant' or 'Power Plant'; 'Generating Station', 'Generating Unit' etc., and there is a special objective behind the same. These expressions "Captive Generating Plant", "Generating Station", "Generating Company" and "Company" have been defined in the Electricity Act, 2003 as under:

> *"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(30): "generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switchgear, 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 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(13) "company" means a company formed and registered under the Companies Act, 1956 and includes anybody corporate under a Central, State or Provincial Act;

6.17. The Respondent further submits that, on 23.09.2020, TANGEDCO issued a Notice to the Respondent through its Superintending Engineer bearing No. Lr.No.SE/DGL/DFC/AO/ REV/F.CGP/D.No. 826/2020 to show cause as to why the Captive Generating Plants mentioned at Item 3 of Table A at Karikali, Dindigul be not disqualified from having the Captive User Status in respect of the captive consumption, for the financial years 2014-15 and 2015-16 and the Respondent be held to be liable to pay the Cross Subsidy Surcharge to the extent of Rs.95,02,09,269.00. The Petitioner TANGEDCO had proceeded to issue the Show Cause Notice dated 23.09.2020, purporting to treat the above CGP at Karikali, Dindigul, separately as a unit for meeting out the conditions specified under Rule 3 of the Electricity Rules 2005, without considering the aggregate generation from all the three CGPs, mentioned in Table A above and the aggregate quantum of Captive Use thereof, by the Respondent.

6.18. On 06.10.2020, the Respondent had duly replied to the Show Cause Notice dated 23.09.2020, placing the legal and factual aspects, as to how the CGPs of the Respondent including the CGP at Karikali, Dindigul, duly qualify as

Captive Generating Plants and consequently, how the Respondent has become an eligible Captive User. The Respondent craves leave to refer to the reply dated 06.10.2020 sent by the Respondent to the Show Cause Notice dated 23.09.2010.

6.19. TANGEDCO is proceeding on a fundamentally wrong basis, by considering the CGP at Karikali, Dindigul, independently, instead of considering all the three CGPs together, in determining the Captive Status, with reference to the aggregate generation and aggregate captive use. The claim of the Petitioner - TANGEDCO based on the above misunderstanding and consequent computation, treating the CGP at Karikali, Dindigul, as an independent and separate unit, is patently erroneous, contrary to the provisions of the Electricity Act, 2003, the Electricity Rules, 2005; the scheme, objective and purpose behind the Act and Rules; the principles laid down by the Hon'ble Appellate Tribunal, the Hon'ble High Court, the Order in RA No. 7 of 2019 dated 28.01.2020, passed by the Commission, and is otherwise arbitrary and capricious.

6.20. Further, the claim made by the Petitioner pertains to financial years 2014-15 and 2015-16 is therefore time barred and suffers from gross delay/ latches and is also to be declared as infructuous in view of the final order and judgement of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020, as far they relate to the past periods.

6.21. The Respondent further submits that the Scheme under the Electricity Act, 2003 (in contrast to the dispensation in the previous Electricity Laws), is to encourage Captive Generation and Captive Use. The Statement of Objects and Reasons to the Electricity Act, 2003, inter alia, provides Generation being delicensed and captive generation freely permitted. The Corporate Entity such as the Respondent should have the freedom to establish its own generating facilities for its power requirement, so long such generation is primarily used by the Corporate Entity itself. Section 2 (8) of the Electricity Act, 2003 which defines "Captive Generating Plant" as a power plant set up primarily for his own use, has to be interpreted and applied in the above background of the above objective and purpose.

6.22. The Respondent further submits that the concept of what should be considered as primarily for his own use, has been further elaborated and provided in Rule 3 of the Electricity Rules, 2003. The objective is that on overall basis the Corporate Entity setting up the facility of captive generation, should use itself in aggregate 51% of the available generation in Million Units.

6.23. The Respondent further submits that Section 2(8) of the Electricity Act 2003, uses the expression 'power plant' or 'captive generating plant' differently from the definition of 'generating station' or 'generating unit'. The expression 'a power plant' appearing in Section 2(8), would include Power Plants of Captive

Generating Plants, as per the provisions of Section 13 of the General Clauses Act 1897, namely the singular shall include the plural also. In Commissioner, Trade Tax Uttar Pradesh Vs. DSM Group of Industries, (2005) 1 SCC 657 the Hon'ble Supreme Court, considering the expression "Unit" in relation to exemption provision under the U.P. Trade Tax Act 1948, had construed the same as applicable to expansion of more than one Unit.

6.24. There is nothing in the provisions of the Electricity Act 2003, which requires any interpretation to the contrary. On the other hand, considering the objective and purpose of allowing captive generation freely, there is a clear basis for construing Power Plants together or in an aggregate manner.

6.25. The Respondent further submits that the provisions of Rule 3 of the Electricity Rules 2005, in the opening part of Rule 3 (1)(a), deals with Captive Generating Plant and thereafter liberalises the consideration of Captive Status to smaller formation of "Generating Station", "Generating Unit" in Rule 3 (1)(b). The objective is therefore clear that in order to facilitate the captive generation and use, consideration be not limited to the whole of the power plants, with multiple generating station or generating units and smaller formation, be also considered if so desired by the Captive Generator and Captive User. In the circumstances, it will be not consistent with the Act and the Rules, to restrict the consideration of Captive Generation and Captive Use, to higher formation of all the Generating

Plants of a Corporate Entity. This is particularly in the case, such as the present one, where both the Captive Generator and Captive user, is one entity and it is not a group captive or ownership or captive user status is not being claimed for anyone else or there is no Association of Persons or Society etc., involved in the process of captive consumption.

6.26. The Respondent had placed reliance on the decision of the Hon'ble Appellate Tribunal for Electricity in its order in Appeal No. 252 of 2015 (Salasar Steel & Power Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission & Others) to the extent extracted below. A copy of the order of the Hon'ble APTEL in Appeal No. 252 of 2015 dated 08.11.2016 was already filed before the Hon'ble Commission while filing the counter on 13.03.2021 as Annexure G and considering the point of repetition, the same has not been re-filed again.

> *"11. After having a careful examination of all the issues brought before us on the issues raised in this Appeal for our consideration, our observations are as follows:-*
> *……..*
>
> *h) Hence considering the provision of Rule 3 (1) (b) of Electricity Rules, 2005 which prescribes that a generating station can identify a unit or units of such generating stations for captive use, it is clear that Appellant had identified both the Units i.e. TG-1(15 MW) and TG-2 (65 MW) for captive use during FY 2013-14. In view of above for deciding the captive status of the Appellant plant, the aggregated Generation and consumption from both the units i.e. TG-1 (15 MW) and TG-2 (65 MW) has to be considered as per the provision of Rule 3 (1) (b) of Electricity Rules 2005."*

6.27. The Respondent further submits that the Petitioner-TANGEDCO is wrong in distinguishing the above decision of the Hon'ble Tribunal, by stating that in the

said case, all the generating units were in the same premises. As mentioned above, in the light of the objective and purpose of freeing the captive generation, the principles laid down in the above case, will equally apply to more than one CGP, as the objective is that a legal entity establishing the generating plants, should be considered for captive status on aggregate basis. When the legal entity, such as the Respondent in the present case has opted for such higher formation, the Petitioner TANGEDCO cannot require the Respondent to sub-divide the consideration to lower and multiple formations.

6.28. The Respondent further submits that even the Commission, while issuing the procedure for verification of the CGP status, in Order in RA No. 7 of 2019 dated 28.01.2020, has also categorically held as below, in Para. 7.7.1 & 7.7.2 and however, more particularly in Para 7.7.3:

> *"7.7 Accounting of aggregate generation and consumption*
>
> *7.7.1 Verification of criteria of consumption shall be based on the aggregate energy generated from generating unit(s) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis i.e gross energy generated less auxiliary consumption. 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 agreements, provided the captive users of each EWA are the same holding same proportion of ownership. The quantum of auxiliary consumption shall be the metered auxiliary consumption or the normative auxiliary consumption whichever is less. The captive consumption (the captive user) may be within the premises where the CGP is located or at a different location. In the absence of measured data on auxiliary consumption, until metering as prescribed in para 7.9.1 of this procedure is completed, the normative auxiliary consumption specified in the Regulations of the Commission may be considered for the purpose of*

CGP verification status.

7.7.2 As per the explanation to Rule 3, „annual basis" refers to determination in a financial year. For determination of captive status on an annual basis, for the first year, the date of grant of open access shall be considered as the start date for the Financial Year(FY). For the subsequent years, generation from 1st April to 31st March of a FY shall be considered for determining captive status.

7.7.3 The Aggregate Generation for each Generating Plant/Unit identified (in the case of SPV) for captive use on Annual basis shall be calculated as follows:

Aggregate generation =Total generation of the Financial year of all units or units identified (-) Auxiliary consumption."

6.29. That the same issue, whether it should be the aggregate of energy to be taken for CGP verification, came before the Hon'ble High Court of Judicature at Madras also, in a recent matter concluded on 31.08.2020 in W.P. No.11694 of 2020, the Hon'ble High Court has observed as below and the Ld. Additional Advocate General appeared on behalf of the Petitioner TANGEDCO, has also undertook to comply with the order in RA No. 7 of 2019 dated 28.01.2020, for considering the aggregate energy generated and consumed for the purpose of CGP verification.

"6. Per contra, Mr.P.H.ArvindPandian, learned Additional Advocate General, appearing on behalf of respondents 1,2,4 and 5, submitted that TNERC has already passed an order by laying down the guidelines and fixing the methodology of verification of the consumption annually by the captive users. The learned Additional Advocate General further submitted that in view of the said order, the respondents 4 and 5 can be directed to once again determine the unutilised banked units in line with the order passed by TNERC and, thereafter, pass a fresh order.

8. On a careful consideration of the submissions made on either side, it is

clear that the impugned order, dated 06.08.2018, is no longer sustainable in view of the orders passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. Accordingly, the impugned order passed by the fourth respondent, dated 06.08.2018, is hereby quashed. The matter is remanded back to the file of fourth and fifth respondents to determine any payment to be made to the petitioner for the unutilised banked units strictly in accordance with the order passed by TNERC in R.A.No.7 of 2019, dated 28.01.2020. The final orders are to be passed within a period of eight weeks from the date of receipt of a copy of this order."

6.30. In terms of the above, as all the three Captive Generating Plants owned by the Respondent Company, are identified for captive use, the captive generation and consumption should be considered only on the aggregate energy generated by the Respondent. When the Respondent itself had proposed for the above from the beginning and acted so on a consistent basis, both before and after the two financial years, which are the subject matter of the present petition, there is no basis to take each Captive Generating Plant, as a separate entity, for the purpose of CGP verification process. When all the three Captive Generating Plants are identified for Captive Use, attempting to select one of the Captive Generating Plants and further attempting to go for a single Plant alone, in an isolated manner for the purpose of CGP verification, is not permissible in law.

6.31. The Respondent is providing the following Table, year-wise, to demonstrate, as how the Captive Consumption Norms, have been met out, as far as the minimum 51% consumption norms are concerned, which has to be taken always in aggregate as per the above quoted provisions of law and also as per

the finding judgement of Hon'ble APTEL, Hon'ble High Court of Judicature at Madras and even by the order in RA No. 7 of 2019 dated 28.01.2020 issued by the Commission for the purpose of the verification of CGP status.

Table B

Year:2014-15

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Generation in each unit after deducting the auxiliary consumption	Consumption in each unit	Aggregate Consumption ÷ Aggregate Generation	%
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur Cement Factory, Puliyur, Karur District-639114 HTSC No. 101, Karur EDC	88259080	84652480	357003220 ÷ 669832931	53.297 or 53.30 %
2	Chettinad Cement Corporation Private Limited CCCPL, AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC	255133875	119210964		

3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District-624 703 HTSC No. 345, Dindigul EDC	326439976 (Wrongly mentioned as 326439974 in the SCN)	153139774		

6.32. By taking into account of the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to the aggregate generation of all three units, it can be seen that the Answering Respondent has consumed to the extent of 53.30% during the year 2014-15 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, duly satisfy the condition of minimum consumption requirement of 51%, for the year 2014-15.

6.33. Likewise, the Respondent submits the figures for the year 2015-16 also as below:-

Table C

Year:2015-16

Sl. No.	Name of the Unit, Address & HTSC No. / EDC	Individual Generation at each Unit	Individual Consumption	Aggregate Consumption ÷ Aggregate Generation	%
1	Chettinad Cement Corporation Private Limited CCCPL, KumarajahMuthiah Nagar, Puilyur	96481900	85598160	311012008 ÷ 529091323	

	Cement Factory, Puliyur, Karur District-639114 HTSC No. 101, Karur EDC				
2	Chettinad Cement Corporation Private Limited CCCPL, AriyalurTrichy Road, Keelapalur Post, AriyalurAriylaur District- 621 707 HTSC No. 70, Perumbalur EDC	205038421	104552678		58.78%
3	Chettinad Cement Corporation Private Limited CCCPL, Rani Meyyammai Nagar, Karikkali, Gujilamparai (via), Dindigul District-624 703 HTSC No. 345, Dindigul EDC	277061760	120861136		

6.34. The Respondent submits that by taking into account the aggregate consumption of all the individual captive generating plants owned by the Company, with reference to their aggregate generation of all three, it can be seen that the Respondent has consumed to the extent of 58.78% during the year 2015-16 and therefore, all the three power plants owned by M/s. Chettinad Cement Corporation Private Limited, duly satisfies the minimum consumption requirement of 51%, for the year 2015-16 also.

6.35. It should be noted that there are no individual equity shares earmarked or available for each of the Respondent's three units, separately or otherwise, on a unit to unit basis. Only the Corporate Entity, namely M/s. Chettinad Cement Corporation Private Limited, has the share capital, covered by a Common Balance Sheet and a Common Annual Financial Statement for all of its assets and liabilities. For the purpose of ownership, when the Company is taken as a whole, to decide the 26% minimum ownership criteria, the rationale of going by individual unit wise generation vis-à-vis unit wise consumption, is not legally valid by any means. In other words, there is no separate set of share capital or shareholders for each of the individual CGPs available in any manner.

6.36. The Respondent further submits that while the Commission has issued clear cut orders to take the aggregate generation and aggregate consumption only, for determining the captive status of any Generating Plant(s), the Petitioner TANGEDCO attempting to go by individual unit-wise generation vis-à-vis individual consumption-wise, is totally illegal. The Hon'ble Madras High Court has also remanded back W.P.No.11694 of 2020 for reappraisal based on the undertaking provided by the Ld. Additional Advocate General by passing an order on 31.08.2020, strictly in accordance with the procedures laid down as per the order in RA No. 7 of 2019 dated 28.01.2020.

6.37. The Respondent submits that the Superintending Engineer, Dindigul

Electricity Distribution Circle of the Petitioner, has wrongly attempted to verify the CGP status of the plant at Karikkali unit alone (HTSC No. 059094500345), treating it as a separate CGP and is wrongly claiming that the Respondent's CGP Unit at Dindigul be disqualified of the CGP status.

6.38. The Respondent submits that when the Show Cause Notice dated 23.09.2020 was issued by the Superintending Engineer of the Petitioner, there was an unfair demand of Rs.95,02,09,269.00 raised which is not legally maintainable, under the Doctrine of false uno-false omnibus, as it is nothing but an action flowing out of a wrong and misconceived method of verification of CGP status in violation of law. Moreover the show cause notice of TANGEDCO has already determined the liability and prejudged the issue. Hence, any decision post hearing can only be a post decisional hearing and is therefore violative of the principles of natural justice.

6.39. The Respondent submits that in the facts and circumstances mentioned above, the entire Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the consequential petition filed by the Petitioner in M.P. No. 36 of 2020 are devoid of any merit and therefore, the present petition being M.P. No. 36 of 2020 is liable to be dismissed.

6.40. The Respondent submits that, it is also not out of context to bring it to the

knowledge of the Commission that, a writ petition has been filed by Madras Steel Rerollers Association, challenging the order of the Hon'ble Commission in RA No. 7 of 2019 dated 28.01.2020 and the same pending before the Hon'ble High Court of Judicature at Madras and an injunction order has been granted on it on 10.03.2020. Further the matter in RA No. 7 of 2019 is already in challenge in various Forums as submitted in the Table below. Therefore, keeping all the matters pending by not passing any order, on such challenges and proceeding to adjudicate the matter covered in M.P. No. 36 of 2020, is not legally correct and this score also the present petition in M.P. No. 36 of 2020 needs to be dismissed. As the matter covered by the challenges may reverse any of the positions covered by the order in RA No. 7 of 2019 dated 28.01.2020, before adjudicating the matter, at least the Review and Clarification Petitions pending before the Commission may be disposed-off suitably, without which keeping the matter covered by the challenges and proceeding to adjudicate the matter in a separate track would lead to several implications in future. It is therefore humbly submitted that the petitions pending before this Hon'ble Commission may be disposed-off first.

Table

Sl.No.	Name of the Contesting Party	Forum	Reference No.	Jurisdiction
1.	TASMA	Commission	R.P. No. 2 of 2020	Review
2.	TANGEDCO	e Commission	R.P. No. 3 of 2020	Review

3.	Sugapriya Paper & Boards (P) Ltd	e Commission	R.P. No. 4 of 2020	Review
4.	Madras Steel Re-Rollers Association	Hon'ble High Court	W.P. No. 6160 of 2020	Writ
5.	IWPA	Commission	M.P. No. 24 of 2020	Clarification
6.	TANGEDCO	Commission	M.P. No. 23 of 2020	Clarification

6.41. The Respondent therefore submits that, the petition covered by M.P. No. 36 of 2020 is totally devoid of merits both on grounds of law as well as on the grounds of factual matrix and accordingly, also fails to consider the legal provisions correctly, by adopting a harmonious reading of the legal provisions as contained in the Electricity Rules, 2005 and other connected judgements and orders of both the Hon'ble Appellate Tribunal as well as the Commission, to the extent as submitted below.

(i) The Petitioner has failed to consider as how the verification of CGP status should go, when the Company has multiple Captive Generating Plants identified for its own captive use, without the involvement of any other second or more captive users other than the Company itself and on this score alone, having attempted to identify one among the power plants selectively taken for the purpose of verification, in an isolated manner, is basically wrong and such a procedure is nowhere provided either in the Electricity Rules 2005 or in the binding judgements of the Hon'ble Tribunal or even by the order of the Commission in RA No. 7 of 2019 dated 28.01.2020. Therefore, the entire petition covered under M.P. No. 36 of

2020 needs to be quashed in toto.

(ii) By all reasons, both the Show Cause Notice dated 23.09.2020 issued by the Superintending Engineer of the Petitioner and the consequential petition filed by the Petitioner in M.P. No. 36 of 2020 before the Commission, is neither maintainable to law nor maintainable to facts as well and therefore, the said Show Cause Notice has to be quashed in all possibilities and the subsequent and consequential petition in M.P. No. 36 of 2020 filed by the Petitioner before the Commission, needs to be dismissed for all reasons, without any further proceedings.

(iii) The Respondent is therefore not liable to pay the cross subsidy surcharge of Rs.95,02,09,269.00 as demanded in the Show Cause Notice and also by the petition covered in M.P. No. 36 of 2020.

(iv) Further, as the order of the Hon'ble APTEL dated 07.06.2021 issued in Appeal No. 131 of 2020 has made several changes and modifications and also set aside many portions of the order in RA No. 7 of 2019 dated 28.01.2020, the Respondent prays that the Commission may be pleased to quash the Show Cause Notice and also to dismiss the petition filed by the Petitioner in M.P. No. 36 of 2020 as totally infructuous and accordingly, declare that the demand of Rs.95,02,09,269.00 is also not maintainable to law, as well as on facts and consequentially dismiss the whole petition covered in M.P. No. 36 of 2020 as not maintainable to law.

7. Written Submission filed by the Petitioner:-

7.1. TNERC has clarified the CGP verification either on generating station / EWA wise or on an aggregate manner in the para 7.7.1 of the order in R.A. No. 7 of 2019 dated 7.12.2020 and In the para 9.9.7.1 of the order dated 07.12.2021 in M.P. No. 24 of 2020 that

> *"Verification of criteria of consumption shall be based on the aggregate energy generated from generating units) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis*
>
> *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 agreements "*

7.2. The above reveal that the wind energy generating CGP to be verified on aggregate of energy generated from all the WEGs and other than wind generators the CGP status to be verified on generating station wise Hence, the contention of the Respondent to verify the GGP status on aggregate energy generated in all the three generating stations located in different locations is not acceptable.

7.3. The Hon'ble APTEL order in Appeal No. 252 of 2015 is not squarely applicable to the present case. Since, in the said case, the Units TG-1 (15 MW) and TG-2 (65 MW) are located in the same premises. But in the case of

respondent herein, three Captive Generating Plants are located in different places and hence, the said Appeal is not applicable to the present cae.

7.4. TNERC clarified in the para 9.9.10 of the order dated 07-12-2021 in M.P. No. 24 of 2020 that

> *"R&C measures were also in place during FY 2014-15 and a party of FY 2015-16" (9.9.10.1)*
> *"Levy of cross subsidy surcharge for non-compliance of Rule 3 for the period when R &C measures were in force will be decided on merits of each case. (9.9.10.4)"*

8. Findings of the Commission:-

8.1. The seminal issue which arises for consideration in this petition is whether an entity be, it a company or partnership or concern or any other entity for that matter having captive generating plants at different locations can aggregate the entire energy consumed in all such plants as a single unit instead of plant-wise consumption for the purpose of deciding 51% of the consumption as required under Rule 3 of the Government of India Rules, 2005. The factual matrix of the case lies in a narrow compass and hence it is not necessary to delve deep into the averments made by both sides. It would suffice if the entire issue is decided with reference to the prevailing authoritative pronouncements on the subject.

8.2. The present petition has been filed to declare that the respondent, namely, M/s. Chettinad Cement Corporation Private Limited having HT SC No. 345, Dindigul EDC has lost the status of a captive generating plant for the financial

years 2014-15 and 2015-16 and in consequence thereof the respondent is liable to pay cross subsidy surcharge in view of such disqualification of the said company arising out of its inability to satisfy the consumption criteria of 51% as postulated in the GoI Rules, 2005.

8.3. Having gone through the averments of both sides, it is seen the seminal issue which has cropped up in this petition has already been settled in the order of the Commission delivered in M.P. No. 24 of 2020 and only with a view to reiterate the same and make the decision explicit enough the present orderis issued by the Commission. However, for understanding the past history relating to the verification of the captive plants status, it is necessary to set out a brief history of the background leading to the filing of the present petition.

8.4. Hence, a brief history of the past litigation in regard to the verification and determination of CGP status is set out before adverting to the issue on hand.

8.5. The authority of the TANGEDCO to verify the captive status of the CGP has seen litigation in multiple fora and the matter was ultimately decided by the Hon'ble High Court of Madras in W.A. (M.D.) Nos. 930 and 931 of 2017when the issue was transferred to the Commission for adjudication. It has been the consistent stand of the Captive Generating Plants that the Distribution Licensee being a judge of its own case cannot verify the captive status of the captive generation plants and it is only the Commission which has to do such exercise. However, in the proceedings before the Hon'ble High Court of Madras, the

Commission took a position that there is no bar in verification of the captive status of the CGPs by the Distribution Licensee when the authority to finally determine the status of the CGPs rested with the Commission at all times. After multiple rounds of litigation, the Division Bench of Hon'ble High Court of Madras came to the conclusion that the delegation of powers made by the Commission under section 97 of the Act to the Licensee for verification of the CGP status is permissible when the ultimate adjudication of the dispute lies within the domain of the Commission. In view thereof the matter was taken as R.A. No. 7 of 2019 on the file of the Commission and the methodology for verification of the CGP status was prescribed by the Commission. Being aggrieved by the same an appeal was filed by Tamil Nadu Power Producers' Association before the APTEL in Appeal No. 131 of 2020 in which the directions issued by the Commission in R.A. No. 7 of 2019 were modified by the Hon'ble APTEL with reference to certain issues. Consequently in another petition in M.P. No. 24 of 2020, the issues remanded by APTEL were taken up and a revised order was passed in line with the directions of the APTEL in Appeal No. 131 of 2020.

8.6. In such circumstances, where the issue having already attained finality before APTEL and the consequential order passed in M.P. No. 24 of 2020 too having become final without any challenge to the same, it would suffice if the contentions of both sides are decided with reference to the said orders.

8.7. It is seen from the perusal of the material records that the company is holding 97.230 % of shares in the Group Captive Scheme and hence fulfils the criteria on shareholding required under Rule 3 of Electricity Rules, 2005. Thus, there is no dispute of whatsoever in nature on this score. However, the issue arises in regard to the requirement of 51% of consumption as required under the Government of India Rules, 2005. While the stand of the petitioner is that the Commission's clarification on CGP verification permits computation of energy generated either on generating plant wise or EWA wise, the petitioner has taken a stand to the effect that the consumption in an aggregate manner has been permitted by the Commission only for the wind energy generating plants and not for the other generating plants. The relevant portion of the written submission filed by the petitioner in this regard is extracted for reference:-

> *"2. It is submitted that the TNERC has clarified the CGP verification either on generating station /EWA wise or on an aggregate manner in the para 7.7.1 of the order in R.A.No. 7 of 2019 dated 7.12.2020 and In the para 9.9.7.1 of the order dated 07.12.2021 in M.P. No. 24 of 2020 that*
>
> > *"Verification of criteria of consumption shall be based on the aggregate energy generated from generating units) in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis*
> >
> > *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 agreements "*
>
> *The above reveal that the wind energy generating CGP to be verified on aggregate of energy generated from all the WEGs and other than wind generators the CGP status to be verified on generating station wise Hence, the contention of the Respondent to verify the GGP status on aggregate*

energy generated in all the three generating stations located in different locations is not acceptable."

8.8. It may be seen from the above that the petitioner has relied upon the para 9.9.7.1 of the order dated 07-12-2021 in M.P. No. 24 of 2020 in support of its stand. However, the petitioner has overlooked the fact that in the same order, the Commission has rendered a finding to the effect that identification of captive generating plant shall be done on the basis of captive user which means that it is the user's over all consumption which matters for the purpose of aggregate consumption and not the consumption pertaining to the individual plants.

8.9. It is to be observed here that there is no provision either in the Act or Regulations which puts embargo on the consideration of the energy generated at different places in the name of a single user and hence the order dated 07-12-2021 in M.P. No. 24 of 2020 is perfectly in consonance with the provisions of the Electricity Act and the judgment of the APTEL in Appeal No. 131 of 2020. The relevant portions of the order dated 07-12-2021 in M.P. No. 24 of 2020 is reproduced for reference:-

"*9.9.2.2. Hon'ble APTEL's order does not prevent TANGEDCO from conducting the exercise of verification of data with respect to CGP status for the past years. For the past years i.e. cases from 2014-15 to 2019-20, TANGEDCO shall verify data for the purpose of verification of captive generating plant status in the State, on the basis of data already furnished by CGP/ captive user(s).*

9.9.5.2. (i) If there is one captive user, the user shall hold not less than 26% of the equity share capital with voting rights and shall consume not

less than 51% of the electricity generated on an annual basis for captive use."
Clause No. 9.9.7.3.state as under:

"The Aggregate generation for each Generating Plant / Unit identified (unit identification applies to SPV) for captive use on Annual basis shall be calculated as follows:

(a) For all generators except wind generator:

Aggregate generation = Gross generation of generating plant or units identified (-) Auxiliary consumption."

8.10. On an overall conspectus, it emerges that the contentions advanced on behalf of the petitioner is not sustainable in the light of the decisions of the Hon'ble APTEL and order of the Commission in M.P. No. 24 of 2020. The question whether an entity having generating plants at different locations is entitled to aggregate the energy from all such captive generating plants is no longer a subject matter of dispute and has been well settled by the Commission in M.P. No. 24 of 2020, albeit not explicitly enough.

8.11. In the present order for the purpose of more clarity, it is made clear unequivocally that the spirit of the order in M.P. No. 24 of 2020 is not to treat different generating stations as an individual units for the purpose of deciding the CGP status with reference to the consumption. It is further made clear that it is the captive user as a single entity which should be criteria for the purpose of deciding the overall consumption and not the individual generating stations.

8.12. The para 9.9.7.1 of Commission's order, in our well-considered view, has been misunderstood by the petitioner to the effect that except for wind energy generators, the verification criteria shall be done generating station-wise. However, such distinction has been made only to enable the CGP having multiple WEGs and who have separate wheeling agreements to aggregate the consumed units of all stations and it can no way be considered otherwise. All other aspects remaining as such, the only criteria to be seen is whether the generating station was identified before the commencement of captive wheeling. If the answer is in affirmative, there is no doubt of whatsoever that it is the consumption of whole entity which should be the criteria for consumption.

8.13. If the contention of the petitioner is accepted, it would lead anomalous situation where a corporate entity or any other entity for that matter having its Registered office or Corporate office at a particular place and having place of business in various places will not be in a position to account its own generation from various generating stations in aggregate for the purpose of Rule 3 of Government of India Rules, 2005 in regard to consumption but an entity having place of business at a specific place will be entitled to account its entire consumption. This would lead to absurdity and certainly, was not the true intent and import of the order of the Commission in M.P. No. 24 of 2020. Hence, we find that the arguments of the petitioner in this regard isdevoid of merits.

8.14. The respondent has furnished a Table in its counter statement to demonstrate as to how the captive consumption norms have been met by the respondent for the Financial Years 2014-2015 and 2015-2016. As per the details set out in Table B and Table C, the aggregate consumption of the respondent for the Financial Years 2014-2015 and 2015-2016 is 53.30% and 58.78% respectively. The figures furnished by the respondent in Table B and Table C have not been put to any challenge by the petitioner. Situated thus, it is apparent that the respondent has satisfied the condition / requirement of Rule 3 of the Electricity Rules, 2005 so as to categorize the respondent's plant as a "Captive Generating Plant".

8.15. The fact that during the relevant Financial Years the equity share capital with voting rights held by the respondent is more than 26% is not disputed by the petitioner and the same is borne out through documents. Since the norms set out in Rule 3 of the Electricity Rules, 2005 has been satisfied by the respondent, thepetitioner's contention that the respondent cannot be construed as a Captive Generating Plant for the Financial Years 2014-2015 and 2015-2016 and that the respondent is liable to cross subsidy surcharge of Rs.95,02,09,269/- for the disqualification of Captive Status cannot be countenanced.

8.16. In the light of the above conclusion, which is arrived at on subjective analysis of evidence placed on record, this Commission decides that there is no merit in the application.

In the result this petition is dismissed. Parties directed to bear their respective cost.

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission