

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 22nd Day of April 2025

PRESENT:

Thiru K. Venkatesan

.... Member

and

Thiru B. Mohan

.... Member (Legal)

M.P. No. 21 of 2023

Tamil Nadu Generation and Distribution
Corporation Limited,

144, Anna Salai,
Chennai – 600 002.

Represented by its Chief Financial Controller /
Deposits & Documentation

..... Petitioner

**Thiru.Richardson Wilson
Advocate for the Petitioner**

Vs.

M/s.OPG Energy Pvt. Ltd.
No.8, Komal Road, Maruthur Village
Terizhandur Post,
Mayiladuthurai
Nagapattinam,
Tamil Nadu – 609808.

... Respondent

**Thiru. Rahul Balaji,
Advocate for the Respondent**

This Miscellaneous Petition stands preferred by the Petitioner Tamil Nadu Generation and Distribution Corporation Ltd., with a prayer to declare that M/s. OPG Energy Private Limited has lost captive status for the financial year 2019-20, 2020-21 and 2021-22.

This petition came up for final hearing on 22-10-2024 in the presence of Thiru. Richardson Wilson, Advocate for the Petitioner and Thiru. Rahul Balaji, Advocate for the

Respondent and on consideration of the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

ORDER

1) Contentions of the Petitioner:-

1.1) 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) 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 :

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.

1.2) The Generator, M/s.OPG Energy Pvt. Ltd. obtained approval for wheeling energy for the following users and EWA has been executed between M/s.OPG energy Pvt. Ltd. and the Superintending Engineer / Nagapattinam EDC.

The Shareholding details for the FYs 2019-20, 2020-21 and 2021-22 :-

Sl.No.	Name of the captive consumer	2019-20	2020-21	2021-22
1	Salem Food Products Pvt. Ltd.	217760	157160	197860
2	The South India Steel & Starch	102900	45300	63900
3	Arthanari Clothing Pvt Ltd.	27200	48700	48700
4	Arthanari Loom Centre Textiles Pvt. Ltd.	192600	172600	-
5	Meenakshi Agro and Flour Mill Pvt Ltd.	71100	71100	71700
6	Sri Sai Krishna Cotton Mills	77600	32700	-
7	Jayachandran Textiles Pvt. Ltd.	83500	66200	-
8	Sri Lakshmi Textiles	50900	51200	56400
9	RPS Spinner India Pvt. Ltd.	59900	44800	34100
10	SBT Apparels Pvt. Ltd.	95500	95500	-
11	Marutham Textiles Pvt.Ltd	48300	27900	27900
12	Salem Roller Flour Mills	36500	36700	49600
13	Sonal Iron Industry Pvt. Ltd.	171700	138600	111800

14	ARS Fanrics Pvt. Ltd.	55300	49300	54400
15	Allwin Mills	21900	22000	32900
16	Sabari Textiles Pvt. Ltd.	-	-	52000
	Captive Users Shares	1312560	1059760	801260
	Total Equity Shares	708772018.52	7087720	7087720
	Ownership %	18.52 %	15%	11.3%
	CGP shareholding / Ownership	Not fulfilled	Not fulfilled	Not fulfilled

Hence, the captive generation plant has not fulfilled the 'Ownership' criteria.

As the generating plant has not fulfilled the 'Ownership' criteria, the CGP has lost the captive status and have to pay the cross subsidy.

For the reasons stated above, the TNERC may be pleased to declare that M/s.OPG Energy Pvt. Ltd., has lost captive status for the financial years 2019-2020, 2020-21 and 2021-2022.

2) Counter affidavit on behalf of the Respondents

2.1) At the outset, save and except what are matters of record, the Respondent denies and disputes all the averments, contentions and allegations raised by the petitioner in the present petition in the manner alleged or at all, and no part of the said petition shall be deemed as an admission by the respondent unless the same is specifically admitted in the present counter affidavit.

2.2) The respondent (OPG Energy Private Limited), set up as an SPV, owns and operates a 17.5 MW gas-based captive generating plant at Maruthur Village,

Nagapattinam District and 5 MW Non captive Solar based plant at Rajasthan, Total installed capacity of the Company is 22.5 MW of which only 17.5 MW is identified as Captive Generating Plant. The said captive generating plant achieved commissioning in the year 2003.

2.3) The present petition is preferred by the petitioner TANGEDCO seeking to declare that the Respondent's power plant has lost captive status for the Financial Years 2019-2020, 2020-2021 and 2021-2022 and is consequently liable to pay cross subsidy surcharges.

2.4) In contravention of the regulations framed by the Commission, the present petition has been unlawfully and erroneously filed as a Miscellaneous Petition. In this regard, it is necessary to point out that the instant petition ought to be numbered and listed as a Dispute Resolution petition, owing to the fact that the petitioner TANGEDCO has alleged a dispute with the respondent with respect to the determination of captive status of the said respondent. It is relevant to state that the petitioner TANGEDCO at para 3 of its petition has claimed that the respondent is liable to pay cross subsidy surcharge. Although through astute drafting, the petitioner has cleverly not calculated and stated that amount, it is evident that the said petition is a "dispute" as per the TNERC – Fees and Fines Regulations, 2022. The Explanation appended to Regulation 10 is reproduced below for ready reference:

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

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

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

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

2.6) On the above ground alone, the present petition ought to be dismissed at the very threshold, since on an analysis of the nature of issues involved, claim and relief sought, viz., determination of captive status of the Respondent's CGP and consequent liability towards payment of cross subsidy surcharge, it is evident that, by invoking the adjudicatory powers of the Commission for dispute resolution, the Petitioner is trying to erroneously disguise the nature of the reliefs sought as regulatory, with an aim to circumvent the payment of the required court fees. The Respondent submits that the Petitioner ought to be directed to quantify and determine the claim of cross subsidy surcharge as the "amount in dispute" and re-file the present petition under the category

of a Dispute Resolution Petition, and, thereby also furnish the requisite court fee towards filing of such a petition.

2.7) The Respondent submits that its gas-based power plant is a "Captive Generating Plant" 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 or persons for generating electricity 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 of the Act unless-

(a) in case of a power plant-

(i) not less than twenty-six per cent of the ownership is held by the captive user(s); and

(ii) not less than fifty-one per cent 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 per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty-one per cent 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 per cent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub- clause (a) above including-

Explanation.-(1) The electricity required to be consumed by captive users - all 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 per cent of the equity shares in the company (being the twenty- six per cent proportionate to Unit A of 50 MW) and not less than fifty-one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub- clauses (a) and (b) of

sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied within any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

(3) The captive status of such generating plants, where captive generating plant and its captive user(s) are located in more than one state, shall be verified by the Central Electricity Authority as per the procedure issued by the Authority with the approval of the Central Government.

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:

Provided that the consumption of electricity by the captive user may be either directly or through Energy Storage System:

Provided further that the consumption by a subsidiary company as defined in clause (87) of Section 2 of the Companies Act, 2013 (18 of 2013) or the holding company as defined in clause (46) of Section 2 of the Companies Act, 2013 (18 of 2013), of a company which is a captive user, shall also be admissible as captive consumption by the captive user;

(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. "

2.8) The Respondent submits that 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;

2.9) 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 Act, 2003, interalia, provides Generation being delicensed and ratio freely permitted. The Corporate Entity such as the Respondent e freedom to establish its own generating facilities for its power requirement so long such generation is primarily used by the Corporate Entity itself

2.10) 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.

2.11) The Commission, while issuing the revised verification of CGP status, stated in its Order dated 07.12.2021 in 2020 & R.P. 2,3,4 of 2020 in R.A.7 of 2019, as below in Para 9.9.5.3 .

“ 9.5.3 In the case of SPV under Rule 3(1)(b), the captive user(s) shall hold in aggregate not less than 26% of the proportionate paid up equity share capital with voting rights of the units identified for captive use (i. e. the proportionate of the Equity of the company related to the generating unit or units identified as the CGP) and shall consume not less than 51 % of the aggregate electricity generated on annual basis from the identified units. The condition of consumption of 51% of aggregate generated electricity has to be met by the consumers of SPV collectively. ”

2.12) The Petitioner's case for alleging the Respondent's non-fulfilment of the 'Ownership' criteria under Rule 3 of the Electricity Rules, 2005, is premised entirely upon the singular consideration of shareholding details of Captive users who consumed energy through Open Access as per the Energy Wheeling Agreement. The Respondent submits that the petitioner/TANGEDCO has evidently failed to account for the shareholding of the captive user located within the premises of the Respondent's captive generating plant viz., AAA Plus Trading Pvt. Limited. Such arbitrary and selective consideration of partial details regarding Respondent's shareholding is unlawful and grossly negligent.

2.13) Destination of use is entirely the Respondent's prerogative and the Petitioner cannot arbitrarily ignore internal consumption whilst taking into account external consumption only. The respondent submits that the concept of what should be considered as primarily for his own use as provided under Section 9 of the Electricity Act, 2003 has been further elaborated and provided in Rule 3 of the Electricity Rules,

2003. The objective is that on an overall basis the Corporate Entity setting up the facility of captive generation, should use itself in aggregate 51% of the available generation in Units.

2.14) It is pertinent to note that when the Respondent executed the Energy Wheeling Agreement (EWA) for the period 01.04.2021 to 31.03.2024, the particulars of in-house captive user were specified. While so, the Petitioner/TANGEDCO required wheeling charges to be paid for the in-house consumption, as per the Energy Wheeling Approval & Agreement. Aggrieved by such action of imposing wheeling charges, the Respondent herein filed a petition vide M.P .No. 42 of 2021 and sought clarification on applicability of wheeling charges for sourcing captive power from its CGP to its in-house Captive user i.e., M/s.AAA Plus Trading Pvt Ltd. The Commission vide its order dated 05.05.2022 while ruling that Wheeling Charges do not arise for in-house consumption, held as follows:

"7.13. In result of our findings above, we clarify that Wheeling charge in respect of the petitioner's case which has an arrangement of in-house consumption of power transmitted through dedicated transmission line situated within the plant premises from the CGP (M/s.OPG Energy Pvt Ltd) to its Captive user (M/s.AAA Plus Trading Pvt. Limited) does not arise. "

2.15) The above order is in line with Section 42(2) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules 2005, which specifically exempts a person who avails open access and has established a captive generating plant, for carrying the electricity to the destination of his own use, from payment of such surcharge.

2.16) Once the shareholding of such in-house captive user is appropriately factored in, it would become categorically clear that the Respondent falls well within the ambit of the prescribed consumption and ownership criteria. The Respondent is setting out a tabulation to demonstrate, how the Captive Ownership Norms have been met, in respect of the minimum 26% ownership of total equity shareholding with voting rights is concerned:

	Shareholding details	2019-20	2020-21	2021-22	Remarks
A	Captive Users Shares Class (Only Users consumed through Open Access as given by TANGEDCO in petition)	62,500	56,900	43,500	For the FY 2019-20 Two in-house consumption shareholders namely Avanti Metals Pvt. Ltd. (consumed upto Nov-2019) & AAA Plus Trading Pvt. Ltd. (Consumed from Dec-2019 to March 2020). For FY 2020-21: only AAA Plus consumed For FY 2021-22: Only AAA Plus consumed
B	Captive user share-class-A (who is co-located near the plant and consuming majority of energy generated)	81,000	1,12,100	1,12,100	
C=A +B	Total Captive Users share	1,43,500	1,69,000	1,55,600	
D	Total Equity Shares	4,21,320	4,21,320	4,21,320	
E=C / D	Ownership%	34.06%	40.11%	36.93%	
	CGP Shareholding / Owner ship Norms	Fulfilled	Fulfilled	Fulfilled	

2.17) It would be pertinent to note that in respect of the Financial Year 2019-20 the Petitioner/TANGEDCO had already filed a Petition vide M.P. No. 05 of 2021, contending that although the captive user(s) of the Respondent Company hold not less than 26% of the equity shares with voting rights, however, the said user(s) hold less than 26% of the total paid up equity, and consequently fail to satisfy the minimum ownership criteria.

2.18) The Petitioner relied upon information from the Financial Year 2018- 19 to allege the Respondent's disqualification from CGP status for FY 2019-20, the Commission vide its order dated 22.03.2022, directed TANGEDCO to carry out the verification afresh with correct data. The relevant extract is as reproduced as follows:

"6.16. The Petitioner's claim for levy of Cross Subsidy Surcharge from the Respondent pertains to the Financial Year 2019-20. Hence, the Petitioner is required to obtain the Financial data from the Respondent for the Financial Year 2019-20 i.e. as on 31st March 2020 afresh and verify the same as to whether the Respondent satisfy with the twin criteria of "Ownership" and "Consumption". If CGP norms are complied with by the Respondent, then there is no issue. If not, the Petitioner is required to file the Miscellaneous Petition with the Commission for necessary Orders. "

2.19) The Respondent submits that the issue of whether verification of the captive status of a generating plant should be confined to the extent of the members having voting rights only, has been categorically decided by the Commission in the affirmative vide its order dated 31.08.2023 in M.P. No. 31 of 2020, wherein it was held as under:

"8.10. As may be seen from the above, the Hon'ble Punjab and Haryana High Court has interpreted its expression "ownership" occurring in Rule 3 of the Government of India Rule 2005 with a clear observation that so long as the captive consumers of the captive generating plant are collectively holding equity shares in the company with 26% voting right over the company then the test of

ownership is clearly met as per the Rule irrespective of the value of the issues. The Hon'ble High Court of Punjab and Harayana also went on to hold that the determinative factor is not 26% of the equity value but only 26% of the voting rights. Hence, the contention of the petitioner is not only devoid of merits but also no legal legs to stand.

8.11. In the result, the petition is dismissed with observation that the petitioner shall act strictly within the confines of Government of India Rules, 2005 and the law interpreted by the Hon'ble High Court of Punjab and Haryana while verifying or examining the Captive Generating status of a Generator. No order as to costs”

2.20) The Petitioner/TANGEDCO while taking monthly reading also notes down the in-house/co-located user's consumption. When the Respondent submitted the CGP status verification documents to TANGEDCO annexed herewith as A-1, the shareholding and consumption of the co-located captive user were also submitted, but the Petitioner/TANGEDCO blatantly neglected to consider the same in carrying out the verification for captive status. The Respondent submits that the Petitioner's basis for the Respondent's alleged loss of captive status is solely attributable to their unjustifiable and arbitrary negligence in failing to account for the ownership of the in-house captive consumer, despite being aware of the consumption by the in-house Captive user.

2.21) The present petition has been filed without proper consideration of the relevant facts and records in its entirety. As is evident from the reasons stated above, the Respondent's CGP undisputedly satisfies the Ownership norms in accordance with the applicable law and judicial precedents.

3) Rejoinder filed by the petitioner :-

3.1) Avanti Metals Pvt. Ltd., AAA Plus Trading Pvt. Ltd. cannot be considered as the captive user as they have not got open Access approval and they are not included as

captive user in the Energy Wheeling Agreement executed between the CGP and TANGDECO during the period.

3.2) The Hon'ble Supreme Court of India order dated 09.10.2023 passed in the Civil Appeal No.8527-8529 of 2009, settled various matters regarding the interpretation of the Electricity Act and Rules. Based on the this supreme court order, the respondent may prove.

- i) The continuity in the minimum 26 % ownership throughout the year

- ii) The proportionality minimum and maximum norms fulfilment.

3.3) Further, the respondent may provide the supporting document

- i) For the generation E-tax paid on the gross generation (including in house consumption)

- ii) For the E-tax paid on the in-house consumption (AAA Plus Trading Pvt. Ltd)

As the generating plant has not fulfilled the 'Ownership' criteria, the CGP has lost the captive status for the financial year 2019-20, 2020-21 and 2021-22.

4) Heard the counsel for the petitioner and the respondents. Relevant provisions of law traversed. Written Arguments submitted on either side and legal precedents pressed into service considered.

5) On evaluation of the rival pleadings and evidence adduced on either side, the following issues crop up for consideration.

1) Whether the contention of the respondent that the petition deserve to be dismissed on the ground of erroneous categorization has legal foundation?

2) Whether the claim of the petitioner that the respondent's Generating plant has lost its captive status for the Financial years 2019-2020; 2020-2021 and 2021-2022 for not satisfying the ownership criteria envisaged in Rule 3 of the Electricity Rules 2005 is sustainable both on law and facts ?

3) Whether the petitioner is entitled to the declaratory relief prayed for?

6) Findings of the Commission :-

6.1) Issue No:1

The learned counsel for the respondent, drawing attention of this Commission to the averments set out in the petition and prayers sought for in the petition, argued with intensity that since the dispute raised by the petitioner in regard to the captive status of the respondent's plant is adjudicatory in nature and not regulatory, the petitioner should have classified the petition only as Dispute Resolution Petition on payment of the requisite court fees by quantifying the cross subsidy charges and that since the petitioner has classified the petition as Miscellaneous Petition the same is liable to be dismissed for contravention of Regulation 10 of TNERC – Fees and Fines Regulations, 2022.

6.2) The question of classification of a petition wherein the CGP status of a plant is put to challenge, is no longer *res integra* in view of the order passed by this Commission in R.A.No.7 of 2019. The relevant portion of the order is as hereunder :-

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

6.3) Apposite to point out that the above order became final since the same was not put to challenge by way of appeal. Thus it is manifest that, the classification of the instant petition as “Miscellaneous Petition” is perfectly in order.

6.4) In view of the above said conclusion, this Commission decides that the contention of the respondent that the petition deserve to be dismissed on the ground of erroneous categorization / classification has no legal foundation.

According this issue is decided.

7) Issue No: 2

7.1) Having considered the pleadings of the parties and rival contentions at length, the question which arises for consideration is whether the prayer seeking disqualification of the respondent's captive status can be predicated upon the shareholding of captive users as found in the EWA. While the petitioner seeks disqualification of the captive status of the respondent on the ground that the shareholdings of AAP Plus Limited cannot be considered for the purpose of shareholding as the said company has not got open access approval and its name does not bear any reference in the EWA executed between the respondent and the petitioner TANGEDCO, the respondent, on the other hand, terms such insistence as something premised entirely upon singular consideration of EWA. The respondent contends that the destination of use is its prerogative and that the petitioner cannot arbitrarily ignore internal consumption and account only external consumption by excluding the consumption of AAA Plus Trading Ltd. for this purpose. But, here again, who can claim that the power is transmitted to the destination of its use is a moot point which will be discussed in the coming paragraph.

7.2) The respondent has placed reliance on Section 9 of Electricity Act 2003 and Rule 3 of Electricity Rules 2005 to buttress its point that on overall basis, a corporate entity setting up a plant for captive generation should use 51% of the available generation thereby implicitly contending that the EWA has nothing to do with the shareholding pattern.

7.3) The respondent also relies upon the order of the Commission in M.P.No.42 of 2021 which held that wheeling charges does not arise in the case of in-house consumption of power transmitted through dedicated transmission lines. Notably, in the said case, the very same respondent herein, namely, M/s.OPG Power Generation Private Limited and M/s.AAA Plus Trading Private Limited were parties to the proceedings.

7.4) Per contra, the petitioner placing reliance on the order of Hon'ble Supreme Court in C.A.No.8527, 8529 of 2009, sought the details of Electricity Tax on gross generation paid by the respondent herein and Electricity Tax on in house consumption paid by M/s.AAA Plus Trading Private Limited, presumably to check whether the M/s.AAA Plus Trading Private Limited is really a captive user and whether the respondent herein was actually the one who supplied power to the AAP Private Limited as part of an in-house arrangement.

7.5) Having considered the entire gamut of the issue, we have to observe that the insistence on a wheeling agreement between M/s.AAA Plus Trading Private Limited and TANGEDCO or insistence on atleast a reference or mention about AAP Plus Trading Private Limited in the Energy Wheeling Agreement between the respondent and the petitioner cannot be faulted. The argument of the respondent that the GoI Rules 2005 postulates only the twin requirements of 51% consumption in proportion to their shares and 26% shareholding and therefore recourse to Energy Wheeling Agreement for deciding the captive status of an user is illogical or irrational may appear to be facile and

convincing at the first blush. But such insistence on a separate Energy Wheeling Agreement with M/s.AAA Plus Trading Private Limited or atleast a mention or reference about AAP Private Limited in the Energy Wheeling Agreement signed between the respondent and the petitioner cannot be outrightly rejected altogether. The reasons are obvious. The very edifice on which the twin criteria is built is nothing but for deciding the status of a captive user, or an Open Access consumer as the case may be, who will be ultimately called upon to pay CSS in case the twin criteria are not met.

7.6) We are of the well considered view the entire issued should be viewed through the prism of captive user as well and it would be a grave injustice to view the issue only from the point of view of the captive generating plant. An argument may be advanced that the Rules do not provide for such interpretation or approach. Be it noted that an Act or GoI Rule 2005 or Regulation cannot foresee every issue which may likely to arise and it is only for the said reason that provisions are found in the Regulations for exercise of inherent power. Here again, such inherent power cannot be invoked at the drop of a hat and has to be exercised sparingly and in exceptional circumstances. We are of the view that we have a fair case for invoking inherent powers in this case to do complete justice. If the edifice of the status of the captive user collapses even on any reason other than these twin criteria, the said criteria cannot survive on their own, and will have to be necessarily grounded.

7.7) It is one thing to say that the twin criteria is the basis on which the captive status should be determined, but it would be totally perverse to assume that the twin criteria

should survive even in the face of collapse of the foundational basis of captive user's status and legitimacy should be accorded even in the face of an entity being denuded of its status of captive user for any other reason. The captive status of a plant is co-terminus with that of status captive user and it cannot be delinked. In our view, such view would militate against the object of Gol Rules 2025 and any interpretation of captive status of a generation station *dehors* the status of captive user would be anathema to the whole scheme of captive generation.

7.8) A mechanical interpretation of shareholding of a SPV or a generating station based on the in-house consumption and shareholding of a company engaged in-house consumption *dehors* the very captive status of a captive user would defeat the very intent of Gol Rules. Such interpretation cannot be agreed to as it would frustrate the whole scheme of Gol Rules 2005. When there is a generating station which has composite shareholding with a whole lot of captive users claiming to have satisfied the captive status on the basis overall shareholding *inter se*, as natural corollary, it goes without saying that the captive users too must pass the test of captive status which can be done only on production of documents pertaining to the agreement between the generator and the captive users or by establishing the generator-captive user relationship. But no evidence was let in during the hearing despite the doubts expressed by the counsel for the petitioner to the contrary. In the absence of wheeling agreement or agreement for in-house consumption, the consumption cannot be termed as captive consumption and it has to be treated as if it was a transmission of power from a

generating company as the recipient of power in such case would be neither an open access consumer nor captive user. If not be so, it would frustrate the captive scheme under the Act and Rules.

7.9) Here, in the instant case, even assuming for argument's sake the generating company can be said to possess captive status with the aid of shareholding of a captive user, still when an entity fails to meet the test of captive user, and when such captive user is not part of Energy Wheeling Agreement, the argument that the generating station is deemed to have passed the twin criteria, solely on the basis of determination of shareholding and consumption vis-a-vis, the generating station in our view is flawed. The argument for taking the shareholding of in-house consumption made by a company may look glamorous but it cannot stretch beyond a point to the extent of discarding the very status of a captive user for the reason that it could ultimately confer legitimacy on the captive user's exemption from CSS even in the face of non-satisfaction of the basic requirement which is mandatory for a captive user. The captive generator and captive users are two faces of a coin and one cannot be altogether discarded to give validity to the scheme.

7.10) Now, coming to resolve the issue, it is to be observed that, when faced with a quandary such as this, the courts resort to the doctrine of *causes omissus* to fill up the gaps in an enactment. Unfortunately, we have no such power to supply causes *omissus* but the circumstances warrant something to be done to step in and render justice. It is evident that status of captive generators and captive user are coterminous and

corresponding. This vital aspect is found missing in the GoI Rules as the provisions deal only with the requirement of captive status of a generator. When the ultimate burden to pay CSS is on the captive user's for failure to satisfy the twin requirement of GoI Rules 2005, we see no reason as to why the captive user's status cannot be tested and declared in the process, for, it is only for the captive user or OA consumer as the case may be, to declare that the power is carried to the destination of its use and it is not for the captive generator to plead on behalf of a captive user. In short, the captive generator is a statutory fiction provided under the captive scheme to give a common face for the captive users and hence, the captive user's status cannot be detached in any manner on any issue and nothing can be decided solely from the perspective of captive generator. In this case, there is no whisper about the details of consumption or geographical location of captive user M/s. AAA Plus Trading Private Limited which strikes a jarring note. All these go to show that there is an element of doubt on the status of the captive user, i.e., M/s.AAA Plus Trading Private Limited which can be confirmed only by providing the details of generation at the generation end and details of consumption at the consumption end. Unfortunately, though this issue was raised by the petitioner, the respondent failed to adduce evidence during the proceedings to refute the same, which manifestly points to the fact that the very status of M/s.AAA Plus Trading Private Limited as a captive user is nebulous. In the absence of any substantial and cogent evidence to prove the captive user status of M/s.AAA Plus Trading Private Limited by way of invoices concerning generation and consumption, we have no other alternative but to hold that it has not been proved beyond doubt that the transmission of power from the respondent

to M/s.AAA Plus Trading Pvt. Ltd. is an in-house consumption. As a natural corollary, we have to further hold that the share of M/s.AAA Plus Trading Private Limited cannot be counted for shareholding of the respondent in the absence of generator – captive user relationship between the two.

7.11) In the petition, the petitioner has tabulated the shareholding of the respondent for the Financial years 2019-2020; 2020-2021 and 2021-2022. The petitioner contend that the aggregate of the shareholding of the respondent is 18.52, 15 and 11.3 percentage respectively for Financial years in question. The particulars set out in the table had not been disputed by the respondent. Since this Commission has arrived at a finding that the shareholding of M/s. AAA Plus Trading Company cannot be taken into account to arrive at the total percentage of shareholding held by the respondent in the relevant Financial years, it is pellucid that the 26% ownership criteria contemplated under Rule3 of Electricity Rules 2002 has not been satisfied by the respondent for the Financial Years 2019-2020; 2020-2021 and 2021- 2022.

7.12) A conspectus evaluation of the evidence on record propel this Commission to arrive at a logical conclusion that the contention of the petitioner that the respondent's Generating plant had lost its Captive Status for the Financial Years 2019 – 2020, 2020 – 2021 and 2021-2022 for not satisfying the ownership criteria envisaged in Rule 3 of the Electricity Rules 2005 is sustainable both on law and facts.

Accordingly this issue is decided.

8) Issue No.3:-

8.1) This Commission has rendered a categorical finding in issue No.2 that the shareholding of M/s AAA Plus Trading Private Limited cannot be taken into account while deciding as to whether the respondent M/s. OPG Energy Pvt. Limited has satisfied the "ownership" criteria contemplated under Rule 3 of Electricity Rules 2005. The fact that if the shareholding of M/s. AAA Plus Trading Private Limited is excluded in computing the ownership percentage, the respondent does not satisfy the 26 percentage ownership criteria for the Financial Years 2019 -2020; 2020-2021 and 2021-2022 is not disputed even by the respondent. Hence it is manifest that the respondent had lost the Captive Status of its plant for the above referred Financial Years. In view of the above, there remains no shadow of doubt that the petitioner is entitled for the relief of declaration that the respondent M/s OPG Energy Private Limited has lost its Captive Status for the Financial Years 2019-2020; 2020-2021 and 2021-2022.

Accordingly, this issue is decided.

In the result an order is passed in favour of the petitioner declaring that the respondent M/s OPG Energy Private Limited had lost its Captive Status for the Financial Years 2019-2020; 2020-2021 and 2021-2022. Parties shall bear their respective costs.

Petition stand disposed of accordingly.

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

(Sd.....)
Member

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**