**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the 31st Day of August 2023**

**PRESENT**:

**Thiru M.Chandrasekar .... Chairman**

**Thiru K.Venkatesan .... Member**

**and**

**Thiru B.Mohan .... Member (Legal)**

**M.P. No.31 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**.

M/s. ARS Energy Private Limited
Survey No. 207, Equvarpalayam Village
Gummidipoondi – 601 201
Represents by its Deputy Director
Mr.N.Prabhu

…. Respondent
(Thiru R.S.Pandiyaraj
Advocate for Respondent)

This Miscellaneous Petition stands preferred by the Petitioner TANGEDCO with a prayer to direct to declare M/s. ARS Energy Private Ltd is not a captive generating plant with effect from 01.04.2019 and to cancel the

captive Open Access of energy with effect from 01.04.2019 and to treat the same as Third party transaction as per law and levy Cross Subsidy Surcharge for the energy adjusted/consumed from all users concerned.

This petition coming up for final hearing on 11-01-2022 in the presence of Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the TANGEDCO and Thiru R.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 relates to declare M/s ARS Energy Private Ltd is not a captive generating plant and the petitioner may be permitted to levy Cross Subsidy Surcharge for the period from 01.04.2019 onwards from their users [HT consumers] for captively adjusted energy.

1.2. In this connection, Rule 3 of the Electricity Rules -2005 is read 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:

xxxx

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent

of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

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

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

xxxxxx

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;"

1.3. The Generator, M/s. ARS Energy Pvt. Ltd has submitted application vide letter dated 12.03.2019, 15.03.2019 & 16.03.2019 for revised Energy Wheeling approval and enclosed a Chartered Accountant certificate dated 14.03.2019. The details of shareholding of captive users furnished in the Chartered Accountant certificate have been put up below,

TABLE-A

| No. | As on | No. of Equity Shares (of Rs. 10/- each) with voting Rights | Total Class "B" Equity Shares (of Rs.10/- each) | Percentage holding in Equity Share Capital with voting rights |
|---|---|---|---|---|
| 1 | 01-04-2019 | 15,480 | 34,000 | 45.53% |

1.4. As per the MOA with amendment dated 7th July 2015, submitted by the Generator for obtaining wheeling approval during July 2020, the liability clause of M/s. ARS Energy Pvt. Ltd reads as follows,

> *"V. The Authorized share capital of the company is Rs. 15,10,00,000/- (Rupees Fifteen Crores Ten Lakhs only) divided in to 1,49,00,000*
>
> *(One Crore and Forty Nine Lakhs only) Class "A" Equity shares with no voting rights of Rs.10/- (Rupees Ten only) each and 2,00,000 (Two Lakhs only) Class "B" Equity shares ordinary shares of Rs.10/- (Rupees Ten only) each with the power to increase or reduce its capital for the time being, reclassify the class of shares and also to consolidate/divide/sub-divide in to several classes, and to attach thereto respectively and different rights, privileges and conditions as may be determined by or in accordance with regulations of the company, and to vary or modify or abrogate any such rights, privileges or conditions in such manner as may for the time being provided by the regulations of the company."*

1.5. From the above clause, it is clear that M/s. ARS Energy Pvt. Ltd has 2 class of shares, which is Class "A" Equity share with no voting rights of Rs.10/- each and Class "B" Equity shares of Rs.10/- each with one vote per share.

1.6. Further, financial statement of M/s. ARS Energy Pvt. Ltd for FY 2018-2019 downloaded from MCA website details the Paid-up Equity Share Capital of M/s. ARS Energy Pvt. Ltd as on 31.03.2019 & 31.03.2018 as below,

TABLE-B

| No. | Particulars | No. of Shares | Amount (Rs.) |
|---|---|---|---|
| 1 | Equity Share of Rs.10/- each with voting right | 34,000 | 3,40,000 |
| 2 | Equity Share of Rs.10/- each with differential voting right | 81,40,442 | 8,14,04,220 |
| TOTAL | | 81,74,442 | 8,17,44,420 |

1.7. From the above, it is clear that the total Paid-up Equity Share Capital of M/s. ARS Energy Pvt. Ltd is Rs.8,17,44,420/ as on 31.03.2019 & 31.03.2018. In this connection, it is stated that as per Electricity Rules-2005, “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. The captive user shall have both ownership & control over the generating plant. “Ownership” is with reference to the total paid up equity share capital & ‘Control’ is with respect to the voting right in the Generating Plant. Hence, it is seen from the above Table-A & Table-B, that though the captive users of M/s. ARS Energy Pvt. Ltd possess not less than 26% of the total voting rights in the Generating Plant, they are holding less than 26% of the total paid-up Equity Share Capital of the Generating Plant as detailed below:-

| No | As on (A) | No.of Equity shares held by captive users (B) | Equity Share Capital with voting Rights held by captive users (Rs.) (C) | Percentage of Equity Share Capital held by Captive users (C÷Rs.8,17,44,420) * 100% | Percentage Voting rights held by Captive Users (B/34,000)* 100% |
|---|---|---|---|---|---|
| 1 | 01.04.19 | 15,480 | 1,54,800 | 0.19% | 45.53% |

1.8. Despite the negative qualification to wheel energy under captive category based on auditor certificate dated 14.03.2019, the wheeling continues to be carried on in FY 2020-21 based on the In-Principle approval already issued dt.18.03.2019.

1.9. For the previous financial year 2019-20, commencing from 01.04.2019, the captive wheeling approval dated 18.03.2019 was issued vide ref cited with a condition as below:-

> *"1. This approval is accorded without prejudice to further course of action to be taken by the TANGEDCO in accordance with law.*
>
> *2. This approval is subject to the directions from TNERC on the G.O.(Ms) No.37 dt.17.04.2018 (Copy Enclosed)."*

1.10. Further the Annexure II vide ref cited gives the following Terms and Condition:

> *"5.The approval open access quantum to each captive user may either be cancelled (or) revised downwards subject to provision of Grid connectivity & ISOA Regulation – 2014.*
>
> *6. This approval is accorded subject to the condition that the company should provide and clarify all necessary details as requested by Account Wing as and when required.*
>
> *7. The company shall adhere to the various provisions of Electricity Act 2003, the Electricity Rules 2005, required metering provisions as per CEA regulations 2006 and subsequent amendments and prevailing TNERC Intra-state Open Access regulations & Orders.*
>
> *8. The TANTRANSCO reserves the rights to withdraw the concurrence to operate the company's generator set in parallel with grid if any of the condition is violated or for any valid reason."*

1.11 For the reason mentioned above, as the ownership qualification of the Captive User of M/s. ARS Energy Pvt. Ltd. is not satisfied as per the Electricity Rules 2005, the arrangement to wheel power cannot be treated as captive consumption. The power availed by your users during the period of open access transaction under ref shall be treated as third party transaction and will attract cross subsidy surcharge.

1.12. In continuation necessary Show-Cause notice issued to the Generator M/s. ARS Energy Pvt. Ltd vide Lr.No.CE/GO/SE/CO/EE/OA/E.ARS Captive wheeling/D.No.168/20 dated.10.09.2020. In the Generator furnished their reply vide letter dated.17.09.2020, the relevant portion which held as follows:

"xxxx

1. *In compliance with the applicable laws and articles of association, the Company has issued two classes of equity shares i.e. 'Class A' equity shares which have no voting rights and 'Class B' equity shares which have voting rights i.e. one vote per share. The details of the classes of the equity shares authorized to be issued by the company can be verified in the capital clause of the memorandum of association submitted by us earlier. In order to substantiate the same, we have also submitted the audited financial statements of the company for the year 2018-2019 mentioning the details of the classes in the equity share capital of the Company. For the sake of clarity, we are reproducing the same below:*

| *No.* | *Particulars* | *No of shares* | *Amount* |
|---|---|---|---|
| *2.* | *Class A equity shares of Rs.10/- each with no or differential voting rights* | *81,40,442* | *8,14,04,420* |
| *2.* | *Class B equity shares of Rs.10/- each with voting rights.* | *34,000* | *3,40,000* |
| | *TOTAL* | *81,74,442* | *8,17,44,420* |

2. *In order to substantiate our submission that the company meets the ownership criteria under the Electricity Rules, 2005, a reference is made to the definition of the term 'ownership' under rule 3 of the Electricity Rules, 2005, which is reproduced below:*

   *……..*

   *"Ownership" in relation to a generating station or power plant set up by 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.*

   *……..*

3. *As required under the above said rule, the ownership must be assessed by considering such equity shares which have voting rights alone. Accordingly, for the purpose of computing the ownership of the captive consumers in the company, the equity shareholding with voting rights (Class B equity shares) held by the captive consumers must be considered i.e. percentage of the Class B equity share capital held by the captive consumers in the total Class B equity share capital, must be reckoned.*

4. *The corollary of the above would be that the Class A equity shares of the company, which do not have any voting right need not be considered for the purpose of calculating the ownership of the captive consumers in the Company.*

5. *In this regard, please refer to the auditors' certificate dated 14.03.2019 enclosed along with our application. The said certificate confirms that the captive consumers hold 45.54% of the Class B equity shares (15480 Class B equity shares out of 34,000 Class B equity shares) of the Company which has voting rights. Therefore, the percentage of the Class B equity share held by the captive consumers in the total equity share capital with voting rights of the company, is above the statutory requirement of 26%.*

6. *The subject show-cause notice issued by your good office takes into account the total paid-up equity capital of the company, i.e. it includes Class A equity share capital which does not have voting right. We state that such an interpretation is not as per the Electricity Rules, 2005, which is explained above. We would like to reiterate that per the Electricity Rules, 2005 clearly defines "ownership" in relation to a generating station or power plant set up by company or other body corporate shall mean the equity share capital with voting rights. Class A shares (which are without voting rights) ought not be taken into account while considering the shares held by the captive consumers who hold class B shares which carry voting rights.*

7. *Considering the above, we state that the Company, ARS Energy Pvt. Ltd. satisfies the criteria stated in Rule 3 of the Electricity Rules, 2005 with regard to "Ownership" and is fully qualified to generate*

8. *Electricity under captive category. Accordingly, the wheeling arrangement is a captive consumption arrangement and cross subsidy surcharges cannot be levied.*

1.13. Section 85 of the Companies Act 1956 which was in operation at the time of coming in to force of Electricity Rules, 2005 is extracted below:-

*Section-85*
*85. Two kinds of share capital.*

*(1) " Preference share capital" means, with reference to any company limited by shares, whether formed before or after the commencement of this Act, that part of the share capital of the company which fulfils both the following requirements, namely:-*

*(a) that as respects dividends, it carries or will carry a preferential right to be paid a fixed amount or an amount calculated at a fixed rate, which may be either free of or subject to income- tax; and*

*(b) that as respects capital, it carries or will carry, on a winding up or repayment of capital, a preferential right to be repaid the amount of the capital paid up or deemed to have been paid up, whether or not there is a preferential right to the payment of either or both of the following amounts, namely:-*

*(i) any money remaining unpaid, in respect of the amounts specified in clause (a), up to the date of the winding up or repayment of capital; and*

*(ii) any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company. Explanation.- Capital shall be deemed to be preference, capital, notwithstanding that it is entitled to, either or both of the following rights, namely:-*

*(i) that, as respects dividends, in addition to the preferential right to the amount specified in clause (a), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;*
*(ii) that as respects capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in clause (b), it has a right to participate,*
*whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.*

*(2) " Equity share capital" means, with reference to any such company, all share capital which is not preference share capital.*

*(3) The expressions" preference share" and" equity share" shall be construed accordingly."*

1.14. Thus it can be seen from the above provision of the Companies Act, 1956 which was prevailing at the time of coming into force of the Electricity Rules, 2005 there is no equity share capital which can be issued with differential voting rights. Thus the intent of the Electricity Rules, 2005 with respect to

Ownership has to be viewed in the light of the above provision of the Companies Act, 1956.

1.15. In this regard, it is stated that as per Electricity Rules, 2005, “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. The captive user shall have both ownership & control over the generating plant. “Ownership” is with reference to the total paid up equity share capital of the Generating plant & ‘Control’ is with respect to the voting right in the Generating Plant. Hence, it is stated that though the captive users of M/s. ARS Energy Pvt. Ltd possess not less than 26% of the total voting rights in the Generating Plant, as on 1-4-2019 they are holding just Rs.1,54,800/ out of the total paid up equity share capital of Rs.8,17,44,420/ which works out to 0.19% only. Therefore the captive users of M/s. ARS Energy Private Ltd., are holding less than 26% of the total paid-up Equity Share Capital of the Generating Plant and hence does not satisfy Ownership criteria as per Rule-3 of the Electricity Rules 2005. Therefore, the Captive Generating plant was not eligible to wheel power under captive category from 1-4-2019 onwards. Further, as per Rule 3(2) of the Electricity Rules-2005, it is 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. There is certainly an obligation of the captive users who are also the owners of the

Captive generating plant to the extent of their ownership in such plant to ensure that they fulfil the qualification of ownership before they wheel energy for captive consumption.

(i) Tamil Nadu Grid Connectivity and OA Regulation prescribes for levy of Cross Subsidy Surcharge Regulation 23.

(ii). 4th proviso Section 42(2) of the Act, 2003 exempts levy of CSS for captive use.

(iii). The Electricity Rules prescribes qualification required the intention of the Rules has been conveyed clearly in Rule 3(2) by the use of the words “obligation of the captive users” “ensure consumption” “at percentages as in Rule 3(1) (a) and (b)” “ is maintained” etc.

(iv) Rule 3(1)(a)(b), the qualification for captive status is with respect to both “ ownership” and “consumption”, Consumption can’t be delinked from Ownership. Unless there is “ownership” as per Rule-3 read with Section 2(8) and Section 9 of the Electricity Act, 2003, “consumption” can’t happen for captive use. In other words, if there is no ownership, qualification of verifying consumption does not arise.

(v) Therefore when the act and the Rules there under very clearly provides that the Ownership is a condition precedent to consumption under captive OA, the same cannot be brushed aside.

1.16. From the above it is clear the users/generators should have got the Ownership qualification before wheeling under captive OA. Had they been subjected themselves this would have come to light as early in April 2019.

Further they opted not to subject themselves for clarity before the availing by captive OA by which the monthly CSS that would have got credited to TANGEDCO has not been realized then and there in the monthly bills.

**2. Contentions of the Respondent:-**

2.1. The Respondent is running a Captive Generating Plant (CGP) at Survey No.207, Equvarpalayam Village, Gummidipoondi - 601 201 in the name and style of "M/s. ARS Energy Private Limited" and M/s. ARS Energy Private Limited is a Company incorporated under the Repealed Companies Act 1956 and coming under the purview of the Companies Act 2013. The registered office of the Company is functioning at D-109, 4th Floor, LBR Complex, Anna Nagar East, Chennai - 600 102. The capacity of the CGP is 62.8 MW and is connected with the Superintending Engineer, Chennai Electricity Distribution Circle/ North in HT SC No. 1984. The power generated by the above said CGP is being shared by the Company and also among the other willing shareholders of the Company, whoever requires captive power for their own use, which procedure is approved by the Electricity Act, 2003, further elaborated by the Electricity Rules, 2005 and also by way of various binding judgements of the Hon'ble APTEL, New Delhi in many matters.

2.2. In the order of the Commission in RA No.7 of 2019 dated 28.01.2020, in the matter of verification of the CGP status, *inter-alia,* the authority is provided to TANGEDCO as below in Para 6.1.6 of the order.

*"6.1.6 In view of the above, we decide that the TANGEDCO, shall*

*conduct the verification of CGP status based on the procedure duly passed by the Commission in this order."*

2.3. From the above it could be seen that the Commission has decided that the TANGEDCO shall conduct the verification of CGP status based on the procedures duly passed by the Commission in the said order in RA No.7 of 2019 dated 28.01.2020.

2.4. However, much contrary to the same, in the instant case filed against the Respondent, the notice for CGP verification was issued by the State Load Despatch Centre (SLDC) with whom no authority for verification of the CGP status was provided by the Commission by way of its order in RA No.7 of 2019 dated 28.01.2020 or even otherwise. A copy of the letter issued by the Chief Engineer, Grid Operation, State Load Despatch Centre, Chennai in Lr.No.CE/GO/SE/CO/EE/OA/AEE/OA/F.ARS captive wheeling/D. No.168 /20 dated 10.09.2020.

2.5. The above letter issued by the SLDC is based on the application filed by the Answering Respondent for grant of OA approval in respect of certain captive users through its letters dated 12.03.2019, 15.03.2019 & 16.03.2019. Those letters were issued to the SLDC seeking for open access approval, much before the order of the Commission was passed in RA No.7 of 2019 dated 28.01.2020. However, without providing any approval over the same, the SLDC on scrutinizing the application, has issued a letter. After receipt of the letter in Annexure A, the Answering Respondent has also filed suitably the responses

over it by way of its letter dated 17.09.2020.

2.6. Therefore, the Respondent submits that the SLDC was not provided with any power of verification towards CGP status either in the order in RA No. 7 of 2019 dated 28.01.2020 or otherwise. Therefore, the letter issued by the SLDC, by way of a Show Cause Notice dated 10.09.2020 is basically without the authority of law. Being a Grid Manager, issuing such a letter for the grant of OA approval is also not anyway sanctioned in the Grid Connectivity and Intra State Open Access Regulations 2014 issued by the Commission for the purposes of regulating the measures relating to grant of Intra State Open Access in the State of Tamil Nadu. Therefore, in having issued a letter by way of a SCN by the State Load Despatch Centre as per Annexure A is per se not legal as it lacks complete authority of law.

2.7. However, even when the SCN was suitably defended by the Respondent by way of its letter, the SLDC has not proceeded further and is keeping the OA approvals even without providing any reply and this makes the provisions of the Grid Connectivity and Intra State Open Access Regulations 2014 fully violated.

2.8. While the matters are so placed, based on the order issued by the Commission in RA No. 7 of 2019 dated 28.01.2020, the Petitioner TANGEDCO on an attempt to verify the CGP status of our Company, has issued a Show Cause Notice bearing No. Lr.N.SE/CEDC/N/DFC/AO/Rev/AAO/HT/ASA/F. Show Notice/D. 2107/2020 dated 23.09.2020. By issuance of this Show Cause Notice,

stating some frivolous grounds and reasons, the petitioner was attempting to disqualify the CGP status for the years 2018-19 and 2019-20 and accordingly, unilaterally arrived and fixed the Cross Subsidy Surcharge to the extent of Rs.132,11,91,081.00 on its own, even without the approval of the Commission. Further, the Petitioner has gone to the extent of marking the copy of the Show Cause Notice to all the Captive Users of the Respondent, which procedure was not approved by the Commission, in any manner in the order in RA No.7 of 2019 dated 28.01.2020. The idea behind, sending the copies of the Show Cause Notice to all the Captive Users of the Respondent is to make the Captive Users to get scared over the allegation of not satisfying the CGP status and attempting to drive all of them to get out of the CGP arrangement by following some foul means. The letter of the Superintending Engineer of the Petitioner issued by way of a Show Cause Notice dated 23.09.2020.

2.9. Annoyed over the attempt of the Superintending Engineer of the Petitioner, the Respondent has filed a detailed reply against each of the contents of the Show Cause Notice through its letter dated 05.10.2020 and accordingly, defended the case with the support of relevant binding judgements of the Hon'ble APTEL and also even by the order of the Commission delivered in RA No.7 of 2019 dated 28.01.2020. The reply of the Respondent filed with the Superintending Engineer of the Petitioner.

2.10. However, even without properly analysing all the contents of the reply filed by the Answering Respondent either on 17.09.2020 to the SLDC and

23.09.2020 to the Superintending Engineer of the Petitioner, in a hurried manner, the Petitioner has filed the instant petition covered by M.P. No. 31 of 2020 before the Commission, even without providing any reply to the Respondent, as to why the replies of the Respondent were not considered fully and why the replies are not found convinced over the allegations made vide their Show Cause Notices dated 10.09.2020 and 23.09.2020.

2.11. Therefore, the whole idea of the petitioner is to rush the matter by any means, whether it is legally maintainable or not and by these premature attempts the Petitioner is trying to make scared all the shareholders of the Respondent to go out of the CGP arrangement, while the entire CGP arrangement was well within the scope of law and falling entirely within the frame works of the guidelines prescribed by various binding judgements of the Hon'ble APTEL, New Delhi based on the Electricity Rules 2005 and all such grounds were suitably adduced by the Answering Respondent in both the replies filed by the Answering Respondent both before SLDC as well as before the Superintending Engineer of the Petitioner.

2.12. As things were placed so, the Petitioner has filed the instant petition covered by M.P. No. 31 of 2020, before the Commission only based on the first Show Cause Notice issued by the SLDC on 10.09.2020 and has completely suppressed the subsequent events of issuing another Show Cause Notice through its Superintending Engineer on 23.09.2020. For filing any petition before the Commission, in the matter of verification of CGP status if the TANGEDCO

finds it that the CGP has not demonstrated its status, the Commission in its order in RA No.7 of 2019 dated 28.01.2020 has made it clearly as follows:-

> "*7.9.9 In cases where the captive users/CGPs offer explanation/clarification and the Licensee finds the explanation satisfactory, the licensee may accordingly act on withdrawal of claims made. Where, the Licensee is not satisfied with the explanations offered by the CGP /captive users and is convinced that action has to be pursued for disqualification of the CGP or to raise the demand towards payment of cross subsidy surcharges, such cases shall be brought before the Commission for adjudication by filing necessary petition."*

2.13. From the above, it could be seen that any petition for adjudication before the Commission needs to be filed by the Licensee only when the Licensee is not satisfied with the explanations offered by the CGP {captive users and is convinced that action has to be pursued for disqualification of the CGP or to raise the demand towards payment of cross subsidy surcharges. However, in the instant case covered by M.P. No. 31 of 2020, it is made amply clear that the Licensee has not issued any Show Cause Notice on its own directly and however, it has acted up on the Show Cause Notice issued by the State Load Despatch Centre, which is not a competent authority provided and entrusted with the power to verify CGP status in any manner by the Commission through its order in RA No. 7 of 2019 dated 28.01.2020 or otherwise. Therefore, the fundamental question, whether the Licensee has issued any Show Cause Notice before filing this petition before the Commission is not satisfied in the instant case covered by M. P. No. 31 of 2020. Instead, the Petitioner has filed the petition covered by M.P. No. 31 of 2020, based on a Show Cause Notice issued by the SLDC in the first instance which is legally not maintainable. Therefore, the Respondent submits that the petition filed by the Petitioner solely based on a

non-maintainable Show Cause Notice issued by the SLDC is per se has rendered the petition covered by M.P. No. 31 of 2020 not eligible to be proceeded with by the Commission in terms of the order found in Para 7.9.9 of the order in RA No.7 of 2019 dated 28.01.2020. Therefore, based on the above defective procedure followed by the Petitioner in filing the M.P. No. 31 of 2020, not based on any notice issued by the Licensee/TANGEDCO, having proceeded to file the petition covered in M.P. No. 31 of 2020, based on a SCN issued by State Load Despatch Centre is a fundamental flaw and makes the entire petition covered by M.P. No. 31 of 2020 infructuous for further proceeding for adjudication as it completely violates the spirit of the order covered by RA No.7 of 2019 dated 28.01.2020, more particularly as found in Para 7.9.9 as extracted above.

2.14. While the fundamental flaws are as explained above, before going to provide suitable Counter in the instant Petition covered by M.P. No. 31 of 2020 in a detailed manner, the Answering Respondent wishes to submit that the Respondent is a member in Tamil Nadu Power Producers' Association (TNPPA). The Association of the Respondent namely TNPPA, has already filed an Appeal Petition before the Hon'ble APTEL, New Delhi, in Appeal No. 131 of 2020, against the very operation of the order of the State Commission in RA No. 7 of 2019 dated 28.01.2020 in very many grounds and one of such grounds is relating to providing authority for the Petitioner TANGEDCO to verify the CGP status.

2.15. After hearing the appeal in full, on various dates, from all the sides, in a detailed manner, the Hon'ble APTEL has finally reserved the matter for orders, through its Daily Order dated 30.09.2020. However, the appeal was again ordered to be reheard from 04.01.2021 onwards and accordingly, after hearing the matter from all the sides fully again, the Hon'ble APTEL has again reserved the matter for judgement, by way of its Daily Order dated 12.02.2021.

2.16. Therefore, the Respondent wishes to reiterate that at the face of the record, primarily the Show Cause Notice issued by the SLDC on 10.09.2020, per se is not maintainable as it is not having any authority provided towards verification of CGP status. Further, issuing such a Show Cause Notice, at a stage, when the whole matter is already sub-judice before the Hon'ble APTEL, New Delhi is also not maintainable to law. Without pre-judice to the same and also subject to the outcome of the Appeal No. 131 of 2020, filed by Tamil Nadu Power Producers' Association (TNPPA), in which the Respondent is a member, the Respondent wishes to state that the TANGEDCO in having issued Show Cause Notice through its Superintending Engineer on 23.09.2020, is also a clear error in law and therefore, the Show Cause Notices themselves need to be withdrawn and accordingly, in all fairness on the above score alone, besides to all other facts narrated below, the Commission has to keep in abeyance the entire proceedings found initiated through M.P. No. 31 of 2020 till the disposal of the appeal filed by the TNPPA in Appeal No. 131 of 2020 by the Hon'ble APTEL, New Delhi.

2.17. The petition covered by M.P. No. 31 of 2020 filed on 12.10.2020 before the Commission, the Petitioner has completely suppressed the facts of having issued a Show Cause Notice by the Superintending Engineer of the Petitioner on 23.09.2020 and the facts of the Answering Respondent having filed a detailed reply to the Superintending Engineer of the Petitioner on 05.10.2020. Due to these suppression of facts, the primary requirement of issuing a notice by the Licensee/TANGEDCO before filing any petition before the Commission is fully suppressed and on this score alone the instant petition in M.P. No. 31 of 2020 needs to be dismissed without any action as per Para 7.9.6 as extracted below as there was no evidence demonstrated in the petition covered by M.P. No. 31 of 2020 that the Licensee / TANGEDCO has verified the CGP status and found that the captive status was not fulfilled and there is no further evidence provided in the M. P. No. 31 of 2020 that the Licensee has issued or intimated that the captive status has not been fulfilled. Due to the suppression of these fundamental requirements, the petition in M. P. No. 31 of 2020 deserves to be dismissed in toto.

> *"7.9.6 Based on conditions stipulated in this procedure, the licensee shall verify the captive status of CGP and captive users, and shall intimate fulfilment of condition in regard to the captive status or otherwise to the CGPs/captive users by 30thJune. Where the conditions of captive status have not been fulfilled, the licensee shall intimate the user's liability on dues, provisionally, to be remitted on account of losing the captive status."*

2.18. Further, without prejudice to the fact that the whole matter covered by the order in R.A. No.7 of 2019 dated 28-01-2020 of the Commission is already sub-judice and is already seized before the Hon'ble APTEL in Appeal No. 131 of

2020, the Answering Respondent prays to keep the matter covered in M.P. No. 31 of 2020 under abeyance till the delivery of the judgement in Appeal No. 131 of 2020 filed by the Tamil Nadu Power Producers Association (TNPPA).

2.19. The twin objectives of the Rule 3 of Electricity Rules, 2005, go as below.

*"3. Requirements of Captive Generating Plant.-*

*(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-*
*(a) in case of a power plant -*

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

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

*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.*

2.20. From the above, quoted provisions of Electricity Rules 2005, the Respondent submits that according to Rule 3 (1) (a) (i), it has been made as below.

*“(a) in case of a power plant -*
*(i) not less than twenty six percent of the ownership is held by the captive user(s ),”*

2.21. Therefore, the Respondent submits that when the captive users hold not less than 26% of the equity shares, with voting rights, it would be sufficient and amounts to satisfy the ownership norms, which is one among the two criterions.

2.22. Further to the same, the Respondent submits that the ownership was further defined in respect of Companies, as below in the explanatory provisions provided under Rule 3 (2) Explanation (1) ( 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. "*

2.23. It should be noted that the Respondent is a Company incorporated under the Repealed Companies Act 1956 and now coming under the Companies Act 2013. The Respondent presumes that there are no differences of opinion on the fact, whether the Respondent is a Company or not and therefore, everything is being pursued on the ground that the Respondent is a Company incorporated under the Companies Act 2013.

2.24. The Respondent further submits that the focused issue raised, both in the Show Cause Notice issued by the State Load Despatch Centre on 10.09.2020 and the other Show Cause Notice issued by the Superintending Engineer of the Petitioner on 23.09.2020 and as well in the instant petition covered by M.P. No. 31 of 2020, pertains only on a grave misunderstanding of the provisions relating

to the ownership and the minimum requirement of 26% ownership by equity shares with voting rights. Therefore, the Respondent has to invoke the reference as provided for the definition of the term 'ownership' in relation to a Generating Station or Power Plant, set up by a Company or any other Body Corporate, from the Electricity Rules 2005 which go to explain that the ownership shall always mean, the equity share capital with voting rights as defined under the above Rule relating to ownership.

2.25. Therefore, the Respondent submits that on a combined reading of the same, with Rule 3 (l)(a) and Rule 3 (2) Explanation (1) (c) of Electricity Rules 2005, it would amply make clear and would amount to mean that to qualify the status of a captive generating plant, all the captive users, should hold 26% of the ownership and therefore, if they all hold 26% of the equity shares, with voting rights, then the status of the captive generating plant is satisfied as far as ownership is concerned and therefore, thereby, one of the criterions would be treated as satisfied as far as ownership is concerned. Here in the instant case, the captive users are clearly having 26% minimum ownership based on their equity shares with voting rights and the same was not anyway disputed by the petitioner.

2.26. To elaborate further, the Answering Respondent wishes to submit that the Company of the Answering Respondent is having two types of equity shares, as permitted under the Companies Act 1956 and also under the Companies Act 2013. One type is of equity share with voting rights. The other is of equity shares

without voting rights.

2.27. The Respondent further submits that according to the Companies Act 1956 and also according to Companies Act 2013, being a Private Limited Company and not being a Public Limited Company, having shares with differential rights, is permitted under both the Companies Act 1956 and 2013.

2.28. It shall be noted that the Companies Act, 1956 (hereinafter referred to as the "1956 Act") was amended in the year 2000, with effect from 13.12.2000, whereby issuance of shares, with deferential voting rights ('DVR's") was introduced by inserting Section 86. Accordingly, the definition of "shares with differential rights" was inserted in Section 2 (46A) of the 1956 Act. The amended provisions stood as below:

2.29. Section 2(46A): "Share with differential rights" means, a share that is issued with differential rights, in accordance with the provisions of Section 86. As per Section 86 of the Act, the issue of share capital is of only two kinds:

(a) equity share capital-with voting rights; and / or

(b) with differential rights as to dividend, voting or otherwise in accordance with such rules and subject to such condition as may be prescribed.

2.30. Further, pursuant to Section 90(2) of the 1956 Act, the provision of Section 86 of the Act, is not applicable to a Private Limited Company, unless it is

a subsidiary of Public Limited Company. As such, Private Limited Companies, which are not subsidiary of Public Limited Companies, are entitled to issue, any kind of share capital equity, preference or others, with differential rights, as to voting, dividend and also non-voting shares even. But in no case, a Public Limited Company is empowered to issue Non-Voting shares.

2.31. While the legal position contained and continued so, as explained above, after the repeal of the Act of 1956, by introduction of the Companies Act 2013, the issue of DVRs under Companies Act, 2013 was again regulated as below.

2.32. Section 43 of the Companies Act 2013, provides that Equity share capital can be,

a) with voting rights and / or

b) with differential voting rights as to dividend, voting or otherwise.

2.33. As regards to the issue of fresh DVR, a Company is required to comply with the conditions contained in Rule 4 of the Companies (Share Capital & Debentures) Rules, 2014.

2.34. Pursuant to the Notification dated 5th June 2015, Section 43 and conditions given under the Rules, do not apply to the Private Limited Companies, in respect of the shares of DVR, if the Memorandum or Articles of Association of the Company provides so.

2.35. In the case of Listed Limited Companies, with the apprehension of

possible misuse of Differential Voting Rights (shares with superior voting rights), SEBI had prohibited the issue of such shares on July 21st, 2009. However, shares with inferior voting rights were permitted by SEBI. Later on SEBI has allowed to issue shares with superior voting rights also.

2.36. To sum up the Respondent submits that only Private Limited Companies are allowed to issue DVRs, without voting rights and Public Limited Companies and Subsidiaries of Public Limited Companies are not allowed to issue equity shares without voting rights.

2.37. Therefore, the Respondent namely M/s. ARS Energy Pvt Ltd., being a Private Limited Company, in all respects, has all the right to issue shares with Differential Voting Rights (DVRs) and such an arrangement is already and perfectly provided under the Companies Act, 1956 and also under the Companies Act 2013. The Memorandum and Articles of Association of the Answering Respondent also permits such an arrangement in all fairness.

2.38. If the Memorandum of Association of the Answering Respondent's Company is seen at Article 47-V, it could be seen that the said Article 47-V would amply specify, as how the Company is entitled to issue DVRs and therefore, the Company of the Answering Respondent by all means, is entitled and eligible to issue DVRs, as per the requirements, which procedure has been fully regulated under Companies Act 1956, which was repealed by Companies Act 2013 and further supported by the Memorandum of Association of the

Answering Respondent's Company.

2.39. Therefore, the matter of objecting to keep certain equity shares with voting rights and certain equity shares without voting rights, cannot be a matter of any more concern or objection or scrutiny, as such a practice and procedure is legally made valid by the above provisions of the Companies Act 1956 as well as under the Companies Act 2013, further supported by the Memorandum of Association of the Respondent's Company.

2.40. With this backdrop, the Respondent wishes to proceed to answer certain queries raised in the Show Cause Notice issued by the State Load Despatch Centre on 10.09.2020 and also the Show Cause Notice issued by the Superintending Engineer of the Petitioner dated 23.09.2020, which both pertains to the matter of ownership of the CGP and on which ground the whole petition covered by the matter in M.P. No. 31 of 2020 was filed before this Hon'ble Commission.

2.41. It is alleged that the SLDC while scrutinizing the application filed by the Respondent for grant of OA approval has unilaterally decided and communicated the same by its letter dated 10.09.2020 that the ownership criteria was not satisfied. Even though the Respondent has fittingly replied over the letter of the SLDC dated 10.09.2020 by way of the letter filed by the Respondent on 17.09.2020, the SLDC has not provided any further reply to the Respondent as to why the letter of the Respondent has not found convinced

over the query raised on the ownership criteria.

2.42. Besides to the above lacuna, it is reiterated that the Petitioner TANGEDCO itself has filed a Petition before the Commission through the Chief Financial Controller-Revenue, in M.P. No. 23 of 2020 and accordingly, the TANGEDCO has clarified the matter, whether the lockdown is lifted and whether TANGEDCO can go for collection of documents for CGP verification. The prayer in M.P. No. 23 of 2020 is as below and the matter in M. P. No. 23 of 2020 is still continued at the Commission without passing any final order.

> *"11. I respectfully submit that this Hon'ble Commission being a Regulatory authority in the interest of the applicant and the consumers exercising power may issue appropriate direction as prayed for herein on the circumstances and situation warrants issuance of the same.*
>
> *Under above circumstances, this Hon'ble Commission may be pleased to issue suitable direction in S.M.P. No. 1 of 2020 dated 24.04.2020 to the Captive Generators and the Distribution Licensee in the matter of submission/collection of the documents for verification of CGP status in view of the relaxations provided under various G.Os during the COVID lockdown period."*

2.43. While the Petition filed by the Chief Financial Controller-Revenue is still pending for final clarification with the Commission and when the matter was heard on 13.10.2020, the Commission has ordered to submit the documents to the petitioner TANGEDCO without considering the matter of CGP verification got seized before the Hon'ble APTEL and was waiting for the final verdict as per the Daily Order dated 30.09.2020 of the Hon'ble APTEL.

2.44. Therefore, having directed to submit the documents for CGP verification

while the appeal in Appeal No. 131 of 2020 was waiting for final judgement, there was a great error committed by law and in the legal proposition and accordingly, the Daily Order of the Commission in M.P. No. 23 of 2020 dated 13.10.2020, was also agitated by way of an appeal filed by the Tamil Nadu Power Producers' Association in Appeal No. 179 of 2020. After hearing the matter, the Hon'ble APTEL has ordered as below through its Daily Order dated 23.10.2020.

> *"Such details must be furnished by the Appellant on or before 28.10.2020 with advance copy to the other side. Once it is furnished to the Respondent-TANGEDCO, it (TANGEDCO) must put its stand on the decision, action or proceeding taken on or before 01.11.2020 in that regard on the data furnished by CGP with advance copy to the other side. We also direct Respondent- independent CGP, who are not Members of the Association, to furnish such detail to Respondent- TANGEDCO, as stated above, within the time limit and Respondent- TANGEDCO also shall comply with our direction, as stated above, in respect of independent Respondent-CGPs. We hope, meanwhile, no coercive action will be initiated."*

2.45. The Respondent submits that even though the Petitioner TANGEDCO was permitted to collect the documents, the Hon'ble APTEL also reiterated not to initiate any coercive action on the matter. Therefore, the action of the Petitioner to rush to file this petition covered under M. P. No. 31 of 2020 is a clear violation of the order of the Hon'ble APTEL passed in the order in Appeal No. 179 of 2020 dated 23.10.2020 to the extent that the Petitioner has taken coercive action against the express directions of the Hon'ble APTEL dated 23.10.2020.

2.46. Therefore, while things are placed so and when the matters are agitated before the Hon'ble APTEL and also before the Commission under a Clarification

Petition filed by the Petitioner, prima- facie, attempting to coercively and forcibly making verification of CGP status of M/s. ARS Energy Pvt Ltd, is not a fair and legal course and therefore, the Show Cause Notice issued by the State Load Despatch Centre on 10.09.2020 and the Show Cause Notice issued by the Superintending Engineer of the Petitioner on 23.09.2020 and the subsequent petition covered in M.P. No. 31 of 2020 filed before the Commission, are all going beyond the legal propositions covered by the principles of equity and fairness.

2.47. Under the above backdrop, when coming to the matter of taking the equity share percentage held by the captive users of the Respondent, both the State Load Despatch Centre as well as the Superintending Engineer, while issuing the respective Show Cause Notices, have totally confused the matter in its entire core. It seems that the SLDC and the Superintending Engineer were not acting independently with proper mind application on the matter on their own and the Chief Financial Controller-Revenue is presumed to be in the backdrop of both the SLDC as well as the Superintending Engineer and everything was being is found acted up on in a remotely controlled manner, from the TANGEDCO Head Quarters, with some ulterior motives, to make compulsorily the CGP of the Respondent to fail in the status, even though the CGP of the Respondent has gone all through the tests satisfactorily in every possibility and is clearly to be declared as an eligible CGP.

2.48. While the Electricity Rules 2005, make it obligatory that the captive users

must possess 26% of the equity shares with voting rights, whether the captive users are having the 26% of the equity shares with voting rights, would be the right rationale to examine the ownership criteria.

2.49. The Respondent's Company is eligible to have two types of shares as per the norms of the Repealed Companies Act 1956 and also as per the norms available under the Companies Act 2013. Accordingly, the Answering Respondent's Company is having two types of shares (ie) one type of equity shares with voting rights and the other type of equity shares without the voting rights. Therefore, the persons making captive use of the power, whether they possess 26% of the shares with the equity rights, would be the one and only right proposition to check the ownership. The persons holding the equity shares, without voting rights, are not consuming the power of the captive generating plant in any manner. Therefore, only out of the persons having equity shares with voting rights, the captive users whether are falling in line with 26% minimum ownership needs to be verified.

2.50. Since, the other persons having equity shares without voting rights are not captive users of the power generated by the CGP of the Respondent, their mere stake of ownership by way of equity shares without voting rights, has no consideration to verify the status of the CGP on ownership, whether the captive users are collectively having minimum 26% of equity shares with voting rights.

2.51. The following Table would demonstrate, as how the equity shares with

voting rights of the Company are distributed with percentage on different dates.

Total No. of Equity Shares of the Company found with Voting Rights: 34000 Nos.

| Sl. No. | Date | No. of Equity Shares with voting rights held by captive users | Percentage on Total No. of Equity Shares with voting rights |
|---|---|---|---|
| 1 | 30-11-2017 | 10,710 | 31.50% |
| 2 | 28-03-2018 | 10,830 | 31.85% |
| 3 | 16-04-2018 | 14,940 | 43.94% |
| 4 | 01-04-2018 | 15,150 | 44.56% |
| 5 | 13-06-2018 | 15,150 | 44.56% |
| 6 | 28-06-2018 | 15,230 | 44.79% |
| 7 | 28-11-2018 | 15,480 | 45.53% |
| 8 | 27-03-2019 | 15,480 | 45.53% |
| 9 | 01-04-2019 | 15,480 | 45.53% |

2.52. From the above Table, it could be seen that on no date, the percentage of Equity Shares with Voting Rights, has fallen down below 26%. It should be noted that the language of Electricity Rules 2005 is made as below only.

> (*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 bv the captive user(s ), and*
>
> *Rule 3 (2) Explanation (1) (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. "*

2.53. Therefore, from the above defined Rules and by making a harmonious interpretation of the law, it should be noted that the Rules are not anyway mentioning, about the total shares of a Company to be taken for consideration,

for deciding the 26% of the minimum requirement. It should be noted that it is limiting the definitions, only to the extent of any equity share capital with voting rights alone. As such, it would be not a correct methodology to calculate the total No. of shares held by a Company, including the Company's equity shares without voting rights to arrive the minimum percentage of ownership of 26% as defined in the Electricity Rules 2005.

2.54. When the Companies Act 1956 and Companies Act 2013, both permits a Company, to have equity shares with differential rights, one with voting rights and the other without voting rights, for the purpose of CGP verification, to decide the ownership, only the shares with voting rights, need to be accounted for, to decide the minimum percentage of 26% and it cannot be the percentage of all the total shares of the Company, including the shares where, there were no voting rights provided. Such an interpretation of law goes against the very harmony of the system. What is not there in the law cannot be added by force.

2.55. Hence, both in the Show Cause Notice issued by the State Load Despatch Centre as well as by the Superintending Engineer of the Petitioner and also in the petition filed in M.P. No. 31 of 2020, this vital point has been coercively omitted to be considered, which makes the entire Show Cause Notices and all other consequential actions in filing the instant petition in M.P. No. 31 of 2020 untenable to law, without properly understanding the legality of the whole matter and attempting to interpret the law in their own fashion by the Petitioner.

2.56. Further to the same, in order to add strength to our stand, we are enclosing herewith a Judgement of Hon'ble Punjab and Haryana High Court in CWP No. 12908 of 2016 dated 01.07.2016, which goes to interpret the system, in a similar matter as below.

> *"5. Rule 3(1)(a)(i), inter alia, provides that no power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless, in case of a power plant, not less than twenty six percent of the ownership is held by the captive user(s). For the purpose of Rule 3, the term "Ownership" is defined in Explanation (1)(c) to Rule 3. A mere reading of Explanation (1) (c ) to Rule 3, shows that the test of "Ownership" with regard to companies like the petitioner, is share capital with voting rights. The eligibility therefore has to be decided by reference to percentage of voting rights and not the monetary value of shares. It would seem that the Respondent No. 2 has ignored the voting rights of the shares held by the captive consumers of the Petitioner and has instead used monetary value of the shares as a determinative factor. Such an approach would make the words "with voting rights", in the Explanation (1)(c) to Rule 3 redundant and otiose. Any recourse to monetary value of the shares in question is clearly not warranted and is contrary to the concept of "Ownership" of Companies as envisaged by the Explanation (1) (c) to Rule. So long as the captive consumers of the petitioner are collectively holding equity shares in the company with 26% voting rights in the company, then the test of 'ownership' is clearly met as per the Rules, irrespective of the value of the share. In other words, the determinative factor is thus not 26% of the equity value, but only 26% voting rights.*
>
> *6. At this stage the counsel of the Respondent No.2, on instruction states that the Respondent No. 2 will consider this writ petition as a representation. Given the aforesaid, without being prejudiced or influenced by the decision reflected in the Memo No. 288/0A/PPR dated 30.03.2016 issued by the Respondent No.2, the Respondent No. 2 is directed to consider the present writ petition as the Petitioner's representation and decide the same in light of the observations made above. The decision on the matter shall be communicated to the Petitioner by the Respondent No. 2 within one week, i.e., on or before 08.07.2016. "*

2.57. Therefore, even by the decided case law as quoted above, it is only the 26% of the equity shares with voting rights have to be considered for deciding

the minimum requirement of ownership for demonstrating a captive generating plant and therefore, the equity shares without voting rights are having no say in the matter as long as they remain as equity shares without voting rights. This position has to be understood as interpreted by the Hon'ble High Court of Punjab and Haryana.

2.58. Further, the Answering Respondent is enclosing herewith few Legal Opinions as received from a Legal Experts on the matter and therefore, if anything contrary is being interpreted, then the Petitioner is at liberty to provide contra opinions for the understanding of the Commission.

2.59. Therefore, the entire Show Cause Notices issued by the SLDC and the Superintending Engineer and the consequential petition filed by the Petitioner in M.P. No. 31 of 2020 are completely lacking the correct method of interpreting the law in its core and therefore, on this very ground alone, the petition in M.P. No.31 of 2020 is liable to be dismissed and it never deserves to be proceeded further.

2.60. It is not also 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 is also pending before the Hon'ble High Court of Judicature at Madras and an injunction order is already granted on it on 10.03.2020.

2.61. Further to the same, the Answering Respondent submits that 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 pending, on such challenges and proceeding to adjudicate the matte" covered in M.P. No. 31 of 2020, is legally not possible. As the matte covered by the challenges may reverse any of the positions covered 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. Hence, the Commission may first dispose off the petitions pending before the Commission and accordingly, any adjudication can be continued in the matter of CGD verification.

| 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 |

2.62. The petition filed by the Petitioner in M. P. No. 31 of 2020 has not correctly understood the concepts available under the Companies Act 2013 and accordingly, the petitioner has failed to appreciate the legal provisions in the correct context. Even though the Answering Respondent has already provided replies suitably both to the SLDC as well as to the Superintending Engineer of the Petitioner, without analysing those replies properly, the Petitioner has chosen to file the instant petition in M. P. No. 31 of 2020 before the Commission, without any total mind application.

2.63. The petition covered by M.P. No. 31 of 2020 is totally devoid of merits and also fails to consider and appraise 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 APTEL as was the Commission, to the extent as submitted below:-

(i) By the Memorandum of Association of the Respondent's Company, the Company is permitted to have equity shares of different types and such a course has been legally approved and permitted under the Companies Act 1956 and also under the Companies Act 2013.

(ii) Accordingly, the Respondent's Company namely, M/s. ARS Energy Pvt Ltd, has two types of shares, one with voting rights and other without voting rights. It is for the Company to go with such a course, as per the approved canons of law and the legal right of the Company as sanctioned by the Companies Act 2013 cannot be

questioned with by the Petitioner in any manner as the said matters are not falling under the domain of the Petitioner.

(iii) While arriving the minimum ownership requirement of 26%, the Electricity Rules 2005, speak only on the equity shares with voting rights and it never mentions about total shares of the Company or to include the shares without voting rights also for any calculation. Therefore, arriving of the minimum percentage of ownership of 26%, should be only in relation to the total No. of equity shares with voting rights, held by the Company, which is at present in 34000 Nos. and it is by all means, satisfying the norms as provided under the Electricity Rules, 2005.

(iv) The petition covered in M. P. No. 31 of 2020 is based on the observations consequent to the issuance of notice by the State Load Despatch Centre on 10.09.2020. When the State Load Despatch Centre was not declared as a competent authority for verification of CGP status either through the order in RA No. 7 of 2019 dated 28.01.2020 or otherwise, based on the notice issued by the SLDC, the Petitioner having filed this petition in M.P. No. 31 of 2020 solely based on the notice of the SLDC is not maintainable to law and more specifically when the petition does not refer any attempt taken by the TANGEDCO I Licensee in making the CGP verification as provided in the order in RA No.7 of 2019 dated 28.01.2020.

(v) The Petitioner has failed to incorporate all the events when filing

the petition covered in M.P. No. 31 of 2020 and has suppressed about the very facts of having issued another Show Cause Notice through its Superintending Engineer on 23.09.2020. Such suppression of facts, makes the entire petition liable for dismissal in toto.

(vi) In having marked the copy of the Show Cause Notice of the Superintending Engineer of the Petitioner, to all captive users of the Answering Respondent, M/s. ARS Energy Pvt Ltd, even without properly considering whether the Show Cause Notice is maintainable to law or not, the Superintending Engineer of the Petitioner has exceeded his powers and limits, with a malafide intention to unnecessarily scare the captive users and to bring them back to the fold of the Petitioner TANGEDCO, which is clearly exposed in the whole exercise. Therefore, the actions of the Petitioner in having issued the Show Cause Notice through its Superintending Engineer and having initiated the consequential attempts in having filed the petition in M. P. No. 31 of 2020 by completely suppressing all such events, are nothing but unfair attempts in making the Respondent to coercively curb the legally approved canons of open access system, as enshrined under the Electricity Act, 2003, Electricity Rules, 2005 and various other Regulations, with a complete indiscriminatory right for the Open Access Consumers to avail Open Access Power. By marking the copies of the Show Cause Notice to reach all the captive users of

the Answering Respondent M/s. ARS Energy Pvt Ltd, the Petitioner TANGEDCO, is indirectly exposing its malafide intention to drive away the consumers from Open Access System and to forcibly make them to come back to the Petitioner TANGEDCO to avail their costly power.

(vii) Therefore, by all reasons, the Show Cause Notice issued by the SLDC on 10.09.2020 and the consequential Show Cause Notice issued by the Superintending Engineer on 23.09.2020 and the consequential efforts initiated by the Petitioner in filing the petition in M.P. No. 31 of 2020, before the Commission, are unfair, not maintainable to law and also not maintainable to facts as well and therefore, the Show Cause Notice issued by the SLDC on 10.09.2020 and the Show Cause Notice issued by the Superintending Engineer dated 23.09.2020 all have to be quashed in all possibilities and the subsequent and consequential petition filed by the Petitioner TANGEDCO in M.P. No. 31 of 2020, needs to be dismissed for all reasons, without any further proceedings.

(viii) Hence, considering the Counter filed by the Respondent as submitted above, the Respondent wishes to submit that the Respondent is not liable to pay the cross subsidy surcharge of Rs.132,11,91,081.00 as demanded in the Show Cause Notice and also by the petition covered in M.P. No. 31 of 2020 even though it is not quantified and accordingly, the Answering Respondent prays the Commission to kindly quash both the Show Cause Notices

dated 10.09.2020 and 23.09.2020 and also to dismiss the petition filed by the Petitioner in M.P. No. 31 of 2020 and accordingly, declare that the demand of Rs.132,11,91,081.00 raised by the Superintending Engineer vide his Show Cause Notice dated 23-09-2020, is not anyway maintainable and consequentially dismiss the whole petition covered in M.P. No. 31 of 2020 as not maintainable to law.

**3. Memo filed on behalf of the Respondent:-**

3.1. The Respondent has made the same averments as was made in the Counter Affidavit for the present Memo and hence it is not necessary to reproduce them.

3.2. This Memo is being filed, in pursuance of the Daily Order of the 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.

3.3. The 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 this Commission.

3.4. 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.Rahul Balaji, 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."*

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

3.6. 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 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.

3.7. 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.*

3.8. 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.

3.9. 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.

> 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. Laxmidas Devidas (1937) 39 BOM LR 910; and Dwaraknath Harishchandra Pitale, [1937] 5 ITR 716 (Bom), Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. Buldana Distt. 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."*

3.10. 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 Hon'ble 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.

3.11. 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.

3.12. 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."*

3.13. 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."*

3.14. 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)."*

3.15. 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.

3.16. 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."*

3.17. 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.

3.18. 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."*

3.19. 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."*

3.20. 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.

3.21. 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 Basant Agrotech (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."*

3.22. 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 open access.”*

3.23. 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."*

3.24. Further, any order has its enforceability only prospectively which has been affirmed as per the Legal Maxim *"Nova Constitutio futuris forman imponere debet 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 & ors dt 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 Constitutio futuris forman imponere debet 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.

3.25. 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."*

3.26. 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."*

3.27. 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."*

3.28. 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.

3.29. 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 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.

3.30. 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.

3.31. 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.

3.32. The Respondent is running a Captive Generating Plant (CGP) at Survey No.207, Equvarpalayam Village, Gummidipoondi – 601 201 in the name and style of “M/s. ARS Energy Private Limited” and M/s. ARS Energy Private Limited is a Company incorporated under the Repealed Companies Act 1956 and coming under the purview of the Companies Act 2013. The registered office of the Company is functioning at D-109, 4$^{th}$ Floor, LBR Complex, Anna Nagar East,

Chennai – 600 102. The capacity of the CGP is 62.8 MW and is connected with the Superintending Engineer, Chennai Electricity Distribution Circle/ North in HT SC No. 1984. The power generated by the above said CGP is being shared by the Company and also among the other willing shareholders of the Company, whoever requires captive power for their own use, which procedure is approved by the Electricity Act 2003, further elaborated by the Electricity Rules 2005 and also by way of various binding judgements of the Hon'ble APTEL, New Delhi in many matters.

3.33. In the order of the Commission in RA No. 7 of 2019 dated 28.01.2020, in the matter of verification of the CGP status, inter-alia, the authority is provided to TANGEDCO as below in Para 6.1.6 of the order.

> *"6.1.6 In view of the above, we decide that the TANGEDCO, shall conduct the verification of CGP status based on the procedure duly passed by the Commission in this order."*

3.34. From the above, it could be seen that the Commission has decided that the TANGEDCO shall conduct the verification of CGP status based on the procedures duly passed by the Commission in the said order in RA No. 7 of 2019 dated 28.01.2020 and accordingly, even the Hon'ble APTEL while issuing its order in Appeal No. 131 of 2020 on 07.06.2021, has upheld the power to verify the CGP status by the TANGEDCO. However, such power to verify the CGP status was neither delegated to SLDC or to others either by the Commission or by the Hon'ble APTEL.

3.35. However, much contrary to the same, in the instant case of the Respondent filed before this Commission, the whole petition was filed against the Respondent, based on a notice issued by the State Load Despatch Centre (SLDC) for CGP verification, with whom no authority for verification of the CGP status was provided either by the Commission by way of its order in RA No. 7 of 2019 dated 28.01.2020 or by the order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020.

3.36. The above letter issued by the SLDC is based on the application filed by the Respondent for grant of OA approval in respect of certain captive users through its letters dated 12.03.2019, 15.03.2019 & 16.03.2019. Those letters were issued to the SLDC seeking for open access approval, much before the order of the Commission was passed in RA No. 7 of 2019 dated 28.01.2020. However, without providing any approval over the same and keeping such application totally without processing, the SLDC in the guise of scrutinizing the application, has issued a letter in No. CE/GO/SE/CO/EE/OA/AEE /OA/ F.ARS captive wheeling/D.No.168 /20 dated 10.09.2020, which was subsequently culminated in to the filing of M.P. No. 31 of 2020. After receipt of the letter dated 10.09.2020 from the SLDC, the Respondent has also filed suitably its responses over it by way of its letter dated 17.09.2020.

3.37. Therefore, the Respondent submits that the SLDC was not provided with any power of verification towards CGP status, either in the order in RA No. 7 of 2019 dated 28.01.2020 or in the order dated 07.06.2021 of the Hon'ble APTEL in Appeal No. 131 of 2020. Therefore, the letter issued by the SLDC, by way of a

Show Cause Notice dated 10.09.2020 is basically without the authority of law. Being a Grid Manager, issuing such a letter for the grant of OA approval is also not anyway sanctioned in the Grid Connectivity and Intra State Open Access Regulations 2014, issued by the Commission for the purposes of regulating the measures relating to grant of Intra State Open Access in the State of Tamil Nadu. Therefore, in having issued a letter by way of a SCN by the State Load Despatch Centre, the SLDC has gone beyond its powers and authority and therefore, the letter dated 10.09.2020 issued by the SLDC, is *per se* not legal as it lacks complete authority of law.

3.38. However, even when the SCN dated 10.09.2020 issued by the SLDC was suitably defended by the Respondent by way of its letter dated 17.09.2020, the SLDC has not proceeded further and was keeping the OA approvals even without providing any reply and this makes the provisions of the Grid Connectivity and Intra State Open Access Regulations 2014 fully violated.

3.39. While the matters are so placed, based on the order issued by the Commission in RA No. 7 of 2019 dated 28.01.2020, the Petitioner TANGEDCO on an attempt to verify the CGP status of Respondent's Company, has issued a separate Show Cause Notice bearing No. Lr.N.SE/CEDC/N/DFC/AO/Rev/ AAO/HT/AS.4/F.Show Notice/D.2107/2020 dated 23.09.2020 through its Superintending Engineer, Chennai Electricity Distribution Circle/North. By issuance of this Show Cause Notice, stating some frivolous grounds and reasons, the petitioner was attempting to disqualify the CGP status of the Respondent for the years 2018-19 and 2019-20 and accordingly, unilaterally

arrived and fixed the Cross Subsidy Surcharge to the extent of Rs.132,11,91,081.00 on its own, even without the approval of the Commission. Further, the Petitioner has gone to the extent of marking the copy of the Show Cause Notice to all the Captive Users of the Respondent, which procedure was not approved by the Commission, in any manner in the order in RA No. 7 of 2019 dated 28.01.2020. Therefore, the idea behind, sending the copies of the Show Cause Notice to all the Captive Users of the Respondent is to make the Captive Users to get scared over the allegation of not satisfying the CGP status and attempting to drive all of them to get out of the CGP arrangement by following some foul means. Moreover the Show Cause Notices of the SLDC and TANGEDCO have 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.

3.40. Annoyed over the attempt of the Superintending Engineer of the Petitioner, the Respondent has filed a detailed reply against each of the contents of the Show Cause Notice through its letter dated 05.10.2020 and accordingly, defended the case with the support of relevant binding judgements of the Hon'ble APTEL and also even by the order of the Commission delivered in RA No. 7 of 2019 dated 28.01.2020.

3.41. However, even without properly analysing all the contents of the reply filed by the Respondent either on 17.09.2020 to the SLDC and 23.09.2020 to the Superintending Engineer of the Petitioner, in a hurried manner, the Petitioner has filed the instant petition covered by M.P. No. 31 of 2020 before the

Commission, even without providing any reply to the Respondent, as to why the replies of the Respondent were not considered fully and why the replies are not found convinced over the allegations made vide their Show Cause Notices dated 10.09.2020 and 23.09.2020.

3.42. Therefore, the whole idea of the petitioner is to rush the matter by any means, whether it is legally maintainable or not and by these premature attempts the Petitioner was trying to make scared all the shareholders of the Respondent to go out of the CGP arrangement, while the entire CGP arrangement was well within the scope of law and falling entirely within the frame works of the guidelines prescribed by various binding judgements of the Hon'ble APTEL, New Delhi based on the Electricity Rules 2005. All such grounds were suitably adduced by the Respondent in both the replies filed by the Respondent both before SLDC as well as before the Superintending Engineer of the Petitioner and the Respondent has filed all the documents before the Commission also while filing the counter on 13.03.2021.

3.43. As things were placed so, the Petitioner has filed the instant petition covered by M.P. No. 31 of 2020, before the Commission only based on the first Show Cause Notice issued by the SLDC on 10.09.2020 and has completely suppressed the subsequent events of issuing another Show Cause Notice through its Superintending Engineer on 23.09.2020. For filing any petition before the Commission, in the matter of verification of CGP status, if the TANGEDCO finds it that the CGP has not demonstrated its status, the Commission in its order in RA No. 7 of 2019 dated 28.01.2020 has made it clearly as follows.

> *"7.9.9 In cases where the captive users/CGPs offer explanation/clarification and the Licensee finds the explanation satisfactory, the licensee may accordingly act on withdrawal of claims made. Where, the Licensee is not satisfied with the explanations offered by the CGP/captive users and is convinced that action has to be pursued for disqualification of the CGP or to raise the demand towards payment of cross subsidy surcharges, such cases shall be brought before the Commission for adjudication by filing necessary petition."*

3.44. From the above, it could be seen that any petition for adjudication before the Commission needs to be filed by the Licensee, only when the *Licensee is not satisfied with the explanations offered by the CGP/captive users and is convinced that action has to be pursued for disqualification of the CGP or to raise the demand towards payment of cross subsidy surcharges.* However, in the instant case covered by M.P. No. 31 of 2020 of the Respondent, it is made amply clear that the Licensee has not issued any Show Cause Notice on its own directly and however, it has acted up on the Show Cause Notice issued by the State Load Despatch Centre, which is not a competent authority, provided and entrusted with the power to verify CGP status in any manner by the Commission through its order in RA No. 7 of 2019 dated 28.01.2020 or otherwise.

3.45. Therefore, the fundamental question, whether the Licensee has issued any Show Cause Notice before filing this instant petition before the Commission is not satisfied in the instant case covered by M.P. No. 31 of 2020. Instead, the Petitioner has filed the petition covered by M.P. No. 31 of 2020, based on a Show Cause Notice issued by the SLDC in the first instance which is legally not maintainable and such a course of action amounts to great misuse of power besides to complete arbitrariness.

3.46. Therefore, the Respondent submits that the petition filed by the Petitioner solely based on a non-maintainable Show Cause Notice issued by the SLDC is *per se* has rendered the petition covered by M.P. No. 31 of 2020 not eligible to be proceeded with, by the Commission in terms of the order found in Para 7.9.9 of the order in RA No. 7 of 2019 dated 28.01.2020. Therefore, based on the above defective approach followed by the Petitioner in filing the M.P. No. 31 of 2020, not based on any notice issued by the Licensee / TANGEDCO and having proceeded to file the petition covered in M.P. No. 31 of 2020, based on a SCN issued by State Load Despatch Centre, is a fundamental flaw and makes the entire petition covered by M.P. No. 31 of 2020, infructuous for further proceeding for adjudication, as it completely violates the spirit of the order covered by RA No. 7 of 2019 dated 28.01.2020, more particularly as found in Para 7.9.9 as extracted above and goes against the principles of natural justice.

3.47. Therefore, the Respondent wishes to reiterate that at the face of the record, primarily the Show Cause Notice issued by the SLDC on 10.09.2020, *per se* is not maintainable, as the SLDC is not having any authority provided towards verification of CGP status. Further, issuing such a Show Cause Notice, at a stage, when the whole matter was already sub-judice before the Hon'ble APTEL, New Delhi, was also not maintainable to law. Without pre-judice to the same, that the Respondent submits that in the Order in Appeal No. 131 of 2020, filed by Tamil Nadu Power Producers' Association (TNPPA), the Hon'ble APTEL has set aside various portions of the order in RA No. 7 of 2019 dated 28.01.2020 and accordingly, greatly modified the order of the Commission both in letter and spirit in very many ways.

3.48. 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 issued by the SLDC on 10.09.2020 and the consequential Show Cause Notice issued by the Superintending Engineer on 23.09.2020 and also to dismiss the petition filed by the Petitioner in M.P. No. 31 of 2020, as totally infructuous and accordingly, declare that the demand of Rs.132,11,91,081.00 is also not maintainable to law, as well as on facts and consequentially dismiss the whole petition covered in M.P. No. 31 of 2020 as infructuous and not maintainable to law.

**4. Written Submission filed by the Petitioner:-**

4.1. The petitioner has made the same averments as was made in the petition for the present Written Submission and hence it is not necessary to reproduce them.

4.2. As per Electricity Rules, 2005, “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. The captive user shall have both ownership & control over the generating plant. “Ownership” is with reference to the total paid up equity share capital of the Generating plant & ‘Control’ is with respect to the voting right in the Generating Plant. Hence, it is stated that though the captive users of M/s. ARS Energy Pvt. Ltd possess not less than 26% of the total voting rights in the Generating Plant, as on 1-4-2019 they are holding just

Rs.1,54,800/ out of the total paid up equity share capital of Rs.8,17,44,420/ which works out to 0.19% only. Therefore the captive users of M/s. ARS Energy Private Ltd., are holding less than 26% of the total paid-up Equity Share Capital of the Generating Plant and hence does not satisfy Ownership criteria as per Rule-3 of the Electricity Rules 2005. Therefore, the Captive Generating plant was not eligible to wheel power under captive category from 1-4-2019 onwards. Further, as per Rule 3(2) of the Electricity Rules-2005, it is 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. There is certainly an obligation of the captive users who are also the owners of the Captive generating plant to the extent of their ownership in such plant to ensure that they fulfil the qualification of ownership before they wheel energy for captive consumption.

4.3. As M/s. ARS Energy Pvt Ltd Limited consumes minimum 51% of the annual generation, and also it is a Special Purpose Vehicle and hence the test of proportionality on total consumed units or on 51% of the annual generation to be applied subject to outcome C.A.Nos.8527-8529 of 2009, C.A.Nos.1-2 of 2010, C.A.Nos.1693-1698 of 2010 and C.A. Nos. 12282 of 2016, Civil Appeal Diary No.22360 of 2021 and Civil Appeal Diary No.21493 of 2021.

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

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

5.2. 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.

5.3. 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.

5.4. 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.

5.5. 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.

5.6. 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.

5.7. 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.Rahul Balaji, 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."*

5.8. 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.

5.9. 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 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.

5.10. 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 judgment 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 Judgment 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.*

5.11. Further, while concluding the judgment, 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.

5.12. 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.

Paras 12.19 & 17.3 of the Judgment 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. Laxmidas Devidas (1937) 39 BOM LR 910; and Dwaraknath*

*Harishchandra Pitale, [1937] 5 ITR 716 (Bom), Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449, CIT v. Buldana Distt. 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."*

5.13. Further, while concluding the judgment, 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."*

5.14. 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.

5.15. 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.

5.16. In this regard Paras 13.6 & 17.4 of the Judgment 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."*

5.17. Further, while concluding the judgment, 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."*

5.18. To support further this view, the Hon'ble APTEL has reiterated the position also again in Para 16.8 of the Judgment 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)."*

5.19. 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.

5.20. 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."*

5.21. 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.

5.22. Accordingly, Paras 14.7 & 17.5 of the Judgment 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."*

5.23. Further, while concluding the judgment, 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."*

5.24. 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.

5.25. Accordingly, Paras 15.8 & 17.6 of the Judgment 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 Basant Agrotech (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."*

5.26. Further, while concluding the judgment, 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 open access."*

5.27. 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.*

5.28. Further, any order has its enforceability only prospectively which has been affirmed as per the Legal Maxim *"Nova Constitutio futuris forman imponere debet 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 & ors dt 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 Constitutio futuris forman imponere debet 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.

5.29. 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.

5.30. 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.”*

5.31. Accordingly, Paras 16.12 & 17.7 of the Judgment 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."*

5.32. Further, while concluding the judgment, 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."*

5.33. 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 order of the Commission in very many areas to the extent submitted supra.

5.34. 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.

5.35. 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.

5.36. 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 Commission dated 07.12.2021. Accordingly, the whole petition filed by the TANGEDCO, needs to be dismissed as infructuous in all respects.

5.37. 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.

5.38. 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.

5.39. The Respondent is running a Captive Generating Plant (CGP) at Survey No.207, Equvarpalayam Village, Gummidipoondi – 601 201 in the name and style of “M/s. ARS Energy Private Limited” and M/s. ARS Energy Private Limited is a Company incorporated under the Repealed Companies Act 1956 and coming under the purview of the Companies Act 2013. The registered office of the Company is functioning at D- 109, 4$^{th}$ Floor, LBR Complex, Anna Nagar East, Chennai – 600 102. The capacity of the CGP is 62.8 MW and is connected with the Superintending Engineer, Chennai Electricity Distribution Circle/ North in HT SC No. 1984. The power generated by the above said CGP is being shared by the Company and also among the other willing shareholders of the Company, whoever requires captive power for their own use, which procedure is approved by the Electricity Act, 2003, further

elaborated by the Electricity Rules 2005 and also by way of various binding judgments of the Hon'ble APTEL, New Delhi in many matters.

5.40. In the order of the Commission in RA No. 7 of 2019 dated 28.01.2020, in the matter of verification of the CGP status, inter-alia, the authority is provided to TANGEDCO as below in Para 6.1.6 of the order.

> *"6.1.6 In view of the above, we decide that the TANGEDCO, shall conduct the verification of CGP status based on the procedure duly passed by the Commission in this order."*

5.41. From the above, it could be seen that the Commission has decided that the TANGEDCO shall conduct the verification of CGP status based on the procedures duly passed by the Commission in the said order in RA No. 7 of 2019 dated 28.01.2020 and accordingly, even the Hon'ble APTEL while issuing its order in Appeal No. 131 of 2020 on 07.06.2021, has upheld the power to verify the CGP status by the TANGEDCO. However, such power to verify the CGP status was neither delegated to SLDC or to others either by the Commission or by the Hon'ble APTEL.

5.42. In contra, much contrary to the same, in the instant case of the Respondent filed before the Commission, the whole petition was filed against the Respondent, based on a notice issued by the State Load Despatch Centre (SLDC) for CGP verification, with whom no authority for verification of the CGP status was provided either by the Hon'ble Commission by way of its order in RA No. 7 of 2019 dated 28.01.2020 or by the order of the Hon'ble APTEL dated 07.06.2021 in Appeal No. 131 of 2020 or by the order of the Hon'ble APTEL

dated 26.11.2021 or even in the Common Order of the Hon'ble Commission dated 07.12.2021.

5.43. . By issuance of the Common Order dated 07.12.2021, this position of quantifying the Cross Subsidy Surcharge Component by the TANGEDCO in any manner is not approved or authorized. Therefore, the idea behind, sending the copies of the Show Cause Notice to all the Captive Users of the Respondent is to make the Captive Users to get scared over the allegation of not satisfying the CGP status and attempting to drive all of them to get out of the CGP arrangement by following some foul means. Moreover, the Show Cause Notices of the SLDC and TANGEDCO have 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. For instant reference, the relevant Para of the Common Order dated 07.12.2021 is extracted below.

> *"9.9.5.5 All the CGP holders shall submit the data as per formats specified in this 'Procedure for verification of CGP status as on 31st March to TANGEDCO/verifying authority on or before 31st May every year.*
>
> *The TANGEDCO shall verify the data every year to check the captive status of the CGP and submit a report to the Commission every year on or before 31st July and furnish the details of verification viz. name of the company, date of submission of documents by CGP, compliance of twin criteria of ownership and consumption for all CGPs and other details relevant to this issue.*
>
> *Wherever non-compliance of CGP status is noticed, TANGEDCO shall file a Miscellaneous Petition before the Commission for*

*adjudication and the Commission shall dispose the same within six months.*

*Before adjudicating by the Commission, the licensee should not issue any show cause notice to the CGP/end users demanding Cross Subsidy Surcharge."*

5.44. Therefore, from the above extracted contents of the Common Order dated 07.12.2021 of the Commission also, the current Miscellaneous Petition filed by the TANGEDCO becomes totally infructuous and not maintainable to the standards as declared by the Commission, as it directly violates the guidelines.

5.45. However, annoyed over the attempt of the Superintending Engineer of the Petitioner, the Respondent has filed a detailed reply against each of the contents of the Show Cause Notice through its letter dated 05.10.2020 and accordingly, defended the case with the support of relevant binding judgements of the Hon'ble APTEL and also even by the order of the Commission delivered in RA No. 7 of 2019 dated 28.01.2020.

5.46. All such grounds were suitably adduced by the Respondent in both the replies filed by the Respondent both before SLDC as well as before the Superintending Engineer of the Petitioner and the Respondent has filed all the documents before the Commission also while filing the counter on 13.03.2021.

5.47. 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.

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

6.1. 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.

6.2. The instant matter covered in M.P. No. 31 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."

6.3. The Daily Order in M.P. No. 31 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.

6.4. 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, more particularly about the Rule of Proportionality to be adopted in the case of SPVs.

6.5. 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 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.

6.6. 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 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.

6.7. 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.

6.8. 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 this 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.

6.9. The Respondent wishes to state that besides to the all submissions made above, such matters relating to Memorandum of Association and Articles of Association, the manner of issuing shares etc., are falling under the complete domain and scope of the Companies Act, 2013 and therefore, the Petitioner TANGEDCO cannot travel beyond its scope and limit, by over occupying the jurisdiction of the Registrar of Companies or by any other manner, by which the Companies Act 2013 is placed.

6.10. The Respondent submits that the petition filed by the Petitioner in M.P. No. 31 of 2020 has not correctly understood the concepts available under the Companies Act 2013 and accordingly, the petitioner has failed to appreciate the legal provisions in the correct context. Even though the Respondent has already provided replies suitably both to the SLDC as well as to the Superintending Engineer of the Petitioner, without analysing those replies properly, the Petitioner has chosen to file the instant petition in M.P. No. 31 of 2020 before the Commission, without any total mind application.

**7. Memo filed by the Respondent:-**

The respondent has made the same averments as was made in the

counter affidavit, written submission, additional written submission, in the present Memo also and hence it is not necessary to reproduce them.

**8. Findings of the Commission:-**

8.1. The prayer of petitioner is to declare that M/s. ARS Energy Private Ltd. is not a captive generating plant with effect from 01-04-2019 and to cancel the captive Open Access of energy with effect from 01-04-2019 and to treat the same as Third Party transaction as per law and levy Cross Subsidy Surcharge for the energy adjusted / consumed from all users concerned.

8.2. We have considered the rival submissions and perused material records adduced as evidence before us. The respondent has raised objections to the way the petitioner conducted itself before proceeding to verify the captive status of the petitioner. The primary grievance of the respondent is that the SLDC has issued show cause notice to the respondent without any authority of law in the matter of verification of captive status of the respondent at the time of grant of wheeling approval and kept the process of wheeling approval pending. It is the case of the respondent that the act of SLDC sending a notice in the matter of verification of captive status is beyond its authority and liable to be quashed.

8.3. The respondent, on this ground, has sought to strike down the entire proceedings as void *ab initio* and resultant disposal of the present petition. Not only that, the respondent has also has grievance with regard to the way, the Superintending Engineer of the petitioner conducted himself in issuing notice dated 23-09-2020 without considering the reply given by the respondent to the

show cause notice and proceeded to mechanically decide the captive status of the respondent.

8.4. To put it otherwise, the respondent seeks to declare the notices dated 10-09-2020 of SLDC and 23-09-2020 of the concerned Superintending Engineer as invalid in law. It is also the case of the respondent that petitioner deliberately sent the show cause notice to all its constituent members to scare them off and further to bring them within the fold of its operations for commercial considerations thereby preventing the respondent from continuing with the captive arrangements. In the normal circumstances, we would have hesitated to take up the main issue and remanded it to the petitioner for consideration afresh. Though the grievances are manifold, we are not traversing these technical objections as much water has fallen down the bridge and at this juncture it is not necessary to deal with the same. It is because at the time when the present petition was filed, there was no appeal against the orders of the Commission in R.A. No. 7 of 2019 dated 28-01-2020 before the Hon'ble Appellate Tribunal. Consequent to the elaborate judgment given by the Hon'ble Tribunal in Appeal No. 131 of 2020 dated 07-06-2021, the consequential orders passed by the Commission in M.P. No. 24 of 2020 dated 07-12-2021, the issue has attained finality requiring no more elaboration. However, so far as the present petition is concerned, there is an issue which is still to be decided and which is substantive in nature too, namely, the validity of the shares of the members not having voting rights. Hence, at this stage, without going into the technical objections such as the validity of the show cause notices and non-consideration of reply given by

the petitioner to the show cause notices we proceed to discuss the substantive issue involved in this case.

8.5. Accordingly, we are of the view that the following issue arise for consideration:-

1. Whether the contention of the respondent that the verification of the captive status of a generating plant with regard to 26% membership should be confined to the extent of the members having voting rights only or whether ownership should be considered with reference to the total equity paid up share capital?

2. Whether the respondent company is having a right to differential voting rights in regard to its members?

We proceed to take up both these issues together. We are to observe that the Companies Act, 1956, as rightly contended by the respondent, provides that a Company may consist of shareholders with or without voting rights. Hence, the only requirement is whether the Memorandum of Association and Articles of Association permits such an arrangement to its Members for this purpose. It is not the case of the petitioner that the respondent company's Articles of Association and Memorandum of Association do not have provision for distinct clause of voting rights in terms of ownership held by its shareholders. Here again, it is not necessary on our part to conduct a roving exercise on our own to find out whether the Memorandum and Articles of Association of the respondent company have such distinction in terms of its voting rights of its members. We find that this vital issue has not been disputed by the petitioner

during the course of hearing and in such case it is to be assumed that there is no contrary view held by the petitioner in regard to the existence of such provision in the Memorandum of Association and Articles of Association of the company. On the other hand, the petitioner seeks to repel the contentions of the respondent on regard to “term” the ownership as defined in Rule 3 of the Government of India Rules, 2005 by giving an extended meaning to include “Control” also within its ambit.

8.6. We are afraid we cannot agree to such proposition advanced by the petitioner for the simple reason that a statutory provision, in the absence of any ambiguity has to be read as such and no other meaning can be attributed to expand its meaning and scope. Here, it is seen that the petitioner has sought to overstretch its interpretation of term “ownership”, occurring in the Government of India Rules, 2005 to bring within its ambit “control” which is neither contemplated nor postulated in the said Rules. As stated supra, a provision has to be read as such and it cannot be that stretched beyond a limit to tweak its real import. The “control” factor which is sought to be introduced by the petitioner to interpret Rule 3 in its favour would do violence to the said provision and militate against the true intent and meaning of the said Rules. It is not the case of the petitioner that there is an ambiguity in the definition of the term “ownership” and only for the said reason, the term “control” is required to be brought within its scope to fill the gaps or lacuna. No arguments have been advanced on this score. Hence, we are not persuaded to accept the contention of the petitioner in this regard and accordingly the contentions in this regard are outrightly rejected.

8.7. It is true that in the explanation to the Rule 3 (2) of the Electricity Rules, the factum of interest and control over the generating station or power plant does find a mention. But, in our well considered view, the factum of "interest and control" will be pressed into service only in cases other than a generating station or power plant set up by a company or any other body corporate which means in such cases, the criteria would be equity share capital with voting rights only. A careful reading of the said provision makes it abundantly clear that "interest and control" in regard to others are not merely "interest and control" as is being understood in common parlance but it has to be proprietary "interest and control". On a wholesome reading of the GoI Rules, it is clearly discernible that wherever, the control over a generating plant is absolutely vested with a person or an authority to the exclusion of others and to the exclusion of principle of collectivity, the said plant has to satisfy the criteria single handedly but wherever the captive generation is done on collective basis, the criteria laid down can be satisfied collectively.

8.8. On the question of the powers of the respondent company to make a distinction within its shareholders in terms of its voting rights, we have no manner of doubt that that there is no provision in the Companies Act prohibiting the company from carving out such distinction between its Members in terms of the voting rights. The arguments advanced by the respondent that the power to make a distinction of its members into two categories, namely, with voting rights and without voting rights in our opinion, seems perfectly justified on an overall conspectus. It is to be observed that the respondent has a fair case on hand and as rightly contended by the respondent, the ownership of 26% required as

per the Government of India Rules is to be decided only with reference to the voting rights of the shareholders and those shareholders who are not having voting rights can be excluded.

8.9. Our attention has also be drawn judgment of the Hon'ble High Court of Punjab and Haryana excerpts, of which are set out below:-

> *"5. Rule 3(1)(a)(i), inter alia, provides that no power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless, in case of a power plant, not less than twenty six percent of the ownership is held by the captive user(s). For the purpose of Rule 3, the term "Ownership" is defined in Explanation (1)(c) to Rule 3. A mere reading of Explanation (1) (c ) to Rule 3, shows that the test of "Ownership" with regard to companies like the petitioner, is share capital with voting rights. The eligibility therefore has to be decided by reference to percentage of voting rights and not the monetary value of shares. It would seem that the Respondent No. 2 has ignored the voting rights of the shares held by the captive consumers of the Petitioner and has instead used monetary value of the shares as a determinative factor. Such an approach would make the words "with voting rights", in the Explanation (1)(c) to Rule 3 redundant and otiose. Any recourse to monetary value of the shares in question is clearly not warranted and is contrary to the concept of "Ownership" of Companies as envisaged by the Explanation (1) (c) to Rule. So long as the captive consumers of the petitioner are collectively holding equity shares in the company with 26% voting rights in the company, then the test of 'ownership' is clearly met as per the Rules, irrespective of the value of the share. In other words, the determinative factor is thus not 26% of the equity value, but only 26% voting rights.*
>
> *6. At this stage the counsel of the Respondent No.2, on instruction states that the Respondent No. 2 will consider this writ petition as a*

*representation. Given the aforesaid, without being prejudiced or influenced by the decision reflected in the Memo No. 288/0A/PPR dated 30.03.2016 issued by the Respondent No.2, the Respondent No. 2 is directed to consider the present writ petition as the Petitioner's representation and decide the same in light of the observations made above. The decision on the matter shall be communicated to the Petitioner by the Respondent No. 2 within one week, i.e., on or before 08.07.2016. "*

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.

| (Sd.....) | (Sd.....) | (Sd.....) |
|---|---|---|
| Member (Legal) | Member | Chairman |

/True Copy /

**Secretary**
**Tamil Nadu Electricity**
**Regulatory Commission**