



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

## **ORDER**

### **1. Contentions of the Petitioner:-**

1.1. The present Miscellaneous Petition seeks to declare that M/s. Ashok Granites Limited, WEG No.79204721284, EDC Tirunelveli is not qualified as a Captive Generating Plant for the FYs 2015-16, 2016-17, 2017-18 and 2018-19. As per the Hon'ble APTEL order in A.No.131 of 2020 dated 07.06.2021, TANGEDCO could be appointed for undertaking an exercise of collecting and verifying data for the purpose of verification of captive generating plant status in the State of Tamil Nadu, without exercising the powers to take any coercive action against any CGP/Captive User(s). Any action to be initiated against the CGP/Captive User(s) regarding its captive status or for recovery of CSS, as per law, needs to be done through appropriate proceeding initiated before the Commission. Hence, TANGEDCO has filed this Miscellaneous Petition.

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

2. (8). *"Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such Co-operative Society or Association."*

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

*"42. Duties of distribution licensees and open access*

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

*Provided that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:*

*Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee: Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:*

*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.*

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

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

*on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."*

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

"23. Cross subsidy surcharge:

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

From the above, it could be observed that if the above provisions are read in conjunction with each other, Cross Subsidy Surcharge shall not be leviable in case Open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

1.5. In exercise of powers conferred by section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government issued Electricity Rules-2005 for requirements of Captive Generating Plant. The regulation 3 envisages the requirements of Captive Generating Plant which are as follows:

"3. Requirements of Captive Generating Plant:

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

(a) in case of a power plant-

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

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

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

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

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

*Explanation:-*

(1) *The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and*

(2) *The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six percent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.*

*Illustration: In a generating station with two units of 50 MW each, namely, Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.*

*(2). It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied within any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.*

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

*a. "Annual Basis" shall be determined based on a financial year;*

*b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;*

*c. "Ownership" in relation to a generating station or power plant setup by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases, ownership shall mean proprietary interest and control over the generating station or power plant;*

*d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."*

From the above, it can be understood that the twin rules of "Ownership" and "Consumption" have to be satisfied as per the Electricity Rules-2005 in order to qualify as a Captive Generating Plant. If the status of a Captive generating plant is lost due to non-fulfilment of any one of the conditions or both, the entire electricity generated from such plant in a year shall be treated as a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by the respective Generating Plant, as per the proviso 4 of Section 42 (2) of the Electricity Act, 2003 which clearly states that such surcharge shall not be leviable in case

open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

1.6. As per latest Company Master Data in the MCA portal with reference to the Company's CIN, the Authorized Equity share capital of the Generator is Rs.1,50,00,000/- (One Crore and Fifty Lacs only) and the Issued and Paid up Equity Share Capital is Rs.1,12,50,000/- (One Crore Twelve lacs Fifty Thousand only).

1.7. The generator itself is using the HTSC No. 049094240151 and hence is holding 100% ownership in the Generator M/s. Ashok Granites Limited, thus fulfils the criteria of "ownership" stated in Rule 3 of Electricity Rules, 2005.

1.8. The aggregate consumption of the plant, M/s. Ashok Granites Limited for the FYs 2015-16, 2016-17, 2017-18 and 2018-19 is as follows:

Financial Year	Generator HTSC	Consumption Details	
		Gross Generation in units	Captive Consumption in units
(1)	(2)	(3)	(4)
2015-16	79204721284	12,01,320	559,606
2016-17	79204721284	19,63,170	896,915
2017-18	79204721284	21,38,156	817,252
2018-19	79204721284	725,868	334,923

In accordance with Electricity Rules-2005, the "Ownership" condition is fulfilled. In respect of the "Consumption" criteria, the Rule-3 of Electricity Rules, 2005 stipulates that

not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. In this regard, the aggregate electricity generated means Gross generation minus auxiliary consumption. In this connection, the computation of the "Consumption" criteria for the said financial year is arrived as follows:

Financial Year	Consumption Details WEG No.079204721284			
	Generator HTSC	Gross Generation	Captive Consumption	Percentage of captive consumption on aggregate generation
(1)	(2)	(3)	(4)	(5) = (4 / 3)
2015-16	79204721284	12,01,320	559,606	46.58%
2016-17	79204721284	19,63,170	896,915	45.69%
2017-18	79204721284	21,38,156	817,252	38.22%
2018-19	79204721284	725,868	334,923	46.14%

From the above, it could be observed that Respondent has not fulfilled "Consumption" criteria for the FYs 2015-16, 2016-17, 2017-18 and 2018-19 as its captive consumption was 46.58%, 45.69%, 38.22% and 46.14% respectively i.e. below the requirements of 51%. The Respondent failed to fulfil the "Consumption" criteria as per the Electricity Rules-2005 for the FYs 2015-16, 2016-17, 2017-18 and 2018-19.

1.9. As per the Commission's Order in R.A. 7 of 2019, in the case of wind energy, if the CGP having multiple generating units have separate Energy Wheeling agreements, the aggregate energy of all generating units of the CGP shall be considered irrespective



of separate wheeling agreements provided the captive users of each EWA are the same and holding same proportion of Ownership.

1.10. M/s. Ashoka Granites has lost the 'ownership' criteria for FYs 2018-19 and 2019-20. Hence, the wheeling approval during July 2011 is deemed to be cancelled and energy adjusted has to be treated as third party for FYs 2018-19 and 2019-20. Hence, the petitioner is compelled to file the present petition to declare that the respondent is not a Captive Generating Plant for the FYs 2015-2016, 2016-2017, 2017-2018 and 2018-2019.

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

2.1. The present Miscellaneous Petition has been filed to initiate action against the Respondent for recovery of CSS on the ground that the Respondent's WEG No. 79204721284 is not a Captive Generating Plant for the FYs 2015-16, 2016-17 and 2017-18. The present petition has been wrongfully and erroneously filed as a Miscellaneous Petition. It is necessary to point out that the instant petition ought to be numbered and listed as a Dispute Resolution Petition, owing to the fact that the Petitioner/TANGEDCO has alleged a dispute with the Respondent with respect to the determination of captive status of the said Respondent. The Petitioner/TANGEDCO at para 9 & 10 of its petition has claimed that the Respondent is liable to pay cross subsidy surcharge. The Respondent states that though the Petitioner has cleverly not calculated and stated the disputed amount, it is evident that the said petition involves a "dispute" in

view of the TNERC-Fees and Fines Regulations, 2022. The relevant regulation is reproduced below for ready reference:

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

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

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

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

2.3 Since the petitioner is claiming CSS, the present petition ought to be dismissed at the very threshold, and the Petitioner be directed to determine the "amount in dispute" and re-file the present petition under the category of dispute resolution petition, thereby also paying the requisite court fee towards filing of such a petition.

2.4. Twin rules of 'ownership' and 'consumption' have to be satisfied as per Rule 3 of the Electricity Rules, 2005 in order to qualify as a Captive Generating Plant in a given financial year. The Petitioner TANGEDCO has admitted that the Respondent is holding 100% share in WEG No. 79204721284 and hence the criteria of 'ownership' is fulfilled as per Rule 3 of the Electricity Rules, 2005 for the FYs 2015-16, 2016-17 and 2017-18.

2.5. In para 8, the Petitioner TANGEDCO has illegally alleged that the Respondent in WEG No. 79204721284 has not fulfilled the 'consumption' criteria i.e., not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use for the FY 2015-16. The Petitioner has alleged that the Respondent's captive consumption for the FY 2015-16 in WEG No. 79204721284 is 46.58% only i.e., below 51% and hence liable to pay CSS for the self-captive consumed units during the said financial year. The method of calculation adopted by the Petitioner TANGEDCO at para 9 to arrive at 46.58% i.e., the 'consumption' criteria is illegal, arbitrary and contrary to the order passed by the Commission in M.P. No. 24 of 2020 dated 07-12-2021.

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

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

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

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

The above mentioned method of calculating Net generation (i.e., gross generation - banking charges in kind - start up power in units) has not been adopted/followed by the Petitioner TANGEDCO at para 8. Similarly, the Petitioner TANGECO has not added T&D losses to the actual adjusted units. Such an action is clearly contrary to para 9.7(ii)(a)(c) of the order passed by the Commission in M.P. No. 24 of 2020 dated 07-12-2021. Hence the present Petition is liable to be dismissed in this ground alone.

2.7. The actual captive consumption by the Respondent from its WEG No. 79204721284 for FY 2015-16 is as follows:-

Gross Generation	1201320
Less EB import	23274
Net Generation	1178046
Adjusted from April 2015 to March 2016	551109
Less Line Loss	51362
Total Adjusted	602471
CGP Consumption %	51.14%

From the above it is clear that the Respondent has fulfilled the 'Consumption' criteria for the FY 2015-16 in its WEG No. 79204721284. The Respondent states that the percentage works out to 51.14% for the period 2015-2016, which is well within the norms for consumption.

2.8. Similarly for the financial year 2018-19, the above mentioned method of calculating Net generation (i.e., gross generation-banking charges in kind - start up power in units) has not been adopted/followed by the Petitioner TANGEDCO at para 8.

Similarly the Petitioner TANGECO has not added T&D losses to the actual adjusted units. Such an action is clearly contrary to para 9.7(ii) (a)(c) of the order passed by the Commission in M.P. No. 24 of 2020 dated 07-12-2021.

2.9. The actual captive consumption by the Respondent from its WEG No. 79204721284 for FY 2018-19 is as follows:-

Gross Generation	725868
Less EB import	8856
Net Generation	717012
Adjusted from April 2018 to March 2019	334922
Less Line Loss	46821
Total Adjusted	381743
CGP Consumption %	53.24%

From the above it is clear that the Respondent has fulfilled the 'Consumption' criteria for the FY 2018-19 in its WEG No.79204721284. The percentage works out to 53.24% which is well within the norms for consumption.

2.10. The Respondent admits that as stated by Petitioner, the TANGEDCO, the Respondent has not complied with the minimum 51% consumption norms from the windmill having WTG HTSC No. 79204721284, during the years 2016-17 and, accordingly, failed to demonstrate the CGP norms for its failure to consume minimum 51% of the energy generated during the above years.

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

Name of the Generator/ Captive User:			M/s. Ashok Granites	
HTSC No. / EDC			151 / Salem	
WEG HTSC No. / EDC			79204721284	
Sl. No.	Year	Units Generated	Units Consumed	Percentage of Consumption
1	2016-17	1939806	981516	50.60%

2.12. Since the Respondent has not consumed the generated energy at the level of 51% for the year 2016-17, as stated by the Petitioner, the Respondent has to face the consequences as stipulated under Rule 3 (2) of the Electricity Rules 2005, to the extent extracted below.

*"Rule 3(2): It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. "*

2.13. Therefore, according to the above Rule, the units captively consumed by the Respondent, during 2016-17, have to be treated as supplied by the Generating Company and accordingly, the same may be charged with Cross Subsidy Surcharges, at the applicable rates, from the failed captive user for the reason of not demonstrating the captive status of his CGP on the reason of consuming the captive energy at below 51% level, in the above year. Accordingly, the Respondent hereby admits the liability to pay the Cross Subsidy Surcharge, as demanded by the Petitioner TANGEDCO in this regard.

2.14. However, when the Respondent is ready to pay to the Petitioner TANGEDCO the Cross Subsidy Surcharge, the Petitioner TANGEDCO is also having an equal obligation to allow the encashment of the unutilized units as on 31<sup>st</sup> March, for the above year, at the rates applicable. As per “Billing” clause of the EWA executed between petitioner TANGEDCO and the Respondent for WEG No. 79204721284, the unutilized balance energy after monthly consumption shall be paid at Rs.2.75/- per unit to the Respondent by TANGEDCO and accordingly, it is worked out as follows:-

Sl. No.	Year	Unutilized Units as on 31 <sup>st</sup> March	Feed in Tariff Rate	Amount (Rs.)
1	2016-17	958290	Rs.2.75	26,35,297

2.15. The Respondent prays that the amount of Rs.26,35,297/- may be ordered to be paid towards encashment of unutilized energy at the end of 31<sup>st</sup> March on each year as stated above, within a period specified in this regard.

2.16. According to the calculation of the Respondent, the TANGEDCO can claim the Cross Subsidy Surcharge, at a maximum from the Respondent to the extent as stated below at 40% of the Cross Subsidy Surcharge of Rs.3.32/- as applicable to the 33 kV Injection / 11 kV Drawal Voltage.

Sl. No.	Year	Units Captively Consumed	Rate of CSS as applicable at 40% of Rs.3.32	Amount (Rs.)
1.	2016-17	981516	Rs.1.32	12,95,601/-
Total				12,95,601/-

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

2.17. From the above, it could be seen that the TANGEDCO has to make a payment of Rs.13,39,696/- [Rs.26,35,297/- (-) Rs.12,95,601] to the Respondent. The Commission may issue an order, directing the Petitioner TANGEDCO to pay a sum of Rs.13,39,696/- to the Respondent, on the declaration that the Respondent's CGP is not qualified to be a CGP during the year 2016-17.

2.18. The Respondent also admits that as stated by Petitioner, the TANGEDCO, the Respondent has not complied with the minimum 51% consumption norms from the windmill having WTG HTSC No.79204721284, during the years 2017-18 and, accordingly, failed to demonstrate the CGP Norms in view of its failure to consume minimum 51% of the energy generated during the above years.

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

Name of the Generator/ Captive User:			M/s. Ashok Granites	
HTSC No. / EDC			151 / Salem	
WEG HTSC No. / EDC			79204721284	
Sl.	Year	Units Generated	Units Consumed	Percentage of Consumption
1	2017-18	2117088	909549	42.96%



2.20. Since the Respondent has not consumed the minimum consumption level of 51% for the year 2017-18, as stated by the Petitioner, the Respondent has to face the consequences as stipulated under Rule 3 (2) of the Electricity Rules 2005, to the extent extracted below.

"Rule 3(2): It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case, the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company."

2.21. According to the above Rule, the units captively consumed by the Respondent, during 2017-18, have to be treated as supplied by the Generating Company and accordingly, the same may be charged with Cross Subsidy Surcharge, at the applicable rates, for the reason of not adhering to the captive status of his CGP on the reason of consuming the captive energy at below 51% level, in the above year. Accordingly, the Respondent hereby admits the liability to pay the Cross Subsidy Surcharge amount, as demanded by the Petitioner TANGEDCO in this regard.

2.22. However, when the Respondent is ready to pay to the Petitioner TANGEDCO the Cross Subsidy Surcharge, the Petitioner TANGEDCO is also having an equal obligation to allow the encashment of the unutilized units as on 31<sup>st</sup> March, for the above year, at the rates applicable. As per 'Billing' clause of the EWA executed between Petitioner TANGEDCO and the Respondent for WEG No. 79204721284 the unutilized balance

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

Sl. No.	Year	Unutilized Units as on 31 <sup>st</sup> March	Feed in Tariff Rate	Amount (Rs.)
1	2017-18	1207537	Rs.2.75	33,20,726

2.23. The Respondent prays that the amount of Rs.33,20,726/- may please be ordered to be paid towards encashment of unutilized energy at the end of 31<sup>st</sup> March on each year as stated above, within a period specified in this regard.

2.24. According to the calculation of the Respondent, the TANGEDCO can claim the Cross Subsidy Surcharges, at a maximum from the Respondent to the extent as stated below at 40% of the Cross Subsidy Surcharge of Rs.3.32/- as applicable to the 33 kV Injection / 11 kV Drawal Voltage.

Sl. No.	Year	Units Captively Consumed	Rate of CSS as applicable at 40% of Rs.3.32	Amount (Rs.)
1.	2017-18	909549	Rs.1.32	12,00,604/-
Total				12,00,604/-

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

2.25. Therefore, from the above, it could be seen that TANGEDCO has to make a payment of Rs.21,20,122/- [Rs.33,20,726/- (-) Rs.12,00,604] to the Respondent, accordingly, the Respondent most earnestly prays that the Commission may issue an order, directing the Petitioner TANGEDCO to pay a sum of Rs.21,20,122/- to the Respondent, on the declaration that the Respondent's CGP is not qualified to be a CGP during year 2017-18.

### **3. Rejoinder filed by the Petitioner:**

3.1. The petitioner seeks to declare that M/s.Ashok Granites Ltd has lost captive status for the financial year 2015-16,2016-17,2017-18 & 2018-19. In the counter filed, the respondent admits that the minimum 51% consumption norms has not been met for the FYs 2016-17 and 2017-18 and hence the CGP norms have not been fulfilled.

3.2. In Para 15 and Para 23 of the counter filed, the Respondent also admits that it is ready to pay the Cross Subsidy Surcharge amount as demanded by the Petitioner TANGEDCO.

3.3. In SMT Order No.9 of 2014 Determination of Tariff for Generation & Distribution dated 11.12.2014, the Cross Subsidy Surcharge for HT consumers having Injection Voltage of 33 KV and Drawal Voltage of 22 KV is Rs.3.3233/Kwh. In Order in T.P No 1 of 2017 dt.11.08.2017, irrespective of the drawal and injection voltage, the CSS rate is Rs.1.67/kwh. In Order No 3 of 2016, the Comprehensive Tariff order on Wind Energy dated 31.03.2016, the Commission has ordered to levy 50% of the Cross Subsidy

Surcharge. Hence, for the FY 2016-17, the CSS rate is 50% of Rs.3.3233/kwh (i.e) Rs.1.66165/kwh. For the FY 2017-18, the applicable rate of Cross Subsidy Surcharge upto 10.08.2017, is 50% of Rs.3.3233 i.e. Rs.1.66165 and from 11.08.2017, Rs.50% of 1.67/kwh i.e. Rs.0.835/kwh has been levied. During the month of August 2017, the adjusted units have been divided proportionately for the number of days and the respective rate of CSS is applied to calculate the amount to be claimed from the respondent.

FY	Units Adjusted	CSS RATE	Amount (Rs.)
2016-17	896915	1.66165	14,90,358.80

#### FY 2017-18

Months	Units Adjusted	CSS Rate	Amount (Rs.)
Apr -17	32640	1.66165	54236.25
May-17	82599	1.66165	137250.62
Jun-17	88292	1.66165	146710.40
Jul-17	83744	1.66165	139153.21
01-08-2017 to 10-08-2017	23048	1.66165	38297.71
11-08-2017 to 31-08-2017	48400	0.835	40414
Sep-17	66736	0.835	55724.56
Oct-17	62964	0.835	52574.94
Nov-17	71876	0.835	60016.46
Dec-17	74560	0.835	62257.60
Jan-18	61840	0.835	51636.4
Feb-18	56136	0.835	46873.56
Mar-18	64416	0.835	53787.36
<b>Total</b>	<b>817251</b>		<b>938933.09</b>

The total CSS payable is Rs.24,29,291.90

3.4. The contention of the Respondent in the counter filed that, the CGP norms have been fulfilled for the FY 2015-16 & 2018-19 is accepted.

3.5. The Hon'ble APTEL in Appeal No.56 of 2022, dated 26.05.2022 has passed an order that "The payment for the unutilized energy and collection of Cross Subsidy Surcharge are two different issues which cannot be interlinked as they operate on different spheres."

4. Arguments advanced on either side heard. Materials available on record perused. Relevant provisions of the Electricity Act and Electricity Rules traversed.

5. The points for determination that arise for determination in the present case are as follows:-

- (1) Whether the preliminary objection raised by the respondent that the classification of the petition as Miscellaneous Petition by the petitioner is a grave error which entail dismissal of the petition is sustainable under law?
- (2) Whether the camouflaged plea of set-off raised by the respondent can be entertained and considered by the Commission in the present case?
- (3) Whether the petitioner is entitled to the declaration relief prayed for in the petition?

## **6. Findings of the Commission:-**

### **6.1. Findings of the Commission on Point No.1:-**

6.1.1. Let us take up the preliminary issue raised by the Respondent in regard to the classification of the petition. To answer this question, it is necessary to refer to para

7.9.10 of the order passed by the Commission in R.A. No. 7 of 2019 which reads as follows:-

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

6.1.2. It is clear from the above that the classification of the instant petition as Miscellaneous Petition cannot be faulted and the contention made by the respondent at this stage for classification of the same as Dispute Resolution Petition is not tenable. Accordingly, this point is decided.

## **6.2. Findings of the Commission on Point No.2:-**

6.2.1 In the counter affidavit filed by the respondent, there is a categorical admission that for the Financial Years 2016-17 and 2017-2018, the respondent’s plant has not fulfilled the “Consumption” criteria as contended by the petitioner.

6.2.2 Admissions are as ancient as hill and it is the best form of proof which a court can rely upon to decide an issue. In the back drop of the above candid admission made by the respondent, there is no difficulty for this Commission to come to the logical conclusion that the respondent’s plant is not a Captive Generating Plant for the FYs 2016-2017 and 2017-2018.

6.2.3. The respondent, while conceding that it had lost its CGP status in regard to the FY 2016-2017 and 2017-18 in para 16 and 24 had pleaded set-off by quantifying the amounts due from the petitioner towards encashment of the unutilized units at the applicable rate and sought adjustment of the amount payable by it to the petitioner TANGEDCO towards cross subsidy surcharges for the relevant periods. According to the respondent while the amount payable by it to the petitioner towards CSS is Rs.12,95,601/- FY 2016-17 and Rs.12,00,604 for FY 2017-18, the amount due from the petitioner towards encashment of unutilized units is Rs.26,35,297/- for 2016-17 and Rs.33,20,726/- for 2017-18. Contending so, the respondent prayed for passing an order directing the petitioner to pay a sum of Rs.13,39,696/- for FY 2016-17 and Rs.21,20,122 for FY 2017-18 to the respondent by setting off Rs.12,95,601/- for FY 2016-17 and Rs.12,00,604/- for FY 2017-18.

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

6.2.5. The fact that for the FY 2016-2017 and 2017-18, the petitioner is liable to pay the respondent for the unutilized energy units cannot be disputed by the petitioner. But the million dollar question that arises in the instant case is as to whether the plea of set-off pleaded by the respondent can be legally entertained on the given facts and circumstances.

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

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

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

- a) the sum due from the plaintiff to the defendant is definite
- b) the sum is legally recoverable (and is not a contested amount) and
- c) does not exceed the pecuniary jurisdiction of the Court before which the suit is filed.



6.2.8. From the above discussion it is manifest that the plea of set-off can be raised only in money suits. In the case in hand, the petitioner TANGEDCO has preferred a petition seeking a prayer for declaration that the respondent is not a CGP for the FY 2015-16, 2016-17, 2017-18 and 2018-19. Hence, it is manifest that the instant application is not a money claim. Situated thus as per the rigour of Rule 6 (1) of Order VIII CPC, the plea of set-off cannot be entertained in the instant case. Merely because the respondent quantified certain amounts that is claimed to be payable by the petitioner to the respondent and vice versa, the same cannot change the nature of claim made in the original petition. Since the very foundational fact for projecting the plea of set-off (i.e.) existence of money claim, has not been established by the respondent, this Commission decides that the plea of set-off projected by the respondent cannot be entertained by the Commission in the instant case. Accordingly, this point is decided.

### **6.3. Findings of the Commission on Point No.3:-**

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

affirmed by the Hon'ble APTEL vide Order dated 26.05.2022 passed in Appeal No.56 of 2022.

6.3.2. In the backdrop of the Order dated 22.09.2020 passed in DRP No.67 of 2014, this Commission hereby hold that the respondent is entitled for payment on the unutilized banked energy as contended in its counter affidavit. The respondent in its counter affidavit has quantified the amount payable by it to the petitioner towards CSS. But the figures set out by the petitioner in the rejoinder with regard to CSS do not match. However, this being a petition for a declaration relief, we are not going into the same and confine ourselves to declaration alone. In the rejoinder filed by the petitioner, the calculation tabulated in the counter affidavit in regard to payment on unutilized banked energy is neither admitted nor denied. However this issue, in the considered opinion of this Commission, can be resolved by the petitioner and the respondent through reconciliation and deliberation across the table.

6.3.3. On a conspectus evaluation of all facts and circumstances emanating from the material records in the light of the settled principles of law governing the subject, this Commission decides that the petitioner is entitled to an order of declaration as prayed for in the petition in respect of the Financial Years 2016-2017 and 2017-2018. However, in the light of the categorical admission made by the petitioner in its rejoinder that the respondent had fulfilled the "ownership" and "consumption" criteria in respect of the FYs 2015-2016 and 2018-2019, this Commission decide that the petitioner is not entitled to the declaratory relief for that period. Accordingly, this point is decided.

In fine, the following order is passed:-

- (a) It is hereby declared that M/s. Ashok Granites Limited, WEG No.79204721284, EDC, Tirunelveli is not qualified as a Captive Generating Plant for the Financial Year 2016-17 and 2017-18.
- (b) The prayer for declaration that the respondent is not a Captive Generating Plant for 2015-2016 and 2018-19 is dismissed in view of the categorical admission by the petitioner in the rejoinder that the captive generating norms have been fulfilled by the respondent for the said period.
- (c) Parties shall bear their respective cost. Petition stands disposed of accordingly.

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

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

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