

Rajasthan Electricity Regulatory Commission, Jaipur

**Petition No. RERC/2082/2023 & I.A. No. 01, 02
& 03 of 2023 in Petition No. RERC/2082/2023**

Petition under Sections 9, 42, 61(h), 66 and 86 of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005, Regulation 18 of the RERC (Conduct of Business) Regulations 2000 and Regulation 19 of the RERC (Transaction of Business) Regulations 2021 for seeking declaration cum directions on the condition(s) applicable for qualifying as a captive generating plant in the State of Rajasthan.

Coram:

| | |
|--------------------------------|-----------------|
| Dr. B.N. Sharma, | Chairman |
| Shri Hemant Kumar Jain, | Member |
| Dr. Rajesh Sharma, | Member |

Petitioner : 1. Onevolt Energy Pvt. Limited
2. Grian Energy Private Limited
3. Amplus Ages Private Limited

Respondents : 1. Jaipur Vidyut Vitran Nigam Ltd.
2. Jodhpur Vidyut Vitran Nigam Ltd.
3. Ajmer Vidhyut Vitran Nigam Ltd.

Date of hearing : 27.01.2023, 05.04.2023, 08.06.2023, 09.11.2023

Present : Sh. Aniket Prasoon, Advocate for Petitioners.
Sh. Bipin Gupta, Advocate for Respondents.

Order Date: 03.01.2024

Order

1. The Petitioners referred in the cause title have been incorporated as Special Purpose Vehicles (SPVs) by Amplus Energy Solutions Pvt Limited (AESPL) under the provisions of the Companies Act, 2013 and are generating companies in terms of Section 2(28) of the Electricity Act, 2003.
2. Jaipur Vidyut Vitran Nigam Ltd. (hereinafter also referred as “JVVNL” or “Respondent No. 1”) is a company for carrying on the business of distribution and supply of electricity in the area of supply mentioned in its license and having its registered office at 1st Floor, Vidhyut Bhawan, Janpath, Jyoti Nagar, Jaipur.
3. Jodhpur Vidyut Vitran Nigam Ltd (hereinafter also referred as “JdVVNL” or “Respondent No. 2”) is a company carrying on the business of distribution and supply of electricity in the area of supply mentioned in its license and having its registered office at New Power House, Basni industrial area, Jodhpur.
4. Ajmer Vidyut Vitran Nigam Ltd (hereinafter also referred as “AVVNL” or “Respondent no. 3”) is a company for carrying on the business of distribution and supply of electricity in the area of supply mentioned in its license and having its registered office at Hathi Bhata Power Office, Jaipur Road, Ajmer.
5. Petitioners in their petition and during hearing mainly made following submissions:
 - 5.1 The Petitioners submitted that Amplus Solar (AESPL) is in the process of establishing solar based power projects of 300 MW (3x100 MW) at village Jaimalsar, Bikaner, in Rajasthan through three different SPVs. The Projects have been envisaged to be operated under

captive/open access arrangement and would be connected to Inter-State Transmission System, wherein Power generated from the said Projects would be supplied to users/consumers (both within and outside Rajasthan) under long/medium / short term arrangements.

- 5.2 The Petitioners further submitted that in view of the projects being envisaged to be operated under the captive/open access arrangement for supplying power within and outside Rajasthan, the Petitioners deem it appropriate to have long-term clarity on the applicability of the Rule of Proportionality on the CGP(s) set up by SPV(s) (like the Petitioners) owing to the huge investment commitment by them.
- 5.3 The Petitioners also submitted that it becomes relevant to highlight that they vide letters dated 15.12.2022 had sought the requisite clarification(s) from the Respondents on the applicability of the Rule of Proportionality to the Projects particularly in light of the TNPPA Judgment and its consequent effect of removing the very basis of the Tesco Order. However, the Petitioners has not received any response to the said letter(s).
- 5.4 The Petitioners further submitted that in absence of any response/clarification(s) from the Respondents, the Petitioners are constrained to approach this Commission in order to issue necessary declaration(s) cum direction(s) necessary to provide regulatory certainty vis a vis the applicability of Proportionality in light of the TNPPA Judgment and its consequent effect of removing the very basis of the Tesco Order.
- 5.5 The Petitioners submitted that insofar as the requirements for qualifying as a CGP is concerned, the same are solely governed by

Rule 3 of the Electricity Rules, which lays down only two requisites for a generating plant to fulfill (for it to qualify as a Captive Plant), which are stated herein below:

- i. not less than 26 (twenty-six) percent of the ownership of Captive Plant is held by the captive user(s); and
- ii. not less than 51 (fifty-one) percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use

5.6 The Petitioners further submitted that With regards to the CGP(s) which are set up by association of persons, second proviso to Rule 3(1)(a)(ii) provides for a third condition (in addition to the two conditions stipulated in Rule 3(1)(a)(1) and (ii)) which is reproduced herein 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 (1) and (i) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity

generated, determined on an annual basis in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent: “

- 5.7 The Petitioners submitted that bare perusal of the above makes it clear that only when the CGPs are set up by association of persons, will the captive user(s) be required to consume the energy in proportion to its shareholding in the CGP (Rule of Proportionality).
- 5.8 The Petitioners further submitted that the Hon'ble APTEL, vide the Kadoaara Judgment, had adjudicated upon whether the said Rule of Proportionality be extended and applicable to CGP(s) set up by SPV(s). While doing so, the Hon'ble APTEL had wrongly equated SPV(s) with associations of persons and had accordingly applied the Rule of Proportionality to the CGPs set up by SPV(s).
- 5.9 The Petitioners submitted that relying upon the Kadodara Judgment (passed by the Hon'ble APTEL), this Hon'ble Commission had passed the Tesco Order wherein it had categorically (albeit erroneously) applied the Rule of Proportionality to the CGP set up by an SPV. This Commission (vide the Tesco Order) went a step further in directing all the shareholders of concerned SPV therein (including the ones who were not the captive users) to consume energy in proportion of their respective shareholding. The aforesaid premise in any event is against the letter and spirit of relevant provisions dealing with setting up a CGP and the settled precedents of law including the judgment by Hon'ble APTEL in *Prism Cement Limited v. MPERC & Ors.*
- 5.10 The Petitioner submitted that the Kadodara Judgment has been now held to be *per incuriam* by the Hon'ble APTEL vide the TNPPA Judgment. The Hon'ble APTEL, by way of the TNPPA Judgment, has held that equating SPV(s) with association of persons and applying

the Rule of Proportionality to the CGP(s) set up by SPV(s) as was done in Kadodra Judgment is not in consonance with the statutory requirements for being a CGP under Rule 3 of Electricity Rules.

5.11 The Petitioner submitted that therefore, in light of the TNPPA Judgment, it is clear that the principles laid down by the Hon'ble APTEL (vide its earlier Kadodara Judgment) are no longer good law and cannot be applied to the CGP(s) set up by SPV(s). The TNPPA Judgment has been rendered after the Tesco Order passed by this Hon'ble Commission. Hence, this Hon'ble Commission's Tesco Order, being in direct conflict with the Hon'ble APTEL's TNPPA Judgment, is no longer good law and cannot be used as a precedent. Even otherwise, it is submitted that the Tesco Order was passed in the context of the peculiar facts of that case and is therefore distinguishable.

5.12 The Petitioners submitted that it is appropriate to highlight that the TNPPA Judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 1141 of 2022 and 1142/2022. In fact, AVVNL has also challenged the Judgment in Tamil Nadu Power Producers Association (supra) vide Civil Appeal No. 3662/2022. However, there is no stay granted by the Hon'ble Supreme Court against the same. This effectively means that TNPPA Judgment is good law as on date and continues to bind and govern the field and is therefore, binding on the distribution licensees as well the Commission. Thus, the entire basis of Tesco Order (it having relied upon Kadodara Judgment) stands demolished.

5.13 The Petitioners further submitted that the investments in the renewable energy space are driven by long term certainty about the form and period of concessions provided under the state policies

for financial viability purposes. In case of regulatory uncertainty and uncertain future of revenue stream, there is a high perceived risk qua the projects becoming non-bankable/unviable.

5.14 In view of the above, the Petitioners in their petition have prayed to:

- a. Hold and declare and consequently, issue a direction to the Respondents that the Rule of Proportionality in context of consumption of power is not applicable to CGP established/ being established by an SPV [like the Petitioners(s)] in the State of Rajasthan, particularly in light of the TNPPA Judgment; and
- b. Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioners.

6. The counsel on behalf of the respondents, in its written submissions and during hearings) has submitted as below:

6.1 The Respondents submitted that there is no provision for seeking any declaration from the Commission under the provisions of the Electricity Act, 2003 and therefore, on sole that count the petition deserves to be rejected.

6.2 The Respondents also submitted that the Commission in similar facts, has already passed an order in RERC Petition no. 1327/2018 decided on 08.05.2019 Tesco matter, in which it has been clearly held that rule of proportionality is applicable on special purpose vehicle and the said order has attained finality and therefore the prayer by the petitioner cannot be granted and therefore the petition is liable to

be rejected. The prayer is in the form of advance ruling which is not permissible under law of the Electricity Act, 2003 and thus, the petition is liable to be rejected.

- 6.3 The Respondents further submitted that the judgment of Kadodara as well as TNPPA have been passed by the Hon'ble APTEL by two judges bench and thus, Kadodara judgment cannot be overruled by an equal bench. Furthermore the matter is pending before the Hon'ble Apex Court both in respect to earlier judgment passed by the APTEL as well as the judgment passed by the APTEL subsequently. The SLPs of both the judgments of APTEL have been clubbed together for hearing. In such facts and circumstances, since the issue is pending before the Hon'ble Supreme court which will involve the question that whether the judgment of Hon'ble APTEL passed earlier or the judgment passed subsequently by the APTEL is correct. Before any decision by the Hon'ble Apex Court, as per law of precedents, the earlier judgment of Hon'ble APTEL would be binding and the judgment of Tesco passed by this commission would be binding as well.

IA dtd.29.03.2023 filed on behalf of the petitioners

7. The Petitioners filed IAs to amend the captioned petition, wherein it is submitted that:
- 7.1 The Petitioners submitted that the applicability of Rule of Proportionality to the designated captive users and not all equity shareholders of an SPV were duly highlighted by the Petitioner no.1 to the Respondents in its letters dated 15.12.2022 as well as pleaded the captioned Petition. However, upon perusal of the Reply filed by the Respondents, it came to the Applicant's knowledge that it had

inadvertently missed to seek relief in furtherance of the submissions in the captioned Petition.

7.2 The Petitioners further submitted that the captioned Petition canvassed two-pronged argument to establish the Applicants' case which requires adjudication by the Commission. The Applicants further state that without prejudice to their submissions that the Rule of Proportionality does not apply to an SPV, the issue of applicability of Rule of Proportionality to the equity shareholders of an SPV or as to whether it only applies to the designated captive users of the CGP is also an integral issue which is required to be adjudicated as already put forth in the captioned Petition.

7.3 The Petitioners also submitted that in view of the above, the Applicants seek leave of the Commission to include new paragraph, which reads as follows:

"28A. In addition, and without prejudice to the reliance placed by the Applicant on TNPPA judgment, assuming arguendo that the Rule of Proportionality applies in case of an SPV, it is submitted that the same may only apply to designated captive users and by any stretch of interpretation of Rule 3 of the Electricity Rules cannot be made applicable to all the equity shareholders of the CGP i.e., equity shareholders not consuming power from the CGP such as project developer."

7.4 The Petitioners also submitted that the Applicants' seek leave of this Commission to add the following prayer , which reads as follows:

"(a1) Without prejudice to the prayer (a) above, hold and direct that even if the Rule of Proportionality is to be made applicable to an SPV, the said rule may only be applicable to the designated captive users of CGP set up by such an SPV and not to all the equity shareholders of the said SPV i.e. equity shareholders not consuming power from the CGP such as project developer."

8. The Counsel on behalf of Respondents have also submitted

additional reply to the amended petition which states as under:

- 8.1 The respondents submitted that the rule 3 of the Electricity Rules, 2005 is very clear and does not require any interpretation as being sought to be interpreted by the petitioners. As per the rule the captive users of the SPV shall not hold less than 26% of the ownership of the plant aggregate and such captive users shall consume not less than 51% of the electricity generated determined on an annual basis in proportion to their share of ownership of the power plant within the variation not exceeding 10%. Thus, the requirement is that the SPV which is claiming it to be captive generating plant in such case the shareholding of the captive users shall not be less than 26% and those captive users is required to consume not less than 51% of the electricity generated determined on an annual basis in proportion to their share in ownership of the power plant within a variation not exceeding 10% and therefore, the words are very clear and not require any additional interpretation being sought for and therefore, the petition liable to be rejected.
9. The Petitioners, in response to the reply of the Respondents, have filed rejoinder dated 08.07.2023 and submitted as under :
- 9.1 The Petitioners submitted that the filing of the captioned Petition and the prayers as enumerated therein clearly and obviously indicates that same are sought for the purpose of business efficacy as in the absence of the necessary directions being issued by this Commission, the entire transaction involving setting up of CGP would become untenable and commercially unviable. Moreover, the said clarity by this Commission will also allow the Petitioners and other developers to get the Projects registered as a CGP with the nodal agency dealing with development of renewable power projects

being Rajasthan Renewable Energy Corporation Limited ("RRECL") under the Rajasthan Solar Policy, 2019.

9.2 The Petitioners further submitted that it is the bounden duty cum obligation of this Commission in terms of the relevant provisions namely Sections 61 (h), 66 and 86(1)(e) to allow development of renewable energy cum captive projects in the State of Rajasthan and therefore, the jurisdiction completely vests with this Commission. It is rather the part of this Commission's function to provide the required clarity to ensure swift development of renewable energy cum captive projects. Hence, in order to promote investments in renewable space in the State of Rajasthan, which is the intent of Electricity Act, National Electricity Policy and Tariff Policy, 2016, it is humbly submitted that this Commission has the regulatory power to provide clarity with regards the non-applicability of the Rule of Proportionality to the CGP(s) set up by SPV(s) (like the Petitioners' Projects) for providing much needed regulatory certainty.

9.3 The Petitioners further submitted that since the issue "Interpretation of Rule 3" is pending before the Hon'ble Supreme Court, therefore the sanctity of Kadodra Judgement and/or TNPPA Judgement will be decided accordingly. The mere fact that an appeal is pending before the appellate forum (against the TNPPA Judgement), it would not tantamount as stay on the operation of that order (unless an interim stay is granted). In this regard, it is submitted that unless and until the Hon'ble Supreme Court overrules the findings of TNPPA Judgment, the observations passed by Hon'ble APTEL is very much in operation. It is submitted that Hon'ble APTEL vide the TNPPA Judgment has categorically held Kadodora Judgment to be per incuriam therefore the contention of the Respondents that if two judgments have been challenged, then the earlier judgment will

hold ground and not the later one is completely erroneous. Such a contention by the Respondents is completely devoid of any merits.

10. Additional submission on behalf of Petitioners dated 27.10.2023 to bring on record the Hon'ble Supreme Court Judgment dtd. 09.10.2023, wherein it is submitted that :

10.1 The Petitioners submitted that Hon'ble Supreme Court vide judgment dated 09.10.2023 in the matter titled as Dakshin Gujarat Vij Co. Ltd. v. Gayatri Shakti Paper & Board Ltd., 2023 SCC Online SC 1276. ("Dakshin Gujarat Judgment"), has set aside the TNPPA judgment of the Hon'ble Tribunal to the extent that the said judgment held that the Rule of Proportionality in context of consumption of power is not applicable to a CGP established/being established by an SPV and that the minimum ownership requirement for assessing the captive status of a CGP is required to be maintained throughout the financial year, along with the minimum electricity consumption requirement. Further, the TESCO Order passed by this Commission has also been in-effect/in-principle overruled by the Dakshin Gujarat judgment and this is specifically to the extent that TESCO Order had held that in order for SPV to qualify as a CGP, all the shareholders of the concerned SPV (including the ones who are not the designated captive users i.e. the shareholders in the SPV who are not procuring power) are required to consume energy in proportion to their respective shareholding.

10.2 The Petitioners further submitted that the Hon'ble Supreme Court at Para. 48-49 explained the various possible scenarios under which the consumers would qualify as captive user(s). The illustrations and paragraphs of the Dakshin Gujarat judgment relevant to the present case are as under: -

"48 The last portion of the second proviso to Rule 3(1)(a) of the Rules, that is the proportionality principle, specifies an unitary qualifying ratio. The unitary qualifying ratio is the consumption requirement divided by the shareholding requirement, that is, 51% divided by 20%. This means that the owner of every 1% shareholding of the CGP should have minimum consumption of 1.96% of the electricity generated by the CGP, with a variation of +10% being permissible. Therefore, the unitary qualifying ratio has to be within a range of 1.764% to 2.156%. In other words, we do not take into consideration 100% of the electricity generated. Instead, we apply the shareholding requirement, which should not be less than 26% in aggregate, to the electricity consumed, which should not be less than 51% and thereby compute whether the ownership criteria and the proportionate consumption criteria is satisfied. Benefit of variation by 10% either way is to be a given."

Further, the illustration 1 provided by Mr. M.G. Ramachandram, Senior advocate in paragraph 49 of the Dakshin Gujarat judgment: Users (A) to (E) which holds 51% shareholding consume the entire 100% power from the CGP, and all of them qualify to be the captive users, However, it also clarifies that the entity holding the remaining 49% of the shareholding does not necessarily need to consume electricity from The CGP, to enable Owners (A) to (E) be qualified as captive users Accordingly, the said illustration unambiguously clarifies that:-

- a. Captive users must be shareholders, but all shareholders need not necessarily be captive users;
- b. All equity shareholders are not required to consume power;
- c. The entity(ies) categorized as "Others" in the illustration, which holds even 49% shareholding is not required to consume power in proportion to its/their shareholding; and
- d. Failure of one shareholder to qualify as captive user does not fail the whole captive structure, if remaining captive users meet the twin requirements i.e, 26% shareholding and 51% consumption in proportion to shareholding.

10.3 The Petitioners further submitted that accordingly, in the present

Petition, Prayer (a) has been declared by the Supreme Court in favour of the Petitioners through its Dakshin Gujarat Judgment i.e. Rule of Proportionality is to be only applicable to the designated captive users of CGP set up by such an SPV and not to all the equity shareholders of the said SPVs.

Commission's View

11. The Commission has considered the submissions made by the Petitioners/Respondents in petition, written submissions and oral arguments during hearing(s).
12. The Commission observes that the petitioners mainly prayed to :
 - (i) hold and declare and consequently, issue a direction to the Respondents that the Rule of Proportionality in context of consumption of power is not applicable to CGP established/being established by an SPV in the State of Rajasthan, particularly in light of the TNPPA Judgment.
 - (ii) Without prejudice to the above prayer, hold and direct that even if the Rule of Proportionality is to be made applicable to an SPV, the said rule may only be applicable to the designated captive users of CGP set up by such an SPV and not to all the equity shareholders of the said SPV i.e. equity shareholders not consuming power from the CGP such as project developer.
13. After going through the arguments advanced by the counsel on behalf of the Petitioners, the Commission observes that AESPL has incorporated the Petitioners as SPVs for establishing three Solar

Power Projects of 100 MW each. The Petitioners are planning to operate these plants in Captive Mode and they need clarity regarding applicability of rule of proportionality and others issues regarding interpretation of rule 3 of the Electricity Rules 2005. The Clarifications sought by the petitioners are general in nature and not specific to their Solar Plants. As a matter of fact, they have not even submitted the shareholding details of the plants and consumption pattern of the energy generated from the plants, two mandatory conditions under rule 3 to be fulfilled to qualify as captive user.

14. Per Contra the Counsel on behalf of the Respondents submitted that the prayers advanced by the Petitioners are in the nature of advance ruling, which is not permissible under the law.
15. The Commission further observes that similar issues have been addressed by the Commission in detail vide its order dated 14.12.2023 in the matter of Ultratech Cement Vs AVVNL , in light of the Judgment of Hon'ble APEX Court dated 09.10.2023 on this issue,
16. The Commission observes that issue no. 1 related to 'applicability of rule of proportionality' has been addressed by the APEX Court in its judgment dated 09.10.2023 in the matter of M/s Dakshin Gujarat Vij Company Vs Gayatri Shakti , wherein it was held that under the Electricity Rules 2005, all group captive users which are not registered cooperative societies are required to comply with the test of proportionality specified in the second proviso to Rule 3(1)(a). Relevant extracts of the Judgments are as under :

"61. To reiterate, Section 2(8) of the Act recognises two categories of CGPs, that is, single captive users and group captive users. For group captive users, only two categories of users are recognised, that is, a cooperative society and association of persons. The first proviso to Rule 3(1)(a) of the Rules

creates an exception for cooperative societies. It requires members of the cooperative society to only collectively satisfy the minimum ownership and electricity consumption requirements specified under paragraphs (i) and (ii) of Rule 3(1)(a) of Rules. The second proviso to Rule 3(1)(a), which refers to association of persons, requires such captive users to satisfy the minimum ownership and electricity consumption requirements specified under paragraphs (i) and (ii) of Rule 3(1)(a) of Rules. Additionally, it also requires such captive users to consume electricity generated by the CGP, which shall not be less than 51%, in proportion to their individual shares in the ownership of the CGP, which shall not be less than 26%. Thus, under the Rules, all group captive users which are not registered cooperative societies are required to comply with the test of proportionality specified in the second proviso to Rule 3(1)(a).

.....

66. In view of the aforesaid reasoning, we hold that SPVs which own, operate and maintain CGPs are an "association of persons" in terms of the second proviso to Rule 3(1)(a) of the Rules. Companies, body corporates and other persons, who are shareholders and captive users of a CGP set up by a SPV, are required to comply with Rule 3(1)(a) of the Rules read with the second proviso of the Rules."

17. The Petitioners raised another issue regarding 'applicability of rule of proportionally to the designated captive users only and not to the other equity shareholders which are not consuming power from the CGP'. The Commission observes that this aspect is also echoed in the Judgment of APEX Court dated 09.10.2023. Relevant paras of the judgment are extracted as under :

" 25. To qualify as a CGP under Section 9, read with Section 2(8) of the Act, the requirements of paragraphs (i) and (ii) to Rule 3(1)(a) of the Rules have to be satisfied. We have already referred to the definition of a CGP under Section 2(8) of the Act which uses the words, "primarily for his own use". This expression has been given statutory grain vide Rule 3 of the Rules. Rule 3 as repeatedly noticed incorporates two separate requirements. The first requirement is that the captive user(s) should have not less than 26% of the ownership in the CGP. Lower limit or minimum of 26% ownership is prescribed. Upper limit of ownership is not prescribed. The second requirement relates to the minimum electricity consumption 51% of aggregated or more of the generated electricity should be consumed by the user(s) who meets the ownership requirement.

26. The presence of the words, “not less than”, in paragraphs (i) and (ii) to Rule 3(1)(a) of the Rules reflects and shows that the stipulations with regard to 26% ownership and 51% consumption is the minimal or lowest threshold. Maximum is not prescribed. A captive user who owns 100% of the CGP and consumes 51% or more electricity generated from such plant would satisfy the parameters prescribed. Equally, a captive user who owns 26% of the CGP and consumes 51% or more of the electricity generated would qualify as a captive user. However, this can result in abuse or gaming where there are multiple owners with different shareholdings. In case of an association of persons, a situation which is covered by the first explanation. This aspect, when there are multiple owners, in a case of association of persons, is examined under Issue II.

27. Proviso to clause (b) to Explanation 1 to Rule 3 states that consumption by a subsidiary, or holding company as defined in the Companies Act, 2013, when one of them is a captive user, shall be also admissible as captive consumption by the captive user. Clause (b) to Explanation 1 to Rule 3 states that captive user is the end user of the electricity. Captive user is the actual consumer who uses electricity for his own use.

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44. For clarity, the illustrations provided Mr. M.G. Ramachandran, Senior Advocate, are reproduced below:

| Total Generation | | 100% | Unitary Qualifying Ratio is Consumption Requirement divided by Shareholding Requirement (with a variation of 10%) Le 51% divided by 26% which equals to 1.96% consumption by a captive 51% user for every 1% shareholding | | |
|--|--------------------|---------------------|---|---|---------------------------------|
| Consumption Requirement (Not less than) | | 51% | | | |
| Shareholding Requirement (Not less | | 26% | | | |
| Share holder | Actual Consumption | Actual Shareholding | Unitary Ratio Achieved | Remarks | Result |
| ILLUSTRATION 1 | | | | | |
| A | 20 | 10.2 | 1.96 | A, B, C, D, and E (all) consume not less than 1.96% for 1% shareholding and therefore all qualify as captive users. All collectively own more than 26% captive shareholding | A to E qualify as captive users |
| B | 20 | 10.2 | 1.96 | | |
| C | 20 | 10.2 | 1.96 | | |
| D | 20 | 10.2 | 1.96 | | |
| E | 20 | 10.2 | 1.96 | | |
| Others | 0 | 49 | 0 | | |
| Illustration 2 | | | | | |
| A | 15 | 7 | 2.14 | A, B, C, D, and E (all) consume more than 1.96% for 1% shareholding and | A to E qualify as |
| B | 15 | 6 | 2.5 | | |

| | | | | | |
|----------------|------|----|------|--|---|
| C | 15 | 5 | 3 | therefore all qualify as captive users. All collectively own more than 26% captive shareholding | captive users |
| D | 15 | 4 | 3.75 | | |
| E | 15 | 4 | 3.75 | | |
| Others | 25 | 74 | - | | |
| Illustration 3 | | | | | |
| A | 30 | 10 | 3 | A B and C qualify the captive consumption qua their shareholding in the ratio of not less than 1.96% of 1 shareholding The ratio of D is not above 1.96, yet it qualifies on account of its ratio being within the permissible limit of 10% variation. E does not qualify as unitary consumption 1.67% only i.e. less than 1.96% per 1% shareholding and the same does not fall within 10% variation. Excluding E, the shareholding held by A B C and D is 33% i.e. not less than 26%. Hence A B C and D quality captive user. The disqualification of E will not affect A, B, D and Das they cumulatively consume more than 51% and hold 33% i.e. not less than 26%. | A to D Qualify as captive users. E is not a captive user. |
| B | 30 | 10 | 3 | | |
| C | 20 | 10 | 2 | | |
| D | 5.75 | 3 | 1.92 | | |
| E | 5 | 3 | 1.67 | | |
| Others | 9.25 | 64 | - | | |
| Illustration 4 | | | | | |
| A | 25 | 6 | 4.17 | A, B, C and D qualify the captive consumption qua their shareholding in the ratio of not less than 1.96% for 1% shareholding. E does not quality as unitary consumption is 1% only. i.e. less than 1.96% per 1% shareholding. Excluding E, the shareholding held by A, B, C and D however is only 21%.Since Cumulatively A, B, C, and D do not hold not less captive than 26%, by virtue of Rule 3(2) of Electricity Rules, user 2005, they cannot claim captive user status. | No one qualifies as captive user. |
| B | 20 | 5 | 4 | | |
| C | 15 | 5 | 3 | | |
| D | 10 | 5 | 2 | | |
| E | 5 | 5 | 1 | | |
| Others | 25 | 74 | - | | |
| Illustration 5 | | | | | |
| A | 30 | 1 | 30 | Neither of A or B qualify as captive user even though they collectively satisfy the requirements of minimum shareholding of not less than 26% and minimum consumption of not less than 51%. B does not qualify as unitary consumption is less than 1.95% and not within the 10% variation. A or B independently do not satisfy the shareholding and consumption requirements. By virtue of Rule 3(2) of user Electricity rules, | No one qualifies as captive |
| B | 21 | 25 | 0.84 | | |
| Others | 49 | 74 | - | | |

| | | | | | |
|--|--|--|--|---|--|
| | | | | 2005, they cannot claim captive status. | |
|--|--|--|--|---|--|

Once the above standard is met and satisfied, the person satisfying the requirement will be treated as a member of the group captive users."

18. The Commission observes that all the issues raised by the petitioners have already been decided by Hon'ble APEX Court and no further clarification is required from the Commission. Incidentally the petitioners have raised a hypothetical question before us and there is no dispute presented before us with facts which can be adjudicated by the Commission.
19. The instant petition is filed only for seeking declaration on the conditions applicable for qualifying as a captive generating plant which in our understanding , is duly settled by the APEX Court. The Petitioners and Respondents may easily reach on conclusion regarding captive status of its plants, applying the law laid down by APEX Court vide its judgment dated 09.10.2023. Still if any dispute arises in future, the Petitioners are at liberty to approach the Commission with complete facts.
20. The petition along with IAs is disposed in above terms. No order as to cost.

(Dr. Rajesh Sharma)
Member

(Hemant Kumar Jain)
Member

(Dr. B. N. Sharma)
Chairman