Rajasthan Electricity Regulatory Commission, Jaipur

Petition No. RERC/2047/2022 & IA No. 01 in 2047/2022

In the matter of Petition filed under Section 9, 42 and 86 of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules and Regulation 18 of the Conduct of Business Regulations 2000 and Regulation 19 of the Transaction of Business Regulations 2021 challenging the illegal and arbitrary levy of Cross Subsidy Surcharge, Additional Surcharge and Water Cess by Ajmer Vidyut Vitaran Nigam Limited on the power consumed by UltraTech Cement Limited (Unit: Aditya Cement Works) from its 8 MW onsite captive solar power project.

Coram:

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

Petitioner: 1. UltraTech cement Limited (UTCL)
2. Amplus Dakshin Private Limited (ADPL).

Respondent : Ajmer Vidhyut Vitran Nigam Limited (AVVNL)

Date of hearing : 20.09.2022, 01.11.2022, 08.12.2022, 12.01.2023, 05.04.2023, 09.11.2023

Present : Sh. Abhishek Munot, Advocate for Petitioners.
Sh. Parinitoo Jain, Advocate for Respondent

Order Date: **14.12.2023**

Order

1. UltraTech cement Limited (hereinafter also referred as "Petitioner No. 1" or UTCL) is the cement flagship company of the Aditya Birla Group. Amplus Dakshin Private Limited (hereinafter also referred as "Petitioner No. 2" or ADPL) was incorporated as a Special Purpose Vehicle (SPV) by its promoter Amplus Energy Solutions Pvt Limited (AESPL) to set up captive generating plant for UTCL.

2. Ajmer Vidyut Vitran Nigam Ltd (hereinafter also referred as "AVVNL" or "Respondent") 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.

3. Petitioner in its petition and during hearing mainly made following submissions:

3.1 The Petitioner has submitted that UTCL owns and operates unit Aditya Cement Works in Chittorgarh having a capacity of 7.18 MTPA. In order to meet its industrial requirements, UTCL entered into an agreement with ADPL and AESPL to install an onsite Solar Captive Generating Plant. As per the agreement, ADPL (which is incorporated as a SPV by UTCL and AESPL) shall install the Solar CGP of 8 MW capacity on captive mode/ basis. UTCL owns 26% equity stake in ADPL and AESPL owns 74%. UTCL shall maintain requisite equity investment in ADPL and shall consume 100% of the power generated from the Solar CGP.

3.2 The Petitioner further submitted that on 07.05.2022, the Solar CGP was commissioned as Captive Generating plant under the aegis of the Rajasthan Solar Policy, 2019. After commissioning of the Solar CGP, UTCL has been consuming 100% of the power generated from

the Solar CGP. On 03.08.2022, AVVNL levied Cross Subsidy Surcharge (CSS), Additional Surcharge (AS) and Water Cess (WC) on the power consumed by UTCL from the Solar CGP by holding that UTCL was not a Captive User. On 16.08.2022, UTCL provided a detailed response to AVVNL, along with copies of the agreements executed between UTCL and ADPL, demonstrating compliance with the Electricity Act, 2003 and Electricity Rules, 2005 .

3.3 The Petitioner further submitted that on 24.08.2022, AVVNL rejected UTCL's contentions. AVVNL justified the levy of CSS, AS and Water Cess on UTCL by stating that UTCL is not fulfilling the requirement of consuming electricity in proportion to its percentage shareholding in the CGP as mandated by the Commission's Judgment dated 08.05.2019 in M/s. Tesco Energy Two Pvt. Ltd. v. Rajasthan Vidyut Prasaran Nigam Ltd. & Anr. ("TESCO Order"). Accordingly, AVVNL stated that UTCL is not a Captive User.

3.4 The Petitioner also submitted that Rule 3 of the Electricity Rules 2005 lays down the qualifications which are needed to be met by a power plant for it to quality as a CGP. Rule 3 as amended from time to time, in its entirety is extracted hereunder for ease of reference:

> *"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:

(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 (1) and (i) 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:

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

Provided further that the consumption of electricity by a subsidiary company, as defined in clause (87) of section 2 of the Companies Act, 2013 (18 of 2013). of a company which is an existing captive user shall also be admissible as captive consumption by the captive user.

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

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

3.5 The petitioner submitted that Rule 3(2) Explanation 1(d) defines an SPV as a legal entity owning operating and maintaining a generating station and with no other business activity to be engaged in by the said legal entity. Further, the term 'set up' used in Rule 3 read with Section 9 has been given an expansive meaning through judicial interpretations in Kadodara Power Judgment read with Prism Cements Judgment and Tamil Nadu Power Producers Association Judgment of Hon'ble APTEL which mean 'construct, operate and maintain a power plant. Thus, a CGP can be

established/ set up by a person other than the captive user, and the captive user can purchase equity share capital in the SPV. In other words, equity shareholding by a captive user in an SPV denotes that the CGP has been 'set up' by said captive user for captive consumption.

3.6 The petitioner further submitted that in the facts of the present case, UTCL qualifies as a captive user qua Solar CGP for the following reasons:

a. In terms of the SSSA and the Amended SSSA, UTCL has agreed to:
    i. Subscribe to 26% of the equity share capital in ADPL the power producer and to continue to maintain said shareholding in existing and to be commissioned CGPs.
    ii. Pay additional subscription amount to account for its investment in the Solar CGP in Unit Aditya Cement Works.
b. In exercise of its aforesaid rights and obligations, UTCL has subscribed to 26% equity shareholding in ADPL. This is also evident from the CA Certificate dated 12.08.2022 certifying that as on 09.08.2022, UTCL is holding 26% of the equity shareholding in ADPL.
c. UTCL has executed PPA with ADPL wherein it has agreed to offtake 100% of the power generated by ADPL at Unit Aditya Cement Works.
d. On and from the date of commissioning of the Solar CGP i.e. 07.05.2022, UTCL is consuming 100% of the power being generated by said Solar CGP.

3.7 The petitioner also submitted that UTCL meets the Ownership and Consumption Tests prescribed under Rule 3 of the Electricity Rules

for captive consumption and to be qualified as a captive user. Hence, UTCL fulfilled the twin test and qualifies as a CGP and is entitled to exemption from Cross Subsidy Surcharge, Additional Surcharge and Water Cess.

3.8 The petitioner also submitted that It is pertinent to note that the Proportionality Test under 2nd Proviso to Rule 3(1)(a) is qua the group captive user or multiple captive users of the CGP. This is evident on a plain reading of the said proviso. Explanation 1(b) to Rule 3 clarifies that a captive user is the end user of electricity generated by a CGP.

3.9 The petitioner further submitted that in the present case, UTCL is the only captive user of ADPL. UTCL owns 26% equity shareholding in ADPL and consumes 100% of the electricity generated by the Solar CGP. The remaining 74% in ADPL is owned by AESPL. However, AESPL is not a captive user of ADPL since it is not consuming any electricity generated by the Solar CGP. Rule 3 does not mandate that all shareholders of an SPV which has setup a CGP become captive users by default and/ or are required to consume electricity from the CGP.

3.10 The petitioner further submitted that the Proportionality Test will not apply since UTCL by itself is meeting the Ownership and Consumption Test in terms of Rule 3(1)(a). The Proportionality Test will be applicable only to a scenario where there are multiple captive users, Therefore, AVVNL's reliance on this Hon'ble Commission 's TESCO Order is erroneous and misplaced.

3.11 The petitioner also submitted that In any case, and without prejudice to the above, it is submitted that Commission's TESCO

Order was premised on the law laid down by the Hon'ble Tribunal in Kadodara Power . In the said Judgment, Hon'ble Tribunal had held that an SPV is nothing but an association of persons and therefore the Proportionality Test under 2nd Proviso to Rule 3(1)(a) would be applicable to a CGP setup as an SPV. The petitioner submitted that subsequently, the Hon'ble Tribunal by its Judgment in Tamil Nadu Power Producers Association has held its earlier Judgment in Kadodara Power as per incuriam and based on an incorrect interpretation of the law. It is settled law that a judgment is per incuriam if it is rendered in ignorance of a statute or law.

3.12 The petitioner also submitted that in light of the above Judgment of the Hon'ble Tribunal, the principles laid down earlier by the Hon'ble Tribunal in Kadodara Power is no longer good law and cannot be applied to SPVs. The Hon'ble Tribunal's Judgment in Tamil Nadu Power Producers Association has been rendered after this Hon'ble Commission's TESCO Order. Hence, this Hon'ble Commission's TESCO Order, being in direct conflict with the Hon'ble Tribunal's Judgment in Tamil Nadu Power Producers Association , is no longer good law and cannot be used as a precedent. Even otherwise, it is submitted that the TESCO Order was passed on the context of the peculiar facts of that case, and is therefore distinguishable.

3.13 The petitioner also submitted that even otherwise, if the principle in Kadodara Power is to be made applicable, UTCL still meets the requirement of Rule 3 since UTCL by itself owns 26% of the shareholding in ADPL and consumes 100% of the electricity generated from ADPL's Solar CGP.

3.14 The petitioner further submitted that the Hon'ble Tribunal's Judgment in Tamil Nadu Power Producers Association has been challenged before the Hon'ble Supreme Court in Civil Appeal Nos.

1141/2022 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, as on date no stay has been granted against the said Judgment by the Hon'ble Supreme Court. Therefore, the law interpreted and clarified by the Hon'ble Tribunal in Tamil Nadu Power Producers Association (supra) continues to govern the field and binds the distribution licensee as also this Commission. In view of the same, AVVNL's letter dated 24.08.2022 cannot be sustained being contrary to the law laid down by the Hon'ble Tribunal and must be quashed by this Commission.

3.15 In view of the above, the Petitioner has prayed to:

(a) Admit and allow the present Petition;

(b) Hold and declare that UTCL is a captive user qua the 8 MW Solar CGP installed in the premises of Unit Aditya Cement Works;

(c) Hold and declare that the Proportionality Test (consumption of electricity in proportion with the shareholding) is not applicable to UTCL in the present facts of the case;

(d) Hold and declare that UTCL is not liable to bear Cross Subsidy Surcharge, Additional Surcharge and Water Cess on the units consumed by it from its onsite 8 MW Solar CGP as sought to be levied by AVVNL vide its letter dated 03.08.2022;

(e) Set aside/ Quash the:

(i) Impugned Levy dated 03.08.2022 issued by AVVNL to UTCL for the amount of INR 87,75,965/- (Indian Rupees Eighty

Seven Lacs Seventy Five Thousand Nine Hundred and Sixty Five only)

(ii) Letter dated 24.08.2022 issued by AVVNL to UTCL denying the captive status to UTCL, as arbitrary and illegal;

(f) Pass such other and further orders as may be deemed fit under the facts and circumstance of the present case.

4. The counsel on behalf of the Respondent in written submission and during hearing submitted as under:

4.1 The Respondent submitted that the petitioner UTCL has 26% of share holding and 74% share holding is of AESPL. Therefore, there is more than one entity involved hence the Rule of proportionately would apply. Further, it is submitted that the judgment of the Hon'ble Commission passed in the case of M/s. Tesco Energy has attained finality since the judgment of M/s. Tesco Energy was never challenged before the Hon'ble APTEL.

4.2 The Respondent further submitted that the Commission has already specified the rates of cross subsidy surcharge, additional surcharge and water cess. Therefore, the respondent applied the rate in the instant case and levied the charges in accordance with the Act and Regulations.

4.3 The Respondent submitted that the question of verification of ownership and proportionate consumption test at the end of the financial year would apply in those cases where the power is being consumed in proportion right from the beginning till the end of the year. However in the instant case right from the beginning the

power is not being consumed in proportion whereas 100% power is being consumed by single entity. Therefore, there is no question of evaluating the ownership and the proportionate consumption at the end of the financial year. Hence, the proportionate consumption test has not been fulfilled and therefore the levy is justified which deserves to be upheld.

4.4 The counsel on behalf of the Respondent, during the final arguments, also submitted that recent judgment of Hon'ble APEX Court dated 09.10.2023 has upheld the order of the Commission in the matter of TESCO Energy in the terms that every shareholder of a plant must consume energy generated from the plant in ratio of their ownership in the plant to make qualify the plant as Captive Power Plant.

5. Written submissions dated 24.11.2023 filed on behalf of the Petitioner :

5.1 The Petitioner submitted that the interpretation of Rule 3 has now been settled by the Hon'ble Supreme Court in Dakshin Gujarat Judgment dated 09.10.2023. In Dakshin Gujarat , while the Hon'ble Supreme Court has agreed to the Hon'ble Appellate Tribunal's interpretation of 2nd Proviso to Rule 3(1)(a) in Kadodara Power (supra), it has interpreted Rule 3 of the Electricity Rules and laid down the principles of law applicable to CGPs. In view of the same, Hon'ble Appellate Tribunal's Judgment in Kadodara Power (supra) has merged with the Judgment of the Hon'ble Supreme Court in Dakshin Gujarat (supra) to the extent of the findings which have been approved by the Hon'ble Supreme Court in the said Judgment.

5.2 The petitioner further submitted that In Dakshin Gujarat (supra) the

Hon'ble Supreme Court has held as under:

a) There are only two types of CGP recognized under the Electricity Act and the Electricity Rules i.e. Single Captive User CGP and Group Captive Users CGP.

b) The Ownership and Consumption test is the minimal requirement prescribed under Rule 3. Maximum limit 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. Even a captive user who owns 26% of the CGP and consumes 51% or more of the electricity generated would quality as a captive user.

c) All Group Captive User CGP's, which are not registered cooperative societies, have to meet the Proportionality Test under 2nd Proviso to Rule 3(1)(a).

5.3 The petitioner also submitted that on a Conjoint reading of the principle laid down by the Hon'ble Supreme Court and the illustrations set out by the Hon'ble Supreme court, it is clear that:

a) A CGP can have equity shareholders who are not consuming electricity from the CGP. Such equity shareholders will neither qualify as Captive Users nor impact the captive status of a CGP.

b) As long as the Captive Users of the power plant are meeting the Ownership and Consumption Test (and in the context of multiple user CGPS, the Proportionality Test as well), such a power plant will qualify as a CGP.

5.4 The Petitioner further submitted that when the aforesaid principles laid down by the Hon'ble Supreme Court are applied to the facts of the present case, it is evident that:

a) UTCL is meeting the Ownership and Consumption Tests since it owns 26% equity shareholding in the Solar CGP and is consuming more than 51% (100%) of the power generated by such CGP.

b) Without prejudice to the above, assuming without admitting that UTCL also has to meet the Proportionality Test i.e. consume electricity in proportion to its shareholding. UTCL has to ensure that its ownership- consumption ratio meets the unitary qualifying ratio. In other words, UTCL's unitary qualifying ratio cannot be less than 1.764%. Since UTCL holds 26% equity shareholding in the Solar CGP and is consuming 100% of the electricity generate by the Solar CGP, then UTCL's unitary qualifying ratio is 3.846%. Clearly, UTCL is meeting the unitary qualifying ratio as well. Therefore, UTCL meets the tests of Rule 3 even if AESPL is not consuming power from the Solar CGP.

5.5 The Petitioner further submitted that during the hearing held on 09.11.2023, it was contended by AVVNL that in Dakshin Gujarat (supra) the Hon'ble Supreme Court has stated that gaming should not be permitted. As is evident from the aforesaid extracts of the Judgment in Dakshin Gujarat (supra), the Hon'ble Supreme Court has clarified that gaming would be in a scenario where a 1% or an insignificant shareholder of the CGP disproportionately uses the electricity generated by the CGP. In the present facts of the case, UTCL is not insignificant shareholder consuming electricity disproportionately. UTCL is holding 26% equity shareholding in the Solar CGP i.e. the mandatory minimum shareholding required as per Rule 3 and consuming 100% of the electricity generated by the CGP (i.e., more than the minimum

51%).

5.6 The Petitioner also submitted that another contention raised by the distribution licensee during the hearing on 09.11.2023 is that the Illustrations set out by the Hon'ble Supreme Court is not binding and should not be considered. The said contention is incorrect and based on an erroneous reading of the Judgment. The Illustrations set out in Para 49 of the Judgment in Dakshin Gujarat (supra) merely clarifies the principles set out in the preceding paragraphs of the Judgment. The illustrations are not in conflict with the principles laid down in the Judgment, In fact, when read together with the principles laid down in the Judgment the illustrations clarify how Rule 3 operates practically. As such, the Illustrations form an essential part of the ratio decidendi of the Judgment and are binding on AVVNL as well as on this Commission.

Commission's View

6. The Commission has considered the submissions made by the Petitioner/Respondent in petition, written submissions and oral arguments during hearing(s).
7. The present lis emerged from the different interpretations of Rule 3 of Electricity Rules 2005. The Commission observes that ADPL has installed 8 MW Solar Captive Power Plant for fulfilling industrial requirement of UTCL a cement manufacturer. ADPL is a SPV incorporated by UTCL and AESPL to installing and executing the Solar CPP.
8. The Commission further observes that it is undisputed fact that UTCL and AESPL are having 26% and 74% shareholding respectively in the SPV and UTCL alone consumes 100% of the energy generated by the SPV's Solar

Plant. In simple words, UTCL is having 26% shareholding and 100% consumption from the SPV's Solar plant.

9. Elaborate submissions, both oral and written, were put forth by Learned Counsel appearing on behalf of the Petitioner and Respondent. The Counsel on behalf of the Petitioner mainly submitted that the Solar CPP is a single user captive plant having UTCL as only consumer hence the test of proportionality prescribed under Rule 3 cannot be applied here. Further, after the judgment of Hon'ble Supreme Court dated 09.10.2023 in the matter of Dakshin Gujarat Vij Company Ltd Vs Gayatri Shakti Paper Ltd, it is clear that Unitary Qualifying Ratio of the Solar CPP is 3.84 (100/26) which is more than 1.96, minimum qualifying ratio prescribed by the Hon'ble APEX Court at para 44 of the Judgment.

10. Per contra, the counsel on behalf of the Respondent mainly submitted that according to the findings of the Commission in 'Tesco Energy Order', UTCL and AESPL are two shareholders in the CPP hence two entities are involved and they must consume energy generated from the CPP in ratio of their shareholding. But in present case, only one shareholder (UTCL) is consuming full energy generated and hence does not fulfil the proportionality test. He also argued that Hon'ble APEX Court, in its judgment dated 09.10.2023, also upheld this view.

11. The Commission also observes that during final arguments the Counsel on behalf of the Respondents submitted that illustrations cited at para 44 of the judgment of Hon'ble APEX Court dated 09.10.2023 in the matter of Dakshin Gujarat Vij Company Vs Gayatri Shakti, are not binding on us. We

don't agree with the argument of the learned counsel as at the end of para 44 it is clearly noted that once the above standard is met and satisfied, the person satisfying the requirement will be treated as a member of the group captive users. Further, at para 45 it is stated that the aforesaid interpretation checks, "gaming", by owners, which would amount to misuse and abuse of the Rule 3(1)(a) of the Rules. Hence, by going through para 44 and 45, it is clear that the illustrations given at para 44 are an integral part of the findings and observations of the Hon'ble APEX Court and binding on the lower Courts/Tribunals/Commission. Thus, contention of the respondent on this account deserves to be rejected.

12. Before examining the rival contentions, urged in this petition by Learned Counsel on either side, it is useful to cite Rule 3 of the Electricity Rules 2005 and its interpretation by the Hon'ble APEX Court in its Judgment dated 09.10.2023. Rule 3 of the Electricity Rules is extracted 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 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:

(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*.

(3) The captive status of such generating plants, where captive

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

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

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

b. "captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "captive use" shall be construed accordingly:

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

Provided further that the consumption of electricity by a subsidiary company, as defined in clause (87) of section 2 of the Companies Act, 2013 (18 of 2013). of a company which is an existing captive user shall also be admissible as captive consumption by the captive user.

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

e. "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."

13. Relevant observations and findings of Hon'ble APEX Court in its judgment dated 09.10.2023 in the matter of M/s Dakshin Gujarat Vij Company Ltd Vs M/s Gayatri Shakti Paper and Board Ltd and Ors, Civil Appeal Nos. 8527-8529 of 2009, is extracted below –

" 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 grail 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%*	

Shareholder	*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*	*A to E qualify as*
B	*20*	*10.2*	*1.96*		

C	*20*	*10.2*	*1.96*	*and therefore all qualify as captive users. All collectively own more than 26% captive shareholding*	*captive users*
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 therefore all qualify as captive users. All collectively own more than 26% captive shareholding*	*A to E qualify as captive users*
B	*15*	*6*	*2.5*		
C	*15*	*5*	*3*		
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 15% 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*	No one qualifies as captive
B	21	25	0.84		
Others	49	74	-		

				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, 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.

45. The aforesaid interpretation checks, "gaming", by owners, which would amount to misuse and abuse of the Rule 3(1)(a) of the Rules. Instances of gaming are where a 1% or an insignificant shareholder of the CGP disproportionately uses the electricity generated, in which case he should not be treated as a group captive user and, therefore, should be denied the benefits that are given under the Act to the captive users. Gaming or misuse should be checked to protect interests of the Distribution Licensee.

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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).

……."

14. The Commission observes that the Petitioner and Respondent both have referred earlier judgments of Hon'ble APTEL , dated 22.09.2009 in Kadodara matter and dated 07.06.2021 in TNPPA matter, and order of the Commission dated 08.05.2019 in TESCO matter. But Hon'ble APEX Court

now have settled the issue of verification of captive consumers and interpretation of Rule 3, vide its latest judgment dated 09.10.2023 in the matter of M/s Dakshin Gujarat Vij Company Ltd Vs M/s Gayatri Shakti Paper and Board Ltd and Ors. Thus, needless to say that now this judgment of Hon'ble APEX Court shall prevail and the instant matter shall be decided on the basis of the observations and findings of the Hon'ble APEX Court.

15. After going through the judgment, the Commission observes that Rule 3 incorporates two separate requirements to qualify as a Captive User. The first requirement is that the captive user(s) should have not less than 26% of the ownership in the plant. 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. In this regard, the Commission would like to note that some shareholder(s) of a plant, who also consume energy from the plant, can qualify as Captive Consumer(s) subject to fulfillment of the criteria of Rule 3 and at the same time the other shareholder(s), who don't consume energy generated from the plant, will have no effect on the captive consumer status of the consumer(s) who fulfills the criteria prescribed in Rule 3.

16. For more clarification, let us explain by an example.

(a) Suppose there are total five shareholders in a plant with names as A, B, C, D and E. Out of these five shareholders, D and E don't consume any energy generated from the plant i.e. the consumption of D and E from the plant are zero. In this situation, other shareholders i.e. A, B and C can qualify as captive consumer(s) subject to fulfillment of the criteria prescribed in Rule 3 . D and E don't have any role in the

further process of verifying captive status of rest of the shareholder(s) i.e. A, B and C.

(b) Further, let us assume that A and B have achieved Unitary Qualifying Ratio as mentioned in para 44 of the Hon'ble Supreme Court's Judgment i.e. A and B have Unitary Qualifying Ratio more than 1.764 (1.96 – 10% of 1.96). But C has failed to achieve the ratio prescribed i.e. C has Unitary Qualifying Ratio less than 1.764. In this situation, C will not qualify as captive consumer but at the same time, disqualification of C will not stop A and B to qualify as captive consumer(s) if they fulfill the criteria prescribed in Rule 3 . Suppose, A and B , combinedly, have shareholding 26% or more and consumption 51% or more , in that case A and B will be qualified as captive consumers as they already have Unitary Qualifying Ratio more than 1.764 . In simple words, once C has disqualified as being a captive consumer, it will not have any role in further process of verification of A & B as captive consumer(s).

(c) It can be concluded from the example that out of total five shareholders, two shareholders (D and E) have zero consumption from the plant , thus they are already out from the race of qualification as captive consumers. Rest three shareholders (A, B and C) which are consumers also, must fulfil the conditions of 'not less than 26% shareholding, not less than 51% consumption and Unitary Qualifying Ratio more than 1.764' to qualify as captive consumers. A and B fulfill all of the above conditions but C doesn't , hence only A and B qualify as captive consumers finally, out of the initial five shareholders. Only A and B will enjoy the benefits provided to the captive consumers by the Act/Regulation.

17. Applying the aforesaid ratio of the judgment of Hon'ble APEX Court to the facts of the present case, the Commission notes that in the instant matter UTCL and AESPL are having 26% and 74% shareholding respectively in the SPV's Plant and UTCL alone consumes 100% of the energy generated by the SPV's Solar Plant. It can be observed that the present case is squarely covered by the observations of the Hon'ble APEX Court at para 26 of the Judgment wherein the APEX Court noted that a captive user who owns 26% of the CGP and consumes 51% or more of the electricity generated would qualify as a captive user. In the present case UTCL owns 26% of the plant and consuming 100% (more than 51%) of the electricity generated. Hence UTCL will qualify as captive consumer. The requirement of proportionality test will not arise here because UTCL alone fulfills the twin conditions prescribed in Rule 3 i.e. it owns 26% or more and consumes 51% or more (100% in the instant case) and other shareholder consumes zero energy generated from the plant.

18. Further, illustration 1 given at para 44 of Hon'ble Supreme Court's judgment also covers the situation arose in the instant case. In illustration 1 , 'others' own 49% shareholding but not consuming any energy generated by the plant. On the other side, A to E own 51% shareholding and consuming 100% of energy generated with unitary qualifying ratio of 1.96. Accordingly, A to E qualify as captive users. By this illustration, it can be noted that for qualifying as Captive Consumer it is not mandatory to consume energy generated from the plant by every shareholder of the plant , if the other shareholders fulfils the conditions prescribed in Rule 3. In the instant case, AESPL is having 74% shareholding and 0% consumption in the plant but this will not stop the other shareholder (UTCL) to become a Captive Consumer if it fulfils the conditions of Rule 3 , which UTCL does with 26% shareholding and more than 51% consumption.

19. In view of above, the Commission observes that the conditions with regard to 26% or more ownership and 51% or more consumption is the minimal or lowest threshold, maximum is not prescribed in the Rules. In instant matter, UTCL is having 26% ownership in the plant and consuming 100% of energy generated. UTCL is fulfilling both the conditions prescribed under Rule 3. AESPL, although, owns 74% in the CPP but consumes 0% , does not have any effect on the qualification of UTCL as captive consumer. UTCL qualifies as a captive consumer and entitled for the benefits provided to a captive consumer under the Act/Rules/Regulations i.e. UTCL being captive consumer shall not be liable to pay Cross Subsidy Surcharge (CSS) and Additional Surcharge (AS) on the captive consumption from the plant. So far as Water Cess is concerned, this doesn't fall in the purview of the Commission as it is governed by orders of the State Government.

20. The Petitioner and Respondent have raised some other contentions like Association of Person Vs SPV, Applicability of proportionality test etc. The Commission is of the considered view that Hon'ble APEX Court have dealt with all these issues in detail, even with examples, in its judgment dated 09.10.2023. In light of this, the Commission feels that it is not required to go into these issues.

21. In view of above discussion, the Commission orders that –

a) The Petitioner UTCL qualifies as captive consumer, as it is having ownership 26% or above in the plant and consumption 51% or above of electricity generated from the plant, subject to the verification of consumption and shareholding data by the licensee.

b) Subject to para (a) above, the petitioner UTCL shall not be liable to pay Cross Subsidy Surcharge (CSS) and Additional Surcharge (AS) on the captive consumption from the plant since commissioning of the

plant. For the amount recovered on account of CSS and AS, if any, from the petitioner, the Discom is directed to refund such amount in 06 equal monthly installments.

22. The matter along with IA, is disposed in above terms with no order as to cost.

(Dr. Rajesh Sharma)	(Hemant Kumar Jain)	(Dr. B. N. Sharma)
Member	Member	Chairman