

N./13 of 2020

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**  
**No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

**Dated: 07.09.2021**

**Present**

<b>Shri Shambhu Dayal Meena</b>	<b>: Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>: Member</b>
<b>Shri M.D. Ravi</b>	<b>: Member</b>

**OP. No. 01/2020**

**BETWEEN**

Green Infra Wind Power Generation Limited,  
No.515 & 514, Tolstoy House,  
Tolstoy Marg New Delhi  
New Delhi-110 001.

**.... Petitioner No.1**

M/s Bright Packaging Pvt. Ltd.  
Baikampady Industrial Area,  
Mangaluru

**.... Petitioner No. 2**

(Represented by Senior Advocate Sri. Sanjay Sen,  
for Hemant Singh of M/s Charter Law Chambers, New Delhi)

**AND**

Mangalore Electricity Supply Company Limited,  
Corporate Office,  
MESCOM Bhavana  
Bejai, Kavour Cross Road,  
Mangaluru-573005

**... Respondent**

[Represented by M/s Just Law Advocates, Bengaluru]

**ORDER**

1. The present Petition is filed under Section 9(2), 42, 57, 60, 86(1)(c), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 for the following reliefs:
  - a) Declare the Harpanhalli CGP of the Petitioner is a captive generating plant, with the Petitioner No. 2 Pvt. Ltd. as its captive user, for FY2018-19;
  - b) Direct that the Respondent cannot treat the Petitioner No. 2 Pvt. Ltd. as a non-captive user of the Harpanhalli CGP of the petitioner, mid-way in a financial year;
  - c) Quash the impugned invoices dated 01.03.2019, 01.04.2019, 01.05.2019, 01.06.2019, 01.07.2019 and 01.08.2019, 01.09.2019, 01.10.2019, 01.11.2019, and Official Memorandums dated 06.03.2019, 05.04.2019, 06.05.2019, 28.05.2019, 06.07.2019, 05.08.2019, 27.08.2019, 04.10.2019 and 06.11.2019, respectively (Annexures P-9, P-14, P-17, P-20, P-22, P-24, P-10, P-15, P-18, P-21, P-23, 25, P-26, P-27, P-28, P-29 and P-30, respectively) issued by the Respondent;
  - d) Quash the impugned demand notice dated 06.11.2019 (Annexure P-31) issued by the respondent;
  - e) Direct the Respondent to treat the Petitioners, in future, as a Captive Generating Plant thereby not charging any cross Subsidy Surcharge, Additional Surcharges and differential tax on a monthly basis upon its captive user(s), in the event the application for Open Access, as per

Section 9, is made under Regulation 4(3) of the KERC (Terms and Conditions for Open Access) Regulations, 2004;

- f) Devise and formulate a mechanism for the purpose of ascertaining the captive status of the Petitioner's Harpanhalli captive Generating Plant.
  - g) Declare that the Respondent has abused its dominant position, in terms stated in the present petition;
  - h) Grant liberty to the Petitioners to claim compensation from the Respondent, through a separate petition, in the event this Commission grants prayer (f) in favour of the said Petitioners; and
  - i) Pass such other and further order or orders as this Hon'ble Commission deems fit and proper under the facts and circumstances of the present case.
2. Brief facts of the case/the material facts pleaded by the petitioners may be stated as follows:
- a) The Petitioner, Green Infra Wind Power Generation Limited (GIWPGL) is a company which owns and operates a wind based Captive Generating Plant (herein after referred to as CGP) as per G.O. dated 04.03.2016 (Annexure P1) situated at Harpanhalli. The power generated from the said captive generating plant is being sourced to the group of captive users for their self-consumption, including

Petitioner No. 2. On 01.08.2016 (Annexure P2), the Petitioner entered into WBA with KPTCL, BESCOM, CESC and GESCOM.

- b) The Petition is filed against the wrongful imposition of Cross-Subsidy Surcharge (CSS), Additional Surcharge and enhanced Electricity tax by MESCOM on captive consumer M/s Bright Packaging Pvt. Ltd. (Bright Packaging) by treating it as a non-captive user of the Petitioner mid-way during FY2018-2019 and FY2019-2020 is completely contrary to Rule-3 of the Electricity Rules, 2005. The Petitioner has submitted that as per 2<sup>nd</sup> proviso of Rule-3(1)(a)(ii) of the Electricity Rules, 2005, the respondent can verify the data collected from a captive generating plant as to whether the above Rules have been complied or not at the end of the year. The Petitioner has contended that the said verification can only be done at the end of the year and not in between and post the said exercise by the ESCOM, the same has to be further verified by the Commission in the event the ESCOM alleges that the tests of Rule-3 have not been complied with. Thus, the ESCOM cannot unilaterally, without the approval of the Commission, decide the captive status of a CGP and then impose CSS, Additional Surcharge and enhanced Electricity Tax.
- c) The Petitioner has stated that it is a captive generating plant and Bright Packaging is a captive consumer which is evident by the Wheeling and Banking Agreement dated 01.08.2016 read with Supplemental Wheeling and Banking Agreement wherein the respondent has

treated the Petitioner as a captive generating plant and the Petitioner No. 2 as a captive user. The Petitioner has also stated that BESCO in its letter dated 28.02.2019 addressed to the ESCOMs and the respondent has mentioned that the Petitioner No. 1 is a captive generating plant, while the Petitioner No. 2 is a captive user. This clearly shows that the status of the Petitioner was clearly evident to BESCO as well as the respondent.

- d) Further, as per Section 9 of EA, 2003, Regulation 4(3) of the KERC Open Access Regulations 2004 and Rule-3 of Electricity Rules, 2005, the distribution licensee has to grant the Open Access based on a statement that such access is being applied under Section 9. As per Rule-3, the complete verification of the data pertaining to fulfillment of the tests contained in the above rule can only be done at the end of the financial year, which is further subject to final verification by the Commission. In case any generator fails to satisfy Rule-3 at the end of the financial year, then the distribution licensee can levy Cross Subsidy Surcharge or levy any other charges applicable along with interest. The petitioner has to be treated as a CGP for the entire financial year starting from the date of application. As such, Cross Subsidy Surcharge, Additional Surcharge and enhanced Electricity Tax could not have been imposed in the month of February, 2019. For the purpose of captive use, the captive generating plant and the captive users are one and the same entity.

- e) In pursuance of Regulation 4(3) of the KERC Open Access Regulations 2004, the Respondent allowed the Petitioner to function as a captive generating plant and therefore the said Respondent was estopped from reneging qua the above position. Further, in addition to the argument of promissory estoppel, there was no ability which was left with the respondent for treating Petitioner as a non-captive generating plant on account of treating Petitioner No.2 as non-captive user for FY2018-2019. It is stated that Petitioner No. 2 has been illegally treated as a non-captive user, without first conducting the mandatory verification as prescribed under the 2<sup>nd</sup> proviso of Rule 3(1)(a)(ii) of the Electricity Rules, 2005.
- f) The reason put forth by the respondent for treating Petitioner No. 2 as a non-captive user is that the said user became a shareholder of the Petitioner after the commissioning of the Petitioner's captive generating plant. However, without prejudice to the settled legal position that a captive generating plant can have changes in share holdings even after the same is commissioned, it is submitted that the Petitioner No.2 was already an equity shareholder with voting rights (i.e., on 24.08.2016) before the Petitioner commissioned the 36 MW completely on 13.01.2017. Hence, on both the above counts, the Petitioner No. 2 is a captive user of the Petitioner.
- g) Further, prior to the commissioning of Phase-4 i.e., 13.01.2017 (Annexure P3), the Petitioner on 24.08.2016 (Annexure P4) had issued

48,000 equity shares with voting rights having a face value of Rs. 10 each to the Petitioner No. 2.

- h) Petitioner No. 2 was accorded captive user status by the respondent for FY2017-2018 and the power was being supplied to the said captive user by the Petitioner without levy of CSS or Additional Surcharge on a monthly basis in accordance with the exemption proviso under Section 42(2) and (4) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005. This clearly goes to show that the respondent was well aware of the fact that Petitioner No. 2 was a captive user and was availing the supply of power from the Harpanhalli CGP of the Petitioner for FY18 (i.e., from April, 2017) and the respondent never disputed the captive status of Petitioner No. 2 and the power was wheeled under the captive mode. Further, the Respondent, taking into consideration Form 'C' provided by the Petitioner vide its letter dated 21.01.2019 (Annexure P6), issued an Official Memorandum (OM) dated 05.02.2019 (Annexure P7), thereby considering Petitioner No. 2 as the captive user and further permitted the Petitioner to adjust 8,00,000 kWh in the electricity bill of the said captive user. The respondent, in the said OM categorically exempted Petitioner No. 2 from levy of CSS and Additional Surcharge.
- i) The respondent on 01.03.2019 (Annexure P9) has issued an invoice for the month of February, 2019, without providing any justification/reasoning, illegally and in blatant disregard of the statutory

provisions, read with the data/information supplied by the Petitioner, treated the said Petitioner as non-captive generating plant and consequently Petitioner No 2 as a non-captive user and thereby illegally and arbitrary imposing CSS, Additional Surcharge (AS) and enhanced electricity tax to the tune of Rs.13,09,750, Rs.1,00,750 and Rs.5,38,430 respectively. Thereafter, on 06.03.2019 (Annexure P10), the respondent once again issued the official memorandum in the middle of FY2018-2019 thereby treating the Petitioner No. 2 as non-captive and accordingly imposing CSS at the rate of Rs.1.69 per unit for the units wheeled and AS at a rate of Rs.0.13 per unit for the said units. The Impugned invoices and the impugned OM is not only in contravention of the provisions of Section 42 read with Rule 3 of the Electricity Rules, 2005, but also against the principles of natural justice as the respondent did not provide any opportunity of being heard to the Petitioner and Petitioner No. 2 before treating the said captive user as non-captive user. The Petitioner vide its letter dated 18.03.2019 (Annexure P12) requested the respondent to grant an opportunity for meeting in person for discussing the concerns. The Petitioner vide its letter dated 02.04.2019 (Annexure P13) informed the respondent that the said shares were allotted to Petitioner No. 2 on 24.08.2016 i.e. much before the commissioning of phase-4 of the said CGP i.e., on 13.01.2017. Thereafter, the respondent issued various impugned demand notices. In demand notice dated 06.11.2019 (Annexure P31) the respondent went on to impose CSS and AS and enhanced



electricity tax to the tune of Rs.1,71,14,528 for the period 01.04.2017 to 31.01.2019. it is submitted that the Harpanhalli CGP fulfills both the criteria as regards to ownership and minimum consumption for FY2018-2019 and FY2019-2020.

- j) A protocol needs to be established as to how the distribution licensees have to monitor the captive status of the captive generating plant in the state. The determination of liability on account of loss of captive status can only be determined by a State commission by validating the data collected and certified by Chief Electrical Inspector.
- k) The Petitioner in its Affidavit dated 20.08.2020 has stated that the Petitioner No. 2 under protest had made the payment of all the invoices/demands raised between February 2019 till January, 2020 amounting to Rs.1,68,88,486. It is stated that after the month of February, 2020, the Petitioner No. 1 stopped sourcing power to Petitioner No. 2. Thereafter, Petitioner No. 1 resumed sourcing captive power to the Petitioner No. 2 from the month of June, 2020. However, the respondent again levied the CSS, Additional Surcharge and enhanced electricity tax for the month of June, 2020 on 01.07.2020 (Annexure A). The same was not paid by the Petitioner No.2 due to pendency of the present petition.
3. Upon notice, the Respondent has filed the statement of objections in detail, the gist of the same is as follows:

- a) The Respondent has observed that the entities which are consuming power generated by the Petitioner No.1 are not meeting the criteria of a captive user since the Petitioner No.2 was made a shareholder to the petitioner No.1 subsequent to the commissioning of the plant of Petitioner No.1. A power plant can qualify to be a captive generating plant when it is set up by consumers to utilize the energy generated primarily for their own consumption. The respondent has submitted that consumers cannot acquire right in an already established Captive generating plant and same has been clarified by this Commission in its letter dated 18.09.2019 (Annexure R-1) and by the Government of Karnataka in its Order dated 17.07.2019 (Annexure R-2). In the present case, subsequent to the commissioning of the plant, Petitioner No.2 has been made a shareholder in the generating company of Petitioner No. 1. In view of the same, the Petitioner No 2 does not meet the required criteria. Thus, Petitioner No.2 cannot be considered a captive user of the Petitioner No.1 herein since the Petitioner No.2 was not a shareholder from the inception of the Company. In fact, even when the plant was commissioned, it was not a shareholder. The Petitioner No. 2 was made a shareholder only on 24.08.2016, subsequent to the commissioning of the plant. Therefore, the contention of the Petitioners that all the necessary criteria have been fulfilled is untenable.

- b) The Petitioner has commissioned its first unit on 12.08.2016. Since the Petitioner has not provided any unit-wise specification of wheeling of energy to its consumers, the Respondent has considered the commissioning of plant to be on 12.08.2016. Therefore, Petitioner No.2 is liable to pay cross subsidy surcharge to the distribution company in terms of Section 42 of the Electricity Act 2003. It was submitted that the demand for payment of cross subsidy surcharge that has been impugned in the present petition has been issued strictly in accordance with law. Cross subsidy has been computed in keeping with the tariff determined by the Commission from time to time, depending upon the tariff category of the Petitioner. Further, the Respondent has computed electricity tax in accordance with the Karnataka Electricity (Taxation on Consumption or Sale(Amendment) Act 2018. It is submitted that there is absolutely no infirmity in the same.
- c) As regards the contention of the Petitioner with regard to lack of jurisdiction is concerned, it is submitted that Section-42 of the Electricity Act, 2003 specifically empowers the ESCOM to levy and collect cross subsidy surcharge. In order to exercise the said power, the ESCOM examines the material available on record to come to its conclusion. Further, the Electricity Rules, 2005 do not restrict the distribution licensee from verifying the captive status in between the financial year. Therefore, the question of adjudicating the issue would not arise at all. This Commission would only step in in the event of a dispute

arising between the parties. Hence, the averment that the Respondent has usurped the jurisdiction of this Commission and has acted in a high handed manner is untenable and denied.

- d) It is also submitted that the contention of the petitioners that the Respondent has usurped its dominant position is wholly untenable. The Electricity Act 2003 and the Electricity Rules 2005 empower the utility to examine whether the criteria with regard to captive consumption is met or not. In the case on hand, the Respondent has carried out that exercise strictly within the confines of law and found that the Petitioner does not conform to the necessary requirement. Therefore, the Respondent has raised the impugned demands.
- e) The averment regarding wrongfully treating the Petitioner as a non-captive user mid-way of FY2018-19 and FY2019-20, which in turn amounts to treating the Petitioner as a non-captive generating plant, contrary to Rule-3 of the Electricity Rules, 2005 is untenable and denied. It is submitted that the Rules do not mention anywhere that verifying the CGP in between the financial year is not allowed.
- f) The averment that the Respondent itself admitted the factual position that Petitioner No.1 is a captive generating plant and Petitioner No. 2 is its captive user is untenable and denied. The averment that by way of Wheeling and Banking (W&B) Agreement dated 1.8.2016 and Supplemental W&B Agreement, the Respondent has treated Petitioner as a captive user is denied. Averment that BESCO addressed a letter

dated 28.2.2019 to other distribution licensees, mentioning that the Petitioner No.2 is captive user of Petitioner No.1 is a misleading statement.

- g) The averment that as per Rule 3, complete verification of the data pertaining to fulfilment of the tests can only be done at the end of the financial year, is untenable and denied. It is submitted that the Electricity Rules, 2005 do not prescribe anywhere that determination cannot be done in between the financial year. It is submitted that verification of the Commission is not compulsory unless there arises a dispute between the parties.
- h) The averment that in pursuant to Regulation 4(3) of the KERC (Terms and Conditions for Open Access Regulations, 2004, the Respondent allowed the Petitioner to function as a captive generating plant, and therefore Respondent was estopped from reneging qua it is untenable and denied. Averment that in addition to the argument of estoppel, no ability was left with the Respondent for treating the Petitioner as non-captive Generating plant on account of treating the Petitioner No.2 as non-captive user for the FY 2018-19 is untenable and denied.
- i) The Respondent has considered the commissioning date to be 12.8.2016 since Petitioner has not placed on record any unit-wise specification regarding energy consumption of captive users. Since the Petitioner was not a shareholder on 12.8.2016 i.e., commissioning date, it is not considered as a captive user.

- j) The averment that the Respondent has issued the official Memorandum dated 05.02.2019, thereby considering Petitioner No. 2 as captive user of the Harpanhalli CGP of the Petitioner and permitted to adjust the electricity to the bill of the captive user is untenable.
- k) The averment that the status of Petitioner No. 2 as a captive user of the Petitioner was clear to BESCO as well as the Respondent is denied. The averment that Respondent was aware that Petitioner No.2 fulfilled the criteria for being treated as a captive user and that Petitioner is a CGP is untenable and denied.
- l) The averment that a CGP can have changes in shareholding even after the same is commissioned is untenable and denied. It is submitted that the Petitioner has 4 units and the first one was commissioned on 12.8.2016 when Petitioner No.2 was not a shareholder of the company belonging to Petitioner No. 1. It is submitted that the Petitioner No.1 did not provide any unit specific details, i.e. the specific unit of the power plant from which electricity shall be supplied to its captive users. It is submitted that in RP No. 2 of 2013 in Appeal No. 137 of 2001, the Hon'ble APTEL has held that the captive users are required to identify the unit/units of plant for captive consumption at the time of induction of equity stage itself. Therefore, the contention of the Petitioner that Petitioner No. 2 is captive user is untenable and denied.

- m) The averment that there is no restriction on share transfer of CGP before or after its commissioning is untenable and denied. It is submitted that as per KERC in its letter dated 18.9.2019 has clarified that EHT/HT consumers cannot acquire right in an already established Captive generating plant.
- n) The averment that the respondent never disputed the captive status of Petitioner No. 2 and the power wheeled for captive use in the earlier financial year FY18 is wholly untenable. It is submitted that deviation in captive status came to the notice of Respondent that the Petitioner No. 2 was not meeting the criteria of captive user, only in the month of February, 2019.
- o) The averment that BESCO has acknowledged Petitioner No. 2 vide its letter 28.2.2019 is not binding on the Respondent herein. It is submitted that Petitioner No. 2 falls under the jurisdiction of the Respondent herein and therefore, the verification of meeting criteria of captive user has to be determined by the Respondent. Hence Petitioner's contention that BESCO has permitted Petitioner to wheel electricity in February 2019 is untenable and denied.
- p) The averment that if the distribution licensee is of the opinion that a particular power plant does not qualify CGP, then the only option available is to approach the State Commission for deciding the captive status is wholly untenable and denied. It is submitted that Section 42 of the Electricity Act 2003 specifically empowers the ESCOM

(distribution licensee) to levy and collect cross subsidy surcharge and to examine the material available on record to come to its conclusion. Therefore, the contention of the Petitioner that distribution licensee has no rights is false.

4. The Petitioner in its Rejoinder dated 10<sup>th</sup> February, 2021 has submitted that the following principles emerge from Rule-3 of the Electricity Rules, 2005:
- a) The captive user(s) have to hold a minimum of 26% of equity shareholding along with voting rights in the CGP;
  - b) The captive users have to collectively consume a minimum of 51% of the aggregate electricity generated by the CGP; and
  - c) As per the second proviso of Rule 3(1)(a)(ii), in case of an association of persons, the captive users have to consume 51% of the electricity generated by the CGP, in proportion to their shareholding;
  - d) The above provisions have been interpreted by the Hon'ble APTEL in its Order in Appeal No. 171 of 2008, Appeal No. 172 of 2008 & IA Nos. 233/08 and 234/08, Appeal No. 10 of 2008 and Appeal No. 117 of 2009 in the case of Kadodara Power Pvt. Ltd. and Others Vs. Gujarat Electricity Regulatory Commission and another dated 22nd September, 2009 and has held as under:

*“21) It is submitted that the words “set up” here are important and that the person who has set up the plant alone can own captive generating plant and not the person(s) who is*



*transferee from the original owner(s). This proposition has not been accepted by the Commission in the impugned order. Nor does this proposition appeal to us. The Act nowhere prescribes that once set up by a person(s) a captive generating plant cannot be transferred to another owner. Nor does the Act say that on transfer of ownership the captive generating plant will lose its character of being captive despite fulfillment of all other conditions requiring it to be so."*

The above judgement categorically holds that equity shareholding of a CGP can be subscribed or acquired even after the said CGP has been setup or commissioned. Hence, the issue raised by the respondent whereby it has taken a stand that the captive user cannot acquire shares after commissioning of the CGP is liable to be rejected. The Petitioner No. 2 had purchased equity shares on 24.08.2016, wherein the first phase of the CGP was commissioned on 12.08.2016 and the last phase was commissioned on 13.01.2017. Hence, there is no factual basis of the assertion of the Respondent that the Petitioner No. 2 acquired shares after the commissioning of the project. It is pertinent to state that the respondent never raised any objection in relation to the induction of Petitioner No. 2 as a shareholder at the time of execution of the W&B Agreement and the supplemental W&B Agreement also considered the Petitioner No. 1 as a CGP and Petitioner No. 2 as a captive user of the CGP. Further, MESCOM has not issued the OM for sourcing of 5 lakh units by the Petitioner No.1 to the Petitioner No. 2 during July, 2020 inspite of the

Commission's Order dated 25.08.2020, 22.09.2020 and 01.10.2020 where the Commission had directed MESCOM not to take any coercive action against the Petitioner. Despite the said interim Orders, the respondent is in non-compliance by not issuing the OM.

5. The Petitioner has relied on various Judgements of the Hon'ble APTEL during the course of the Arguments.
6. We have heard the learned counsel for the parties and perused the pleadings and the submissions of the parties, the following issues arise for our consideration:

**Issue No. 1:** Whether the Petitioner No. 1 proves that it is a captive generating plant and the Petitioner No. 2 as its captive user as per the Rule 3 of the Electricity Rules 2005 for FY2018-19?

**Issue No.2:** Whether the respondent MESCOM has followed proper procedure for verification of the captive status of the Petitioner No. 2 i.e., M/s Bright Packaging Pvt. Ltd. as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005.?

**Issue No. 3:** What Order?

7. After considering the submissions of the parties and the records and documents, our findings on the above issues are in negative for the reasons stated below:
8. Since both the issues are correlated to the provisions of the Act & Rules regarding the captive status, they are answered together:

9. **Issue No. 1:** Whether the Petitioner No. 1 proves that it is a captive generating plant and the Petitioner No. 2 as its captive user as per the Rule 3 of the Electricity Rules 2005 for FY2018-19?

**Issue No.2:** Whether the respondent MESCOM has followed proper procedure for verification of the captive status of the Petitioner No. 2 i.e., M/s Bright Packaging Pvt. Ltd. as contemplated under Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005.?

- a) It is necessary to understand the provisions under the EA, 2003 and Electricity Rules, 2005 governing the captive generating plants and Group Captive consumers of the said CGP, in order to answer the above issues. Section 2(8) of the Act of 2003 defines a captive generating plant. Section 9 defines the rights and duties of captive generating plants. Rule-3 of the Electricity Rules, 2005 specifies the conditions to be fulfilled with respect to share-holding pattern and consumption pattern in order to qualify as captive generator/users. Thus, any generating plant/consumers established in accordance with Section 2(8) read with Section 9 has to fulfil conditions under Rule-3 of the Electricity Rules, 2005 with respect to share-holding pattern and consumption pattern in order to qualify as a captive generator/users.
- b) The definition under Section 2(8) and object of Section 9 of the Electricity Act, 2003 are extracted hereunder:

*“Section2(8) “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating*

*electricity primarily for use of members of such co-operative society or association;*

.....

*Section 9. (Captive generation):*

*(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*

*Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*

*Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.*

*(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*

*Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:*

*Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission."*

c) Further, a generating company established under Section 2(8) of the Act has to comply with Rule-3 of the Electricity Rules, 2005 w.r.t. holding of equity shares and proportionality of consumption of electricity by its shareholders to qualify as a captive plant. Rule 3 of the Electricity Rules, 2005 is as follows:

*“3. Requirements of Captive Generating Plan: -*

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

*(a) in case of a power plant -*

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

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

*Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;*

*(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating*

station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including -

*Explanation: -*

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

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

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

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

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

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

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

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

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

d) Thus, in accordance with Electricity Rules, 2005, it is clear that to qualify as CGP it should be set up:

(i) By a person primarily for his own use or;

(ii) By a co-operative society or association of persons primarily for the use of members of such co-operative society or association.

e) Further, conjoint reading of the definition of CGP with Rule-3 of the Rules, 2005 makes it clear that to claim the status of CGP, it should be set up by any person, co-operative society or association, etc., primarily for their own use. In other words, one should invest and setup power plant for his own use or for the use of the members of the co-operative society or association as explained in Rule 3 of the Rules,

2005. That is to say in the event, a generating plant is setup or established primarily not for the use of the person setting up of such plant but for the sale of electricity to others, such generating plant cannot be termed as CGP.

- f) The underlying objectives of allowing to set up captive plants were to attract bulk consumers to set up power plants, primarily for their own use when there was severe power shortage in the country and to entice competition in the sector. The beneficial provision with respect to captive power plant has been provided in the Act, 2003, with a view to add capacity and to secure reliable, quality and cost effective power and facilitate creation of employment opportunities through speedy and efficient growth of industries. The provision relating to captive power plants to be set up by group of persons is primarily to enable small and medium industries that may not individually be in a position to set up plant in a cost effective manner.
- g) Of late, the Commission has noticed that, generating plants, which were set up with an intention of selling the power generated (as IPPs or merchant plants) to third parties are being converted into the so called group captive plants to claim the benefits given to captive plants under the Act, 2003. Due to this, the ESCOMs are losing the CSS, etc.
- h) Accordingly, the Commission had issued a letter dated 18.09.2018, directing all the ESCOMs to monitor the captive status of



generators/users under their jurisdiction. The Commission in its letter dated 18.09.2018 had stated the following:

*“From the definition of ‘CGP, as defined in Section 2 (8) of the Act, it is clear that, unless the Power Plant, set up by a person to generate electricity, is primarily for his own use, it does not qualify as a ‘Captive Generating Plant’. Therefore, unless a Power Plant is set up by Group Captive Users themselves, primarily for their own use, they cannot claim the status of ‘Group Captive Generators/Group Captive Users’. In other words, if a group of a EHT/HT consumer acquires the right in the already set up Power Plant, he cannot claim the status of ‘Group Captive Power Plant Owners/Group Captive Users. Once it is established that the EHT/HT consumers have acquired the right in the status of Group Captive Generators/Group Captive Users by setting up the captive plants themselves, it should be verified as to whether their consumption of Electricity is as laid down in the Rule-3 of the Electricity Rules, 2005.”*

- i) Thus, the Commission in its letter mentioned above, had intended that unless a Power Plant is set up by Group Captive Users themselves, primarily for their own use, they cannot claim the status of ‘Group Captive Generators/Group Captive Users’. In other words, if a group of EHT/HT consumer acquires the right in an already set up Power Plant (which has not been established as a captive unit), it cannot claim the status of ‘Group Captive Power Plant Owners/Group Captive Users. The spirit of the letter is that an IPP or merchant power plant, cannot be converted into a CGP by merely purchasing the ownership or any

part of the ownership of IPP or merchant plant by certain consumers primarily for their own use.

- j) It is noted that the Respondent in its written submission, has contended that the Petitioner No. 2 cannot be considered as a captive consumer of the Petitioner No.-1 as it has purchased the equity shares with voting rights on 24.08.2016 i.e., after 12.08.2016 i.e., the commissioning of first unit of the power plant and since the Petitioner has not provided any unit-wise specification of wheeling of energy to its consumers, the Respondent has considered the commissioning of the power plant to be on 12.08.2016. The Respondent in its letter dated 26.04.2019 addressed to Petitioner No.1 has stated/informed that Electricity Rules, 2005 states as follows:

*"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) & (ii) of the sub clause (a) including.*

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

- k) Hence, in order to consider M/s Bright Packaging Pvt. Ltd., as Captive User in the light of above notification, the Respondent requested the Petitioner No.-1 to submit the 'C' form for the generating units HRG-5, 6, 9, 10, 12, 14, 15, 18 for the month of February, 2019 and March, 2019

and to confirm that M/s Bright Packaging Pvt. Ltd. has acquired shares of these generators. In reply to the above mentioned letter of the respondent, the petitioner in its letter dated 10.05.2019 has stated that the entire Harpanhalli Captive Generating plant was operating as CGP consisting of 18 number of Wind Turbine Generators (WTG) which were commissioned in four phases and according to applicable laws and Regulations, only one 'C' form is required to be generated for the entire 36 MW project, with only specific allocation details of each captive consumer. The Electricity Rules, 2005 permits the fulfillment of CGP condition of energy consumption by units in aggregate. The relevant portions of the Rule3(1)(b) of the Electricity Rules, 2005 are reproduced below:

*“(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;”*

- l) Further, the Respondent in its demand notice dated 06.11.2019 (Annexure P-31) addressed to Petitioner No. 2 has informed that it is sourcing partial power requirement from Petitioner No. 1, and with the

adoption of criteria as specified in the Commission letter dated 18.09.2018, the installation of Petitioner No. 2 will not qualify as Group Captive User for the Petitioner. Accordingly, the Respondent had demanded Rs.1,71,14,528 towards Cross Subsidy Surcharge, Additional Surcharge and enhanced electricity tax for the period from 01.04.2017 to 31.01.2019.

m) The respondent has stated that in accordance with the Commission's letter dated 18.09.2018 and the Government of Karnataka Order dated 17.07.2019, the consumers cannot acquire right in an already established Captive generating plant to claim the status of captive user. The Respondent has noticed in the month of February, 2019 that the allotment of shares to Petitioner No. 2 in the company belonging to Petitioner No. 1 happened after commissioning date of phase-1 and accordingly, the respondent has started issuing the impugned invoices from February, 2019. The Respondent has also contended that since the Petitioner has not provided any unit wise specification of wheeling of energy to its consumers, the Respondent has considered the commissioning of plant to be on 12.08.2016.

n) It may be noted that the Commission's letter dated 18.09.2018 does not specifically say that subsequent acquisition of a right in captive generating plant does not confer the captive status. The Government letter dated 17.07.2019 does not deal with acquisition of captive status by subsequent acquisition of shares in an already set up power plant.

Therefore, the contention in para 9 of the objection statement that “consumers cannot acquire right in an already established Captive generating plant and the same has been clarified by this Commission in its letter dated 18.09.2019 and by the Government of Karnataka in its order dated 17.07.2019” is not correct.

- o) Further, it is to be noted that in case a plant consists of only one unit, the commissioning date of the unit should be considered as the commissioning date of the plant. In case a captive generating plant consists of more than one generating units commissioned in phases having different commissioning date, in absence of any prohibition under the provisions of law, the commissioning date of the units commissioned in the last phase may be considered as the completion date of the project as a whole. As such, the contention of the Respondent that in the absence of any unit-wise specification regarding energy consumption of captive users, the commissioning date of the first phase shall be considered as the commissioning date of the plant commissioned in four phases is not correct as all the units were established for generating, wheeling and consuming energy under captive mode.
- p) On perusal of the commissioning certificates submitted by the Petitioner, it is observed that the last unit was commissioned on 13.01.2017 (Annexure P-3) and the Petitioner No. 2 has purchased the shares of the generating plant before the commissioning date of the

fourth phase. Further, the Commission also notes that since all the phases of the 36MW Harpanhalli project were established claiming to be solely for captive use, the Petitioner need not identify individual generating units wheeling power to the Petitioner No. 2 and the electricity required to be consumed by captive users' needs to be determined with reference to the whole plant in aggregate for captive use. Thus, for the reasons stated above, the contentions of the Respondent that the Petitioner should not be treated as a captive consumer as it has acquired shares of the captive generating plant subsequent to the commissioning date of the first phase and that in the absence of any unit-wise specification regarding energy consumption of captive users, the commissioning date of the first phase of a project having many phases should be considered as the commissioning date of the project is not correct.

- q) As could be seen from the language used in Rule-3 and the explanation 1(c) of sub-Rule 2, it is very clear that "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.
- r) Thus, the Commission holds that Respondent i.e., MESCOM has neither considered the share holding pattern nor the consumption pattern of the consumers of Harpanhalli plant for FY2018-2019 before holding the

Petitioner No. 2 i.e., M/s Bright Packaging Pvt. Ltd. as a non-captive consumer. Instead, MESCOM has issued the impugned demand notices only on the basis of the shares being purchased by the Petitioner no. 2 after the commissioning of the first phase of the project, by considering the commissioning date of the project as the commissioning date of the units commissioned under the first phase, which is not correct.

- s) Hence, a generating unit has to be set up in accordance with Section 2(8) of the Electricity Act, 2003, and the consumers have to satisfy the minimum consumption criteria and minimum shareholding pattern as specified under Rule 3 of the Electricity Rules, 2005. As such, the ESCOMs, in accordance with Rule-3 of the Electricity Rules, 2005, have to verify the captive status of all the captive generators and consumers with regards to minimum shareholding pattern and minimum consumption on an annual basis to confirm the captive status of any generating plant/consumers.
- t) The Commission notes that no material evidence with regards to the share-holding pattern and the total generation and consumption details of the stakeholders for FY2018-2019 has been submitted by the Petitioner no. 1 for ascertaining the captive status of its shareholders in accordance with the Electricity Rules, 2005. Unless the Petitioner places the required evidence to prove the captive status, the Commission cannot grant such relief. The first Petitioner has relied upon

the admission made by BESCO in its letter dated 28.02.2019 written to other ESCOMs including the respondent whereby the BESCO has specifically mentioned that the first Petitioner is a CGP, to contend that it is a CGP. In our considered opinion, the admission made by BESCO or any other ESCOMs is insufficient to establish the status of CGP by the Petitioner. The first Petitioner should have produced material evidence with respect to the proprietorship of the captive users not less than 26% of the ownership in the CGP for the relevant period. The first Petitioner has produced copies of share certificates relating to equity shares of certain consumers including the second Petitioner purchased in between July and August, 2016 marked as Annexure P-4. However, the first Petitioner has not produced the total equity shares issued by it in this case. Unless, the total equity shares issued is not known, it cannot be ascertained as to whether the equity share certificates produced at annexure P-4 would fulfill the requirement of minimum 26% equity share-holding in the CGP. The Commission also notes that the Petitioner has not produced any material evidence to establish the aggregate electricity generated from the wind power project of the Petitioner for the financial year i.e., FY2018-2019. Therefore, it cannot be ascertained as to whether captive consumers consumed not less than 51% of the aggregate electricity generated during that financial year.



- u) In the absence of establishing the above facts properly, the first Petitioner cannot claim that it was captive power plant for FY2018-2019. As such, the prayer of the Petitioner for declaration of the captive status of the Harpanhalli generating plant is to be dismissed by the Commission.
- v) For the reasons stated above, we hold both the issues in the negative.

10. **Issue No. 3:** What Order?

For the above reasons, the following:

**ORDER**

The petition is partly allowed holding that:

- a) The demand notices dated 01.03.2019, 01.04.2019, 01.05.2019, 01.06.2019, 01.07.2019 and 01.08.2019, 01.09.2019, 01.10.2019, 01.11.2019 based on Official Memorandums (OM) dated 06.03.2019, 05.04.2019, 06.05.2019, 28.05.2019, 06.07.2019, 27.08.2019, 04.10.2019 and 06.11.2019, respectively (Annexures P-9, P-14, P-17, P-20, P-22, P-24, P-25, P-27, P-29, P-10, P-15, P-18, P-21, P-23, P-26, P-28, and P-30, respectively) and OM dated 05.08.2019 issued by the Respondent including demand notice dated 06.11.2019 (Annexure P-31) are set aside. The respondent is at liberty to verify the captive status of Petitioner No.2 'M/s Bright Packaging Pvt. Ltd.' in the light of the observations made in this Order.
- b) The Petitioner is not entitled to relief of declaration that it is a captive generating plant with Petitioner No. 2 as its captive user for FY2018-19.
- c) The amount received if any towards cross-subsidy surcharge, Additional Surcharge and the differential electricity tax by the respondent from Petitioners, the same shall be refunded within two months from the date of this Order.

- d) All other reliefs sought for are rejected.
- e) All pending I.A's. also doesn't survive for consideration, accordingly stands disposed off.

sd/-  
(SHAMBHU DAYAL MEENA)  
Chairman

sd/-  
(H.M. MANJUNATHA)  
Member

sd/-  
(M.D. RAVI)  
Member