BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

Petition No. 31 of 2023

Date of Hearing	**:**	**29.04.2024**
Date of Order	**:**	**29.04.2024**

IN THE MATTER OF:
Petition under Section 86 (1)(f) of the Electricity Act 2003 read with Article 10.6 of the Energy Banking Agreement dated 11.05.2020 and other enabling provisions.

petitioner
M/s. Skycity Hotels Pvt. Ltd.

respondents
1. Haryana Vidyut Prasaran Nigam Ltd (HVPNL)
2. Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL)

Present on behalf of the petitioner
1. Sh. Malvika Singh, Advocate

Present on behalf of the respondents
1. Ms. Sonia Madan, Advocate, HPPC

Quorum

Shri Naresh Sardana	**Member**
Shri Mukesh Garg	**Member**

ORDER

Brief Background of the case

1. The present petition has been filed by M/s. Skycity Hotels Pvt. Ltd. seeking to set aside / quash the letters of DHBVNL dated 23.08.2021/28.01.2022/17.02.2022, vide which captive status for the FY 2019-20 onwards was denied and demand of Rs. 10,97,110/- was raised by denying the adjustment of self-produced units, due to failure of the petitioner, caused by Covid-19 pandemic, to consume 51% of the energy generated by the captive power plant of the petitioner. The petitioner has further prayed to allow carry forward/roll-over the units pertaining to FY 2019-20 and FY 2020-2021 to FY 2021-22.

2. **The petitioner has submitted as under:-**

2.1 That the petitioner is operating the hotel namely Skycity Hotel located in Gurugram, Haryana. The petitioner has also set up a 0.5 MW Captive Solar Power Plant at Village Kamalgarh, District Jhajjar, Haryana which is connected to the distribution/transmission system of the Discoms/HVPNL through 11 kV independent line from the plant to 220 kV Sub Station Badhana, Jhajjar. The petitioner executed connectivity agreement on 01.02.2019 and was granted the intra-state long-term open access on 27.01.2020.

2.2 That on 11.05.2020, the petitioner entered into a Tripartite Banking Agreement for Renewable Energy Based Power Plant with respondent no. 2. As per Article 3.8 of the Energy Banking Agreement, the petitioner is required to establish its status as a captive generating plant at the end of each financial year.

2.3 That the conditions for establishing status as a captive generating plant are as under:

(i) Submission of requisite documents/information regarding the ownership details of company along with equity shareholding with voting rights; and

(ii) Compliance with the condition to consume not less than 51% of energy generated on annual basis.

2.4 That in the event of failure to comply with Article 3.8, the petitioner is liable to pay all applicable charges for the said year from which it was exempt on account of having claimed its captive consumption status along with interest at 18% p.a. from the date of losing its status of captive.

2.5 That Article 3.8 of the Energy Banking Agreement dated 11.05.2020 is reproduced below:

"3.8 The company shall submit the requisite documents/ information regarding ownership details of company along with equity share holding with voting rights and compliance of condition to consume not less than 51% of energy generated on annual basis by the captive user (s) as per Electricity Rules, 2005 and its amendment, duly authenticated/certified by Statutory Auditor to establish that it complies with the requirement to qualify for the status of Captive Generating Plant for each financial year by 15th of April, Besides this, the company shall be required to submit any additional documents/information which may be required by UHBVN/DHBVN/HPPC to satisfy itself regarding captive status of the plant. In case, the company fails to comply with the requirement to qualify the Status of Captive Generating Plant during any contract year/financial year, the Company shall be liable to pay all applicable charges for the said year, from which it was having exemption on account of its claimed CPP status, along with interest @ 18% per annum applicable from the date of losing the status of captive. Further, Banked units, if any, shall stand lapsed and no compensation shall be provided."

2.6 That Rules 3 of the Electricity Rules 2005 provides as under:-

"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"

2.7 That Article 6 of the Energy Banking Agreement provides for Force Majeure conditions and the effect thereof on the Energy Banking Agreement. Article 6 is reproduced as under:

6.1 In the event of Force Majeure conditions like war, mutiny, riot, earthquake, hurricane, strike, tempest, accident to machinery, curtailment by SLDC for maintaining Grid Security/stability, affecting the wheeling and/or banking of power, the HVPNL/ Discoms shall have no obligation to Bank and Wheel the energy as per this agreement. However, they shall make all reasonable efforts to restore normally within 30 (thirty) days and if the same is not possible, this agreement is to be treated as temporarily suspended for the period in which Force Majeure conditions continue and in such case the DISCOM shall also make efforts to supply power to 'Captive User(s)' from its own source subject to availability and payment of charges as applicable to the power supplied to the relevant category of consumers.

6.2 During the period in which Force Majeure conditions prevail, HVPNL/Discoms shall not be liable to pay any compensation or damage or any claims whatsoever for any direct or indirect loss that may be suffered by the Captive User(s)/company on account of wheeling and/or Banking of Electricity not being performed during the period.

6.3 In case HVPNL/Discoms/HPPC, on account of any force majeure conditions or breakdown of Grid/ transmission/ distribution lines are not in a position to evacuate/ wheel the power, then HVPNL/Discoms/HPPC shall not be liable to pay any compensation or damage or any other claims whatsoever for any direct or indirect loss to the Company. HVPNL/ DISCOMs shall not also be liable to pay any compensation for any damage caused to any part of the Project resulting on account of parallel operation of the grid."

2.8 That in March 2020, the spread of COVID-19 was declared pandemic and the Government of India, in exercise of the power conferred under Section 10 of the Disaster Management Act, 2005 had issued order no. 40-3/2020-D dated 24.3.2020. As a result of the aforesaid order, a complete national lockdown was ordered and all industrial activities (particularly Hospitality Services) were shut down from the said date in order to prevent the spread of the pandemic disease. As such, the Hotel being run by the petitioner was covered thereunder.

2.9 That the lockdown imposed vide order dated 24.03.2020 was further extended till 03.05.2020 vide order dated 14.04.2020/15.04.2020 issued by the Ministry of Home Affairs, Government India, which suspended/prohibited hospitality services.

2.10 That the lockdown was further extended for a period of two weeks w.e.f. 04.05.2020 vide order dated 01.05.2020 issued by the Ministry of Home Affairs, Government of India and once again hospitality services continued to remain prohibited.

2.11 That the Hotels in Gurugram were not allowed to operate even during first unlock guidelines which remained in force till 30.06.2020. Thereafter even when the hotels were finally

allowed to operate w.e.f July, 2020 provided they were outside the “Containment Zones”, several restrictions continued to remain in place virtually throughout the FY 2020-21. The road to recovery was further marred by repeated surge and restrictions being reinforced due to onset of second wave and is still at a cross-road under the looming darkness of uncertainty and successive waves of pandemic.

2.12 That the petitioner’s hotel relies on a heavy traffic of foreign guests staying with them came to a standstill for a period of three months and continued to suffer such standstill even after lifting of lockdown. Thus, the petitioner continues to run its operations at its lowest and consequently its demand of electricity stands reduced and hence from April 2020 to March 2021 for the FY 2020-2021 the petitioner was not able to make captive use of 51% of the units produced.

2.13 That a similar issue had arisen in the states of Andhra Pradesh, Karnataka and Tamil Nadu pertaining to Captive Consumption Solar Power Generating Plants. Upon seeking advisory from the Ministry of New & Renewable Energy, these States were directed to consider permitting rollover of the banked electricity from FY 2019-20 and FY 2020-2021 to FY 2021-22.

2.14 That the respondent No.2 vide its letter dated 23.08.2021 denied captive status to the petitioner. As a result, in terms of Article 3.8 of the Energy Banking Agreement dated 11.05.2020, the respondents have claimed back all the applicable charges which the petitioner was exempted as having being “reversed” due to failure to establish captive status. Consequently, a demand of Rs. 10,09,950/- along with interest @ 18% has been raised on the petitioner as amount to be reverse-charged for FY 2020-2021 (including amount of Rs. 5,271/- for the FY 2019-20).

2.15 That the petitioner issued letters dated 31.08.2021 and 18.12.2021, re-iterating its difficulty in maintaining its captive status due to COVID-19. However, no action has been taken by the respondent till date and the petitioner is saddled with illegal demand to pay the charges.

2.16 That the sequence of facts as has arisen clearly shows that on account of the order issued by the Government of India and State Authorities in excise of the powers conferred under the Disaster Management Act, 2005; all industrial/commercial activity had been closed and even upon re-opening, numerous restrictions were in place which led to severe dent and reduction in the business and energy consumption. The aforesaid incidents could not have been contemplated. Further, it is also inherent and understood by the parties that there shall be captive consumption of electricity and that the benefit thereof would be admissible for determination of the captive status of the petitioner. It could not have been anticipated by either of the contracting parties that there shall be the spread of pandemic resulting in complete shutdown of all industrial/commercial activity or to contemplate and incorporate occurrence of such an eventuality. It has to be understood as being inherent in any contract

of commercial nature that the element of reciprocity would always be fundamental to the creation of an obligation on the part of the generator. Where the generator has been restrained from drawl of energy at the destined point, by order of the State, the agencies of the State cannot be permitted to ignore the said aspect and denial of yet claim that the consumer is obliged to pay even if he has not availed the facility/supply. The failure to consume electricity was not on account of any reason attributable to the petitioner.

2.17 That before denying the captive status to the petitioner, no opportunity of being heard much less a show cause notice has been issued to the petitioner which is in serious derogation of the principles of natural justice. Apart from adversely pre-judging the case of the petitioner, the respondents have also denied the petitioner the reasonable opportunity to place on record documents which could lead the respondents to decide the case of the petitioner differently and even favourably.

2.18 That the conduct and actions of the respondents are opposed to the Solar Power Policy, 2016, whereby the aim of the Government is to promote setting up of solar power plants. This is because the denial of captive status would take away the incentives and benefits guaranteed under the Solar Power Policy, 2016.

2.19 That the Government of Haryana in the Department of Industries and Commerce issued a notification dated 12.5.2020 whereby it waived all dues payable in the form of rent to the government/agencies and has also notified the existence of 'force majeure' in relation to the agreements with the government/agencies.

2.20 That the state agencies are themselves claiming exemption from payment of various charges to the suppliers by citing the reason of the pandemic and claiming the same to be a force majeure event. The Haryana Power Purchase Centre has served notices to various suppliers under the Power Purchase Agreements invoking Force Majeure event of the respective clauses about not being able to evacuate the contracted power due to the consequences of the lockdown. Hence, the distribution licensee of the State acknowledged existence of the Force Majeure event to claim benefit and exemption for itself but is not accepting and acknowledging the same for its consumers.

2.21 That even otherwise, all contractual provision have to be given meaningful interpretation and not an interpretation as would amount to perversity of justice or which such interpretation would be in conflict with law. In the instant case, the inability on the part of the petitioner to consume the energy cannot be attributed to be a wilful or voluntary act on the part of the petitioner. The failure has arisen on account of a mandatory compliance to the law and any such breach would have rendered action of the petitioner to be unlawful and in conflict with law. The activity of the petitioner does not fall within the permissible activities and as such, this was not a case of mere hardship/oerousness and was rather illustrative of the impossibility on the part of petitioner to act at all. It is settled law that if

performance of an act becomes impossible or unlawful, after a contract has been executed, and such impossibility is due to an event which the party undertaking the performance could not prevent, then such contract itself becomes void or 'frustrated' under Section 56 of Indian contract act which read as under:-

***Section 56. Agreement to do impossible act**.- An agreement to do an act impossible in itself is void.*

***Contract to do act afterwards becoming impossible or unlawful.-** A contract to do an act which, after the contract is made, becomes impossible, or, by reasons of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

2.22 That while dealing with the issue expounding the frustration as contemplated under Section 56 of the Contract Act, 1872, the Hon'ble Supreme Court observed in the matter of ***'Energy Watchdog versus CERC reported as (2017) 14 SCC 80'*** that the scope of Section 56 of the Contract Act is exhaustive. The word" impossible" has not been used in the said Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it maybe impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered into agreement, it can be said that a promisor/promisee finds it impossible to do the act which he had promised to do. It was further observed where the contract discharges as per its own term upon occurrence of some circumstance, the dissolution is considered to have taken place under the ambit of the Contract Act, 1872, however, where the frustration has occurred de-hors the contract, then Section 56 of the Contract Act is to be invoked. It was further clarified by the Hon'ble Supreme Court in the aforesaid judgment that frustration is not mere incidence of expense, or delay or onerousness and has to be as if it were a break in identity between the contracts as provided for and as contemplated and its performance in the new circumstance.

2.23 That Article 10.6 of the Energy Banking Agreement permits this Commission to modify/alter the conditions of the Energy Banking Agreement at the instance of either parties or suo motto after giving an opportunity of hearing to all the parties.

2.24 That as per Section 39 of the Disaster Management Act 2005, it is the duty of the State to take not only the preventive Steps rather it is also bound to take mitigating, capacity building and preparedness measures to minimize the effect of such disaster. The relevant provision is extracted below for quick reference:-

"39. Responsibilities of departments of the State Government.- *It shall be the responsibility of every department of the Government of a State to- take measures necessary for prevention of disasters, mitigation, preparedness and capacity building in accordance with the guidelines laid down by the National Authority and the State Authority;*

a) integrate into its development plans and projects, the measures for prevention of disaster and mitigation;

b) *allocate funds for prevention of disaster, mitigation, capacity-building and preparedness;*

c) xxxx

d) Review the enactments administered by it, its policies, rules and regulations with a view to incorporate therein the provisions necessary for prevention of disasters, mitigation or preparedness;

e) provide assistance, as required, by the National Executive Committee, the State Executive Committee and District Authorities, for-

f) drawing up mitigation, preparedness and response plans, capacity-building, data collection and identification and training of personnel in relation to disaster management;

g) assessing the damage from any disaster;

h) carrying out rehabilitation and reconstruction;

i) make provision for resources in consultation with the State Authority for the implementation of the District Plan by its authorities at the district level;

k) xxxxx

2.25 That Section 61 of the Disaster Management Act, 2005 further prohibits discrimination between the victims and the petitioner cannot be denied the exemptions and benefits of the notified force majeure event by some arbitrary classification on the part of the respondent Chief Engineer. The rights which accrue in favour of a party by operation of law and upon occurrence of the force majeure event cannot be restricted by an administrative order and the same cannot be curtailed.

2.26 The following prayers have been made:-

a) Direct respondents to restore the Captive Consumptive status of the petitioner Solar Power Plant from FY 2019-2020 onwards considering the force majeure event of COVID-19 Pandemic (including the complete Lockdown of 3 months and restrictions which continued to remain in force even thereafter and even till now) resulting into reduction of captive consumption below 51% of the energy generated by the captive power plant of the petitioner, as the same is not on account of any act attributable to the petitioner but was

due to the acts beyond the control of the petitioner and for which no liability could be fastened to the petitioner;

b) Direct the respondents to confirm the captive status of the petitioner for FY 2019-2020 onwards and grant credit of Solar Power Units in electricity bills of the hotel of the petitioner from FY 2019-20 onwards; and

c) Quash/set-aside the impugned order/demand letter dated 17.2.2022, 28.01.2022 and 23.08.2021 whereby illegal arbitrary and unjustified demand of Rs. 10,09,950/- along with 18% interest has been saddled/raised against the petitioner on being disqualified from its captive status; and/or

d) Direct the respondent to refund the amount of Rs. 10,97,110/- along with the interest @18% which was deposited by the petitioner on the pretext of losing the captive status; and/or

e) In the interim direct the respondents to not disconnect the electricity connection of the hotel run by the petitioner located at M/s Skycity Hotels Pvt. Ltd. SCO-1, Old Judicial Complex, Sector -15, Gurugram, Haryana); and/or.

Pass any other order(s) and/or direction(s) as may be deemed fit and proper by the Hon'ble Commission in the facts and circumstances of the present case.

3. **The reply filed by respondent no. 2 (DHBVNL): -**

3.1 That the petitioner has sought 'restoration' of its captive status; however, the petitioner has never qualified as a captive consumer on account of its failure to fulfil the requite criteria laid down under Rule 3 of the Electricity Rules, 2005 ("the Rules"). Since the petitioner never qualified for the grant of captive status, as such, the question of 'restoration' of the same does not arise. Accounting of solar energy of the petitioner was done on monthly basis on a presumption of maintaining the captive status which was scheduled to be reviewed during April 2021. However, on review of the documents submitted by the petitioner to support its captive status, it was found that the petitioner did not fulfil the Rule 3(a)(ii) of the Rules. Accordingly, for each Financial Year (FY) following separate letters were issued to the petitioner duly informing about the non-fulfillment of the captive status and seeking the recovery of the amount due: -

Memo No.	Dated	Non-Fulfilment of Captive Status for FY	Amount sought to be recovered
Ch-178/06/SE/CBO/OA	23.08.2021	2019-20	Rs.5271/-
Ch-107/10/SE/CBO/OA	23.08.2021	2020-21	Rs.10,09,950/-
Ch-179/24/SE/CBO/OA	20.02.2023	2021-22	Rs.1,97,762/-

3.2 That since the petitioner had failed to qualify as a Captive Generating Plant as such a Notice No. 651 dated 16.12.2021 was served upon the petitioner; the relevant part of which is reproduced below: -

"Subject:- Notice of amount of Rs.5270/- for FY 2019-20 and Rs.1003950/- for FY 2020-21.
R/Sir,

In the subject cited matter, it is intimated that you does not qualify the captive status for FY 2019 and 2020-21. So revised calculation is done for the open access adjustment and an amount of Rs.5270/- for FY 2019-20 and Rs.1003950 for FY 2020-21 found chargeable.

… …

It is, therefore directed to submit the said amount within 10 days, otherwise the amount to be charged in your electricity account."

However, the payment was not disbursed by the petitioner, as such another memo no. Ch-205/10/SE/CBO/OA dated 28.01.2022 was issued. The amount mentioned in the notice dated 16.12.2021 was inadvertently mentioned as Rs.10,03,950/- whereas the same was subsequently corrected vide notice dated 28.01.2022 and was correctly mentioned as Rs.10,09,950/-. Similarly, for FY 2021-22, a recovery notice dated 05.05.2023 was served upon the petitioner.

3.3 That a perusal of the above shows that sufficient time had been granted by the respondent to the petitioner for making payment. In fact, there has been a substantial time gap between the intimation given to the petitioner regarding the non-fulfilment of the captive status and the issuance of notice for recovery of the amount. The petitioner had alleged that action had been taken by the respondent in a mechanical manner and no personal hearing had been granted. However, it is submitted that there was nothing stopping the petitioner from either making representation before the answering respondent or approaching the Hon'ble Commission during the time granted to the petitioner from the intimation to the recovery of the amount due. Further, the aforesaid amount for the year FY 2019-20 and 2020-21 had been duly deposited by the petitioner on 14.02.2022 and the surcharge amount of Rs. 93160/- had also been paid by the petitioner on 18.02.2022. As such, the amount that is now being opposed by the petitioner by way of filing of the present petition had initially been deposited by the petitioner without any protest.

3.4 That it appears that the petitioner is trying to seek the benefit that has been granted to one M/s Orbit Resorts Limited (HERC/PRO-06 of 2022), vide order dated 24.08.2022 under which the Hon'ble Commission had directed to compute the percentage of self-consumption after excluding generation and consumption figures for the period April 2020 to July 2020 (four months). The said case is clearly distinguishable as in that matter the petitioner was seeking relaxation for a particular period on account of COVID pandemic. In the instant case however, as stated above, the petitioner has never qualified for the captive plant in terms of the statutory requirement since the commissioning which includes a period unaffected by any pandemic. Thus, the question of relaxation does not arise in the instant case. Without prejudice to the foregoing, even if the relaxation of the period considered in the case of M/s Orbit Resorts Private Limited is granted, the petitioner still fails to fulfil the

captive status for FY 2019-20, 2020-21, and 2021-22. As such, the present petition is nothing but an afterthought is liable to be dismissed outrightly.

3.5 That the primary issue involved in the present case is whether the condition for qualifying the captive status as mentioned in Rule 3 (a)(ii) (i.e. not less than 51% of the aggregate energy generated is consumed for own use) can be relaxed/ waived off by the respondents or by the Hon'ble Commission on the ground that the said conditions could not be met due to the Covid-19 pandemic leading to nation-wide lockdown. Whereas, the Rules are notified by the Central Government under section 176 of the Electricity Act, 2003. By way of this petition, the petitioner is trying to seek an order amending Rule 3 of the Electricity Rules, 2005, by stepping onto the legislative domain, under the garb of a judicial order, which is not permitted under law.

3.6 That the mandate of the Electricity Act, 2003 is clear to the extent that in the event captive users and captive generating plant, fail to fulfill the criteria provided under the aforesaid Rule 3 of Rules, then such users would be liable to make payment of Cross Subsidy Charges ("CSS") along with additional surcharge to the distribution licensee. Further, the petitioner already being disqualified as a captive user is deemed disqualified for the benefits of banked power in terms of the extant Regulations.

3.7 That as per the settled rules of interpretation of statutes, it is not open to the petitioner and/or Hon'ble Commission to add or diminish words from rigid statutory framework of Rule 3 of the Rules, in order to harness the desired intent, which otherwise strikes at the core foundation of such Rule. The verification of minimum shareholding and minimum consumption on proportionate basis for captive Generating Plants and captive Users has to be done strictly in term of Rule 3 of the Rules, without any deviation. The same principle is also held in the judgement passed by Hon'ble Tribunal for Electricity (Appeal No. 131 of 2020) titled as *"Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors."* The relevant paragraphs are reproduced below: -

"11.20 To answer this question, we see the decision in Appeal No. 02 and 179 of 2018 titled as "Prism Cement Limited v. MPERC & Ors.," wherein this Tribunal had the occasion of considering the said issue, as to whether the twin requirements under Rule 3 have to be determined at the end of the financial year together or only the requirement under Rule 3(1)(a)(ii) can be so determined with the exception of Rule 3(1)(a)(i) which can be verified at any given point of time. At para 9.6 of the said judgment, the following has been held by us:

"9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon'ble Supreme Court that to qualify as 'captive generating plant' under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;

a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and

b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.

Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant. It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year. ***Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin- conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year."***

11.21 This Tribunal has taken a decision in the aforesaid case of Prism Cement Limited (Supra). In terms of this decision, we see that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. ***We have to give mandate to the legislative intent as well as the law settled by us on the said issue.***

11.22 We accordingly hold that verification of minimum shareholding and minimum consumption on proportionate basis for CGPs and Captive Users has to be done strictly in terms of Rule 3 of the Rules, without any deviation and the said Rule envisages verification under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) to be at the end of financial year only*. If the Distribution Licensee delays or denies open access, in a manner to defeat the concept of captive generation and consumption, then the question of verification under the above Rules will have no meaning and purpose. Accordingly, we observe that in such a scenario, respondent No. 2 cannot benefit by its own default, and in the event, it is found that the open access was wrongfully denied or delayed, then respondent No. 2 cannot seek to claim CSS at the end of financial year.*

…

14.3

…

<u>This Appellate Tribunal in its judgment dated 18.02.2013, in Appeal No. 33 of 2012, in the matter of "M/s. Godawari Power & Ispat Ltd. Vs. The Chhattisgarh State Electricity Regulatory Commission & Ors." while dealing with the question of providing relaxation in the norms of captive consumption of at least 51% for being qualified as captive power plant/CGP on account of force majeure conditions namely, on account of collapse of the shed of its steel melting plant leading to shut down for repair and maintenance work for a few months enabling or disabling the CGP to achieve the prescribed requirement of minimum 51% consumption of the</u>

<u>total generation clearly held that if anyone of the conditions prescribed in Rule 3 of Electricity Rules 2005 is not fulfilled, the captive power plant/CGP will lose its CGP status and become a generating plant or independent power producer and accordingly the State Commission cannot relax the provisions of Rule 3 of Electricity Rules 2005 under its power to relax."</u>

<u>(Emphasis Supplied)</u>

3.8 That attention in this regard is also brought towards the decision of the Hon'ble Tribunal in Appeal No. 252 of 2014 titled as ***"MSEDCL Vs. MERC & Anr."*** and Appeal No. 316 of 2013 titled as ***"Sai Wardha Co. Limited Vs. MERC & Anr"*** wherein the Hon'ble Tribunal held as under: -

"Pertinently, a bare reading of the Rule 3 clearly establishes that the condition of 26% shareholding is to be adjudged at the threshold and not annually as opposed to the condition of 51% consumption, which can be adjudged only at the end of the financial year. Therefore, the position held by the Judgment dated 07.06.2021 in Appeal No. 131 of 2020 Tamil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission in respect of Rule 3 of Electricity Rules read with Section 2(8) while dealing Issues 2 and 3 formulated therein is wholly erroneous and fallacious.

12.13..

302. The Hon'ble Supreme Court has held that doctrine of prospective overruling not only applies to constitutional validity cases, but also applies when a matter deals with statutory interpretation. However, the same can be applied only by the Hon'ble Supreme Court under Article 32 or Article 141 of Constitution of India or by the High Courts under Article 226 of Constitution of India.

304. The Hon'ble Supreme Court has repeatedly and consistently held that when a court gives an interpretation to a particular statute or rule that interpretation is deemed to have been applied since the beginning of that statute or rule. It is always to be interpreted in the manner as interpreted and not prospectively. The Hon'ble APTEL in TNPPA Order gave two (2) interpretations, namely (i) the analysis of the thresholds of shareholding and consumption should be undertaken at the end of the year and (ii) in case of a Special Purpose Vehicle (SPV), a duly constituted company, whether doctrine of proportionality will have no application. The interpretation of Rule 3 thus should be applied from the date of notification of Rule 3 i.e. from 2005.

305. In view of the same, for FY 2014-15, FY 2015-16, FY 2016-17 and FY 2017- 18, Rule 3 should be interpreted only on two (2) counts:

1. First, the captive consumers should demonstrate compliance with twenty-six percent (26%) shareholding in the captive generating plant;

2. All the captive consumers put together who hold twenty-six percent (26%), not proportionately, have consumed fifty-one percent (51%) of power. Out of the mix of captive consumers one may have consumed ninety percent (90%) of the requisite consumption and the rest may have consumed another ten percent (10%) of required consumption, it would satisfy the requirement of consumption under Rule 3 because the doctrine of proportionality does not apply. Therefore, TNPPA Order binds all parties including this Hon'ble APETL and submissions regarding doctrine of prospective overruling do not apply in the matters."

3.9 That the Hon'ble Appellate Tribunal for Electricity in the judgement dated 18.02.2013 passed in Appeal No. 33 of 2012 titled as "***M/s Godawari Power & Ispat Limited Vs. The Chhattisgarh State Electricity Regulatory Commission & Ors."***, clearly held that the State Commission(s) cannot relax the provisions of Rule 3 of the Rules under its power to relax. Relevant paragraphs of the judgement are reproduced below:

"27. The other claim of the Appellant is that the State Commission has in an earlier case pertaining to another captive power plant in the Petition No. 17 of 2008 has considered similar force majeure conditions and relaxed the provisions under Rule 3 of the Electricity Act, 2005. When this order in Petition No. 17 of 2008 dated 25.5.2009 had been cited by the Appellant before the State Commission in order to substantiate the plea that the State Commission has got the powers for relaxation, the State Commission has rightly distinguished and clarified the said order by stating that it did not lay down that the State Commission has jurisdiction. On the other hand, that order would not be applicable to this case.

30.To Sum Up

(a) Rule 3 of Electricity Rules 2005 specifically prescribes those two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant.

Hence, the State Commission does not have any powers to relax the provisions of the Electricity Act, 2005.

(b) In the present case, the Appellant could not satisfy one of the conditions of Rule 3 viz consumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009–10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules, 2005. ***The State***

Commission does not have any power to relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant's power plant for captive use."

(Emphasis Supplied)

3.10 The Hon'ble Tribunal has re-iterated the same position in the order dated 17.05.2016 in Appeal No. 316 of 2013 titled ***as "Sai Wardha Power Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission and Ors*** while relying on M/s Godawari Power & Ispart Limited Supra. The relevant part of the judgment has been reproduced hereinunder for ready reference:

"vii) This Appellate Tribunal in its judgment dated 18.02.2013, in Appeal No. 33 of 2012, in the matter of M/s. Godawari Power & Ispat Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission & Ors. while dealing with the question of providing relaxation in the norms of captive consumption of at least 51% for being qualified as captive power plant/CGP on account of force majeure conditions namely, on account of collapse of the shed of its steel melting plant leading to shut down for repair and maintenance work for a few months unabling or disabling the CGP to achieve the prescribed requirement of minimum 51% consumption of the total generation clearly held that if anyone of the conditions prescribed in Rule 3 of Electricity Rules 2005 is not fulfilled, the captive power plant/CGP will lose its CGP status and become a generating plant or independent power producer and accordingly the State Commission cannot relax the provisions of Rule 3 of Electricity Rules 2005 under its power to relax."

3.11 Further, the Hon"ble Tribunal in order dated 20.09.2021 passed in Appeal No. 164 of 2020 titled as ***"Greenyana Solar Private Limited Vs. Haryana Electricity Regulatory Commission and Ors.",*** has held that no policy or guidelines can add or relax conditions pertaining to captive status. The relevant part of the judgment is reproduced below:

"132. The State Commission has confused the fulfillment of the 'captive status' criteria with the conditions to be fulfilled under the Solar Policy and the HAREDA Guidelines, which conditions were not even applicable on the Appellant. The criteria of 'captive status' is exclusively and exhaustively covered by the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005 and no policy or guidelines can add or relax such conditions in relation to captive status."

3.12 That in view of the settled position of law, the Hon'ble Commission is not empowered to relax the mandatory requirements of Rule 3. This Hon'ble Commission is a creature of statue and cannot assume to itself any powers which are not otherwise conferred on it. It is settled by the Hon'ble Supreme Court in the case titled as ***"Gujrat Urja Vikas Limited Vs. Solar Semiconductor Power Co. India P Limited, (2017) 16 498, para 39"***, that

under the guise of exercising its inherent power, the Hon'ble Commission cannot take recourse to exercise of a power procedure for which is otherwise specifically provided under the Act. Relevant paragraphs of the said judgement are reproduced below:

"35. Under Regulation 81, the Commission is competent to adopt a procedure which is at variance with any of the other provisions of the Regulations in case the Commission is of the view that such an exercise is warranted in view of the special circumstances and such special circumstances are to be recorded in writing. However, it is specifically provided under Section 181 that there cannot be a Regulation which is not in conformity with the provisions of the Act or the Rules. Under Regulation 82, the Commission has powers to deal with any matter or exercise any power under the Act for which no Regulations are framed meaning thereby where something is expressly provided in the Act, the Commission has to deal with it only in accordance with the manner prescribed in the Act. The only leeway available to the Commission is only when the Regulations on proceedings are silent on a specific issue. In other words, in case a specific subject or exercise of power by the Commission on a specific issue is otherwise provided under the Act or the Rules, the same has to be exercised by the Commission only taking recourse to that power and in no other manner. To illustrate further, there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act. The exercise of power which has the effect of amending the PPA by varying the tariff can only be done as per statutory provisions and not under the inherent power referred to in Regulations 80 to 82. In other words, there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or the Rules.

39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act."

(Emphasis Supplied)

3.13 That the power of relaxation cannot be exercised by this Hon'ble Commission if difficulty arises due to application of the relevant regulations. Regulation 59 of the HERC Open Access Regulations deals with the power of relaxation and Regulation 55 confers inherent power upon to this Hon'ble Commission to adopt a procedure, which is at variance with any of the provisions of these regulations in special circumstances or in public interest or to depart from such procedures. It is noteworthy that such power to relax should not have the effect of amending the regulation itself. An attempt to relax the regulations will fall out if it leads to abrogation or amendment of the Regulations.

3.14 That in present case, if rule 3 will be relaxed, it will make the rule otiose and results in amending the regulation which is not permissible. It is well settled by the Hon'ble Supreme Court in the case titled as ***"Madeva Upendra Sinar v. Union of India (1975) 3 SCC 765"*** wherein it is held that power to remove difficulty may be exercised when there is a difficulty arising in giving effect to the provisions of the Act and not of any extraneous difficulty. It is submitted that the law in this regard is settled whereby, power of relaxation cannot be exercised by this Hon'ble Commission if difficulty arises due to application of the relevant regulations. Such power of relaxation can only be utilized if difficulty arises in application of the extant regulations. Relevant paragraph of the said judgement is reproduced below:

32. The Court noted that the impugned provisions of the 1962 Order seek to alter the connotation of the expression "depreciation actually allowed". It then, towards the end, concluded:

"To sum up: the power conferred by Section 6 of Act 67 of 1949 is a power to remove a difficulty which arose in the application of the Indian Income Tax Act to the merged States: it can be exercised in the manner consistent with the scheme and essential provisions of the Act and for the purpose for which it is conferred. The impugned Order which seeks in purported exercise of the power, to remove a difficulty which had not arisen was, therefore, unauthorized."

3.15 That if the statute prescribes for a thing to be done in a particular manner, then it should be done in that manner alone and in no other manner. The petitioner is seeking relaxation/ exemption from the mandatory conditions/ qualifications stipulated in Rule 3. In this regard, attention is drawn towards a settled principle of law that if the statute prescribes for a thing to be done in a particular manner, then it should be done in that manner alone and in no other manner. The Hon'ble Supreme Court in ***"State of Uttar Pradesh v. Singhara Singh and Ors., AIR 1964 SC 358"***, held as under:

"8. The rule adopted in Taylor v. Taylor (1876) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."

Therefore, the requirements of Rule 3 cannot be varied or modified for the benefit of the petitioner.

3.16 That the mandate of a Statute is required to be followed even if it causes hardship or becomes difficult to apply. It is important to highlight at this juncture that the difficulty faced by the petitioner due to Covid-19 which allegedly prevented them from fulfilling the

conditions mandated in Rule 3 becomes irrelevant as the mandate of a Statute is required to be followed even if it causes hardship or becomes difficult to apply. In ***"Bharat Petroleum Corpn. Ltd V. Maddula Ratnavalli and Ors, (2007) 6 SCC 81"***, the Hon'ble Supreme Court observed this principle as under:

"18. We are, however, not oblivious of the legal principle that ***only because a statute causes hardship, the same may not be declared ultra vires****. (Dura Lex Sed Lex). We may, in this regard, notice certain principles:*

In Raghunath Rai Bareja and Anr. v. Punjab National Bank and Ors. MANU/SC/5456/2006 : (2007) 2SCC230 , it is stated: Learned Counsel for the respondent-Bank submitted that it will be very unfair if the appellant who is a guarantor of the loan, and director of the Company which took the loan, avoids paying the debt. While we fully agree with the learned Counsel that equity is wholly in favour of the respondent-Bank, since obviously a Bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, ***in accordance with the Latin maxim 'dura lex sed lex', which means 'the law is hard, but it is the law'. Equity can only supplement the law, but it cannot supplant or override it.****"*

(Emphasis Supplied)

3.17 That the above quoted principle has been further followed and upheld in various cases. Reference in this regard can also be made to *Madamanchi Ramappa and Anr V. Muthalur Bojjappa, [AIR 1963 SC 1633, (Para 12)]; Vijay Narayan Thatte and Ors V. State of Maharashtra and Ors, [(2009) 9 SCC 92 (Para 19)].*

3.18 Moreover, force majeure cannot apply against compliance of provisions of a statute. Thus, the contention of the petitioner that it failed in fulfilling the requirement for qualifying the captive status due to force majeure or for reasons beyond its control is immaterial. In *DSJ Communications V. Union of India and Ors, W.P.(C) 934/ 2010 judgment dated 30.07.2014 (Para 9),* the Hon'ble Delhi High Court observed that remission in custom duty which is a statutory levy cannot be allowed even if failure of petitioner to meet its export obligations is due to reasons beyond its control. Further, in the case of *Alopi Prashad and Sons vs. UOI, [1960 (2) SCR 793*, the Hon'ble Supreme Court had observed that commercial hardship shall not be a just and reasonable ground to support frustration of contract and excuse performance.

3.19 That the Hon'ble Supreme Court has settled a principle of law in *Energy Watchdog vs CERC, Civil Appeal No 5399-5400 of 2016*, that mere commercial impossibility did not amount to force majeure. In the present case, the petitioner cannot take the aid of force majeure article to waive the amount(s) which it is liable to pay to the answering respondent in terms of the extant rules and regulations. No exemption/ benefit can be allowed to

petitioner beyond the regulations. In *PTC India Ltd. Vs CERC, (2010) 4 SCC 603 (Para 54 to 56)*, the Hon'ble Supreme Court has categorically held that the Regulations framed by Commissions are binding on the commission as well as the Distribution Licensee.

3.20 That further, insofar as the reliance of the petitioner on Clause 6 of the Banking Agreement is concerned, it is submitted that in terms of Article 6 of the Energy Banking Agreement dated 29.04.2019, the DISCOMs/ the Answering respondent is not liable to compensate anything whatsoever to the petitioner herein. It is submitted that clause 6 in the Agreement which provides for force majeure contemplates only such cases which affects the wheeling or banking of power by HVPNL /Discoms due to Force Majeure. It does not contemplate a situation where the petitioner is not able to fulfill his obligations due to force majeure. In fact, Clause 6.3 specifically states that *"… …HVPNL/DISCOMs/HPPC shall not be liable to pay any compensation or damage or any other claims whatsoever for any direct or indirect loss to the Company".* Therefore, the reliance placed by the petitioner on Clause 6 is misplaced and misconstrued.

3.21 Further, insofar as the prayer of the petitioner to carry forward/ roll-over access units pertaining to FY 2019-20 and FY 2020-21 to FY 2021-22 is concerned, it is submitted that the same is contrary to Clause 3.8 of the Banking Agreement. It is evident that once the petitioner fails to qualify as captive, the banked units shall lapse. Therefore, the question of carry forward or roll over of excess units does not arise. Clause 3.8 of the banking agreement reiterates as under:

"...in case company fails to comply with the requirement to qualify the status of captive generating plant during any financial year, the company shall be liable to pay all the applicable charges for the said year, from which it was having exemption on account of its claimed CPP status, along with interest @18% per annum applicable from the date of losing the status of captive. Further banked units, if any, shall stand lapsed and no compensation shall be provided."

3.22 That Regulation 58 of the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (as amended) ("RE Regulations 2017") and the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2021 ("RE Regulations 2021") notified on 30.04.2021, envisage banking facility only to Captive generating plant. Further it contemplates carry forward of banked energy only from month to month and carry forward from one financial year to next financial year is provided only for the energy banked during the last quarter of the financial year.

3.23 That the petitioner cannot be granted any benefit contrary to the Banking Agreement which specifically provides for lapse of banked power on account of the petitioner's inability to utilise the same within the same financial year. Attention in this regard is also brought towards the order dated 24.08.2022 passed by the Hon'ble Commission in PRO-6 of 2022 titled ***M/s Orbit Resorts Limited Vs. HVPNL & Anr.***, wherein the Hon'ble Commission had denied the benefit of banking of power while observing as follows:

"Consequently, the Commission, in line with the HERC RE Regulations in vogue i.e. regulation 66(2) (reproduced below) holds that the power banked shall not be carried over from one financial year to the other as the credit for the banked power remining undrawn shall lapse at the close of the relevant financial year. Consequently, the prayer of the petitioner for roll over of the banked power from the FY 2019-20 and 2020-21 to the FY 2021-22 is rejected as devoid of merit."

3.24 That in view of the submissions made hereinabove, the present petition being devoid of merit may kindly be dismissed, in the interest of justice.

Proceedings in the Case

4. The case was heard on 29.04.2024, as scheduled in the court room of the Commission, wherein the parties mainly reiterated the contents of their petition/replies/written submissions, which for the sake of brevity and prolixity have not been reproduced herein. During the hearing, Ms. Malvika Singh, the learned counsel for the petitioner informed the Commission that faced with the financial difficulties the 0.5 MW solar power plant has been shut down. Consequently, the prayer is restricted to the refund of the amount paid in pursuant to the demand raised by the respondents and waiver of interest leviable thereon.

Commission's Order

5. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record. Upon hearing the parties, the Commission observes that the petitioner herein has sought two specific reliefs in its petition i.e. restoration of its captive status by quashing the demand raised by the respondent on account of payment of applicable charges from which it was exempted by virtue of being a CPP and also allow roll over of banked power from the FY 2019-20, FY 2020-21 to the FY 2021-22. However, during the hearing, the petitioner has restricted its prayer to the refund of the amount already paid in pursuant to the demand raised by the respondents and waiver of interest leviable thereon. The Commission observes that the demand has been raised by DHBVNL, upon non-fulfilment of the conditions prescribed in Rule 3 of the Electricity Rules, 2005, qua the captive status. Therefore, the only issue remains to be examined in the present case is the former relief sought i.e. 'captive status' which has its genesis in the Rule 3 of Electricity

Rules 2005 (hereinafter referred to as "Rules") notified by the Central Government in exercise of the powers vested in it by the Electricity Act, 2003.

6. The petitioner has set up its case that due to the unprecedented COVID – 19 pandemic and the resultant lockdown imposed by the Government vide order dated 24.03.2020 and extended till 03.05.2020, had rendered the entire hospitality industry including the hotel of the petitioner non-functional and all the activities came to a standstill. Resultantly, the criteria of minimum 51% self-consumption of electricity from its 0.5 MW solar captive power plant as per 'Rules' was not met. In support of its contentions the petitioner has relied on Section 61 of the Disaster management Act, 2005 as the fact that various State Instrumentalities have recognized COVID – 19 pandemic as a Force Majeure event and therefore the obligation imposed by the 'Rules' stands frustrated.

   Per-contra, the respondent (s) herein have opposed the aforesaid relief sought primarily on the ground that "Rules" notified by the Central Government under the enabling provisions of the Electricity Act, 2003 cannot be amended by the Hon'ble State Commission. Hence, the petitioner cannot escape payment liability of all the applicable charges during the year in which it fails the 'captive status' test laid down by the Central Government. The respondent (s) cited a few case laws including Hon'ble APTEL's order dated 18.02.2013 in Appeal No. 131 of 2020. The sum and substance of the said order cited by the respondent(s) is that the State Commission cannot relax the provisions of Rule 3 of the Electricity Rules 2005 under its power to relax. Further, reliance was placed on the Hon'ble Supreme Court Judgement in "Energy Watchdog V. CERC, Civil Appeal No. 5399-5400 of 2016", wherein it has been held 'mere commercial impossibility did not amount to force majeure' as well as the judgement in PTC India Ltd V. CERC (2010) 4 SCC 603 (Para 54 to 56) where the Apex court held that the Regulations framed by the Commissions are binding on the Commission as well ….'.

7. The Commission has carefully considered the submissions and arguments of the parties, including case laws cited, in the matter. The Commission has taken note of the judgement dated 16.08.1963 of Hon'ble Supreme Court in the case of State of Uttar Pradesh V. Singhara Singh and Ors. (Criminal Appeal No. 31 of 1962) , wherein it has been observed that *"the rule adopted in Taylor v. Taylor (1875) 1 Ch D 426, 431) is well recognized and is founded on sound principles. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed".* Further, Hon'ble Supreme Court, in its judgement dated 20.01.1960, in the matter of Alopi Parshad and Sons Ltd V. Union of India (Civil Appeal No. 693 of 1957 2 SCR 793, AIR 1960 SC 588), had decided that *"22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account*

of an uncontemplated turn of events, the performance of the contract become onerous". The Commission has also taken note of the judgement of Hon'ble Appellate Tribunal for Electricity (APTEL) dated 18.02.2013, in the matter of M/s Godawari Power & Ispat Ltd. Chattisgarh V. Chattisgarh State Electricity Regulatory Commission and Ors. (Appeal No. 3 of 2012), holding that *"….the State Commission does not have any powers to relax the provisions of the Electricity Act…" ……"The State Commission does not have any power to relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant's power plant for captive use."* The same position was re-iterated by Hon'ble APTEL in its decision dated 17.05.2016 and 07.06.2021 in the matter of *"Sai Wardha Power Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission and Ors (Appeal No. 316 of 2013) and "Tamil Nadu Power Producers Association V. Tamil Nadu Electricity Regulatory Commission (Appellate Tribunal for Electricity - Appeal No. 131 of 2020 and IA Nos 425,426,1210& 1215 of 2020",* respectively.

The Commission has carefully considered the above case law cited by the respondents in support of their contention that no relief can be granted by this Commission in disregard to the stipulation of Rule 3 i.e. minimum 51% self-consumption to be eligible for CPP status. The Commission categorically observes that this Commission has no intention of acting against the provisions of the Electricity Act, 2003, Rules and or Regulations occupying the field. By way of filing heavy briefs, this Commission cannot be nudged to traverse down a path which is statutorily impermissible. The law or the scheme of the Government cannot be tested on the anvil of majoritarian morality but only on constitutional morality.

8. Further, the Commission is of the considered view that Article 6 in the Energy Banking Agreement which provides for force majeure contemplates only such cases which affects the wheeling or banking of power by HVPNL /Discoms due to Force Majeure. It does not contemplate a situation where the petitioner is not able to fulfill his obligations due to force majeure. In fact, Clause 6.3 specifically states that *"… …HVPNL/DISCOMs/HPPC shall not be liable to pay any compensation or damage or any other claims whatsoever for any direct or indirect loss to the Company"*. Therefore, the reliance placed by the petitioner on Clause 6 is misplaced and misconstrued.

9. The Commission has examined provisions of Rules 3 of the Electricity Rules 2005 which specifically provides that a power plant to qualify as a "Captive generating plant" shall consume not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, for the captive use. The provisions of ibid rules, have been embodied in the Article 3.8 of the Energy Banking Agreement dated 11.05.2020 reproduced earlier in this order and which further provides that in case, the company fails to comply with the requirement to qualify the Status of Captive Generating Plant during any contract year/financial year, the Company shall be liable to pay all applicable charges for the said

year, from which it was having exemption on account of its claimed CPP status, along with interest @ 18% per annum applicable from the date of losing the status of captive.

10. The Commission is considerate of the fact that in the case under consideration, the Government itself, by a series of prohibitive executive order(s), including imposing penalty for violation, had imposed lockdown and a staggered opening of the economy. The legal maxim '*lex non cogit ad impossibilia'* i.e. the law does not compel a man to do that which he cannot possibly perform, is relevant in the present case. However, the Commission is constrained to observes that the petitioner has not complied with the provisions of Rule 3(a)(ii) of the Electricity Rules, 2005, qua the 'captive status', even in the FY 2019-20, whereas the outbreak of COVID and its after effects happened since 25.03.2020. Thus, the petitioner has not fulfilled the captive status since its inception.

11. Having examined the above, the Commission observes that in the similar matter of M/s Orbit Resorts Limited (HERC/PRO-06 of 2022), vide its order dated 24.08.2022, a relief was granted to the petitioner and the period effected by COVID-19 i.e. April 2020 to July 2020 (four months) were excluded in the computation of the percentage of self-consumption after excluding generation and consumption figures for the period. Thus, the sanctity of the rule of 51% remains intact. Accordingly, following the legal maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man, the Commission directs that similar relief as granted vide order dated 24.08.2022 in the case no. HERC/PRO-06 of 2022, shall also be applicable to the petitioner herein and by applying the said methodology, in case self-consumption works out to 51% or above, the demand notice of Rs. 10,97,110/- shall be set aside, any amount that has been deposited by the petitioner against the said demand notice shall be refunded by the respondent(s) and the respondent(s) shall forthwith withdraw the charges levied due to non-fulfillment of 'Captive Status' for the relevant period. However, in case the petitioner is not able to meet the criteria of 51% self-consumption, even after excluding the generation and consumption figures for the period from April, 2020 to July, 2020, it shall be liable to pay all applicable charges along with the applicable interest.

12. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 29.04.2024.

Date: 29.04.2024	(Mukesh Garg)	(Naresh Sardana)
Place: Panchkula	Member	Member