BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT PANCHKULA

HERC/petition No. 7 of 2024

Date of Hearing	**:**	**08.05.2024**
Date of Order	**:**	**14.05.2024**

In the Matter of

petition under section 86(1)(f) and (k) of the Electricity Act, 2003 read with Regulations 22, 65 to 67 of the HERC (Conduct of Business) Regulations, 2019, seeking clarification as to the determination of the captive status of the respondents for FY 2020-21

petitioner

Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Hisar

respondents

1. M/s. Piccadily Agro Industries Ltd.
2. M/s. Piccadily Hotels Pvt. Ltd

Present on behalf of the petitioner

1. Ms. Sonia Madan, Advocate

Present on behalf of the respondents

1. Shri Sanchit Gawri, Advocate
2. Mr. Ram Pal, Manager

Quorum

Shri Nand Lal Sharma	**Chairman**
Shri Naresh Sardana	**Member**
Shri Mukesh Garg	**Member**

ORDER

Brief Background of the case

1. The present petition has been filed by Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Hisar, seeking clarification with respect to the method of calculation of energy drawl for the purposes of evaluation of the captive status of the respondent, so far as the treatment of in-house power consumption and the auxiliary consumption of the sugar mill is concerned.

2. **Petitioner's submissions:-**

The petitioner has submitted that the facts leading to the filing of the present petition are as under: -

2.1 That respondent No. 1 owns and operates a Captive Generating Plant. As per Section 2(8), the term 'Captive Generating Plant' has been defined as under:

"'Section 2. (Definitions): --- In this Act, unless the context otherwise requires,--

…

(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,"*

As have been stated above, respondent No.1's 17MW Project has four generation units, however, only one unit of 5MW is captive unit. Further, the Banking Agreement had been entered between the parties for banking of upto 3MW out of the 5MW power.

2.2 That following eligibility criteria has been laid down under Rule 3 of the Electricity Rules, 2005 for the purpose of determination of Captive status:

i) Captive user shall hold not less than 26% of ownership of the Generating Plant;

ii) Captive user should consume minimum of 51% of the electricity generated for its own use.

The captive status is required to be reviewed on annual basis i.e. for every financial year.

2.3 That as such, a committee comprising of Superintending Engineer/CBO, DHBVNL and Company Secretary, DHBVNL was constituted to ascertain the captive status of the respondents. It was found that respondent No. 2 had consumed only 20.52% out of the total injected power in FY 2020-21.

2.4 That as per the Banking Agreement in case the respondent fails to qualify as a Captive Generating Plant then it would be liable to pay all such charges from which it was exempted owing to its captive status. The relevant clauses of the Banking Agreement are reproduced below for ready reference:

"3.8 … 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.

…

7.2 Events of Default:

…

c. Failure to establish status of Captive Generating Plant in any contract year."

2.5 That as such, a letter dated 06.06.2022 was issued by the petitioner to respondent no. 2 intimating regarding its disqualification from captive status**,** the relevant part of which is reproduced below:-

"After reviewing the documents, committee observed that you did not fulfill the clause no. 3(a)(ii) of Electricity Rules, 2005, regarding captive status i.e. not less than 51% of the aggregate energy generated is consumed by the captive user. So, your firm did not qualify the captive status for the FY 2020-21.

…

According, revised accounting of solar energy is done after disqualifying the captive status and found that only Rs.3,01,668/- is adjustable for FY 2020-21. However, Rs. 71,04,888/- is already adjusted during FY 2020-21 as captive user. Hence, an amount of Rs.68,03,220/- is to be reversed/charged for the FY 2020-21. Monthly adjustment sheets are attached herewith for ready reference."

2.6 That in reply to the letter issued by the petitioner, the respondent vide various letters including letter dated 20.09.2022, 27.10.2022 and 24.07.2023 submitted that the power generated from its 5MW generating unit was being used for the in-house consumption and for the consumption of its sister concern- respondent No. 2 only. Further, no PPA for sale of power has been entered into by the respondents. As such, all the units generated were meant for captive consumption. Further, the respondent relied on the judgment in the case of ***Monnet Ispat& Energy Limited etc. Vs. Union of India &Ors.*** *[Civil Appeal No. 18506-18507 of 2017 (Arising out of SLP(C)Nos.17045-17046 of 2013). D/d. 13.11.2017]* to state that 51% of the aggregate energy generated in the plant was being utilized for 'own use' of the respondents.The relevant part of the judgment is reproduced below for ready reference:

"11. The vires of Rule 3(1)(a)(ii) have been put into question in the instant cases. The High Court has rightly upheld its validity. We find that the definition of generating plant, as provided under Section 2(8) of the Act of 2003, emphasizes that ***the generation of electricity should be primarily "for his own use".*** *Similar is the expression used in fourth proviso to Sub-Section 2 of Section 38, and the fourth proviso to Sub-Section (2) of Section 42 of the Act of 2003 contains provision of no surcharge on "his own use" as contemplated therein. Thus, while exercising the power under Section 176 of the Act of 2003, it was open to specify how much minimum use should be made in order to classify a captive power plant, primarily for "his own use". Thus, the Rule cannot be said to be repugnant to, rather it carries the very intendment of, the Act and is quite reasonable.*

14. In the light of what has been discussed by this Court in Global Energy Ltd. (supra) when we examine definition of Generating Plant in section 2(8) of the Act it emphasizes setting up primarily for his own use or in case of cooperative society for use by its members. ***When we consider Rule 3()(a)(ii) of the Rules of 2005, it is clear that it provides not less than 51% of aggregate electricity generated in such plant***

determined on annual basis is consumed for captive use. The rule conforms to the requirement of section 2(8) that primarily electricity should be generated by captive generating plant for his own use/members as the case may be."

2.7 That there is no separate meter installed for monitoring of the auxiliary consumption. However, the respondent had heavily relied upon the said judgment to state that aggregate electricity generated at the plant is liable to be taken into account in place of the net RE power injected after losses and auxiliary consumption for calculation of captive consumption. The generation meter installed at generating point was not provided by the Nigam and the accuracy of this meter and equipment was not verified by UHBVNL authorities. However, the said meter was got checked through NABL and test report along with the generation data certified by the Generator was provided. In view of the data so provided, the petitioner has computed the captive consumption of the respondent plant taking into account following three scenarios –

a) **First Scenario -**Taking into account the total power injected in grid and drawl at respondent no. 2 without considering consumption made by Piccadilly Agro Industry i.e. respondent no. 1;

b) **Second Scenario -**Taking into account the total power generated after losses and auxiliary (8.5% as per RE Regulations, 2021) inclusive of consumption made by Piccadilly Agro Industry i.e. respondent no. 1 (91.5% of consumption) and total drawl by Piccadily Hotel i.e. respondent no. 2;

c) **Third Scenario -** Taking into account the total power generated after losses only and inclusive of consumption made by Piccadilly Agro Industry i.e. respondent no. 1 (100% consumption) and total drawl by Piccadilly Hotel i.e. respondent no. 2.

2.8 That in the three scenarios mentioned above, the captive consumption status of the respondent no. 1 (in percentage) is as under –

Scenario	% Captive Consumption
First Scenario	20.52%
Second Scenario	50.83%
Third Scenario	52.52%

2.9 That Rule 3 of the Electricity Rules, 2005 does not prescribe/ clarify whether the total generation or total injected energy is liable to be considered. Further, there is no clarity as to whether 'own consumption' of electricity generated by the 'generating plant' at its generating point ought to be considered as 'Captive Use' for computation of 'Captive Consumption' of a Generating Plant. Further, as to whether the auxiliary consumption by a generating unit ought to be excluded from the total generation of generated electricity for computation of 'Captive Consumption' of a generating plant.

2.10 The following prayer have been made:-

i) Pass appropriate directions/ issue necessary clarification with respect to the determination of captive status i.e.

a) Whether or not the in-house power consumption is liable to be considered for the purposes of evaluation of the captive status of the respondents; and

b) Whether the Auxiliary consumption needs to be excluded from the total generation for computation of Captive Consumption of the Plant.

ii) Pass any other order(s) and or direction(s), which the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

Proceedings in the Case

3. The case was initially heard on 27.03.2024. Wherein, Mr. Sanchit Gawri, the learned counsel for the respondents, averred that certain factually incorrect data has been placed before the Hon'ble Commission by the petitioner herein and sought time to file a reply. The respondents, filed their reply on an affidavit dated 25.04.2024.

4. **Respondent's submissions:-**

4.1 That the respondent No.1 is *inter-alia* engaged in the business of manufacturing and sale of malt spirits in India and also Ethanol, Extra Neutral Alcohol (ENA), CO2 and white crystal sugar. In its Indri facility, it has set up and installed: -

a) Sugar mill for manufacturing white crystal sugar; and

b) A distillery facility by the name 'Piccadilly Distilleries' wherein it manufactures malt spirits, ethanol, Extra Neutral Alcohol (ENA), CO2;

c) A renewable energy/ bagasse/biomass-based Co-generation Power Project of 17-Megawatt (MW) capacity i.e., four numbers. units of 6 MW, 5 MW, 3 MW and 3 MW (hereinafter referred to as the "Co-generation Power Plant") in the same manufacturing facility;

4.2 That all three above facilities/Units are located in one premises at Indri, District Karnal and are also owned and operated by the respondent No.1.

4.3 That the petitioner has premised the entire petition on only one 5 MW Unit of the respondent No.1 for qualifying the respondent No.1 with regard to captive status under Rule 3(1)(a)(ii) of Electricity Rules. This entire premise is completely incorrect and misconceived for the following reasons: -

a) In para-3 read with para-5 of the petition as well as recitle-1 of the Banking Agreement, the petitioner categorically admits that the respondent No.1 has a (i). "17 MW bagasse generating power plant with four units" and (ii). "such power plant

is owned and operated as Captive Generating Plant". Despite such admitted position, the petitioner has proceeded to presume the that only 5 MW Generating Unit as a "Captive Generating Plant" within the meaning of Section 2(8) of the Electricity Act.

b) Section 2(8) of the Electricity Act provides that a Captive Generating Plant means a "*power plant set up by any person to generate electricity primarily for his own use*". The expression used is "Power Plant" whereas the petitioner has presumed one of the generating Units out of the 4 generating Units constituting the "Power Plant" of the respondent no. 1.

c) The petitioner only considers the consumption/use by respondent no. 2 qua 5 MW Generating Unit as the Captive Use for the electricity generated by the respondent No.1 in its Co-Generation Power Plant and clearly ignores the use/consumption by distillery unit, sugar mill unit, consumption by respondent no. 2 qua other 2 Generating Units of 6 MW and 3 MW and also at generating plants/three generating units. Whereas, the aggregate of consumption of all 3 Units ought to be considered for determining the captive status of respondent no.1 co-generation power plant.

d) The petitioner is under a misconception that only consumption of electricity from a generating Unit by a separate entity through the grid qualifies to be "Captive Use" and no other form of self-consumption qualifies to be "Captive Use";

e) Whereas, the use/consumption of electricity generated from the co-generation power plant of respondent no. 1 for its other Units i.e. distillery unit, sugar mill unit and at generating station of such co-generation power plant will also qualify to be as own use within the meaning of Section 2(8) of the Electricity Act;

4.4 That the respondent no.1's power plant satisfies the test of Captive Status laid down in Section 2(8) of the Electricity Act read with Rule 3 of Electricity Rules for the FY-20-21, as per details given below:-

a) Total power/electricity generated from Co-generation Power Plant (only 3 Units were functional) 3,25,80,358 no of Units; (including auxiliary consumption and excluding transmission losses)

b) Power/electricity consumed by the respondent No.1's generating point (distillery Unit and sugar mill Unit) is no 2,52,78,067 (7,94,328+2,44,83,739) of Units;

c) Power/electricity consumed by the respondent No.2 (Hotel) Unit is 39,71,515 no of Units out of 80,96,619 no of Units exported/supplied by the respondent No.1 to the petitioner for the purposes of banking;

d) Power/electricity supplied/exported by the respondent No.1 to the petitioner for the purpose of banking under the Banking Agreement is 52,76,741 no of Units;

e) As such cumulatively, the respondent No.1 and respondent No.2 had at least consumed 2,92,49,582 no. of Units against 3,25,80,358 no of Units generated at Co-generation Power Plant. In terms of percentage, the respondent Nos.1 & 2 had cumulatively consumed 89.77% (approx.) of the aggregate electricity generated at the Co-Generation Power Plant of the respondent No.1 which is much more than the prescribed threshold of 51% as provided under Rule 3(1)(a)(ii) of Electricity Rules.

The aforesaid data is based on logbooks maintained by the respondent No.1 at its plant and also based on the UI accounts provided by the HVPNL with respect to the respondent no 1 & 2 which is further based on the data of ABT meters installed at 132 KV substation, Bhadson and 66 KV substation, Old Manaser, respectively.

A chart giving summary of power generation at Co-Generation Power Plant of the respondent No.1 and consumption by 3 Units of respondent No.1 and by respondent No.2 for the FY-2020-21 is at Annexure - R/2.

4.5 That for the reasons detailed hereinafter there is no occasion for this Hon'ble Commission to consider the 3 Case scenarios detailed in the present petition to conclude/clarify that:

a) 'Own Consumption' of generated electricity/power by Generating Plant at its generating point ought to be considered as 'Own Use' and/or 'Captive Use' for computation of 'Captive Consumption' of a Generating Plant ;

b) Generating plant is also an end user of the electricity generated therein;

c) Auxiliary consumption by a generating unit ought to be excluded from the total generation of generated electricity/power for computation of 'Captive Consumption' of a Generating Plant

4.6 That on a plain reading of the expressions "*Primary for his own use*" used in Section 2(8) of the Electricity Act and the expressions "*aggregate electricity generated in such plant*", used in Rule 3 (a)(ii) of the Electricity Rules, it is clear that any and all forms "*of own use*" of aggregate electricity generated in a power plant set up by a person/entity is required to be considered while computing the 'Captive Status' of such power plant.

4.7 That the use of expression "Captive user(s)" used in Rule 3(1)(a)(i) and its proviso as well as the expression "Captive users" in the Explanation-1 to Rule 3 (1) (a) of the Electricity Rules make it explicitly clear that there can always be more than one captive user and various forms of captive use. Accordingly, the aggregate of such Captive Use ought to be considered while computing Captive Status of a power plant.

4.8 The expressions "primary for his own use" used in Section 2(8) of the Electricity Act are in no manner restricted or qualified to say that own consumption of power generated by generating plant at its generating point ought not to be considered as

own use or captive use for computation of captive consumption of a Generating Plant. Reliance is placed on the judgment on the Hon'ble Supreme Court in "*Monnet Ispat & Energy Limited vs. UOI and Others"* reported in 2017 SCC OnLine SC 2190, the Hon'ble Supreme Court has held as under:

*"14. The vires of Rule 3(1)(a)(ii) have been put into question in the instant cases. The High Court has rightly upheld its validity. We find that the definition of generating plant, as provided under Section 2(8) of the Act of 2003, emphasizes that the generation of electricity should be primarily "**for his own use**". Similar is the expression used in fourth proviso to Sub-Section 2 of Section 38, and the fourth proviso to Sub-Section (2) of Section 42 of the Act of 2003 contains provision of no surcharge on **"his own use"** as contemplated therein. Thus, while exercising the power under Section 176 of the Act of 2003, it was open to specify how much minimum use should be made in order to classify a captive power plant, primarily for "his own use". Thus, the Rule cannot be said to be repugnant to, rather it carries the very intendment of, the Act and is quite reasonable*

18. In the light of what has been discussed by this Court in Global Energy (supra) when we examine definition of Generating Plant in section 2(8) of the Act it emphasizes setting up primarily for his own use or in case of cooperative society for use by its members. When we consider Rule 3(1)(a)(ii) of the Rules of 2005, it is clear that it provides not less than 51% of aggregate electricity generated in such plant determined on annual basis is consumed for captive use. The rule conforms to the requirement of section 2(8) that primarily electricity should be generated by captive generating plant for his own use/members as the case may be."

Further, Hon'ble Supreme Court, in the matter titled "*Chhattisgarh State Power Distribution Company Ltd. vs. Chhattisgarh State Electricity Regulatory Commission and Another*" reported in 2022 SCC OnLine SC 604, has held as under:

*"14. A combined reading of Section 9 and Clause (8) of Section 2 of the said Act would reveal that a person is entitled to construct, maintain or operate a captive generating plant. **Such a plant should be primarily for his own use**. Clause (8) of Section 2 of the said Act would further show that it includes a power plant set up by any cooperative society or association of persons for generating electricity. The requirement is that it should be primarily for the use of the members of such co-operative society or association."*

"16.It is thus clear that a person, to get benefit under Section 9 of the said Act, could be an individual or a body corporate or association or body of individuals, whether

incorporated or not. It could thus be seen that even an association of corporate bodies can establish a captive power plant. ***The only requirement would be that the said plant must be established primarily for their own use****. The fourth proviso to sub-section (2) of Section 42 of the said Act would also reveal that surcharge would not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."*

"17.Therefore, the question that would arise is as to ***whether the open access for transmitting electricity from SBPIL to SBMPL would be for own use or not****."*

"19. The provisions made in Rule 3 of the said Rules are clear. Sub-rule (1) of Rule 3 of the said Rules provides that no power plant shall qualify as a "Captive Generating Plant" under Section 9 read with Clause (8) of Section 2 of the said Act unless the conditions stated therein are fulfilled. ***The first requirement is that not less than 26% of the ownership is held by the captive user(s****). The* ***second requirement is that not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use****. ....."*

"20. Admittedly, SBMPL holds 27.6% equity shares in SBPIL. As such, the requirement of not less than 26% of shares is fulfilled by SBMPL. As already discussed hereinabove, even an association of corporate bodies can establish a power plant. Since SBMPL holds 27.6% of the ownership, the use of electricity by it would be for captive use under the provisions of the said Act. The other requirement would be that the ***consumption of SBIPL and SBMPL together should not be less than 51% of the power generated****. Admittedly,* ***the joint consumption by SBIPL and SBMPL is more than 51%****. As such, both the conditions as provided under Rule 3 of the said Rules are satisfied."*

4.9 That the justification for exclusion of auxiliary consumption by a generating unit from the total generation of generated electricity/power for computation of 'Captive Consumption' of a Generating Plant, without prejudice to each other, is as under: -

a) Regulation 2(1)(2) of Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2021 (hereinafter referred to as "RE Regulation") defines auxiliary energy consumption as under:-

"Auxiliary energy consumption' or 'AUXe' in relation to a period in case of a generating station means the quantum of energy consumed by auxiliary equipment of the generating station, and transformer losses within the generating station, expressed as a percentage of gross energy generated at the generator terminal of the generating station during the period"

b) Auxiliary consumption is a quantum of energy consumed by auxiliary equipment of the generating station of transformer losses within the generating station. By the very definition of itself it is clear that auxiliary consumption is a consumption of energy and the same requires to be excluded in view of being already consumed while computing any form of net output of any further consumption of power.

c) As per Regulation 42 of RE Regulation, 8.5% of the auxiliary energy consumed is excluded while determining the tariff for a Co-Generation Power Plant.

d) Under regulation 3 of RE Regulation, the auxiliary consumption in a Co-Generation Power Plant is excluded from the gross power output to compute the net power output.

e) Auxiliary consumption is the power consumed for operation and functioning various equipment including boiler feed pumps, id fans, water pump, RO feed pump, dosing pump, RO pump, shoot blower etc, while generating electricity at the Co-Generation Power Plant.

4.10 In view of the foregoing and without prejudice to the submissions made in the preceding paragraphs, the respondents has stated in detail as to how the Case scenarios presented by the petitioner, are factually incorrect:-

4.11 Submissions with respect to the **Case-1** scenario set up by the petitioner: -

a) Under this case, the petitioner has considered only the total power injected by the 5 MW Generating Unit by the respondent No.1 and the total drawl at respondent No.2 facility as own use/captive use. Upon such consideration the petitioner has concluded that the Captive Use of the total energy generated is 20.52% and consequently, the respondent No.1 has failed to comply with Rule 3(1)(a)(ii) of the Electricity Rules.

b) As detailed hereinabove, the consideration of Power Generation limited to 5 MW Generating Unit and limited consideration of consumption of power by the respondent No.2 at its facility is contrary to the express provisions of Section 2(8) of the Electricity Act read with Rule 3(1) of the Electricity Rules.

c) As detailed hereinabove, even otherwise, exclusion of own consumption of power generated by the respondent No.1 at its generating point of 5 MW generating Unit from the preview of Captive Use/Own Use is totally incorrect and misconceived

besides being contrary to the express provisions of Section 2(8) of the Electricity Act read with Rule 3(1) of the Electricity Rules.

d) Even otherwise, the details provided by the petitioner at Pg.50 of the petition is factually incorrect. In this regard, it is submitted as under:

i) The said purported chart does not provide for total RE Power Generation in respect of each month;

ii) The auxiliary consumption details provided are also factually incorrect;

iii) The total net RE Power injected after excluding loss and auxiliary power is also factually incorrect;

A factually correct chart only to counter the inaccuracies in the Case-1 scenario is annexed as Annexure - R/4.

4.12 Submissions with respect to the **Case-2** scenario set up by the petitioner: -

a) Under this case, the petitioner has considered:

i) total power generated by the respondent No.1 with respect to its 5 MW Generating Unit after exclusion of 'transmission losses and distribution losses' and 'auxiliary consumption' (8.5% as per RE Regulations, 2021); and

ii) total drawl at respondent No.2 facilities as 'Own Use/Captive Use'; and

iii) including 'Own Consumption' of generated electricity/power by respondent no.1 at the generating point of 5 MW Generating Unit as 'Own Use/Captive Use'; and

on the basis of purported computation at Pg.51 concluded, that only 50.83% of the total electricity generated has been consumed as Captive Use.

b) Without prejudice to any rights and contentions, it is submitted that the computation provided at Pg.51 of the petition are factually incorrect and hence denied. In this regard, it is submitted that the summary of correct computation is detailed as under:

RE Power Generated after losses & Auxiliary Consumption	97,13,971
Total Drawl (at Piccadily Agro/R-1 and Piccadily Hotel/R-2)	53,21,493
Percentage of drawl from generation	54.78%

A factually correct chart countering the inaccuracies in the Case-2 scenario is annexed Annexure -R/5.

4.13 Submissions with respect to the **Case-3** scenario set up by the petitioner:-

a) Under this case, the petitioner has considered:

i) total power generated by the respondent No.1 with respect to its 5 MW Generating Unit after exclusion of 'transmission losses and distribution losses'; and

ii) total drawl at respondent No.2 facilities as 'Own Use/Captive Use' and

iii) including 'Own Consumption' of generated electricity/power by respondent No.1 at the generating point of 5 MW Generating Unit as 'Own Use/Captive Use'; and

on the basis of purported computation at Pg.52 concluded, that only 52.52% of the total electricity generated has been consumed as Captive Use.

b) Without prejudice to any rights and contentions, it is submitted that the computation provided at Pg.52 of the petition are factually incorrect and hence denied. In this regard, it is submitted that the summary of correct computation is detailed as under:

RE Power Generated after losses	1,07,73,568
Total Drawl (at Piccadily Agro/R-1 and Piccadily Hotel/R-2)	63,81,090
Percentage of drawl from generation	59.23%

A factually correct chart countering the inaccuracies in the Case-3 scenario is annexed herewith and marked as Annexure -R/6.

4.14 In view of the submissions made in Para-8 to 11 above, the following is evidently clear:-

a) Case-1 scenario cannot be considered by any stretch of imagination for determining the "Captive Status" of respondent No.1's 5 MW Generating Unit;

b) Case-2 scenario at the highest can be said to be the correct parameter to determine the "Captive Status" of respondent No.1's 5 MW Generating Unit

c) Even otherwise, under both Case 2 & Case 3 scenario the respondent No.1's 5 MW Generating Unit qualifies the "Captive Status" considering the charts provided by the respondents.

Commission's Analysis and Order

5. The case was called for hearing on 08.05.2024, wherein the Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The petitioner herein (DHBVNL) has approached this Commission seeking clarification with respect to calculation of captive consumption for the purposes of evaluation of the captive status of the respondent, so far as the treatment of in-house power consumption and the auxiliary consumption of the sugar mill is concerned.

6. The Commission considered it appropriate to refer to the relevant provisions of the Electricity Act, 2003 as well as the Electricity Rules, 2005.

Section 2(8) of the Electricity Act 2003 defines "Captive generating plant" as under:-

"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,"

Rule 3 of the Electricity Rules, 2005, provides as under:-

"Requirements of Captive Generating Plant.-

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

(a) in case of a power plant –

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

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

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

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

The Commission observes that while determining the captive status of a generating plant, the terms & conditions as well as capacity mentioned in the banking agreement is not relevant; hence is not dwelled upon.

7. The petitioner, vide its letter dated 06.06.2022, has intimated to the respondent no. 2 that it does not qualify as a captive generating plant due to non-compliance of the condition no. 2 prescribed in the Rule 3 of the Electricity Rules, 2005 which is *'not less than 51% of the aggregate energy generated is consumed by the captive user'*. Having rejected the status of the 'captive generating plant', the petitioner (DHBVNL) has approached this Commission for issuance of necessary clarification, considering the letters from the respondent no. 2, in which the provisions of *Section 2(8) of the Act of 2003* as well as judgment on the Hon'ble Supreme Court in *"Monnet Ispat & Energy Limited vs. UOI and Others" reported in 2017 SCC OnLine SC 2190*, have been emphasized, which provides that *'captive power plants should be set up to generate electricity primarily <u>for his own use</u>' (emphasis supplied).*

8. The Commission observes that the term 'captive generating plant' has been amply defined in the Electricity Act, 2003 read with Electricity Rules, 2005 and 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 Commission is not empowered to clarify the express provisions of the statute. 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:

"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."

In this regard, the Commission also referred to the decision of Hon'ble Tribunal dated 20.09.2021 passed in Appeal No. 164 of 2020 titled as ***"Greenyana Solar Private Limited Vs. Haryana Electricity Regulatory Commission and Ors.".*** The relevant part of the judgment is reproduced below:

"132. ……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."

9. In view of the above discussions, the Commission is of the considered view that Discoms have to act strictly in accordance with the relevant provisions of the Act/Rules and while doing so can be guided by the procedure/guidelines framed by the Ministry of Power/Central Electricity Authority. Accordingly, the Discoms may also review their decision of denial of captive status to respondents and while calculating energy drawl for the purposes of evaluation of the captive status of the respondent, also refer to the draft procedure for verification of captive status of generating plants issued by the Central Electricity Authority (CEA) on 01.11.2023. The Discoms, being not aggrieved by its own decision, does not have any locus-standi to seek clarification on the provisions of the Electricity Act, 2003 or Regulations framed under the powers vested by the Electricity Act. Rather than Discoms seeking clarification, the generator may, if still aggrieved with the decision/findings of the Discom, approach this Commission

under the relevant provisions of the Electricity Act, 2003 and regulations of this Commission framed thereunder.

10. In terms of the above, the present petition is dismissed in limine, without going into the merits of the case.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 14.05.2024.

Date: 14.05.2024 Place: Panchkula	(Mukesh Garg) Member	(Naresh Sardana) Member	(Nand Lal Sharma) Chairman