

Court-II
In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 252 of 2014 and IA No.426 of 2014

Dated: 03rd June, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Maharashtra State Electricity Distribution Co. Ltd.

5th Floor, Prakashgad,
Bandra (East),
Mumbai – 400 051.

... Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission

World Trade Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 001

... Respondent

2. Wardha Power Company Ltd.

8-2-293/82/A/431/A
Road No.22, Jubilee Hills,
Hyderabad – 500 033

... Respondent(s)/Petitioner

Counsel for the Appellant(s) : Mr. G. Sai Kumar,
Ms. Sowmya Saikumar,
Ms. Pooja Nuwal,
Mr. Varun Pathak,
Ms. Nikita Chouksey,
Mr. Nitish Gupta and
Mr. Samir Malik

Counsel for the Respondent(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Buddy A. Ranganadhan
Mr. Anand K. Ganesan,
Mrs Swapna Seshadri,
Mr. Sandeep Rajpurohit,
Ms. Neha Garg
Ms. Mandakini,

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

The instant appeal has been filed under Section 111 of the Electricity Act, 2003 by Maharashtra State Electricity Distribution Co. Ltd. (in short '**MSEDCL/appellant**') against the Impugned Order dated 20.08.2014 passed by the learned Maharashtra Electricity Regulatory Commission (herein after referred to as the '**State Commission**') in Case No. 101 of 2014 and Miscellaneous Application No. 7 of 2014 in Case No.101 of 2014 on the Petition of Wardha Power Co. Ltd. (**WPCL**), against imposition of cross subsidy surcharge on its captive consumers availing open access by the distribution licensee, appellant herein, whereby the said Petition and Miscellaneous Application have been disposed of by the Impugned Order, the relevant part of which is reproduced as under:

"Summary of Rulings:

36. *The Commission in the present case, after analyzing the shareholdings of captive users, consumption of captive users and actual generation of Power Plant, rules that WPCL for FY 2013-14, considering the conditions and reasoning mentioned in paragraphs 21, 22, 24, 25, 26 and 27 of this Order, meets the criterion of shareholding of 13% and consumption of 51% (in proportion to their shareholding within a variation of 10%), for being classified as Captive Generating Plant, as per second proviso to Rule 3(1) (ii) of the Electricity Rules, 2005. Accordingly, the prayer (a) of WPCL gets answered.*

37. *The Commission is of the view that two consumers i.e. Facor Steels Ltd. and Spentex Industries Ltd. who asked for open access and did not consume energy under open access have been irresponsible in their roles as shareholders in a Group Captive Generating Plant and should be penalized to ensure that in future a few shareholder cannot jeopardize the agreement beneficial to many. The Commission therefore is of the opinion that such shareholder should be asked to pay a penalty. Accordingly,*

MSEDCL should submit a proposal for penalty to the Commission for approval.

38. The Commission is of the view that certain issues regarding group Captive Generating Plant has been raised in this case. These have been elaborated in Paragraph 31 and 32 of this Order. The Commission directs MSEDCL to take up this issue and approach the Government of India for seeking clarifications regarding criterion laid down in the Electricity Rules, 2005, separately.

39. The Commission shall revisit the above matter based on the clarifications received in the matter, if required, and till such time the bills raised by MSEDCL shall be live and will be kept in abeyance. Further, upon receipt of clarifications, if the Cross Subsidy Surcharge is payable by Captive Users of WPCL, the Commission rules that MSEDCL shall be eligible to recover the same along with interest.

The Petition of M/s Wardha Power Company Ltd. in Case No. 101 of 2014 and MA No. 7 of 2014 in Case No. 101 of 2014 stands disposed of accordingly.”

- 2) The respondent No.2, namely, WPCL, filed the Impugned Petition, being Petition No. 101 of 2014 under Section 42 and other applicable provisions of the Electricity Act 2003, read with Rule 3 of the Electricity Rules 2005, for declaration of compliance of obligations in respect of its 2x135 MW Captive Generating Plant (**CGP**) for the FY 2013-14 with the following prayers:

“2. WPCL’s prayers are:

- a. “Hold and declare the Captive generating units (2 x 135 MW being Unit No. 3 and 4) of the Petitioner have complied with the obligations attached to captive generating units for the financial year 2013-14 under Rule 3 of the Electricity Rules.*
- b. Hold and declare that the Petitioner and its captive consumers are entitled to all the benefits of captive power plant and captive consumption including exemption from payment of cross-subsidy surcharge;*

- c. *Pass an ad-interim ex-parte order restraining MSEDCL from claiming or raising any bill for cross-subsidy surcharge for the financial year 2013-14;*
- d. *Confirm the order as per prayer (c) above after notice to the Respondent; and*
- e. *Pass such other further order(s) as the Hon'ble Commission may deem just in the facts of the present case."*

3) Subsequently, WPCL filed an Interim Application (MA No. 7 of 2014) dated 21.05.2014 with the following prayers :

"a. "Pass and interim ex-parte order of staying the unilateral demand of cross subsidy surcharge for the year 2013-14 made by MSEDCL by communication dated 13 May, 2014 and the bills raised by MSEDCL

b. Confirm the above order after notice to MSEDCL

c. Pass such other further order(s) as the Hon'ble Commission may deem just in the facts of the present case."

4) As stated above, by the Impugned Order, the Petition being Case No. 101 of 2014 and MA No.7 of 2014 have been disposed of. The Impugned Order dated 20.08.2014, passed by the State Commission has been assailed in the instant appeal by the distribution licensee, MSEDCL.

5) The Impugned Order has been challenged by the appellant, a distribution licensee, on the following grounds:

5.1) That the learned State Commission has wrongly held Wardha Power Co. Ltd. as a captive generating plant for the FY 2013-14, which is a Special Purpose Vehicle (SPV) comprising of 16 captive users

5.2) That the State Commission has wrongly held WPCL as a CGP because minimum 51% of the power generated has to be consumed by such captive users being in proportion to their share holding subject to variation of 10% as required under Rule 3 of Electricity Rule 2005, finding that WPCL has passed the test of a minimum consumption of 51% of total electricity generated by CGP by minimum of 26% of its shareholders and has also passed the test of

proportionality of consumption of the said 51% proportionate to the shareholding in WPCL by its captive users.

- 5.3) That the State Commission has erred in applying rule, as interpreted by this Appellate Tribunal in case of Kadodara Pvt. Ltd., the State Commission has reduced the actual shareholding of India Steel Works Ltd. and M/s Sona Alloys Ltd. from .29% and .72% to .15% and .29%, respectively and then calculated the proportionality test. There was no reason to reduce the actual shareholding of these two, namely, M/s. India Steel Works Ltd and M/s. Sona Alloys Ltd. If the actual shareholding of these two companies is taken, then proportionality test would fail.
- 5.4) That the learned State Commission has erred in considering the calculations for the qualifications of the CGP w.e.f. the date of grant of open access for the three captive users out of 16 captive users in addition to reducing the shareholding percentage for the proportionality test with respect to the aforesaid two companies. Further, the State Commission has erred in not considering the two captive users who have not consumed energy during the period of 2013-14. The State Commission has not considered M/s Facor Steels Ltd. and M/s Spentex Industries Ltd. who are the captive users in the relevant period of 2013-14 and were granted open access but did not consume energy. The learned State Commission wrongly said in the Impugned Order that for abundant caution for the purpose of considering the shareholders as captive users for 2013-14 it has considered such shareholders who have actually consumed energy from the CGP for FY 2013-14. The two captive users have not been considered for the test of proportionality on the pretext of principles of natural justice.
- 5.5) That the learned State Commission has noted in the Impugned Order that the delay in grant of open access was due to non-installation of Special Energy Meter (**SEM**). The condition of installation of SEMs is mandatory in terms of the Regulation and the State Commission had in fact given relaxation of the said condition in its daily order dated 05.07.2012 in Case No. 161 of 2011. It has been stated in the said order that captive users shall install the SEM and allied CT's and allied PT's to be completed by 30.09.2012. The three consumers of captive users did not comply with the said order for installation of SEM etc. even then the appellant continued to provide open access till 30.03.2013. In order to ensure equitable treatment, the State Commission has considered

actual generation from the CGP and the actual consumption by a captive user from the date of grant of open access which is contrary to the provisions of law.

- 6) The appellant herein is a distribution licensee of the State of Maharashtra. Respondent No. 1 is the State Regulatory Commission which is empowered to discharge various functions under the provisions of Electricity Act 2003. Respondent No.2 is the power generating company which is a CGP and is a SPV.
- 7) The main contentions of the appellant in this appeal are as under:
 - 7.1) That the two consumers of WPCL, Facor Steels Ltd. and M/s Spentex Industries Ltd. who did not consume energy despite having availed open access under Section 9 of the Electricity Act, 2003 should be excluded for the determination of CGP status of the Units of the WPCL.
 - 7.2) The benefit of alleged delay in grant of open access has wrongly been given to WPCL by reduction in generation
 - 7.3) That Units 3 & 4 of WPCL have not met the qualifications for being a CGP under Electricity Act 2003 and Electricity Rules 2005. 13% shareholding requirement and 51% consumption in proportion to shareholding with variation of 10% are required to be met by Units 3 & 4 of WPCL for being classified as a CGP under Rule 3 of Electricity Rules 2005.
 - 7.4) That the State Commission has committed wrong by directing in the Impugned Order that the appellant should take up this issue regarding impact on CGP status of generating plant and approach the Government of India for seeking clarification regarding criteria laid down in the Electricity Rules 2005 separately.
- 8) We have heard Mr. G. Sai Kumar learned counsel for the appellant and Mr.Sanjay Sen, Sr. Adv., Mr. Buddy A. Ranganadhan, Mr. Anand K. Ganesan, Mrs Swapna Seshadri and Mr. Sandeep Rajpurohit learned counsel for the respondents and have gone through the written submissions including the Impugned Order along with other material available in record.
- 9) The only issue which arises for our consideration is **whether the respondent No.2/Petitioner, namely, WPCL, has fulfilled the two basic conditions of minimum 51% consumption and minimum 26% shareholding for being**

qualified as CGP as provided under Rule 3 of Electricity Rules 2005 for the FY 2013-14?

- 10) According to the appellant, in this Appeal the minimum 51% consumption of total generation has been achieved but the proportionality test could not be achieved. The State Commission in the Impugned Order has firstly held that both the conditions; firstly, minimum 51% consumption of total generation by the captive users of the CGP in proportion to their shareholding are required to be fulfilled since the two captive users have not consumed any power hence, proportionality of shareholding test failed.
- 11) To counter the contentions of the appellant: it has been vehemently argued on behalf of the respondent No.2/CGP, that following are the two conditions for captive consumption as prescribed in Rule 3 of the Electricity Rules 2005:
- (a) Consumption of minimum 51% generation by the captive consumers on an annual basis;
 - (b) Shareholding of minimum 26% by the captive consumers with respect to the captive unit or units;

These two basic conditions have to be fulfilled collectively by all the captive users. In case the minimum 51% consumption and minimum 26% shareholding is not fulfilled in any year, the entire generation is to be treated as non-captive. The conditions with regard to 51% consumption and 26% shareholding are only the minimum criteria. Rule 3 of the Electricity Rules 2005 clearly provides 'not less than' with regard to both 51% consumption and 26% shareholding. There is no restriction on higher consumption or higher shareholding, but what is to be considered for captive purposes is only the minimum criteria. In addition to the minimum 51% consumption and minimum 26% shareholding criteria, Rule 3 also prescribes that for an Association of Persons, the captive users have to use the electricity in proportion to their ownership and the same thing has been applied to a SPV as in the case of respondent No.2, herein, also by the decision dated 22.09.2009, given by this Appellate Tribunal in the *Kadodara power Pvt. Ltd. Vs. Gujarat Electricity Regulatory Commission* in Appeal No. 171 of 2008 and batch. In *Kadodara's* case, it was held by this Appellate Tribunal that the consumption and shareholding is required to be calculated at the minimum level of 51%

consumption and 26% shareholding for the test of proportionality and there is no restriction on the balance. In the reported *Kadodara* matter, the State Commission calculated the proportion of use to 100% of the total consumption without calculating 10% variation. The 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership and rest 49% of the generation could be sold to anybody including grid, distribution company and the CGP owners themselves and such calculation has to be done on an annual basis i.e. for a financial year. In the reported *Kadodara* case, it was further held that since the State Commission did not consider 10% variation while calculating 51% minimum consumption and 26% shareholding did not consider the 10% variation and the said procedure adopted by the Commission was found to be flawed.

12) The learned counsel for the generating company also contended that the contention of the appellant is, in fact, that the consumption and shareholding need to be considered even for the balance over and above the 51% consumption and 26% shareholding, which is misconceived. The expression used in Rule 3 with regard to the 51% consumption and 26% shareholding is identical, namely, '*not less than*'. However, the proportionality criteria is an individual compliance, namely, to be complied with individually by its shareholder consuming electricity. In case one shareholder does not consume in a proportionate manner, he loses the captive status. However, the other shareholders who consume in proportion do not lose their captive status. There is no such provision in the Electricity Rules, 2005. In the case in hand, for the year 2013-14, the two basic conditions of minimum 51% consumption and 26% shareholding have been fulfilled by the captive users. The consumption by the captive users of respondent No.2 is as under :

- (a) Total generation during the year 2013-14: 1189 MUs;
- (b) Total consumption by the captive consumers during 2013-14: 813.99 MUs;
- (c) Percentage of consumption by the captive consumers: 68.31%

13) According to the respondent No.2, with regard to the shareholding, the captive consumers who have consumed electricity for the year 2013-14 in aggregate hold 13.57% in the respondent No.2, which translates to 27.14% qua the Units

No.3 & 4. Thus, more than 26% of the equity shareholding is held by the captive consumes. Hence, consumption has also been in proportion to the shareholding by the captive consumers which has been duly calculated and verified by the State Commission. The details of which are given in Table under Paragraph 26 of the Impugned Order.

- 14) Further contention of respondent No.2/CGP is that the appellant has not pointed out any mistake in the calculation but has challenged the Impugned Order simply arguing that the entire shareholding of the captive users is to be taken and cannot be reduced to fulfill the minimum criteria of 26%, even in case where the open access was granted with the delay and after many months, the proportionality in consumption is to be applied for the entire year even if there was no consumption for lack of open access, when the delay in grant of open access was not attributable to the appellant as SEM (meter) was not available with the consumers and lastly, the shareholders who are over and above 26% and who have not consumed any electricity should also be considered for calculation of the proportionate consumption. The entire shareholding of the consumers cannot be reduced to fulfill the minimum criteria of 26%.
- 15) Thus the contention of the appellant that the two consumers, namely, M/s.Facor Steels Ltd. and M/s. Spentex Industries Ltd. had applied for open access but did not consume any electricity and therefore, the entire consumption by other consumers would be non-captive is misconceived because these two consumers did not even form part of the minimum 26% shareholding. Excluding the above two consumers, the 51% consumption and 26% shareholding criteria is fulfilled. Hence, there is no requirement to consider other consumers or shareholders as rightly held by this Appellate Tribunal in the case of *Kadodara*.
- 16) That the part of the Impugned Order (paragraphs 31, 32, 33 & 34), where the State Commission proposes to impose penalty on the two consumers for taking open access and not consuming electricity, has been set aside by this Appellate Tribunal in *Sai Wardha Power Company Ltd. Vs. Maharashtra State Electricity Distribution Co. Ltd.& Anr.* In Appeal No. 288 of 2014 vide order dated 08.03.2016 and in *Spentex Industries Ltd. Vs. Maharashtra Electricity*

Regulatory Commission dated 17.03.2015 in Appeal No.27 of 2015, the same issue is again sought to be raised by the appellant to prejudice consumption of electricity by captive users and impose cross subsidy surcharge which cannot be permitted.

17) **Our consideration and conclusion:**

- 17.1) In the upper part of this judgment, we have cited relevant facts, the issue involved and the submissions of the rival parties, which we do not feel necessary to reiterate here. The respondent No.2, namely, WPCL filed a Petition, being Case No. 101 of 2014 before the State Commission challenging imposition of cross subsidy surcharge on its captive users availing open access by the distribution licensee, the appellant herein. The learned State Commission by the Impugned Order dated 20.08.2014, while disposing of the said Petition after analyzing the shareholdings of the captive users, consumption of captive users and actual generation of the power plant has observed and clearly held that the respondent No.2, WPCL has fulfilled the criteria of shareholding of 13% and consumption of 51% (in proportion to their shareholding within the variation of 10%) and classified it as captive generating plant for the FY 2013-14. As per the second proviso to Rule 3(1) (ii) of the Electricity Rules, 2005, the Commission has further held in the Impugned order that the two consumers i.e. M/s. Facor Steels Ltd. and M/s. Spentex Industries Ltd. who had asked for open access but did not consume energy under the open access are irresponsible in their roles as shareholders in a Group Captive Generating Plant and should be penalized to ensure that in future a few shareholder cannot jeopardize the agreement beneficial to many. It is thus by way of the Impugned Order, the State Commission has held the respondent No.2 a CGP for FY 2013-14 holding the said two captive consumers liable to be penalized for not consuming energy under open access even after asking for the open access.
- 17.2) The Impugned Order dated 20.08.2014 has been assailed by the appellant, a distribution licensee in the instant appeal, mainly contending that the State Commission has wrongly held WPCL as a CGP because minimum 51% of the power generated has to be consumed by such captive uses in proportion to their shareholding subject to variation of 10% as required under Rule 3 of the Electricity Rules 2005 and has wrongly interpreted the said provision to Rule 3. Further, the State Commission has wrongly reduced the actual shareholding of

two captive users, namely, M/s. India Steel Works Ltd. and M/s. Sona Alloys Ltd. from .29% and .72% to .15% and .29%, respectively and then calculated the proportionality test. Particularly, when there was no reason to reduce the actual shareholding and if the actual shareholding of these two captive consumers is taken, then proportionality test would fail. Further, the State Commission has further erred in not considering the two captive users, namely, M/s. Facor Steels Ltd. and M/s. Spentex Industries Ltd. who were captive users for 2013-14 and were granted open access but did not consume any energy. Further, State Commission has wrongly considered only such shareholders who have actually consumed energy from the CGP for 2013-14.

- 17.3) It is pertinent to mention here that the very Impugned Order dated 20.08.2014, passed in the same Impugned Petition, being Case No. 101 of 2014 had been challenged by the aforesaid two captive consumers M/s. Spentex Industries Ltd. and WPCL (Respondent No. 2 herein)/Sai Wardha Power Company Ltd. by filing separate appeals, being Appeal Nos. 27 of 2015 and 288 of 2014, respectively.
- 17.4) The Court-I of this Appellate Tribunal, after hearing the Appeal No.27 of 2015, vide order dated 17.03.2015, had passed the following order:

“The Appellant is challenging the Order dated 20.08.2014 passed by the 1st Respondent - State Commission. The only grievance of the Appellant is as regards observations made by the 1st Respondent in Paragraph 37 of the impugned Order. The said paragraph reads as under:

37. The Commission is of the view that two consumers i.e., Facor Steels Ltd. and Spentex Industries Ltd. who asked for open access and did not consume energy under open access have been irresponsible in their roles as shareholders in Group Captive Generating Plant and should be penalized to ensure that in future a few shareholder cannot jeopardize the agreement beneficial to many. The Commission therefore is of the opinion that such shareholder should be asked to pay a penalty. Accordingly, MSEDCL should submit a proposal for penalty to the Commission for approval.”

The 1st respondent has been served on 19.01.2015. Affidavit of service has been filed. However, nobody is representing the 1st respondent. In the circumstances, we proceeded with hearing of this Appeal.

Counsel for the 2nd Respondent, on instructions, states that the 2nd respondent is not submitting any proposal for penalty to the 1st respondent and accordingly the 2nd respondent has written to the 1st respondent. Apart from this, on merits also we are of the opinion that the above order imposing penalty on consumers is not sustainable in law because the 1st respondent cannot impose any penalty on the consumers for not consuming energy corresponding to their share as shareholders in the group Captive Generating Plant.

In the circumstances, we allow the Appeal to the extent setting aside the direction issued in paragraph 37, which we have quoted herein-in-above. Needless to say in view thereof the present Appeal is allowed in terms of prayer clause 'C' of the Appeal, which reads as under:

“(C) Set aside the directions issued by Respondent No.1 against the Appellant in paragraph 37 of the impugned order.”

The Appeal is disposed of.”

- 17.5) The Court-II of this Appellate Tribunal after hearing Appeal No.288 of 2014 filed by CGP, namely, WPCL, subsequently changed as Sai Wardha Power Co. Ltd., vide order dated 08.03.2016 has also allowed the appeal by the following order:

“The instant appeal, being Appeal No.288 of 2014, captioned as Sai Wardha Power Company Ltd. Vs. Maharashtra State Electricity Distribution Co. Ltd. & Anr., has been filed by the appellant, a captive power generating company, namely Sai Wardha Power Company Ltd, against the order dated 20.08.2014 (Impugned Order) passed by the Maharashtra Electricity Regulatory Commission (the State Commission) challenging Paragraphs 31, 32, 33 & 34 of the Impugned Order.

...

4) We quote below the paragraphs 31, 32, 33 and 34 of the Impugned Order here as under:

“31. The Commission further noted that two shareholders i.e., M/s. Facor Steels Ltd. and M/s Spentex Industries Ltd., after seeking open access under Section 9 of the EA, 2003 (i.e. for self use), have not consumed any energy from the CGP. The Commission notes that in the present case, principle of natural justice arises, where there are multiple users of varied industries/ usage catering the requirements at different geographic locations who have come together to fulfill the Captive criterion and do not have control over the usage of each other. The Commission is of the opinion that because of default to Captive Criterion by said two shareholders, the other consumers adhering to the conditions of the Electricity Rules, 2005, should not be penalised for willful default or otherwise by two shareholders.

32. Further, the Commission is of the view that such consumers who have defaulted by asking for open access and not consuming energy under open access, have been irresponsible in their roles as shareholders in a Group Captive Generating Plant and should be penalized to ensure that in future a few shareholder cannot jeopardize the agreement beneficial to many. The Commission therefore is of the opinion that such shareholder should be asked to pay a penalty. Accordingly, MSEDCL should submit a proposal for penalty to the Commission for approval.

33. The Commission is of the view that there is not enough clarity with regards to issues elaborated in Paragraph 31 and 32 of this Order, in interpretation of Electricity Rules, 2005 required for implementation of Captive Generation Plant having multiple shareholders and accordingly the Commission directs MSEDCL to take up this issue and approach the Government of India for seeking clarifications regarding criteria laid down in the Electricity Rules, 2005, separately.

34. The Commission shall revisit the above matter based on the clarifications received in the matter, if required, and till such time the bills raised by MSEDCL shall be live and will be kept in abeyance. Further, upon receipt of clarifications, if the Cross Subsidy Surcharge is payable by Captive Users of WPCL, the Commission rules that MSEDCL shall be eligible to recover the same along with interest.”

5) A copy of the Order dated 17.03.2015, passed by Court-I of this Appellate Tribunal, in Appeal No.27 of 2015, captioned as Spentex Industries Ltd. Vs. Maharashtra Electricity Regulatory Commission & Anr., in which the same Impugned Order dated 20.08.2014 and the same paragraphs were under challenge. Court-I in its order dated 17.03.2015, had allowed the appeal, to the extent setting aside the direction issued in the Impugned Order. The Court-I in the said order has stated as under:

“Counsel for the 2nd Respondent, on instructions, states that the 2nd respondent is not submitting any proposal for penalty to the 1st respondent and accordingly the 2nd respondent has written to the 1st respondent. Apart from this, on merits also we are of the opinion that the above order imposing penalty on consumers is not sustainable in law because the 1st respondent cannot impose any penalty on the consumers for not consuming energy corresponding to their share as shareholders in the group Captive Generating Plant.”

6) After considering the matter before us, challenged in the instant appeal and also the consent of the Learned counsel for the rival parties, the same situation and further considering the observations made by Court-I in the order dated 17.03.2015 in Appeal No.27 of 2015, we allow the instant appeal, being Appeal No.288 of 2014, and set aside the Impugned Order, to the extent challenged in the appeal. Consequently, the observations made in Paragraphs 31, 32 and consequential paragraphs being paragraph Nos. 33 & 34 are hereby set aside and the instant appeal is hereby allowed.”

17.6) Thus this Appellate Tribunal vide order dated 08.03.2016 while allowing Appeal No.288 of 2014 has set aside the Impugned Order dated 20.08.2014 to the extent challenged in Appeal, namely, paragraph Nos. 31, 32, 33 & 34 of the Impugned Order and quashed the observations made by the State Commission in the said paragraphs of the Impugned Order. It is evident from the aforesaid orders, passed by Court-I & II of this Appellate Tribunal, in the aforesaid two appeals, that the two shareholders namely, M/s Facor Steels Ltd. and M/s Spentex Industries Ltd., after seeking open access have not consumed any energy from the CGP, where there are multiple users of varied industries /usage catering the requirements at different geographic locations who have come together to fulfill the captive criterion did not have the control on each other. As per the Impugned Order, such defaulting captive users should be penalised for default because for the default of such two shareholders, the other consumers adhering to the conditions of the Electricity Rules 2005 should not be penalized for the willful default of such aforesaid two shareholders so that in future the few shareholders cannot jeopardize the agreement beneficial to many. Thus the said observations or findings recorded in the aforesaid paragraphs of the Impugned Order have been set aside by Court-I & II of this Appellate Tribunal in the aforesaid two appeals. We have already dealt with

paragraphs 32, 33 & 34 of the Impugned Order in the aforesaid appeals and have set aside the remarks made therein hence, the direction given by the State Commission to the appellant/MSEDCL to take up this issue and approach Government of India for seeking clarifications regarding criteria laid down in the Electricity Rules 2005 separately and then the Commission on receiving clarifications in the matter shall re-visit the above matter, if required and till such time the bills raised by MSEDCL shall be live and will be kept in abeyance, have already been set aside.

17.7) The main contention of the appellant, which is a distribution licensee, is that the State Commission has wrongly held that the WPCL, respondent/petitioner is a captive generator for the year 2013-14, which is a SPV comprising of 16 captive users because minimum 51% of the power generated by the CGP has to be consumed by the captive users thereof in proportion to their share holding with 10% variation as prescribed under Rule 3 of the Electricity Rules 2005. According to the appellant, WPCL/petitioner cannot be held as CGP because two of its consumers did not consume any energy despite having availed open access and the said two consumers should be excluded for the determination of CGP status of units of WPCL. Another argument of the appellant is that the State Commission has committed wrong by directing the appellant that the appellant should take up the issue regarding impact of CGP status of the generating plant and approach the Government of India for seeking clarification regarding criteria laid down in the Electricity Rules 2005 separately. During the arguments, the learned counsel for the appellant candidly submits that the requirement of minimum 51% consumption of the total generation has been achieved by the CGP but the proportionate test could not be achieved because its two captive users have failed to consume any power. Hence, the proportionality of share holding test has failed.

17.8) Against the said contentions of the appellant, the learned counsel for the respondent, WPCL, contends that the two basic conditions namely, minimum 51% consumption of total generation and minimum 26% share holding are required to be fulfilled by any CGP in order to succeed as a CGP. These conditions regarding 51% consumption and 26% shareholding are only the minimum criteria as Rule 3 clearly provides '*not less than*' with regard to both minimum 51% consumption and minimum 26% shareholding. There is no restriction on the higher consumption or shareholding, but what has to be

considered for captive purpose is the only minimum criteria. This Appellate Tribunal vide judgment dated 22.09.2009 in Appeal No. 171 of 2008 and batch in the matter of *Kadodara Power Pvt. Ltd. Vs. Gujarat Electricity Regulatory Commission* (supra) clearly held that consumption and shareholding is required to be calculated at a minimum level of 51% consumption and 26% shareholding for the test of proportionality and there is no restriction on the balance.

17.9) According to the generating company, respondent No.2, the real contention of the appellant is that the consumption and shareholding are to be considered even for the balance over and above 51% consumption and 26% shareholding. The said contention is misconceived and cannot be accepted. However, the proportionality criteria, given in Rule 3 of the Electricity Rules 2005, is an individual compliance, namely, to be complied with individually by shareholders consuming electricity and in case one shareholder/captive consumer does not consume in a proportionate manner, he loses the captive status. However, the other shareholders/captive users who consume in proportion to their shareholding, do not lose their captive status if one shareholder fails to consume his proportion of electricity.

17.10) After considering rival contentions and going through the relevant provisions of law and the relevant part of the Impugned Order, we do not find any merit in the contentions of the appellant because the learned State Commission has, after analyzing the facts and circumstances and the provisions meticulously cited cogent, solid and legal reasons for reaching the said conclusion in the Impugned Order. We approve of the approach taken by the State Commission in the Impugned Order while deciding the captive status of the CGP of respondent No.2. In the instant matter, the appellant has not pointed out any mistake in the said calculation for arriving at the CGP status but has challenged the Impugned Order simply arguing that the entire shareholding of the captive users has to be taken and cannot be reduced to fulfill the minimum criteria of 26%.

17.11) We are unable to accept this contention of the appellant that served the two consumers had applied for open access but did not consume any electricity, hence, the entire consumption by the other captive consumers would be of non-captive because the said two consumers did not even form part of the 26% shareholding. Excluding the said two consumers, both the conditions of the 51% consumption and 26% shareholding have been fulfilled and hence, there is

no requirement to consider other consumers or shareholders as rightly held by this Appellate Tribunal in the *Kadodara* case. Further, Court-I and Court-II of this Appellate Tribunal, as mentioned above, in the two separate appeals filed by the two aforementioned consumers against the same Impugned Order passed in the very same petition, after going through the merits of the Impugned Order and the relevant aspect have allowed/disposed of the aforesaid appeals, being Appeal Nos. 27 of 2015 and 288 of 2014, vide judgments/orders dated 17.03.2015 and 08.03.2016, respectively. The relevant part of which judgment we have cited above. In the aforesaid appeals, this Appellate Tribunal has already set aside the observations made in paragraphs 31 and 32 and consequential paragraphs being Nos. 33 and 34 while allowing the appeal.

17.12) The learned State Commission, in the Impugned Order, after analyzing the shareholdings of the captive users, consumption of captive users and actual generation of power plant has ruled that WPCL, respondent No.2 for FY 2013-14 is a captive generating plant (CGP) as per second proviso, Rule 3 (ii) of the Electricity Rules 2005.

17.13) The other part of the Impugned Order, where the learned State Commission expressed the view that two consumers i.e. M/s. Facor Steels Ltd. and M/s. Spentex Industries Ltd. asked for open access and did not consume energy under the open access, have been irresponsible in their roles as shareholders in a group captive generating plant and should be penalized to ensure that in future a few shareholder cannot jeopardize the agreement beneficial to many and held the view that such shareholders should be asked to pay penalty. This part of the Impugned Order has been dealt with by both the Benches of this Appellate Tribunal in the aforesaid two appeals filed by the two consumers and the said view/observations expressed in the relevant paragraphs of the Impugned Order have already been set aside.

18) In view of the above discussions, we hold and confirm the view of the State Commission that the respondent No.2/petitioner namely, WPCL, has fulfilled the two basic conditions provided under Rule 3 of the Electricity Rules 2005 for being qualified as a CGP. This issue is decided against the appellant and the

appeal is worthy of dismissal. We make it clear that this is a case based on calculation for deciding the status of the respondent No.2 as CGP/CPP and not a case of relaxation in the provisions of the Electricity Act, 2003 or the Electricity Rules 2005. The Commission has taken a right approach in passing the Impugned Order.

ORDER

This appeal, being Appeal No. 252 of 2014, being without merits is hereby dismissed. The part of the Impugned order, which is under challenge before us in this appeal at the instance of the appellant, the distribution licensee, is hereby upheld. IA No. 426 of 2014 stands disposed of.

No order as to costs.

Pronounced in the open court on this **03rd day of June, 2016.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~