

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH**

**Petition No. 47 of 2022
Date of Order: 07.05.2023**

Petition under Section 86 of the Electricity Act, 2003, seeking Approval of the Procedure for determination of Captive Power Status.

AND

In the matter of: Punjab State Power Corporation Limited.

...Petitioner

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

ORDER

PSPCL has filed the present petition seeking approval of the procedure for determination of captive status of a generating plant located within the State of Punjab. The petition was admitted vide order dated 06.09.2022 and was heard on 21.09.2022. The counsel for PSPCL submitted that since the Commission is in the process of notifying the PSERC (Harnessing of Captive Power Generation) Regulations, 2022 which would have bearing on the adjudication of the petition so the matter may be heard after notification of those regulations.

The Commission, vide notification dated 27.10.2022, issued PSERC (Harnessing of Captive Power Generation) Regulations, 2022 (in short CGP Regulations, 2022). As per clause (13) of Regulation 4 of these Regulations, the procedure/guidelines along with verifying agency/authority empowered to collect the data and carrying out verification exercise to establish the captive status of a generating plant is to be separately approved by the Commission. PSPCL was directed, vide order dated 24.11.2022, to amend the procedure for verification to establish the captive status of a generating plant in accordance with the provisions of these Regulations and submit the same to the Commission. PSPCL was further directed that while drafting the procedure/guidelines, the "Model Regulations on verification of status of generating plants and captive users" approved by the Forum of Regulators (FoR) and Hon'ble APTELS order dated 07.06.2021 in A.No.131 of 2020

shall be kept in view. After amending the detailed procedure/guidelines as per the provisions of Regulations, PSPCL was directed to publish a Public Notice inviting objections/comments of the stakeholders.

PSPCL submitted the amended procedure vide CE/ARR&TR letter dated 26.12.2022 and also issued public notice inviting objections vide notice dated 06.01.2023. The public hearing was held on 18.01.2023 in the office of the Commission. However, except officers of PSPCL, none appeared before the Commission. After hearing the petitioner, the Commission raised the following issues;

1. Clause 3(viii) of the draft procedure is not in accordance with the provisions of Rule 3 of the Electricity Rules, 2005 and various orders of the Hon'ble APTEL as the verification is to be carried out at the end of the financial year and not at the time of grant of open access.
2. In clause 6.1.1 of the draft procedure, the documents to be submitted for verification of ownership for different composition of ownership have been listed. Further in clause 6.1.2, it has been mentioned that these documents are to be furnished by the generator/captive user at the time of seeking open access. This is contrary to para 11.28 of the Hon'ble APTEL order dated 07.06.2021 in A. No. 131 of 2020. Further, the requirement of documents to be submitted at the end of the financial year as listed in clause 6.1.1 may be reviewed in the light of Hon'ble APTEL's Order.
3. In clause 6.2.5 it has been provided that verification of consumption criteria and the test of proportional consumption shall be for the financial year. Further, in the table under clause 6.2.7, the verification criteria for consumption in case of Special Purpose Vehicle (SPV) has been mentioned as not less than 51% of the net electricity generated on annual basis in proportion to their share in the units identified for captive use. This is contrary to the findings of the Hon'ble APTEL as contained in para 12.19 of the order dated 07.06.2021. It has also been provided in clause 6.2.5 that in case of change in share holding pattern during the financial year, verification of consumption criteria shall be made on energy generated and

consumed in the corresponding period, which is not in line with the findings of the Hon'ble APTEL as contained in para 13.6 read with para 16.10 of the order dated 07.06.2021.

4. Clause 6.5.1 is contrary to the findings of the Hon'ble APTEL as contained in para no. 14.6 and 14.7 of the order dated 07.06.2021.
5. The provision in clause 6.1.4 that in case of any change in share holding pattern the same has to be intimated to the distribution licensee within 10 days is also not in line with the findings of the Hon'ble APTEL as contained in para 16.12 of the order dated 07.06.2021.
6. In Format I of the draft procedure, the table containing information in case of change in ownership may be inserted.
7. In Format V of the draft procedure, the banking charges to be recovered in kind in case of RE based CGPs have not been reflected. Further the grossing up of T&D losses has not been factored in for verification of consumption criteria.
8. Since the estimated amount equivalent to 51% of consumption may vary from year to year, the provision of BG as contained in clause 4.1(i) may be reviewed.
9. The rationale for time block wise accounting and submission of information/data as per format VI may be explained in view of the requirements of Rule 3 of the Electricity Rules 2005.
10. The criteria for verification of consumption in case of change of shareholding pattern in the financial year particularly in case of Association of Persons be clearly brought out with illustrations.

PSPCL was directed vide order dated 23.01.2023 to review the draft procedure for verification to establish the captive status of a generating plant in light of the above observations in particular and Hon'ble APTEL's order dated 07.06.2021 in A. No. 131 of 2020 in general and submit the same to the Commission. PSPCL was further

directed that in order to have wider consultation on the issue and to afford an opportunity to the stakeholders to file their objections/comments on the revised draft, PSPCL should issue another public notice extending the date of submission of objections/comments in this petition by two weeks from the date of publication of the notice in the Newspapers. The public notice was published on 21.02.2023.

PSPCL submitted the amended procedure after attending to the observations of the Commission except the one relating to the criteria for verification of consumption in case of change of shareholding pattern in the financial year and was directed to comment on this issue vide order dated 02.03.2023. During the hearing on 22.03.2023, learned counsel for PSPCL submitted that the matter is under the consideration of the Hon'ble Supreme Court in Civil Appeal nos. 8527-8529 of 2009 and the judgment has been reserved on 01.03.2023. PSPCL requested that, at this stage, the amended procedure may be approved without elaborating on this point which shall be subject to the interpretation of Electricity Rules, 2005 by the Courts/Tribunal of competent jurisdiction. After hearing the learned counsel for the petitioner, the order was reserved vide Commission's order dated 28.03.2023.

In response to the public notice inviting objections, one objection from Reliance Industries limited has been received. PSPCL also submitted its comments vide CE/ARR&TR letter dated 16.03.2023. The objections/comments received from the stakeholder on the draft procedure and comments of PSPCL are as under:

1. Para 3

Comments received:

The objector requested that the term "not less than" may be added before "51% in the mentioned sub points of Para .No. 3.

Rationale:

The point No.3 of the draft procedure may be modified suitably in line with Electricity Rule No. 3 (a) (ii) of The Electricity Rules, 2005 notified vide Notification No. G.S.R379(E) dated 8.6.2005, reproduced below for removing ambiguity in the procedure.

"not less than fifty-one percent of the aggregate electricity generated in such plant, determined on annual basis, is consumed for the captive use".

PSPCL's Response

Agreed to the suggestion of the objector and amended the procedure.

2. Para 3(iv) and clause (iii) of table under para 6.2.7

Comments received:

The objector suggested that it may be clarified that the proportionate criteria will be applicable on 51% of the annual generation by the CGP in proportion to equity holding by captive users. Energy generated over and above 51% by CGP can be used of by any user or a distribution licensee, including captive users.

The objector quoted the relevant portion of APTEL Judgements clarifying the proportionality criteria as under:

"The 51% of total generation only has to satisfy the rule of proportionality in consumption and ownership. The rest 49% of the generation could be sold to anyone including grid, Distribution Company and the CG owners themselves"

PSPCL's Response

The draft procedure has been amended and in Clause 6.2.6 of the amended draft procedure, it has been clarified that the proportionality test shall be calculated for 51% of aggregate generation and not for consumption beyond 51 % by Captive consumers.

3. Para 3(viii) & 6.1.2

Comments received:

The objector requested that timelines and procedure for processing of open access applications may be detailed/mentioned.

Rationale:-

The captive user seeking open access under the captive arrangement has to submit the documents as listed in para 6.1.1 along with the open access application. Also para 3(viii) provides for verification of share holding pattern of a CGP.

The timelines and procedure for processing of open access applications including those under captive and group captive arrangement and its related

processes such as verification status of CGP, captive user, grant of OA Approval etc. shall be in accordance with the related provisions of CERC Open Access in inter-State Transmission Regulations and PSERC Terms and Conditions for Intra-State Open Access Regulations and amendments to these regulations issued from time to time.

PSPCL's Response

The timelines and procedure for processing of open access applications has already been covered under PSERC (Terms and conditions for Intra State Open Access) regulations, 2011 read with Short Term Open Access Procedure approved by the Commission. The timelines pertaining to submission of documents by CGP/captive user and confirmation of captive status by the verifying authority have already been mentioned at Sr.No. 6.3.3 & 6.3.5 of amended procedure.

4. Para 4.1(i)

Comments received:

The objector pointed out that from the mentioned Para No. 4.1 (i), the calculation for the amount of Bank Guarantee is not clear i.e whether the amount is equivalent to 51% of the captive consumption or 51% of electricity generated from the CGP. The objector also requested for additional clarity on the amount of BG for each captive user in case more than one captive user is drawing electricity from the CGP.

The status of a Generating Plant as a CPP is to be determined for the financial year, depending on whether or not it has met the CPP requirements under the EA, 2003 and the Rules, which can be done only after that year is over and not at the beginning. This has also been reiterated in the orders of APTEL. If it is found after the end of the year that the Plant has not fulfilled these criteria, CSS and Additional Surcharge for that year would be payable.

Under the 4th proviso to Section 42 (2) of the EA, 2003 governing the provision of Open Access by Distribution Licensees, CP Users are not liable to payment of CSS:

"such surcharge shall 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."

Moreover, providing a payment security in the form of a Bank Guarantee or Revolving Letter of Credit is not costless to the Users and/or Generating Plant: it entails substantial costs in terms of blocking of funds, availability of working capital, margin money requirements, Stamp Duty, Bank charges, etc. Commission is silent on whether the distribution licensee would be ready to bear these costs if the CGP status is confirmed after the close of the year.

In view of the foregoing, requiring a Bank Guarantee or Revolving Letter of Credit as payment security from claimed Group CPPs and Inter-State CPPs prior to verification of their status after the close of the year, as proposed by commission, is not tenable. Hence, we request commission to remove the clause regarding requirement of submission of Bank Guarantee by captive users.

PSPCL's Response

The security deposit (BG) has been proposed in line with the recommendations of FOR in its report on "Developing model regulations on methodology for calculation of open access charges and banking charges for green energy open access consumers".

The suitable clause has been amended in the draft procedure wherein the amount of BG is specified and is equivalent to the 51% captive consumption.

In case of more than one captive users, either single security deposit may be submitted by CGP equivalent to 51% of its electricity generated or the captive users may submit separate security deposits in proportion to their individual anticipated consumption from CGP.

Since the captive status is being verified at the end of year and in case CGP/ Captive user fails to meet the criteria laid down in Rule 3 of Electricity Rules, 2005, security deposit shall cover the amount of CSS and Additional Surcharge to be charged by the distribution licensee, especially if the Captive user is not a consumer of the Distribution Licensee.

5. Para 6.1.4

Comments received:

The objector requested the commission to allow the applicant to intimate the distribution license or Verifying Authority, regarding the change in the shareholding pattern of CGP during the financial year at the end of the financial year instead of within 10 days, furnishing proof of documents or this information may be allowed to be submitted by the applicants within 30 days instead 10 days by furnishing proof of documents.

Rationale:-

The status of a Generating Plant as a CPP is to be determined for the financial year, depending on whether or not it has met the CPP requirements under the EA, 2003 and the Rules, which can be done only after that year is over and not at the beginning. This has also been reiterated in Orders of APTEL.

Electricity Rule No. 3 (a) (ii) of The Electricity Rules, 2005 notified vide Notification No. G.S.R 379(E) dated 8.6.2005, reproduced below, sets out the qualification criteria in terms of shareholding pattern of GP and electricity consumption by a captive user on an annual basis. Hence, the request to the Commission to make suitable changes in the regulation regarding intimation of shareholding pattern.

"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 users), and

(i) 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:"

PSPCL's Response

While agreeing to the suggestion of the objector, PSPCL has amended the procedure.

6. Para 6.4

Comments received:

The objector pointed out that the ceasing of qualification of CGP shall be limited to that particular year only and accordingly requested that a suitable provisions may be incorporated in the Regulations. In case of disagreement over the findings of Verification Authority leading to disqualification and ceasing the status CGP and Captive User. In such a case, the applicant, under a suitable provision, may be allowed to approach to the State Commission for review and reconsideration.

PSPCL's Response

The matter comes under the purview of Hon'ble PSERC.

Commission's Findings and Order

The Forum of Regulators (FOR), in its 74th meeting held on 9th April, 2021 deliberated on the issue of import of power from captive generators located within/outside the State through Open access and decided to frame Model Regulations to bring about uniformity. Therefore, a Working Group of the FOR was constituted for "*Developing Model Regulations for Import of Power from Captive Generators Using Open Access*". The WG deliberated on relevant judgements of APTEL, various aspects associated with the legal connotations on the consumption and equity norms for CGP and finalised its report. After detailed deliberations and analysis, the FOR in its 82nd meeting held on 16.09.2022 approved the final report. In the 84th meeting of FOR held on 03.02.2023, minor changes in the Model Regulations have been approved.

The summary of the findings of the Hon'ble Tribunal in Appeal No. 131 of 2020 regarding interpretation of various provisions of Rule 3 of the electricity Rules, 2005 is as under;

1. The distribution licensee can be entrusted only with the exercise of collecting & verifying data for the purpose of verification of captive plant status. However, any coercive action to be initiated against the CGP /captive users regarding its captive status or for recovery of CSS, as per law, shall be decided by the State Commission.

2. For the purpose of granting open access for captive purpose, the documents as specified in Intra- State Open Access Regulations fulfil the requirements of Rule 3 of Electricity Rules, 2005
3. As per provisions stipulated under the Rule 3 of the Electricity Rules, 2005, the SPV & AOP are two distinct entities and cannot be equated at par for computation of annual power consumption for determining the captive status.
4. The verification for determining ownership & consumption for CGP /captive users under Rule 3, being an independent exercise, has to be done on annual basis, at the end of the financial year.
5. The directions that where the minimum 26% ownership and not less than 51% consumption criteria are met, but one or more captive users do not meet the proportionality principle, such users who do not fulfil the proportionality criteria shall lose their captive status and other captive users who fulfil the proportionality criteria will retain their captive status provided the CGP complies with the twin criteria of 26% ownership and 51% consumption excluding users who lost their captive status are in disregard to Rule 3 of Electricity Rules, 2005
6. As per settled principles of law, there cannot be retrospective application of the procedure formulated for verification of status of CGP/captive users. However, it is clarified that for the past years, the distribution licensee can verify data for the purpose of determination of captive plant status on the basis of data already furnished by CGP/Captive users while availing the open access.
7. APTEL set aside the directions wherein the State Commission has held that, in the event, the weighted average of shareholding of captive users changes within a financial year, then the same has to be intimated within ten days to the distribution licensee otherwise the said licensee would proceed to verify captive status without considering weighted average shareholding.

A CGP is required to meet the provisions of the Electricity Act, 2003 and the Rule 3 of Electricity Rules, 2005. The captive users have the obligation to ensure consumption at the percentages mentioned in sub-clauses (a) & (b) of Rule 3(1) of the Electricity Rules, 2005. Failure to comply with the conditions prescribed in the Rules

result in the CGP losing its captive status and the entire electricity generated from the CGP will be treated as supply of electricity by a generating company which shall be subject to payment of cross subsidy surcharge and additional surcharge and other charges, as applicable. However, the failure to satisfy the conditions for captive status shall be only for a particular financial year.

The Commission thus decides that in line with Hon'ble Tribunal's ibid order and the Model Regulations approved by FOR, the verification to determine the captive status of the generating plant shall be carried out at the end of the financial year and not at the time of grant of open access or allowing wheeling of power from a captive plant. At the time of seeking open access to wheel captive power to the destination of its use, the documents required as per PSERC (Terms and conditions for Intra State Open Access) regulations, 2011 read with Open Access Procedure approved by the Commission shall be submitted by CGP/User.

The Distribution Licensee (in whose area the CGP/Captive User is located) shall carry out the necessary checks of the data/documents submitted by the CGP and captive users for the verification of captive status of CGP and submit its report to the Commission by 31st May of the following year with a copy to the concerned CGP/captive user(s). In case the CGP/Captive user has any objection to the findings of the distribution licensee, the CGP/User may approach the Commission. Till the matter is adjudicated by the Commission, the distribution licensee shall not initiate proceedings to demand cross subsidy surcharge and other charges exempted to CGP/Captive user(s) during the financial year. However, the required BGs/LCs/FDs shall be kept valid and available with the Distribution Licensee during the entire period.

The 4th proviso to sub-section (2) of section 42 of the Act exempts the CGP from payment of cross subsidy surcharge in case open access is provided to a person who has established a captive generating plant for his own use but verification of the captive status has to be carried out at the end of the financial year. Thus, to protect the financial interest of the distribution licensee, the Model regulations on verification of captive status of a generating plant have recommended for recovery of a security deposit in the form of BG or LC and same has been provided in this procedure. The issues raised by the objector have been addressed in the procedure for verification of captive status now approved by the Commission.

On the issue of authority for verification of captive status for inter-state power sale, Ministry of Power, Government of India, as conveyed vide letter dated 11.04.2023, has decided that Central Electricity Authority shall be the verification authority for those captive generating plants which are located in one State and its captive consumers are located in other State(s). The same has been provided in the approved procedure.

The Procedure for verification of Captive Generating Plant (CGP) status in accordance with the requirements of Rule 3 of the Electricity Rules, 2005 read with PSERC (Harnessing of Captive Power Generation) Regulations, 2022 has been approved with modifications as discussed above. As some issues regarding interpretation of Rule 3 of the Electricity Rules, 2005 are pending before the Hon'ble Supreme Court and the Appellate Tribunal, this procedure shall be subject to the subsequent/final interpretation of the Electricity Act, 2003 and the Electricity Rules, 2005 by the Courts/Tribunals of competent jurisdiction as applicable from time to time.

The petition is disposed of accordingly.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 07.05.2023

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