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

b) In "**Energy Watchdog vs CERC, Civil Appeal No 5399-5400 of 2016", the Hon'ble Supreme Court** held that mere commercial impossibility did not amount to force majeure. In the present case, the petitioner cannot take the aid of force majeure article to waive the amount(s) which it is liable to pay to the Answering respondent in terms of the extant rules and regulations.

No exemption/ benefit can be allowed to the petitioner beyond the regulations. In **PTC India Ltd. Vs CERC, (2010) 4 SCC 603 (Para 54 to 56), the Hon'ble Supreme Court** has categorically held that the Regulations framed by the Commissions are binding on the commission as well as the Distribution Licensee

i) Other such similarly placed consumers have already paid the pending amount(s). [Eg.- M/s Sky City Hotel Pvt Ltd who was disqualified from captive status for FY 2020-21 by the answering respondent and this consumer has already paid Rs. 10,97,110/-along with interest of Rs. 87,160/-]. Therefore, in present case no relaxation/ benefits can be accorded to the petitioner as they cannot be treated differently from other consumers. Section 45 which prohibits the licensee from showing any undue preference to any person or class of persons or discrimination against any person or class of persons.

ii) The reliance placed by the petitioner on Clause 6 is misplaced and misconstrued. The petitioner cannot take the benefit of the Article 6 as the Respondent is not liable to pay or compensate anything whatsoever to the petitioner during the period of Force Majeure, if any. Clause 6 in the agreement which provides for force majeure contemplates only such cases which affects the wheeling or banking of power by HVPNL /Discoms due to Force Majeure.

Commission's order

5. The case was called for hearing on 10.08.2022, as scheduled, in the court room of the Commission.

6. The learned counsel, Shri Naveen S. Bhardwaj appearing for the petitioner reiterated the contents and relief sought in the present petition under consideration of the Commission. The opposite counsel also reiterated the submissions / reply already filed by them and taken on record by the Commission. The rival contentions have already been reproduced earlier in the present order, Hence, for the sake of brevity and prolixity, the same is not being reproduced here.

7. Upon hearing the parties, the Commission observes that the petitioner herein has sought two specific reliefs i.e. restore its captive status thereby quash the demand raised by the respondent on account of payment of applicable charges from which it was exempted by virtue of being a CPP and also allow roll over of banked power from the FY 2019-20, FY 2020-21 to the FY 2021-22.

The former relief sought i.e. 'captive status' has its genesis in the Rule 3 of Electricity Rules 2005 (hereinafter referred to as "Rules") notified by the Central Government in exercise of the powers vested in it by the Electricity Act, 2003; while the latter i.e. seeking rollover of the banked energy, is at the roots of the 'banking agreement' entered into by the parties and the RE Regulations notified by this Commission in exercise of the powers vested in it by the Electricity Act, 2003. The Commission shall deal with the two issues separately in the paragraphs the follows.

8. The petitioner has set up its case that due to the unprecedented Covid – 19 pandemic and the resultant lockdown imposed by the Government vide order dated 24.03.2020 and extended till 03.05.2020, had rendered the entire hospitality industry including the two hotels of the petitioner non-functional and all the activities came to a standstill. Resultantly, the criteria of minimum 51% self-consumption of electricity from its 7.5 MW solar captive power plant as per 'Rules' was not met. In support of its contentions the petitioner has relied on Section 61 of the Disaster management Act, 2005 as the fact that various State Instrumentalities have recognized COVID – 19 pandemic as a Force Majeure event and therefore the obligation imposed by the 'Rules' stands frustrated.

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

The Commission has carefully considered the submissions and arguments of the parties, including case laws cited, in the matter. The respondent(s), while opposing the relief sought, have relied on the following case laws:-

i. State of Uttar Pradesh V. Singhara Singh and Ors. (Criminal Appeal No. 31 of 1962, decided on August 16,1963) – At para 8 of the ibid judgement, the Hon'ble Supreme Court had observed that "the rule adopted in Taylor v. Taylor (1875) 1 Ch D 426, 431) is well recognized and is founded on sound principles. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed". The Commission has carefully perused the aforementioned citation and categorically observes that this Commission has no intention of acting against the provisions of the Electricity Act, 2003, Rules and or Regulations occupying the field.

ii. Alopi Parshad and Sons Ltd V. Union of India (Civil Appeal No. 693 of 1957 decided on January 20, 1960 – (1960) 2 SCR 793, AIR 1960 SC 588). The crux of this judgement of the Hon'ble Supreme Court cited by the respondent is that "22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract become onerous".

The Commission has perused the judgement (Supra) and is of the considered view that the Court in the analysis of the above judgment has itself observed that true construction of the contract has to be considered. The relevant paragraph is reproduced as below:

"When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in Constantine's case(1) or one 'which justice demands' (Lord Sumner in Hirji http://JUDIS.NIC.IN SUPREME COURT OF INDIA Page 10 of 12 Mulji v. Cheong Yue Steamship Co. Ltd. (2) this result is arrived at by putting a just construction upon the contract in accordance with an 'implication..... from the (1) (1942) A.C. 154, 186. (2) (1926) A.C. 497, 510 807 presumed common intention of the parties'-speech of Lord Simon in British Movietonews Ltd. v. London and District Cinemas Ltd. (1) .....in British Movietonews Ld. v. London and District Cinemas Ld. (2). In that case, Denning, L.J., is reported to have observed : "..... no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable. "

In the present case under consideration it is not that the liability to perform has become "onerous". In the present case, the Government itself, by a series of prohibitive executive order(s), including imposing penalty for violation, had imposed lockdown and a staggered opening of the economy. Violation of Government orders was an offence. The legal maxim, LEX NON COGIT AD lMPOSSIBILIA (the law does not compel a man to do that which he cannot possibly perform) as mentioned in the judgment of Raj Kumar Dey and others vs Tarapada Dey and others (1987) 4 SCC 398, Supreme Court is relevant in the present case. The law itself and the administration of it must yield to that to which everything must bend. The administration of laws must adopt that general exception in the consideration of all particular cases. Therefore, the ground given by the petitioner for not performing as per the rules is to be considered as an impossibility under law because it was illegal not to follow the orders of the Government. Hence, the case law cited is clearly not applicable in the present case.

iii. M/s Godawari Power & Ispat Ltd. Chattisgarh V. Chattisgarh State Electricity Regulatory Commission and Ors. (Appeal No. 3 of 2012 order of the Appellate Tribunal for Electricity dated February 18, 2013). The crux of the order of Hon'ble APTEL cited is that "….the State Commission does not have any powers to relax the provisions of the Electricity Act" (Sic.), 2005. The Commission is conscious of the fact that Rule 3(2) of the Electricity Rules, 2005 which provides for the dispensation that to qualify for a CPP status not less than 51% of the electricity generated from the generating plant has to be captively consumed. To allay the fears of the respondent(s) the Commission is not inclined to change the threshold of 51% specified by the rules in vogue. Moreover, the aforesaid judgment was in the context of erroneous data on auxiliary energy consumption leading to wrong estimation of self-consumption w.r.t. 51%.

Further, The Hon'ble APTEL held that the reasoning given by the appellant for taking 4 months for the repair of shed was not justified. The collapse of shed was not on account of any conscious executive order of the Government. The Commission here is governed by the legal maxim, ACTUS CURIAE NEMINEM GRAVABIT i.e. an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense. The factor of administration of law has to be considered while considering any case. In the present case the Government passed an executive order stopping al activity and Covid restrictions were very well not within the control of the party and they were bound to follow the restrictions so imposed. By the executive order the Government itself had restrained and prevented hotels and civil aviation industry to operate. In the present matter, a case like Government order to close down all activity due to an unprecedented catastrophe like COVID 19 was neither visualized nor could be imagined. Hence, breaking down of a shed has no parallel to the order of the Government closing down all activity due to COVID by a prohibitory order. Hence, the case is clearly distinguishable on the facts and circumstances.

iv. Gujarat Urja Vikas Nigam Ltd. V. Solar Semiconductor Power Co. (India) (P) Ltd. It has been held in the ibid case that a SERC, which is a creature of statute, cannot exercise its inherent power on an issue which is otherwise dealt with or provided for in the Act or the Rules. The Commission is conscious of the aforesaid rule of law. The present case, is distinguishable on facts, as the petition has been preferred under section 86(1)(f) of the Act, to adjudicate upon dispute, and as such it does not invoke exercise of inherent power / power to relax by this Commission.

v. DSJ Communications V. Union of India & Ors. (W.P. (C) 934 / 2010 decided on July 30,2014 . The Commission has carefully perused the ibid judgement cited in the matter. The said judgement rendered by the Hon'ble Supreme Court, dwells at length on the maxim of *impossibilium nulla obligation est* i.e. a legal obligation that is impossible to perform must be excused. It was held that discharge of an obligation for want of fund should result in extinguishment of obligation is misconceived. The present case under the consideration of the Commission is clearly distinguishable on facts as the relief sought by the petitioner has nothing to do with lack of funds or waiver of any legal obligation as the relief sought is set out in the context of a prohibitive order issued by the Government under Disaster Management Act vis-à-vis 'Rules' framed by the Government under the Electricity Act, 2003.

vi. Greenyana Solar Private Limited V. Haryana Electricity Regulatory Commission and Ors. (Appeal No. 164 of 2020, Appellate Tribunal for Electricity order dated September 20, 2021). The Commission has perused the judgement rendered by the Hon'ble APTEL wherein the Hon'ble Aptel agreed with the State Commission that the Appellant (Greenyana) has to satisfy the Discoms on the issue of captive status of the project and the terms and conditions of approvals / policy / guidelines are sacrosanct. The Commission is aware of the ibid order and has taken note of the same. However, the factual matrix in both the cases are distinguishable i.e. in the former the issue was regarding grant of benefits under Haryana Solar Policy and connectivity / long term Open Access. Whereas, in the present case the relief sought is embedded in the calculation of 51% self-consumption and banking agreement entered between the parties to the present case.

vii. Tamil Nadu Power Producers Association V. Tamil Nadu Electricity Regulatory Commission (Appellate Tribunal for Electricity - Appeal No. 131 of 2020 and IA Nos 425,426,1210& 1215 of 2020, order dated June 7, 2021). In the Hon'ble Aptel's order cited by the respondent(s) it was held that "302.Issue No. 5:- We hold that the directions contained in Paras 6.6.3 and 7.8.2 of the impugned order passed by the State Commission are in disregard to Rule 3 of the Electricity Rules and hence, cannot be sustained". The Commission has carefully considered the above case law cited by the respondent in support

of his contention that no relief can be granted by this Commission in disregard to the stipulation of Rule 3 i.e. minimum 51% self-consumption to be eligible for CPP status.

9. The petitioner in support of the relief sought has cited the following case laws:-

i. Binani Zinc Limited V. Kerala State Electricity Board and Ors (Civil Appeal No. 3492 of 2006 dated March, 19, 2009).

ii. Raj Kumar Dey and Others V. Tarapada Dey and Others (Civil Appeal No. 2224 of 1987 dated September 14, 1987).

The crux of the citations (Supra) is the maxim of lex non cogit ad impossibilia i.e. the law does not compel a man to do that which he cannot possibly perform. This maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The other maxim dealt in the above cases is actus curiae neminem gravabit i.e. an act of Court shall prejudice no man. and the administration of laws must adopt that general exception in the consideration of all particular cases.

10. The Commission has taken note of the above Case Laws placed on record by the parties at the time of hearing held on 10.08.2022 and shall be guided by the same while examining the merits of the present case.

11. Admittedly, the petitioner herein is in the hospitality / hotel business. The power generated from its solar system was primarily being used in its hotels viz. 'The Oberoi" and "The Trident" located in Gurugram, Haryana. **The petitioner kept injecting power in the grid and also provided day ahead schedule to the respondent Nigam**. However, as admitted by Shri Sood, the learned Counsel for the respondent, that the petitioner was never directed to stop injecting power even at a time when the demand for power had literally crashed to the minimum level. It is also an admitted fact that the Government had ordered a nationwide lockdown in four phases in India viz. Phase 1 (from 25th March 2020 to 14th April 2020); Phase 2 (from 15th April 2020 to 3rd May, 2020; Phase 3 (from 4th May 2020 to 17th May 2020) and Phase 4 (from 18th May 2020 to 31st May 2020) by issuing prohibitory orders. In terms of number of days, the entire country had come to a standstill for 68 days. Needless to add, the said decisions were taken by the Central Government to rein in Covid – 19 related infections / deaths in India to the barest minimum given the population size and population concentration. The number i.e. 68 days tells only the half truth i.e. the lock down was followed by a staggered unlock period i.e. it stretched from Unlock 1 (beginning 1st June to Unlock 22 (ending 31st March, 2022. Admittedly, the hotels were gradually opened up with restricted operations. During the said period, international flights did not operate. Added to it was the time taken to build – up the confidence amongst domestic as well as international travellers to resume business as usual. As also averred by the petitioner that almost 62% of its clientele is from foreign travelers Consequently, the Commission cannot

ignore the fact that it was due to the orders of the Government that the petitioner closed down its hotels. given the fact that is faced with no normal situation which would call for a normal solution as done by the respondent(s) i.e. apply the 'Rules' in letter and spirit. However, for the Commission vested with the statutory authority of regulating the power sector by balancing the interest of all the stakeholders, the specific relief sought needs to be evaluated in a wider perspective of natural justice.

The judgment dated 18.02.2013 of Honorable Appellate Tribunal for Electricity cited by the respondent was rendered in a normal situation against a judicial order passed by the learned Tamil Nadu Electricity Regulatory Commission. Whereas, in the present case the Commission is dealing with an un-precedented situation i.e. in the recorded history of mankind there has not been any such event that forced over 200 countries to live under the shadows of death. The hospitality industry across the globe was crippled and even till now all the major economies are struggling to return to a normal GDP growth trajectory. Further, it is also not a simple case of 'commercial impossibility' (Energy Watchdog case). The orders to close down were by the Government making any activity a violation. It needs to be noted that the Commission is neither taking any recourse to the 'power to relax' nor in any manner relaxing the provisions of "Rules". As the Regulations of this Commission occupying the field flows from the provisions of the "Rules", hence, as such the provisions of "Relaxing" as appearing in the Regulations cannot be exercised without the intervention of the Central Government. The case laws cited by the respondents in the present matter are clearly distinguishable on facts as in the present case. It is the Government which had prevented the petitioner from carrying out its business in order to contain the spread of Covid – 19 pandemic. By an executive order the Government itself had retrained the petitioner to run his business.

12. The Commission observes that "Contracts" often contain a force majeure clause, as cited by the respondent(s) while referring to the "Banking Agreement" that is agreed upon by the parties and in the present case approved by this Commission. Such agreements invariably list out the events that qualify as force majeure events. Hence, If the event (specifically mentioned in the force majeure clause of the agreement) that is alleged to have prevented performance, then the affected parties may be relieved from performance. However, a Government prohibitory order will not fall within the ambit of the force majeure clause.

The banking agreement executed between the parties herein is a contract, hence such contract has to be accordingly construed. The Indian Contract Act, 1872 ("Act") contains two provisions which are relevant to Force Majeure and Act of God. Section 32 of the Act deals with contingent contracts and inter alia provides that if a contract is based on the happening of a future event and such event becomes impossible, the contract becomes void. Section 56 of the Act deals with frustration of a contract and provides that a contract

becomes void inter alia if it becomes impossible, by reason of an event which a promisor could not prevent, after the contract is made. In the present case, the contract / agreement became impossible to perform due to the executive orders of the Central Government. However, wheeling and banking of power were not affected to trigger force majeure Clause i.e. Clause 6 of the Banking Agreement. Consequently, the Commission, in line with the HERC RE Regulations in vogue i.e. regulation 66(2) (reproduced below) holds that the power banked shall not be carried over from one financial year to the other as the credit for the banked power remining undrawn shall lapse at the close of the relevant financial year. Consequently, the prayer of the petitioner for roll over of the banked power from the FY 2019-20 and 2020-21 to the FY 2021-22 is rejected as devoid of merit. Further, in view of the MNRE memorandum dated 16.04.2020 cited by the petitioner in reference to a similar situation arising in Andhra Pradesh, Karnataka and Tamil Nadu, to consider permitting rollover of the banked power, was state specific and of advisory in nature, hence, not binding on the State Commission. Moreover, this Commission is bound by its own RE Regulations in vogue. Accordingly, it is reiterated that in line with regulation 66(2) of the HERC RE Regulations, 2021 "***the Energy Banked shall be permitted to be carried forwarded from month to month. The banked power shall be utilized within the same financial year failing which the unutilized energy at the end of the financial year shall lapse, and no compensation whatsoever shall be claimed/ paid for such lapsed banked energy, provided the solar energy banked during the last quarter of the financial year shall be carried forward to the next financial year***" (emphasis added).

13. In view of the discussions on the aforementioned issues, the Commission is of the considered view that, while computing 51% self-consumption as provided in the "Rules" , the solar generation and total drawl / captive consumption (%) shall be computed after considering actual solar generation, net of losses, and after excluding the period from April to July when the hotels were closed in compliance with the executive order issued by the Government, due to Covid-19, under the enabling provisions of the Disaster Management Act, 2005 and the subsequent restoration operation undertaken by the petitioner to make the infrastructure and service ready for business. Even after this three month period the restrictions continued including restrictions on the number of people in gatherings or functions and stoppage of flights continued for many months and opening was permitted only in staggered phases. Hence, beyond the lockdown period of about three months i.e. April to June, a further period of one month i.e. July has been considered by the Commission for exclusion while computing 51% for the reason that post lockdown it took more than a month or so thereafter, when business activities were at a standstill and gatherings were first not allowed and then allowed in restricted numbers for a long time, and no international flights were operating. Hence, the hotels of the petitioner could not suddenly jump back into action for normal business as usual. Hence, the period of an additional one

month i.e. July shall be excluded and 51% shall be calculated only for the remaining months. This four month period shall be excluded for the purpose of assessment of captive consumption, considering the directions of the government imposing lockdown which could not be violated, and violation of government orders regarding violation of lockdown were offences punishable under the law- so much so that even offences by department of government were punishable. The financial liability imposed on the petitioner is a direct consequence/result of closure of all activities due to the order of the government. The exclusion being directed above is also in line with the Hon'ble Supreme Court's order in Suo Motu Writ Petition (C) No. 3 of 2020, whereby the Hon'ble Supreme Court has excluded the affected period on account of Covid-19, in counting the limitation under all special or general laws. Further, the Hon'ble Supreme Court of India in the Writ Petition (C) No. 476 of 2020 in the matter of Small-Scale Industrial Manufacturers Association (Regd.) Vs. Union of India and others along with a series of CWPs, categorically held that due to the ongoing Covid-19 pandemic, the persons who have availed the loan moratorium announced by the RBI, should not be called upon to pay compound interest, interest on interest or penal interest. In the same vein i.e. keeping in view the corona pandemic, the Hon'ble APTEL in Appeal No. 67 of 2021(judgment dated 05.07.2021) provided relief in terms of extending the scheduled commission date of the power project as they were unable to draw down the funds and proceed with implementation of the project. The Hon'ble Madurai Bench of Madras High Court while rendering its judgement dated 29.01.2021 in WP (MD) No. 1439 of 2021 & WMP (MD) Nos. 1229 and 1231 of 2021, totally relieved the petitioner from the obligation to pay license fee during the complete lockdown period i.e. 24.03.2020 to 06.09.2020 and for the subsequent period when there was partial relaxation and lifting of lock down of restrictions, the petitioner was granted liberty to move the respondents which included Municipal Administration and Water Supply Department, Chennai.

In fact, even the Government, including the Reserve Bank of India, have extended a number of concessions and relaxations in the power, banking and financial sector during this period to help the beneficiaries tide over the disruptions caused by COVID-19. These include partial waiver of demand charges by the CPSUs, moratorium on payment of interest / installments, emergency credit, 100% guarantee to eligible borrowers including hotels, deferment of electricity bill payment dates, waiver of late payment penalty etc.

14. Thus, the sanctity of the rule of 51% remains intact. In case the 51% threshold criteria is met, the respondent(s) shall forthwith withdraw the charges levied due to non-fulfillment of 'Captive Status' for the relevant period. It needs to be noted that the dispensation of 51% self-consumption, to be computed on an annual basis, has been provided to enable the captive consumer flexibility to even out its daily and monthly consumption to retain captive status i.e. at times it could be lower and at times it could be higher than 51% thereby making good for the months in which self-consumption was lower than the threshold limit.

15. **Summary of the Commission's findings / order:**

i. Percentage of self-consumption shall be computed after excluding generation and consumption figures for the period April 2020 to July 2020 (four months). The figures, placed on record by the petitioner, was not disputed by the respondents.

ii. The generation figures shall be reckoned with net of auxiliary consumption and losses.

iii. In case self-consumption works out to 51% or above, the demand notice of INR 1,80,85,253 / - shall be set aside. Any amount that has been deposited by the petitioner against the said demand notice shall be refunded/ adjusted by the respondent(s) in the next bill.

The petition is disposed of in the above terms.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 24th August, 2022

Date: 24.08.2022
Place: Panchkula

(Naresh Sardana)
Member

(R.K Pachnanda)
Chairman