

No.N/57/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 7th July 2011

1. Sri M.R. Sreenivasa Murthy Chairman
2. Sri Vishvanath Hiremath Member

[Sri K. Srinivasa Rao, Member pronouncing a separate order]

Case No. OP 33/2010

Between

M/s. JSW Steel Limited
Vijayanagar Works
P.O. Vijayanagar
Toranagallu

Bellary District – 583 275

(Represented by its Advocates Sri Adarsh Gangal
& Sri M.G. Ramachandran))

.... **Petitioner**

And

Chief Electrical Inspector to Government
32/1-2, 2nd Floor, Crescent Tower
Crescent Road
Bangalore – 560 001

(Represented by Sri T.K. Vedamurthy,
High Court Government Pleader)

.... **Respondent**

1. This petition has been filed by M/s. JSW Steel Limited seeking a declaration to the effect that two units of 1x100 MW & 1x130 MW power plants located at Toranagallu, Bellary District are captive generating units of the petitioner and other four companies holding shares in the said units namely – M/s. Bellary Oxygen Company Private Limited (BOC Pvt.), M/s.

Bhuwalka Pipes Private Limited (BPPL), M/s. Jamshedpur Injection Powder Limited (JAMIPOL) and M/s. Padmavathi Ferro Alloys Limited (PEAL). The petitioner at the preliminary stage of the present petition, has given up the prayer for setting aside the communication of the respondent CEIG dated 26.6.2010 issued under the Karnataka Electricity (Taxation on Consumption) Act, 1959 and has proceeded to seek a declaration as above, under the Electricity Act, 2003 (the 'Act').

2. The Chief Electrical Inspector to Government (CEIG), who is the only respondent, has entered appearance through the Government Counsel and has filed a detailed statement of objections to the petition on 30.9.2010. Both the parties have also filed their written arguments after addressing oral arguments.

3. We have considered the petition, objection averments and the written arguments submitted by the parties along with supporting documents.

4. As a preliminary issue, the counsel appearing for the CEIG contended that this Commission has no jurisdiction to entertain this petition and give a declaration of captive status to the plants mentioned above under the provisions of the Electricity Act, 2003,. Per contra, Sri Ramachandran, Counsel appearing for the petitioner contended that this

Commission has jurisdiction to give a declaration of captive status as sought by the petitioner.

5. In our opinion, this issue no longer survives for a decision in view of the decision of the Hon'ble Appellate Tribunal for Electricity (ATE) in the case of Chattisgarh State Power Distribution Company Limited Vs. Hira Ferro Alloys (Appeal No. 116/2009) dated 18.5.2010 wherein it has been held as follows :

“A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission as much as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State”.

6. Following the above decision of the Hon'ble ATE, we hold that this Commission has jurisdiction to decide on the captive status of a power plant.

7. It is the case of the petitioner that the power plant in question initially was set up by M/s. Jindal Power Limited which had as its shareholders M/s. JSW Steel and four other companies, i.e., M/s. BOC Pvt. Ltd., M/s. Bhuwalka Pipes Ltd., M/s. Jemshedpur Injection Power Limited and M/s. Padmavathi Ferro Alloys Limited besides others. Subsequently Jindal Power Limited got merged with JSW Steel Limited with effect from 1.4.2005 pursuant to a scheme of amalgamation approved by the Hon'ble High Court of Bombay by its order dated 30.9.2005. This order protected the interests of the four equity participating companies mentioned above in respect of their right to consumption of power generated by the two units in question. Once the power plant set up by Jindal Power Limited merged into JSW Steel, the JSW Steel stepped into the shoes of Jindal Power Limited and became the owner and has been operating the plants in question. It is stated that since JSW Steel is consuming more than 51 per cent of the power generated by the two units, it is a captive consumer of the two units. Further since four other participatory companies' rights are protected in the merger proceedings, they also continue to be captive consumers as before. It is also the case of the petitioner that the proportionality of consumption by captive consumers under proviso to Rule 3(1)(a) of the Electricity Rules, 2005 which has been pressed into service by the CEIG to dispute the captive status of the power plants has no application to this case once the consumption of

the power generated on annual basis crosses 51 per cent by the captive consumers either individually or together.

8. As against the case of the petitioner, it is contended by the CEIG that the power plants in question have been set up by an association of persons consisting of JSW Steel and the other four companies. Therefore to qualify as captive consumers the said companies have to consume not only more than 51 per cent of aggregate energy generated on an annual basis, but also in proportion to their respective shareholding as per Proviso (2) to Rule 3(1)(a) of the Electricity Rules, 2005. In the present case, all the associated persons are not consuming power in proportion to their shareholding as required by the above Rule and therefore the power plant cannot be treated as a captive power plant of the association of persons. Consequently, the companies who constitute the association of persons cannot be treated as captive consumers of the power plant. It is further contended by the CEIG that the consumption of two other companies namely M/s. Jindal Praxair Oxygen Company Limited (JPOCL) and M/s. BOC India Limited which are being supplied power from the same units cannot be treated as captive consumption as they have not contributed any equity in the setting up of the two power plants. It is also contended by the CEIG that power is not being supplied from the plant in question to the associated persons as well as non-equity holder companies through dedicated transmission lines as required under

Section 9 of the Electricity Act, 2003, and therefore they cannot be treated as captive consumers of the power plants in question.

9. The issue to be decided in this case is whether the two units of 1x100 MW and 1x130 MW power plants could be considered as captive units of M/s. JSW Steel Ltd. and the four other shareholder companies mentioned above in the light of the provisions of the Electricity Act, 2003 read with the Electricity Rules, 2005.

10. Before proceeding to consider the dispute in the present case, we may quote the relevant legal provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 on captive generation as succinctly summarized by the Hon'ble ATE in Kadodara Power Ltd. Vs. GERC [(2009) ELR APTEL 1037].

“5) Section 7 of the Act has removed the requirement of a license for establishing a generating station. Section 2(8) defines Captive Generating Plant as under:

“2(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;”

6) Section 9 of the Act has allowed construction of captive generating plant and dedicated transmission lines. The owners of CGPs are also given right to open access for carrying electricity from the captive generating plant to the destination of its use. In exercise of powers conferred by section 176 of the Act the Central Government has made rules known as the Electricity Rules 2005. These rules prescribe certain qualifications for a generating plant to be treated as

a captive generating plant. Since the entire arguments of the parties revolved around interpretation of Rule 3 of the Electricity Rules 2005 it will be appropriate to quote the entire rule:

“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 per cent of the ownership is held by the captive user(s), and

(ii) not less than fifty one per cent 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 co-operative society, the conditions mentioned under paragraphs (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 per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent 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 per cent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including-

Explanation – (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate

identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent, of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant,

Illustration

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is supply of electricity by a generating company.

Explanation – (1) For the purpose of this rule, -

- (a) “annual basis” shall be determined based on a financial year;
- (b) “captive user” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “captive use” shall be construed accordingly;
- (c) “ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership

shall mean proprietary interest and control over the generating station or power plant;

(d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

11. Thus, a captive generation plant is one which is set up by any person for generating electricity primarily for its own use and to qualify as a captive consumer(s), the persons shall have not less than 26 per cent of the ownership of the plant either individually or collectively and shall consume not less than 51 per cent of the aggregate electricity generated in such plant determined on an annual basis.

12. There is no dispute between the parties on the equity shareholding of the petitioner and other companies being more than 26 per cent in the power plant in question. It is seen that the shareholding pattern of the power plant between JSW Steel and the four other companies is, as on the date of amalgamation of Jindal Power with JSW Steel i.e., 1.4.2005, was follows :

1) JSW Steel	61.63 %
2) Bellary Oxygen Company Private Ltd.	6.90 %
3) Jemshedpur Power Injection Limited	0.17 %
4) Bhuwalka Pipes PrivateLtd.	0.35 %
5) Padmavathi Ferro Alloys Limited	3.47 %
6) Others	27.48 %

13. The said shareholding pattern is stated to have continued even after amalgamation. It is therefore clear that JSW Steel and four other companies mentioned above hold more than 26 per cent of the equity interest in the two units of the power plant satisfying the requirement of the minimum equity to be held by captive consumers under Rule 3(1)(a)(i) of the Electricity Rules, 2005.

14. The dispute is on the consumption of electricity by the said companies who are claiming the status of captive consumers in the power plant.

15. It is observed from the pleadings of both the parties that the total power generated by the units in question was 787 million units (MUs) in the year 2005-06, 1,139 MUs during 2006-07, 1,375 MUs in 2007-08, 1,436 MUs in 2008-09 and 1,748 MUs in 2009-10. Out of this, JSW Steel holding 61.63 per cent equity has consumed 667.65 MUs, 726.01 MUs, 1,063.25 MUs, 1,132.99 MUs and 1,410.29 MUs respectively during those years. The consumption of this shareholder in all those years was more than 51 per cent with respect to the total power generated by the two units.

16. The consumption of the other four shareholders during the above years as also the auxiliary consumption of the power plants in MUs was as shown below :

	2005-06	2006-07	2007-08	2008-09	2009-10
Bellary Oxygen Ltd.	0	95.29	153.55	154.8	157.17
JAMIPOL	0.165	0.49	0.66	0.53	0.59
Padmavathi Ferro Alloys	16.01	20.59	31.23	18.82	23.81
Bhuwarka Pipes	0.91	1.03	1	0.01	1.05
Auxiliary Consumption	47.02	70.59	92.12	95.6	111

17. It is submitted by the petitioner that the requirement of Rule (3) of the Electricity Rules, 2005 in respect of captive power plants is only that the captive consumers who hold at least 26 per cent equity interest together must consume a minimum of 51 per cent of the power generated by the captive units on an annual basis. In the instant case, since M/s. JSW Steel which has more than 26 per cent of equity in the power plants in question is consuming more than 51 per cent of the aggregate power generated on an annual basis, it is not relevant whether in respect of the remaining 49 per cent of the power generated the other consumers are consuming in proportion to their equity participation or not. Per contra on behalf of the CEIG it has been vehemently contended that even though M/s. JSW Steel is consuming more than 51 per cent of the aggregate power generated, it is incumbent upon the other four shareholder companies to also consume power in proportion to their shareholding for the units to qualify for being considered as captive generating units. In the light of the actual

consumption data furnished, the other shareholding companies have not been consuming power in proportion to their shareholding, plus or minus 10 per cent as mandated under the second proviso to Rule (3)(1)(a)(ii) of the Electricity Rules, 2005. It is therefore the case of CEIG that the two units in question do not qualify to be considered as captive units in respect of any of the shareholding companies. It is further contended by the CEIG that two other companies namely M/s. Jindal Praxair Oxygen Company Limited (JIPOCL) and M/s. BOC India Limited, who are not shareholders of the units in question are also being supplied with power whose consumption of electricity cannot be treated as captive consumption. Also, power that is being supplied to the shareholders and non-shareholder companies is not supplied through dedicated transmission lines as required under Section 9 of the Electricity Act, 2003 and therefore the units cannot be considered as captive power plants.

18. We have considered the above contentions in the light of Section 9 of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005.

19. In our view, Rule 3, and in particular Rule 3(2), has to be read in the backdrop and light of the objects behind the introduction of the chapter relating to Captive Generation in the Act. One of the important objects of the Electricity Act, 2003 is to encourage investments in generation of power including captive generation. Further, another object of the

Electricity Act, 2003 is also to encourage supply of electricity generated by the captive plants to any consumers of their choice once they meet their requirement subject to the rules made under the Act, so that the consumers need not depend only upon Government utilities for all the times to come.

20. Keeping the above objects in view, the ATE has interpreted Rule (3) of the Electricity Rule, 2005 holding that it is the mandatory 51 per cent of the aggregate power generated from a unit that needs to be considered for the purpose of determining the proportionality of consumption as between the shareholders who are captive consumers. In *Kadodara Power Private Ltd., Vs. GERC (ELR 2009 ATE 1047)*, the Hon 'ble ATE has given the following interpretation of the rule.

“The Electricity Rules, 2005 have set down that not less than 51 per cent of the aggregate electricity generated by a CGP, determined on an annual basis is consumed for captive use. However, in case there are more than one owner then there is a further rule of proportionality in consumption. In case the power plant is set up by a Cooperative Society the condition of use of 51 per cent can be satisfied collectively by the members of the Cooperative Society. However, if it is an 'association of persons' then the captive user(s) are required to hold not less than 26 per cent of the ownership of the plant and such captive users are required to consume not less than 51 per cent of electricity generated determined on an annual

basis in proportion to the share of the ownership of the power plant within a variation not exceeding +/- 10 per cent. For example, if a CGP produces 10,000 KWH of electricity, 5,100 KWH need to be consumed by the owners of CGP. In case there are three owners holding equal share, each one must consume one third of the 5,100 KWH within a variation of +/- 10 per cent, i.e., between 1,530 KWH to 1,870 KWH. It will not be proper to assess the proportionality of the consumption on 100 per cent of the generation".

21. If we look into the facts of the present case in the light of the above interpretation of the Rule, it is clear that in view of JSW Steel holding more than 26 per cent of the equity interest in the two generating units in question and also consuming more than 51 per cent of the aggregate power generated during the five year period mentioned above, the two units are to be treated as captive generating units of M/s. JSW Steel. As far as the other four shareholding companies, they can also be treated as captive consumers in any year in which their consumption is in proportion to their respective share of equity in the unit out of 51 per cent of the aggregate power generated. In case any of these companies do not consume power in proportion to their equity holding with variation of 10 per cent in any year, they will not be captive consumers for the year in question. As a consequence, they will then be liable to pay the charges that are payable by any open access consumer.

22. In our view, merely because some of the shareholders are not consuming electricity generated in proportion to their shareholding in any year, it cannot take away the benefit available under the Act to the other shareholders who are consuming electricity in proportion to their equity holding when the total captive consumption is more than 51 per cent of the electricity generated. Sections 9 and 10 of the Electricity Act, 2003 and Rule 3(2) of the Electricity Rules, 2005 have to be read harmoniously and shall be interpreted keeping in view the avowed broad objective of the Act. As held by the Hon'ble ATE in Malwa Industries Ltd. [(2007)ELR (APTEL)1631] the Proviso to Rule 3(a)(ii) is in the nature of a qualification or an exception and it does not nullify, subsume or swallow the general Rule of captive consumption which shall be a minimum of 51 per cent of aggregate power generated on an annual basis. Rule 3(2) on which heavy reliance is placed by the respondent does not lay down that if any of the captive consumers does not consume power in proportion to the shareholding, all other stakeholders shall forfeit their benefit which is otherwise available to individual captive consumers even when the consumption by captive users exceeds 51 per cent. If it is held otherwise, it may defeat the very object of the Act in respect of facilitating captive generation and may discourage combined investments which may help only large industries.

23. The CEIG has contended that since there are no dedicated transmission lines which feed power to JSW Steel and other equity participants, the petitioner and other companies cannot be treated as captive consumers. In our opinion, this argument cannot be accepted, as this will again defeat the very purpose of the Act mentioned above. So long as the power generated by a captive plant is supplied to the captive consumers through the lines established by the captive plant without utilizing the network of a transmission / distribution licensee it satisfies the requirements of a dedicated transmission line in Section 9 of the statute.

24. The CEIG has also contended that certain other companies who are not shareholders of the power plant are drawing power from these units which again takes away from the character of the captive generating plant of the units in question. The petitioner has claimed that M/s. JPOC Ltd. and M/s. BOC India Ltd., are located in the JSW Steel Complex and are also supplying oxygen and other gases which are required in the steel manufacturing activities of JSW Steel which is the core business activity of that company. These two companies namely JPOCL and BOC India Ltd. are supplying the gases required by JSW Steel on a job work basis and therefore the electricity supplied to them from the two generating units in question should be treated as captive power consumption by JSW Steel itself.

25. We have examined the above question with reference to the nature of the relationship between JPOCL and BOC India Ltd., on the one hand, and the JSW Steel on the other. From the copies of the agreements between JSW Steel and these companies, it is observed that the said companies are treated as sellers of certain gases and JSW Steel is treated as the buyer of their produce. Further, as evidenced by clauses 8.9 to 8.11 of the Pipeline Supply Agreement dated 8.12.1995 between JPOCL and Jindal Vijayanagar Steel Ltd. (now JSW Steel) and clause H of the Gas Supply Agreement dated 31.5.2006 between JSW Steel and BOC India Ltd., produced by the petitioner as Annexures A and B to its written submissions in this case, in respect of the supply of power, the seller companies have power purchase agreements with Jindal Tractabel Power Company Limited, the predecessor of Jindal Power Company, which set up the two generating units in this case. According to the said PPA, the seller companies are responsible to pay for the power consumed by them directly to the power generating company which makes them independent consumers of power. Further, in case of default by the seller companies in making payments for the power consumed, JSW Steel will be competent to deduct corresponding amounts from payments due to these companies and then indemnify the power generating company. This arrangement clearly shows that the nature of relationship between Jindal Steel and these companies is one of buyer and seller and not one

of principal and job workers. At any rate, the two companies are receiving power and are paying for it as consumers in their own right. Therefore the power consumed by these companies cannot be treated as consumption of power by JSW Steel. Further, since M/s. JPOCL and BOC India Ltd. are not shareholders of the power plant in question, they cannot be treated as captive consumers in this case under Rule (3) of the Electricity Rules, 2005.

26. In view of above finding, we declare that –

- (i) the consumption of power by M/s. JSW Steel from the 1x100 MW and 1x130 MW units in question amounts to captive consumption in terms of the Electricity Act, 2003 for those years in which its consumption is more than 51 per cent;
- (ii) the electricity consumed by M/s. Bellary Oxygen Company Private Limited, M/s. Bhuwalka Pipes Private Limited, M/s. Jamshedpur Injection Powder Limited and M/s. Padmavathi Ferro Alloys Limited has to be treated as captive only in the years in which out of 51 per cent of aggregate power generated they have consumed electricity in proportion to their equity participation with a variation of ten per cent, and when the total captive consumption exceeds 51 per cent;
- (iii) the consumption of power from the units in question by the companies who are stated to be doing job work of

M/s. JSW Steel cannot be considered as captive consumption of JSW Steel Ltd.; and

- (iv) the above declaration would imply that the captive consumption of the petitioner and other companies is subject to verification each year by competent authorities and the concerned distribution licensee and for this purpose the petitioner shall make available necessary information on a quarterly basis as may be required.

Sd/-
(M.R. SREENIVASA MURTHY)
Chairman

Sd/-
(VISHVANATH HIREMATH)
Member

No.N/57/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 7th July 2011

1. Sri M.R. Sreenivasa Murthy	Chairman	} Will give separate Order
2. Sri Vishvanath Hiremath	Member	
3. Sri K. Srinivasa Rao	Member	

Case No. OP 33/2010

Between

M/s. JSW Steel Limited
Vijayanagar Works
P.O. Vijayanagar
Toranagallu, Bellary District – 583 275

.... **Petitioner**

(Represented by its Advocate Sri Adarsh Gangal))

And

Chief Electrical Inspector to Government
32/1-2, 2nd Floor, Crescent Tower
Crescent Road,
Bangalore – 560 001

.... **Respondent**

(Represented by Sri T.K. Vedamurthy, High Court Government Pleader)

Being not in agreement with my colleague Members, a separate order is pronounced by me hereunder:

1. The appellant in this appeal is M/s. JSW Steel Limited. It has appealed to the Commission under Section 40 of the Karnataka Electricity Reforms Act, 1999 read with Section 185 of the Electricity Act, 2003 (hereinafter referred to as Act) against the orders of the Chief Electrical

Inspector to Government (hereinafter referred to as CEIG) dated 26.6.2010 and 20.7.2010.

It has been prayed by the appellant as under :

- (a) Set aside the communications dated 26.6.2010 of the Respondent stating that the Appellant does not fulfill the requirements of a captive generator and captive consumers.
- (b) Hold and declare that the Appellant and the four companies have satisfied the requirements of Rule 3 of the Electricity Rules, 2005 with regard to captive generation and consumption of electricity.
- (c) Pass such other further order(s) as the Hon'ble Commission may deem just in the facts of the present case.

27. During the course of hearing appellant has dropped prayer (a) regarding setting aside communication of Respondent dated 26.6.2010 and the main prayer that sustains is about the appellants request for holding and declaring that appellant and four companies have satisfied the requirements of Rule 3 of the Electricity Rules 2005 with regard to captive generation and consumption (as regards its 1x100 and 1x130 MW plants).

28. Briefly, the appellant JSW Steel Ltd. (JSWSL) claims ownership and operates, amongst others, 1x100 MW and 1x130 MW generating units at its

premises at Toranagallu, Bellary District, Karnataka. The process of setting up of the above mentioned two units commenced initially by JSW Power Ltd. (JSWPL). In the said JSWPL, five companies viz. JSWSL, M/s. Bellary Oxygen Company Private Limited (BOCPvt.), M/s. Bhuvalka Pipes Private Limited (BPPL), M/s. Jamshedpur Injection Powder Limited (JAMIPOL) and M/s. Padmavathi Ferro Alloys Limited were participating companies in the setting up and are shareholders.

29. It is in fact stated that the above four companies had participated in setting up the captive power plant of JSWPL (subsequently amalgamated with JSWSL) by infusing equity contribution in proportion to their power requirement from the captive power plant. From the enclosed copies of shareholder agreement entered into by JSWPL with the four companies Individually, it is seen that it contains as part of the covenants that by virtue of equity contribution by the company (one of the four companies) the parties agree that in proportion to shareholding in JSWPL, the company is entitled to certain quantum of MW of power generated by JSWPL, PPA will be entered into between the parties, etc. Further a categorical and unambiguous clarity evolves about the ownership rights of the participants viz. JSWSL and the four companies in the 1*100 and 1*130 MW plants from the submission of the appellant in

para 5 on page 2 of its written submission dated 24th Feb. 2011, which is reproduced here under:

“ The ownership interest of the above participating companies with respect to the 100 MW and 130 MW generating units of JSW Power Limited on the date of amalgamation, i.e., appointed day of 1.4.2005 under the sanctioned scheme were as under:

Name of the Company	Number of shares held	% of shareholding with reference to the generating units
JSW Steel	98614000	61.63
Bellary Oxygen Private Co. Ltd.	11035000	6.90
Bhuwarka Papers Pvt. Ltd.	555000	0.35
Jamshedpur Injection Powder Ltd.	276000	0.17
Padmavathi Ferro Alloys Ltd.	5550000	3.47
Others	43970000	27.48
Total	160000000	100

In the absence of any other specific information by the appellant regarding share holding ownership by JSWSL and the four companies in the individual plants I take the furnished information on shareholding percentages in the table above for use in computing data and in finalizing my conclusions on CGP status. This will be taken up for a detailed discussion at a later point in this order.

5. Pursuant to the scheme of amalgamation sanctioned by the Hon'ble Bombay High Court under the Companies Act, 1956, effective 1.4.2005, M/s. JSW Power Limited was amalgamated into JSW Steel Ltd., and all the assets including the power plants came to be vested in JSW Steel with effect from 1.4.2005, the appointed date for the amalgamation.

6. JSWSL gets its supply from the power plants through Dedicated Transmission Lines (DTL), it is averred. BOC India Ltd., and other shareholding and non-shareholding companies, it is claimed, are supplied power not in their capacity as a consumer but for undertaking job work of the appellant for generating raw materials as in-feed for manufacture of steel by the appellant; as such, power supplied and consumed by them is electricity consumed by appellant itself, it is claimed.

7. JSW Steel, it is reported that, have consumed more than 51 % of electricity generated during years 2005-06 to 2009-10 as a captive user from the power plants owned and operated by it and duly satisfied the conditions mentioned in Section 2(8) of the Electricity Act, 2003 (hereinafter referred to as Act) read with Rule 3 of the Electricity Rules 2005 (hereinafter referred to as Rules) for being a captive user.

8. Details relating to this appeal will get explained at appropriate places in the context of addressing individual issues that are arising in the present case.

9. Before I go into the detailed handling of the issues related to the appeal, it would be worthwhile to provide an extract of relevant definitions of sections of the Act and Electricity Rules.

Section 2 of the Act: Definitions:

2(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.

2(15) “Consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.

2(16) “Dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in Section 10 to any transmission line or sub-station or generating stations, or the load centre, as the case may be.

2(28) “Generating Company” means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, which owns or operates or maintains a generating station.

- 2(30) “Generating station” or “Station”** means any station for generating electricity, including any building and plant with stepup transformer, switchgear, switchyard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by waterpower, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station.
- 2(32) “Grid”** means the high voltage backbone system of interconnected transmission lines, sub-station and generating plants.
- 2(49) “Person”** shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person.

Section 3 of the Electricity Rules: 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 per cent of the ownership is held by the captive user(s); and
- (ii) not less than fifty-one per cent 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 co-operative 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 per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty-one per cent 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 per cent.

- (b) In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including—

Explanation. –

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference in generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty-six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration. – In a generating station with two units of 50 MW each namely units A and B, one unit of 50 MW namely unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty-six per cent proportionate to Unit A of 50 MW) and not less than fifty-one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

- (2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentage mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation. –(1) For the purpose of this rule. –

- (a) “Annual basis” shall be determined based on a financial year;

- (b) "Captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;
- (c) "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;
- (d) "Special purpose vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.

10. In the background of the foregoing , the prayer of the appellant, facts of the case, submissions and aversions, both written and oral presentations by the parties to the appeal and related information have been considered by me.

a. It would now be relevant to list out the issues and deal with them in detail before I record my finding and issue related orders on the appeal.

12. A: Issues arising out of claims by Appellant:

- a) Whether under Section 40 of the KER Act, 1999 read with Section 185 of the Act, decisions of CEIG are appealable before this Commission; whether this Commission has jurisdiction to dispute resolution;
- b) Whether JSWSL and four companies were Association of Persons in the set up of power plant and theory of proportionality applies to the appellant and the four companies;

- c) Whether supply to these companies can be treated as self and captive consumption by JSWSL, as reportedly they are carrying out job work for the appellant;
- d) Whether the supply of power to shareholding four companies and to non-shareholding companies is effected through DTL, as claimed;
- e) Whether appellant requires distribution license to supply within the distribution system established by it considering the prevailing judgements in the context;

B: Issues arising out of claims by Respondent:

- a) Appellant has no jurisdiction to approach this Commission on this dispute and jurisdiction of Commission does not lie to take up this dispute for resolution.
- b) Appellant is not supplying power to the destination of use either through DTL.
- c) Whether the appellant is supplying through its own distribution system
- d) All the seven companies are not consumers, as defined in Section 2(15) of the Act.
- e) Whether Hon'ble Supreme Court's decision in Civil Appeal No. 4660/2001 in the case of AP Gas Power Corporation Limited Vs. AP State Regulatory Commission and another dated 23.3.2004, in regard to power supply by the generator to any company is applicable to this case.

13. Issues

13.1 Issue of Jurisdiction to appeal before this Commission and the jurisdiction of this Commission:

13.1.1 The respondent, Chief Electrical Inspector to Govt., (CEIG), has submitted that at the outset the appeal filed by the appellant is not maintainable either in law or on facts; specifically that appellant has no jurisdiction to approach this Commission. This Commission has no jurisdiction to try the issue raised by the respondent.

13.1.2 Section 40 of Karnataka Electricity Reforms Act 1999 & Section 185 of Electricity Act 2003 are reproduced here under:

Section 40 of the 1999 Act: Appeals from the decision of the electrical Inspectors. – Not with standing anything to the contrary in the Indian electricity Act, 1910 or the Electricity (Supply) Act, 1948, or any rule made there under, an appeal shall lie from the decision of an Electrical Inspector (other than an Inspector of the Central Government or the Central Electricity Authority or Central Electricity Regulatory Commission) to the Commission or to an arbitrator to be appointed by the Commission in terms of Section 39.

Section 185 Repeal and saving: (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the

Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

(2) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made thereunder shall have effect until the rules under section 67 to 69 of this Act are made;

(c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

13.1.3 In consideration of the above it is seen that the appeal filed by the appellant is under Section 40 read with section 185 of Electricity Act 2003 and the same is maintainable before this Commission and the Commission has the necessary jurisdiction. In fact, Hon'ble ATE in the case of Hira Ferro Alloys Ltd., [2010 ELR (APTEL) 0759*] have, in regard to jurisdiction of SERC in the declaration of CGP status, have stated as under :

“----- At Page 0765

24. ----- Jurisdiction of State Commission -----
 whether or not it can determine the captive status -----
 ----- at Para 6 as under :

6. -----

Since permission for open access under Section 39, 40 and 42(2) of the Act is given by the Commission, we feel that the State Commission would have to take on the responsibility of declaring a generating plant as a captive one and monitoring on annual basis if it satisfies the criteria laid down in Rule 3. We have no reason to deviate now from this position.

13.1.4 Accordingly, the appeal lies with the Commission and the jurisdiction rests with the Commission to declare the captive status of the generating plants.

13.2 Issue of Status as an Association of Persons:

13.2.1 JSW Power Limited (JSWPL), a limited company registered under the Companies Act 1956, as is seen from its Memorandum of association, has as one of its main objectives to carry on the business to build own and/or operate power plants for captive consumption of power by the

shareholders. As explained in para 3. above, besides JSWSL four other companies had evinced desire to participate in the setting up of the power plants of 1x100 MW and 1x130 MW, JPL (i.e., JSWPL) had agreed for their participation in the setting up, parties purchased equity shares in JPL and by virtue of equity contribution by the parties individually they became entitled to certain quantum of MW of power generated by JPL in these plants, in terms of the covenants by the parties in the shareholders agreement.

13.2.2 Also, it was stated therein that JPL shall incorporate suitable conditions in the scheme of merger to be entered into with JVSL (JSWSL) to protect the right of individual shareholders to their entitled share of power from the power plant to be owned by the merged entity. The said shareholders agreement was entered into by the JPL individually with each of the four companies.

13.2.3 Pursuant to the above, it is presented that PPAs have been entered into by JPL(i.e JSWPL) with four companies individually. It is seen from the submitted copy of PPA between JSWPL & Jamshedpur Injection Powder Limited (JAMIPOL) that the company had participated in the setting up of the said plants viz., 1x100 & 1x130 MW, made an equity contribution in JPL, was entitled to and wished to purchase power as a captive user and JPL had agreed to supply power to the company as per terms & conditions agreed. One of the terms of agreement is that JPL shall supply power up to the

contracted quantity and in case of shortfall in consumption the buyer (the company) shall pay fixed charges for deemed consumption at a specified rate.

As per one of the terms of 'Representations and Warrants' in the PPA, the agreement constituted a valid, legal and binding obligation upon the parties enforceable in accordance with the terms thereof.

13.2.4 Further, from the order of Hon'ble High Court of Bombay dated the 30th September 2005, sanctioning the scheme of Amalgamation of JSWPL with JSWSL, with the appointed date of 1st April 2005, the following are note worthy:

1. With effect from the appointed date entire business and whole of undertakings of the transferor company (JSWPL) including Contracts, shall Pursuant to orders of the Bombay High Court Without further act, be transferred to the petitioner company (JSWSL).
2. This court further order that all duties and obligations of the transferor Company (JSWPL), including obligations under contractual arrangements of JPL with

Power consumers not withstanding the eventual equity holding of the power consumers in the petitioner Company (JSWSL) following the implementation of the scheme..... Whether or not provided in the books of transferor company shall be deemed to be the duties and obligations of the petitioner company and it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement...

13.2.5 The description in the preceding paras, reveals unambiguously that the four companies acquired their rights and obligations to their entitled share of power by virtue of their infusing equity contribution in JPL, their rights to be protected by incorporation of suitable conditions in the scheme of amalgamation for their entitled share of power and their right as a captive user. In fact the companies had a take-or-pay type of obligation with JSWPL in case of shortfall in consumption by them. The agreement was legal, valid and binding on the parties. It is to note that the sanctioned scheme of amalgamation specifically transfers the obligations of contractual arrangement between JSWPL and power consumers, to JSWSL.

13.2.6 From the above, the following get clearly established:

- i) JSWSL & four companies have come together set up the power plants with JSWPL as an association of persons. Each of the companies by virtue of equity contribution became entitled to certain quantum of power as a captive user.
- ii) Unambiguously, JSWSL has inherited the duties and obligations of JSWPL, pursuant to the sanctioned scheme of amalgamation. This casts a bounden duty on JSWSL to ensure that the companies are supplied with power up to the contracted quantity.
- iii) At no point of time during the proceedings it has been averred that JSWSL on its part has fulfilled its inherited obligation and the companies only have failed to consume. The consequences, of course, are part of their mutual contract and are not relevant to the case on hand.
- iv) The relevant conclusion one can draw and draws here is that the four companies by their participation came together to set up the JSWPL plants, only as an Association of persons and obligations of JSWPL got transferred to JSWSL by virtue of amalgamation. The status of Association of persons very much continued to hold even after the amalgamation, as JSWSL's obligation, although the senior counsel representing the appellant JSWSL has been vehemently claiming that when amalgamated JSW Steel becomes owner of the captive generating plant citing the Hon'ble ATE judgment in the

Kadodara case, that in the case of JSW Steel it was not necessary for all those who set up, to consume 51 % and only JSWSL can consume 51% citing the judgment of Hon'ble ATE in Hira Ferro Alloys case- and that 'set up' is absolutely irrelevant in view of judgment in Kadodara case. The theory of proportionality, it is claimed, does not apply in its case as an operating company, which acts as a captive for its own use and also generates and supplies to its shareholders.

- v) To substantiate its case as an operating company and corresponding captive status for itself, appellant has drawn support from the decision of Hon'ble ATE in the appeal of CSPDCL Vs. Hira Ferro Alloys Limited, 2010 ELR (APTEL) 0759.

13.2.7 A perusal of the judgements of the Hon'ble ATE quoted by the appellant reveals as under :

- a) In the case of Hira Ferro alloys (HFL), HFL is a company which had set up the power plant and its sister concerns were holding equity shares in HFL. Therein Hon'ble ATE has held as under:
"31. The State Commission has determined the captive generating plant status of the First Respondent and the captive user status of its three sister concerns by relying upon this Tribunal's Judgment in Malwa Industries (supra) case facts of which squarely apply to the case in hand. In

view of this, we agree with the decision of the State Commission and hold that the First Respondent's generating plant is a captive plant and its three sister concerns are captive users along with the First Respondent who is the main captive user."

It is seen HFL had individually set up the plant as a person; whereas JSWPL the transferor company of JSWSL had set up the plants in the case on hand, by an Association of Persons as explained.

b) The cases of Malwa Industries and that of kadodara Power Private Limited also have been cross referred in the Hira Ferro Alloys Judgment; however again, Malwa Industries had set up a generating plant by itself (person), like that by Hira Ferro Alloys Limited, while Kadodara Power Private Limited was formed as a special purpose vehicle (SPV) to set up the power plant. It is not the case of JSWSL that JSWPL was formed as a SPV; rather it clearly averred that they are not a SPV.

c) In the quoted judgment of Hira Ferro Alloys under Para 33 on Page 0770, Hon'ble ATE drawing reference to their decision in Kadodara Power Ltd.'s case have detailed the following :

"In the case of Kadodara Power Private Limited and Ors. Vs. Gujarat Electricity Regulatory Commission and Ors. 2009 ELR (APTEL) 1037 decided on 22nd September 2009, this Tribunal has held that the principle of proportional consumption

applies to a company formed as a Special Purpose Vehicle and has interpreted that the shareholders of a Special Purpose Vehicle company consuming electricity for captive use are an Association of Persons and thus having to adhere to the consumption of electricity in proportion to their shareholding in the company".

Hon'ble ATE under Para 34, have clarified the position in the case of an operating company, like that in the case of Malwa Industries, which has set up the plant by itself, as under:

"The above decision is in the context of a special purpose vehicle only and not in the case of an operating company which acts as a captive generator for its own use and also generates and supplies electricity to its shareholders. Such a combination was considered in Malwa Industries case to be permissible and valid."

Whereas, JSWSL – the operating company of the plants in this case – has inherited the plants set up by an Association of Persons as well as the obligations of JSWPL, as per the sanctioned scheme of amalgamation, along with the associated duty & obligation of proportionality of consumption on the Association of Persons, as imposed by the provisions of Rule 3, Electricity Rules 2005; further, OWNERSHIP as defined in Explanation C. under Rule 3(2) is

equity share capital with voting rights in cases like that of Malwa Hira Ferro Alloys etc., set up by a person, whereas in the case on hand set up by an association of persons it shall mean proprietary interest and control over the generating plant. It can, therefore, be said without any ambiguity that JSWSL is not an operating company akin to that of Malwa Industries and hence it cannot draw any support from that judgment.

13.2.8 Further, the following are noteworthy:

a) From the definition of captive generating plant in section 2(8), it is clearly seen that irrespective of whether the plant is set up by a person, a cooperative society or an Association of Persons, the emphasis by the law-makers is on “primarily for own use” or “primarily for use of its members”. Hon'ble ATE also, while dealing with Malwa case noted that the word ‘primarily’ intends to convey mainly or mostly. Accordingly the claim of the appellant's senior counsel that in the case of post-amalgamation-JSWSL it was not necessary for all those who set up the plant to consume 51% and that it was sufficient only for JSWSL to consume 51% does not conform to the provisions of the Act as the generated power from the claimed CGP is meant ‘primarily for use of members of the AOP’

in proportion to their share and hence the claim of the appellant deserves to be rejected.

2. Emphasis in Rule 3 of Rules 2005 is seen clearly to be on a power plant to qualify as Captive Generating Plant(CGP) and not on deciding on Captive status of Members of AOP individually based on their annual consumption. Proviso 2 under Rule 3(1)(a) links the consumption by "such captive users" - members of AOP- to their proportion in shareholding within a variation of not exceeding ten percent. In view of this, even if one member of AOP fails to consume as required in any year annually it emerges that JSWSL does not qualify to be a CGP in that year.
3. Further, it is more than clear that although they are allowed to hold not less than 26% of ownership in aggregate a special onus is cast upon the members of an AOP to consume not less than 51% of the generated electricity together and additionally to consume, individually, in proportion to their shares in ownership of the plant, within a variation not exceeding ten percent. In contrast, as per proviso 1 to rule 3 (1) (a) members of a cooperative society are allowed to satisfy the

requirement of not less than 51% consumption only collectively. This gets further corroborated by the Hon'ble ATE provided example in page no. 1047/243 of their judgment in KADODARA case dated 22nd September 2009. In the same judgment, Hon'ble ATE have stated that a special provision has been made permitting cooperative society to consume 51% collectively, as per first proviso to 3 (1) (a) (ii) and emphasized further on requirement for SPV/AOP to maintain rule of proportionality of consumption.

13.2.9: Included below are tables detailing annual generation figures and other details for financial year 2005-06 to 2009-10 pertaining to the plant in question. Here, as per established decision of Hon'ble ATE the consumption figures of captive users are compared only on the 51% generation value kept as base.

Table 2005-06

Annual Generation = 787 Mus

51% of Annual Generation = 401.37

Name of the Company	Shares held	% shares	-10%	10%	Consumption @ (-10%)	Consumption @ (+10%)	Actual Consumption	Actual greater than (6) ? Yes(Y)/ No(N)
1	2	3	4	5	6	7	8	9
JSWSTEL		61.63	55.47	67.79	222.63	272.10	667.65	Y
BOC		6.90	6.21	7.59	24.93	30.46	0	N
PFAL		3.47	3.12	3.82	12.53	15.32	16.01	Y
BHUW		0.35	0.32	0.39	1.26	1.55	0.91	N

JAMIPOL		0.17	0.15	0.19	0.61	0.75	0.166	N
TOTAL							> 51%	

Table 2006-07

Annual Generation = 1139.16 Mus

51% of Annual Generation = 580.9716

Name of the Company	Shares held	% shares	-10%	10%	Consumption @ (-10%)	Consumption @ (+10%)	Actual Consumption	Actual greater than (6) ? Yes(Y)/ No(N)
1	2	3	4	5	6	7	8	9
JSWSTEL		61.63	55.47	67.79	322.25	393.86	726.01	Y
BOC		6.90	6.21	7.59	36.08	44.10	95.29	Y
PFAL		3.47	3.12	3.82	18.14	22.18	20.59	Y
BHUW		0.35	0.32	0.39	1.83	2.24	1.03	N
JAMIPOL		0.17	0.15	0.19	0.89	1.09	0.49	N
TOTAL							> 51%	

Table 2007-08

Annual Generation = 1375.16 Mus

51% of Annual Generation = 701.3316

Name of the Company	Shares held	% shares	-10%	10%	Consumption @ (-10%)	Consumption @ (+10%)	Actual Consumption	Actual greater than (6) ? Yes(Y)/ No(N)
1	2	3	4	5	6	7	8	9
JSWSTEL		61.63	55.47	67.79	389.01	475.45	1063.25	Y
BOC		6.90	6.21	7.59	43.55	53.23	153.55	Y
PFAL		3.47	3.12	3.82	21.90	26.77	31.23	Y
BHUW		0.35	0.32	0.39	2.21	2.70	1.00	N
JAMIPOL		0.17	0.15	0.19	1.07	1.31	0.66	N
TOTAL							> 51%	

Table 2008-09

Annual Generation = 1436.80 Mus

51% of Annual Generation = 732.768

Name of the Company	Shares held	% shares	-10%	10%	Consumption @ (-10%)	Consumption @ (+10%)	Actual Consumption	Actual greater than (6) ? Yes(Y)/ No(N)
1	2	3	4	5	6	7	8	9
JSWSTEL		61.63	55.47	67.79	406.44	496.77	1132.99	Y
BOC		6.90	6.21	7.59	45.50	55.62	154.80	Y
PFAL		3.47	3.12	3.82	22.88	27.97	18.82	N
BHUW		0.35	0.32	0.39	2.31	2.82	0.01	N
JAMIPOL		0.17	0.15	0.19	1.12	1.37	0.53	N
TOTAL							> 51%	

Table 2009-10

Annual Generation = 1748.92 Mus

51% of Annual Generation = 891.9492

Name of the Company	Shares held	% shares	-10%	10%	Consumption @ (-10%)	Consumption @ (+10%)	Actual Consumption	Actual greater than (6) ? Yes(Y)/ No(N)
1	2	3	4	5	6	7	8	9
JSWSTEL		61.63	55.47	67.79	494.74	604.68	1410.29	Y
BOC		6.90	6.21	7.59	55.39	67.70	157.17	Y
PFAL		3.47	3.12	3.82	27.86	34.05	23.81	N
BHUW		0.35	0.32	0.39	2.81	3.43	1.05	N
JAMIPOL		0.17	0.15	0.19	1.36	1.67	0.59	N
TOTAL							> 51%	

From the tables for 2005-06 to 2009-10 it is seen that in each year the condition of proportionality of consumption is not met or satisfied by at least one member of the AOP and accordingly the plants fail to qualify as CGP in each of these years.

The respondent on its part, has contended that appellant has neither laid Dedicated Transmission Line, nor regulated its supply through grid, connected its generating plant to another generating company JSWEL's generating plant and accordingly JSWSL's plants do not qualify as a CGP.

In view of the above, I hold that the rule of proportionality, as applicable to association of Persons like that of JSWSL, has not been satisfied in each of the financial years 2005-06 to 2009-10 by JSWSL and hence the plant is declared as not a Captive Generating Plant in each of the respective financial years.

13.3 JOB WORK: Issue of supply to companies by JSWSL, whether gets treated as self and captive consumption, because of reported job work by the companies.

13.3.1 Appellant contends that supply of electricity, water, etc., to BOC India Ltd., JAMIPOL and others is by itself. These companies are reportedly situated within the premises of JSWSL and are undertaking job work of the appellant to manufacture and supply raw materials for steel production in the form of gaseous products like oxygen, nitrogen and argon. More than 95 % of gases, including oxygen, required for the appellant and produced by these companies are consumed by the appellant.

13.3.2 Appellant has provided a copy of its pipeline supply agreement with Jindal Praxair Oxygen Company Limited (JPOCL) dated 8.12.1995 from which the following are seen:

- (i) Buyer's requirement of gases only specifies the required maximum instantaneous production rate by the seller Company and the maximum instantaneous demand rate by the buyer and nowhere in the agreement it is mentioned that all of the Company's produce should be made available to the appellant. On the other hand, a mention is found in the agreement that any supply made to the appellant in excess of the maximum production rate set forth in Article 2.1, will be sold at the discretion of seller about availability and will be considered as liquid oxygen, etc.
- (ii) Buyer (JSWSL) has a liability to pay to a limited extent seller's obligation to Jindal Tractabel Power Company Limited or other supplier of Electricity to the seller company, under conditions of non payment by it.
- (iii) Formula for unit price computation for oxygen, etc., gaseous products consists of a factor indicating current and previous prices of power.
- (iv) Further, it is mentioned that inability of seller to obtain electricity shall not suspend the 'take or pay' obligation of buyer (i.e., JSWSL) and that upon seller's request buyer (JSWSL) shall use

its best effort to cause electricity to be reliability supplied to seller.

- (v) Contrary to the claim of the appellant, seller (job work company) has intended to construct production facility only in seller's property in Toranagallu; whereas JSWSL mentions it as "for undertaking job work of the appellant within the premises of appellant" giving an impression that appellant has provided land facility.

13.3.3 From the above it is clear that electricity is not supplied by JSWSL, but procured by the company from other sources like JTPCL or any other supplier. JSWSL has also been cast with the liability to use its best effort to cause electricity to be reliably supplied to seller, upon request of seller companies.

Accordingly, it gets established that appellant JSWSL is not under any obligation to supply electricity to seller (the so called job work company), supplier of electricity is JTPCL or any other supplier as per terms of PPA between JTPCL and seller and appellant is under the obligation to use its best efforts to cause electricity to be reliably supplied to seller, when requested by the seller.

Under the circumstances, consumption by the company cannot be termed as self consumption by JSWSL and that the agreement with seller companies for oxygen, etc., gases is no more than a pure seller buyer agreement and the claim of the appellant that the company and other companies placed in a similar situation are carrying out job work for JSWSL is not acceptable and I hold that the consumption by the above companies cannot be treated as self consumption by JSWSL.

13.3.4 Secondly, appellant JSWSL has entered into a gas supply agreement with BOC India Limited (a non share holder) and the following are the salient features:

- Site leased to BOCIL by JSWSL at the plant site within the works of JSWSL.
- Customers (other than JSWSL): BOCIL shall be entitled to use to supply its merchant customers, beyond its obligation to JSWSL of supply of argon up to 750 Nm³ / hr. liquid argon up to 950 Nm³/hr.
- Customer (JSWSL) shall supply electricity to BOCIL, and further it is stated that "if necessary supply of back up power from KPTCL" will be made.

From the forgoing it is seen that

- Site is leased.
- The agreement is only for a predetermined quantity of liquid/gas; not as if entire production will be for JSWSL and what ever not required is allowed to be sold.

It is not clear, on what authority and basis back up supply is arranged by JSWSL from KPTCL supply.

13.3.5 From the foregoing one concludes that the agreement between JSWSL and the Companies for supply of gaseous and Liquid products are simply in the form of a buyer-seller agreement and not a job-work agreement as claimed by the appellant.

13.4 Issue of whether JSWSL is supplying to its consumers using DTL.

13.4.1 The Appellant claims that DTL have been laid to the steel plant and that DTL can be laid to non-captive users also (settled by Hon'ble ATE). It is denied that supply by the appellant is through its own Distribution system.

13.4.2 On its part, respondent submits that electricity was not being supplied from the generating point to the destination of use either through DTL as defined in Section 2(16) or through grid.

Generated power was connected to the bus bars which was also getting electricity on the same bus from generating units of other companies, thus forming a distribution system, as defined in Section 2(19). In the annexures R5 & R6 of its counter dated 30.9.2010 respondent has produced detailed sketch schematic of different generators interconnected.

13.4.3 From the claims and counterclaims, firstly it needs to be examined whether supply from generator has been made through DTL. In this context, the relevant sections of the Act are extracted below:

2(16) “Dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in Section 10 to any transmission line or sub-station or generating stations, or the load centre, as the case may be.

2(19) “Distribution System” means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

2(28) “Generating Company” means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, which owns or operates or maintains a generating station.

2(32) “Grid” means the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants.

9. “Captive Generation” (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

13.4.3.1 At Page 65 Annexure R5 of its counter dated 30th September 2010, the electrical interconnection schematic is presented by the respondent, which has not been disputed or denied as incorrect by the appellant

13.4.3.2 Therein, as far as Generators are concerned, it is noticed that –

- f) 1x100 MW unit of JSWSL and four companies gets connected to the 33 kV bus bars and further getting connected to the common 220 kV bus bar on transformation from 33 to 220 kV level.
- g) 1x130 MW unit of JSWSL and four companies gets connected to the common 220 kV bus bar on transformation from 15 to 220 kV level directly.
- h) Two units of 130 MW each of JSW Energy Ltd., a different owner's generating company, are directly connected to the common 220 KV bus bar, by transformation from 10.5 KV to 220 KV level, where JSWSL's generating units under consideration in this appeal are connected.
- i) Two units of JSW energy Ltd, a different owner's generating Company 300 MW each, are getting connected to the Common bus bar, first transformed to the level of 400 KV from 20 KV and then from the bus bar of 400 KV it is transformed down to the level of 220 KV and getting connected to the common 220 KV level bus bar, where JSWSL's generating units under consideration in this appeal are connected.
- j) The electrical loads of four companies involved in this appeal, are getting electrically connected to the 33 KV common bus bar at which the generated power of some other owner's generating companies are getting supplied from the 220 KV common bus bar by transformation from 220 kv to 33 KV.
- k) It is also seen that two nos. each of 400 kv lines and 220 KV lines of KPTCL have got connected to the 220 KV common bus bar & 400 KV bus bar of JSW.

13.4.4 From the above, it emerges that –

- a) Generating units of different owner companies (entities) are getting electrically connected and their generation gets mixed up with that of JSWSL 1x100 and 1x130 MW units' generation under consideration.
- b) Transmission lines, 2 nos. each of 400 KV & 220 KV levels, of KPTCL are connected to the 400 KV & 220 KV bus bars of JSWSL & JSWEL, where generating units of JSWSL & JSWEL are also connected. This means power can flow either to the bus bars from KPTCL and to the loads of JSWSL and four companies & also from the bus bars in the direction towards KPTCL bus bars. Similarly power from JSWEL's generation and/or KPTCL can get fed through the busbar system to cater to JSWSL's & the four companies' loads.

Whereas, agreeing with the contention of the respondent I hold that a Captive Generating Plant has to supply to its captive users only from its own generated power and not by mixing various sources of power. This is a major count on which JSWSL gets disqualified to be captive generating plant.

13.4.5 At this juncture it would be worthwhile to examine the definition of DTL under 2 (16) of EA 2003. In the case under consideration, it is required to establish whether or not the JSWSL's plants are connected by DTL (s) to the loads of four companies, and to JSWSL by way of point – to – point

transmission connecting electric lines or electric plants of a CGP (section 9) to the load center here (each of the four companies' loads and of JSWSL constitutes one load center, as concluded by the Hon'ble ATE that a consumer's interconnection point is a load center).

Section 2 (16) is reproduced here for convenience.

13.4.5.1 **Section 2(16) "Dedicated transmission lines"** means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in Section 10 to any transmission line or sub-station or generating stations, or the load centre, as the case may be.

13.4.5.2 'Point-to-point transmission' is of importance and the point to be emphasized here, because there is a generator claiming captive status and he is reported to be supplying, under Section 9, as a CGP to the so called captive users. It means that from the generation point to the consumption point of a company, who is a captive user, there has to be a transmission link or an electric supply line and only from the designated generator for supply and not from a combination

of different generators and sources of supply, as is the situation emerging here.

13.4.6: 1) It, therefore, gets summarized that –

a) Power supply to the four companies and JSWSL load (so called captive users) is through a system where generated power from generating units of JSWSL and JSWEL gets mixed up and power from KPTCL also gets mixed up, indicating supply is not only from the desired and designated source viz. JSWSL's units claiming CGP status , but also from different other sources.

b) The supply link to the four companies and JSWSL load is not only from the desired and designated CGP source but also from sources of other supplies, hence violating the point-to-point electric supply line requirement to the load center (captive user company), as provided in Section 2(16) for a DTL.

2) Thus far it has got established that power supply to the captive user companies (JSWSL & four companies) is not alone from the appellant's plants; also that the power supply link is not a point-to-point transmission line, as required.

3) Based on this one concludes that the supply to JSWSL and the four companies is not through a DTL.

13.4.7 Respondent has averred that the appellant supplies not through a DTL but his activity is a distribution.

1) In this context, Section 2(19) Distribution System of the Electricity Act, 2003 is reproduced here under:

“Distribution System” means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

2) Respondent has taken reference to Para 52 while citing reference to Hon’ble ATE’s discussion/decision in its judgment dated 7th May 2008 in appeal Nos. 27/06, 179/05, 188/05 and 16/06 involving matters of M/s. Jindal Steel & Power Ltd., Vs. The Chattisgarh State Electricity Regulatory Commission and others etc. The same is reproduced here for convenience :

“Thus dedicated transmission lines which the generating station can establish can go up to the load center. Therefore, a generating station can sell electricity to a consumer through dedicated transmission lines up to the load center. However, if the generating company, instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers in a particular area then what he requires is not a dedicated transmission line but a distribution system for he is certainly not contemplating to have dedicated transmission line for each consumer. If this is the situation i.e., a generating company intends to supply to a group of consumers but

not through a dedicated transmission line, does the intended activity become distribution. In that case Section 12 of the Electricity Act 2003 makes no exception for him and he would need a license".

- 3) Exactly on the same lines as discussed in Para 52, M/s. JSWSL, as seen from the schematic at Page 65, Annexure R5 of Respondent's counter dated 30th September 2010, are using a system of supply wherein loads of five companies viz. BOC Ltd., Padmavathi Ferro Alloys Ltd., Bhuwalka Pipes Ltd., JSW Cements Ltd., & BOC India Ltd., are fed from the 33 kV bus bar; the load of JAMIPOL is fed from the 6.6 kV bus bar after transformation from 33 kV level to 6.6 kV level and of JPOCL from the 11 kV bus bar.
- 4) Now I consider the definition in Section 2(19) regarding distribution system. As per the definition in case there is a system of wires and associated facilities between the delivery points on the generation station connection point and the point of connection to the installation of the consumers, then such a system can be called a distribution system. The arrangement of power supply explained in (3) above is seen to be effected by using a system of wires and associated facilities between the delivery points on the generating station connection and point of connection to the installation of consumers, as has been defined in Section 2(19).

5) To consider whether JSWSL have developed a distribution system as claimed by the respondent, I again consider annexure R5 on page 65.

It is seen that between the delivery points of generating plants, 1 x 100 and 1 x 130 MW and points of connection to the load center of JSWSL and four Companies, there is a system of wires comprising KPTCL's 220 KV and 400 KV lines and associated facilities like existing 2 x 130 MW, 2 x 300 MW generating units, proposed 2 x 300 MW generating units (all of JSWEL, a different owner), 220 KV, 400 KV Bus bars, Generator Transformers, Interconnecting transformers, station transformers, 11 KV Bus bar supplying JPOCL etc. This exactly fits the definition of distribution system in Section 2 (19).

6) In view of this I hold that in the power supply effected by JSWSL to its four companies (claimed to be captive user(s)) there is a distribution system in place, as defined in Section 2(19). The same also goes to establish that there is no Dedicated Transmission Line (DTL) between the generating station connection point and the individual captive users, as per requirement.

13.5 In summary, in view of the foregoing I hold that:

- i. The Commission has the jurisdiction to adjudicate on the issues raised in the appeal.
- ii. JSWSL and the four companies are an Association of Persons and theory of proportionality is applicable

to them and the plant is not a CGP and the consumers are not captive during 2005-06 to 2009-10.

- iii. The companies are not doing job work for JSWSL and their consumption cannot be considered as self-consumption by JSWSL.
- iv. The companies are not supplied through DTL; I hold that there is a distribution system involving JSWSL and JSWEL in between the point of generation connection and the point of connection of load center of the companies and of appellant JSWSL.
- v. I also hold that M/s. JSWSL requires a distribution license for the reason that they have established a distribution system of their own and are supplying to users through this system. This is corroborated by the judgment of the Hon'ble Supreme Court in the Civil appeal No. 4660 of 2001 of AP Gas Power Corporation Ltd., Vs. APERC & another and by the Hon'ble ATE vide its judgment dated 7th May 2008 in appeal No. 27/2006 by M/s. Jindal Steel & Power Ltd., Vs. CSERC and others.

13.6 In view of the above the appeal is liable to be dismissed and accordingly dismissed.

Sd/-
(K. Srinivasa Rao)
Member