

No.N/58/10

**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 34/2010

Between

1. M/s. JSW Energy Limited
Toranagallu
Bellary District – 583 275

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

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

.... **Petitioners**

And

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

2. Deputy Chief Electrical Inspector to Government
No.54, 3rd Cross, Parvathinagar
Bellary – 583 101

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

.... **Respondents**

1. This petition has been filed by M/s. JSW Energy Limited and M/s JSW Steel Limited praying for a declaration that the generating units of 2x300 MW owned and operated by Petitioner-1 are the captive generating plant of Petitioner-2 JSW Steel and consumption of electricity by JSW Steel from the said units is captive consumption under the Electricity Act, 2003 and Electricity Rules, 2005. This declaration has been sought in view of the letters of the Chief Electrical Inspector to Government (CEIG) dated 26.6.2010, 7.7.2010, 27.7.2010 and 9.8.2010, wherein he has disputed the captive status of the plant and has demanded electricity tax on the ground that the units in question are not captive units of JSW Steel.

2. On notice CEIG has appeared and has filed an elaborate statement of objections dated 30.9.2010. The petitioners have also filed their rejoinder dated 14.12.2010 to the objections filed on behalf of the CEIG. Both parties have also filed the written arguments in the matter.

3. We have considered the arguments of both the parties and averments made in the respective pleadings and perused documents produced in support of the same.

4. It is the case of the petitioners that the electricity generating units of 2x300 MW mentioned above were initially set up by M/s. JSW Energy (Vijayanagar) at Toranagallu. The said JSW Energy (Vijayanagar) Limited

was a special purpose vehicle formed by three companies i.e., JSW Energy Limited, JSW Steel Limited (petitioner-1 & petitioner-2) and another, JSW Cement Limited. Thereafter JSW Energy (Vijayanagar) Limited merged with JSW Energy Limited with the approval of the Hon'ble High Court of Bombay vide its order dated 10.10.2008. JSW Steel and JSW Cements had participated by equity contribution in the setting up of the said 2x300 MW units by JSW Energy (Vijayanagar) Limited in order to utilize the electricity generated by them for their manufacturing plants. Consequent to the amalgamation of JSW Energy (Vijayanagar) Limited into JSW Energy Limited, the former company ceased to exist as a special purpose vehicle and JSW Energy Limited became a company owning a generating station and supplying electricity to its captive consumers and selling electricity to third parties. Further, since JSW Energy has no manufacturing activity other than generation of power, it qualifies, according to the petitioners, for being considered a special purpose vehicle in respect of its 2x300 MW generating units.

5. It is further stated that M/s JSW Steel Ltd., Petitioner – 2 herein, owned 29.24 per cent of the total issued and paid up capital of the erstwhile JSW Energy (Vijayanagar) Limited on the date of amalgamation of the latter with JSW Energy Limited and continues to hold corresponding shares in JSW Energy Limited subsequent to amalgamation. The power project of JSW Energy is situated in the JSW Steel complex and electricity

from the power plant is transmitted to JSW Steel through dedicated transmission lines laid by JSW Energy. In addition to JSW Steel, the power plant in question supplies electricity to others also. It is the case of the petitioner that JSW Steel which holds 29.24 per cent of the share capital in the 2x300 MW units in question also consumes more than 51 per cent of the power generated by the said unit. It is therefore contended that the power plant in question should be treated as a captive generating plant of JSW Steel under Section 9 of the Electricity Act, 2003 read with Rule (3) of the Electricity Rules, 2005.

6. As against the case of the petitioner, it is strongly contended on behalf of the respondents that JSW Energy (Vijayanagar) Limited itself could not have been a valid SPV as M/s. JSW Energy Limited which is one of the participating units was a generating company and could not have set up another SPV for generation. Further, in order to satisfy the requirements of Rule (3) of the Electricity Rules, 2005, JSW Steel and JSW Cement who are holding 29.24 per cent and 0.58 per cent equity shares respectively in 2x300 MW power plant are required to consume power generated by the said unit in proportion to their equity shares with a variation of +/- 10 per cent. This works out to a minimum of 26.32 per cent to a maximum of 32.17 per cent in the case of JSW Steel and a minimum of 0.52 per cent and a maximum of 0.64 per cent of the electricity generated in the case of JSW Cement. Since the said proportionality in

consumption is not satisfied by the above entities, the 2x300 MW power plant does not qualify to be a captive generating plant.

7. On behalf of the respondents, it is also contended that on the basis of inspections conducted by them it is found that the power generated by the JSW Energy is not supplied through dedicated transmission lines to its consumers, including JSW Steel, and therefore the said plant cannot be treated as a captive generating plant for JSW Steel under Section 9 of the Electricity Act, 2003. It is stated that the transmission lines supplying power from 2x300 MW of JSW Energy are also connected to the power being supplied by another two units of 1x100 MW and 1x130 MW capacity located in the premises of JSW Steel, and the transmission lines of KPTCL and therefore there are no dedicated transmission lines supplying power to any captive consumers.

8. In the light of the above contentions, the question that arises for consideration in this case is whether the power plants of 2x300 MW which now vest with JSW Energy can be treated as captive generating plants of JSW Steel in terms of the provisions of the Electricity Act, 2003 read with Rule(3) of Electricity Rules, 2005.

9. In our Orders on the Petition filed by the 2nd petitioner in OP 33/2010, which was heard along with the present petition, we have quoted the legal provisions of the Electricity Act, 2003 and Electricity Rules, 2005 as

summed up by the Hon'ble Appellate Tribunal for Electricity in the case of Kadodara Power Ltd. Vs. GERC [(2009) ELR APTEL 1037]. Therefore we feel it is not necessary here to repeat the legal position. Therefore we proceed to examine the case of the petitioner in the light of the legal position stated therein.

10. It is not in dispute that JSW Steel and JSW Cement together own more than 26 per cent of equity in the 2x300 MW power plants of JSW Energy. Thus they satisfy the first condition of captive consumers as required under the Electricity Act, 2003 and the Rules thereunder. Now it is to be seen whether the companies which claim to be captive consumers also satisfy the requirement of the second condition, namely minimum consumption of 51 per cent of the aggregate power generated in a year, and whether such consumption is in proportion to their shareholding.

11. From the Annexure R-8, it is seen that the gross generation of the 2x300 MW station for the year 2009-10 was 3,625.28 million units (MUs). Out of this, 284.35 MUs was the auxiliary power consumption of the generating plant and 1,571 MUs is shown as the consumption of JSW Steel. The remaining 1,769.93 MUs was exported to the grid. There was no power supply to JSW Cements during that year. These facts relating to generation and supply have not been disputed by the petitioners as they

are based on the returns filed by the petitioners with the respondents. According to this statement the power supplied to JSW Steel amounted to 43.3 per cent of the aggregate electricity generated. Therefore this falls short of the 51 per cent of minimum power to be consumed by captive consumers in the absence of any consumption by JSW Cement.

12. It appears from the consumption figures relied upon by the petitioners that the auxiliary consumption of the power plant is also taken as consumption of JSW Steel. In our view, this is not correct. Auxiliary power is both an output and an input in the process of power generation. As such, it needs to be accounted towards the generating units only. Even assuming that any part of this is to be assigned as consumption of any other consumer, then it can only be assigned in proportion to the power consumed by the relevant consumer out of the total power generated. Thus, the power consumed by JSW Steel cannot include all the auxiliary consumption made by the power plant. It is seen that 1,769.93 MUs was exported to the grid in 2009-10 which amounts to about 49 per cent of the aggregate power generated. If the same proportion out of auxiliary consumption of the power plant is excluded from the consumption shown against JSW Steel, the total consumption including this portion of the auxiliary consumption by JSW Steel amounts to 47.3 per cent only and thus falls short of the minimum 51 per cent required under the Rules.

13. On behalf of the respondents, it is also stated that out of the 1,571 MUs reported as consumed by JSW Steel during 2009-10, 609.54 MUs was actually supplied through Transformer Nos. TR-3 & TR-4 and this consumption is attributable to M/s. Jindal Praxair Oxygen Company (JPOC) Ltd., which is not an equity holder in these two units of JSW Power and therefore that quantum of power shown against JSW Steel is to be excluded from the consumption of JSW Steel. The remaining 961.46 MUs actually consumed by JSW Steel amounts to 26.52 per cent of the aggregate power generated by these two units. In OP 33/2010 filed by the 2nd petitioner herein, it was claimed that the power supplied to M/s. JPOC Ltd., should be treated as part of the power consumed by JSW Steel as the status of M/s. JPOC Ltd., is only that of a job worker for JSW Steel. This claim has been negated by us in that petition after considering that M/s. JPOC Ltd., has an independent power purchase agreement with the generating company and it is not using power supplied to JSW Steel. Even if it is assumed that the 1,571 MUs (which includes 609.54 MUs consumed by JPOC Ltd.) is treated as consumed by JSW Steel it does not exceed 51 per cent of the aggregate power generated during the year 2009-10 if the auxiliary consumption of the power plant is not treated as part of the consumption by JSW Steel. Therefore it fails to meet the requirement of the statute regarding the minimum consumption by captive consumers.

14. In respect of the contention relating to the existence of dedicated transmission lines raised by the respondents we only need to reiterate the view already taken by us in OP 33/2010 wherein it is held that “so long as power generated by the captive plant is supplied to 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”. However, questions relating to dedicated transmission line need not be considered in this case since we have on other facts come to the conclusion that the petitioner – 2 is not a captive consumer of the plant in question. Similarly, for the same reason, the decisions referred to by the petitioners and the respondents on the proportionality of consumption by shareholding captive consumers also need not be considered.

15. In the light of the foregoing discussion, we declare that the consumption of power by JSW Steel in the power plant of 2x300 MW belonging to JSW Energy Ltd. for the year 2009-10 does not amount to captive consumption and the said power plant cannot be declared as a captive generating plant in terms of the Electricity Act, 2003 and the Electricity Rules, 2005. The captive nature or otherwise of the consumption of power in subsequent years shall be determined on similar basis.

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

Sd/-
(VISHVANATH HIREMATH)
Member

No.N/58/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
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1. Sri M.R. Sreenivasa Murthy	Chairman	} will give separate Order
2. Sri Vishvanath Hiremath	Member	
3. Sri K. Srinivasa Rao	Member	

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(Represented by its Advocate Sri Adarsh Gangal))

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32/1-2, 2nd Floor, Crescent Tower
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.... **Respondents**

(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 Appeal has been filed by M/s. JSW Energy Limited (hereinafter referred to as JSWEL) and M/s. JSW Steel Limited (hereinafter referred to as

JSWSL)) challenging the orders of the Chief Electrical Inspector to Government (hereinafter referred to as CEIG) dated 26.6.2010, 7.7.2010, 27.7.2010 and 9.8.2010, holding that the appellants do not satisfy the requirements of Rule 3 of the Electrical Rules, 2005 notified specifying the conditions for being a captive generation and for captive consumption of electricity. The other prayer in regard to setting aside communications of CEIG dated 7-7-2010 and 27-7-2010 has been dropped during the course of the hearing.

16. Briefly, Appellant No.1 has claimed ownership and operates, amongst others, a thermal generating station of capacity 2x300 MW at Toranagallu, Bellary District in the State of Karnataka (hereinafter referred to as the Plant).

17. It is stated, that the above power plant with two units of 300 MW was being set up by JSW Energy (Vijayanagar) Ltd., which was formed as a special purpose vehicle (SPV) by JSWEL, JSWSL and JSW Cement Ltd. (JSWCL).

18. The shareholding pattern of the three companies in JSW Energy Vijayanagar Ltd., as furnished by the appellant, is as below:

Shareholding Pattern of JSW Energy & Others in JSW Energy Vijayanagar Ltd.

Sl. No.	Shareholders	No.of Equity Share	Price/ Share	Amount (Rs.)	%
1.	M/s. JSW Energy Ltd.	29,01,64,192	10	2,90,16,41,920	70.18
2.	M/s. JSW Steel Ltd.	12,09,00,00	10	1,20,90,00,000	29.34
3.	M/s. JSW Cement Ltd.	24,18,000	10	2,41,80,000	00.58

Since nothing to the contrary has been stated & furnished by the appellant, it is taken that, like JSWSL, the other participating companies viz. JSWEL & JSWCL are also continuing to hold their shares and having ownership interest in JSWEL to the extent of their individual shareholding relating to two units of 300 MW vested with JSW energy after amalgamation.

19. JSWEVL merged with JSWEL, pursuant to a scheme of amalgamation sanctioned by the Hon'ble High Court of Bombay, with the appointed date as 1.4.2008 and was ordered to be dissolved. As per the scheme of amalgamation, JSWEL is engaged in the business of generation, transmission, distribution and trading in power, while the power generation projects of the company are carried on by the Company and through its subsidiary JSWEVL (relevant to the case on hand).

20. The petitioner has stated that post amalgamation JSWEVL came to be dissolved and ceased to exist as a SPV, but JSWEL became a

company owning a CGS and supplying to its captive consumers and selling surplus electricity to third parties.

Here, pursuant to the sanctioned scheme of amalgamation the question as to what really happens to the SPV status of JSWEVL remains to be addressed and answered. The petitioner has, however, contended as one of his grounds to appeal that JSWEL not being SPV, the theory of proportionality does not apply to its case. JSWEL and JSWSL as its shareholder holding more than 26 % of share capital of JSWEL are entitled to use electricity in any manner whatsoever without requiring to share electricity on proportionate basis.

In the context of examination of above, the following extract of judgement rendered by Hon'ble ATE in Appeal No. 171/2008 on 22.9.2009 of M/s. Kadodara Power Limited's case merits attention.

“

The captive generating plant may be set up by any person including a cooperative society or association of persons. In other words, the person to set up a generating plant may be somebody who does not fulfill the description of either a cooperative society or association of persons. Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of persons and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose

vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deal with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail

to comprehend who other than a special purpose vehicle can be an 'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons.

16) In case the special purpose vehicle was not required to maintain the rule of proportionality of consumption, the Central Government could have specifically mentioned the same just as it has done for a cooperative society. The Rule having not exempted a special purpose vehicle from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming the special purpose vehicle as has been done in the case of cooperative society it will only be rational and logical to hold that a special purpose vehicle is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'."

From the above quoted judgement, it becomes clear that Hon'ble ATE have held SPV to be an 'association of persons' and that SPV is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'. Accordingly, as per the sanctioned scheme of amalgamation by the Hon'ble High Court of Bombay, the transferee company JSWEL (the Appellant no. 1 in this case) inherits the rights, duties, responsibilities, liabilities and obligations of the transferor

company JSWEVL. In that case, it is all the more clear that the transferee company JSWEL, does inherit the role of and associated duties, responsibilities and obligations of SPV held by JSWEVL prior to the amalgamation with JSWEL.

Thus, under the circumstances, I hold that the transferee company JSWEL is duty bound to hold the inherited responsibility of SPV after the amalgamation. Hence the SPV after amalgamation, viz. JSWEL, has a duty to ensure that the consumption by the constituent members of SPV, as an Association of persons, satisfy the rule of proportionality stipulated in the Electricity Rule, 2005. The petitioner, however, has not submitted a copy of the Memorandum of Understanding pertaining to the formation of SPV.

21. Accordingly in view of the sanction order of the Hon'ble High Court of Bombay, it is held that the responsibility of SPV will pass on to M/s. JSW Energy Ltd., after the amalgamation and it therefore befalls on the captive users forming the SPV viz. JSWSL, JSWEL & JSWCL to satisfy the rule of proportionality in each financial year, as is required for association of persons. The criteria of satisfaction or other wise of proportionality of consumption by the captive users in each financial year will be tested with the generation figures for each of the concerned financial year.

22. The figures of annual generation for the financial year 2009-10 & 2010-11 for 2x300 MW plant, as received by the respondent from the appellant, have been furnished by the respondent.

23. Issue No.1: Whether the captive consumers forming the SPV have satisfied the rule of proportionality applicable to the SPV as an association of persons:

On the basis of the foregoing we will decide on the satisfaction by the members of the rule of proportionality. While on this, It is seen contended by the respondent that JSWEL being a generating company with no manufacturing activity cannot consume any power and hence cannot qualify to be a captive consumer of a CGP (2x300 MW) and as per Rule(3)(1) JSWEL cannot be a captive user consuming electricity primarily for its own use. Further the respondent has pointed out from the written submissions made by the appellant on 24.2.2011 that JSW Steel is the only captive user of the electricity generated from 2x300 MW units; there is also no mention about consumption of JSW Cement Limited who has contributed for the setting up of the plant by JSW Energy (Vijayanagar) Limited. I agree with the contentions.

From the furnished generation figures, it is seen that there is no consumption by JSWEL, except for auxiliary consumption of its generating units. Although the appellant JSWEL claims this as the captive consumption energy figures of itself, the auxiliary consumption in any generating station having generating units, is only energy consumed by the auxiliary equipment in the station in the context of the generation of electricity by the plant. Actually this energy is lost with no effective availability for use in any manufacturing activity. In fact, there is continuous ongoing effort by power engineers to optimize the auxiliary consumption in generating stations. In view of this I hold that there is no consumption by JSWEL. As far as JSWCL is concerned, no separate energy consumption figures have been furnished for the years 2009-10 & 2010-11. In the absence of availability of individual consumption figures for JSWSL & JSWCL, one has to conclude that there has been no consumption of energy by JSWCL and whatever energy is shown to have been consumed by JSWSL & JSWCL put together as nothing but the consumption by JSWSL only. Further, it is seen that both in 2009-10 and 2010-11 the consumption by JSWSL is less than the mandatory total consumption of 51% of annual generation, while auxiliary consumption is not included in the computation. Hence on this count also plant fails to qualify as CGP in these financial years.

From the above, since JSWCL and JSWEL as members of the SPV and captive consumers have not consumed any energy during the said financial years they fail to satisfy the requirement of proportionality of consumption in proportion to their ownership rights. Accordingly, the rule of proportionality does not get satisfied by the members of SPV (association of persons) thus resulting in the 2x300 MW plant of JSWEL failing to qualify as a CGP during the financial year 2009-10 & 2010-11. Therefore, the main prayer in the petition gets answered in the negative.

There are other related issues which arise based on the aversons by the appellants and contentions by the respondents which are being addressed below :

Issue No.2: Whether supply is made through DTL.

The generating units of JSWSL (1x130, 1x100 MW) and JSWEL (2X130, 2X300 MW) are getting interconnected by a system of wires and associated lines, etc., forming a distribution system as detailed in Annexure R-5 by the Respondent. This has not been disputed by the appellants. Further this issue has been dealt with in great detail by us in OP 33/2010, wherein it was found that the so called captive consumers have not been supplied by JSWSL through DTL. Similarly here also it is seen from Annexure R-5 that the so called captive consumers namely JSWCL, JSWSL & JSWEL are not

being supplied through DTL. Hence we hold that supply is not through DTL to the said captive consumers.

In addition, as already explained, JSWEL is also having a distribution system between the generation connection point and the consumer load connection point as discussed in detail in OP 33/2010. Accordingly we agree with the contention of the Respondents that supply to the captive consumers is not made through DTL and on the contrary, a distribution system is in place, in violation of the Act.

In view of the above, I hold as under :

- (1) The captive consumers as members of SPV (association of persons) have failed to consume in proportion to their shareholding in ownership rights as per Rule 3(1) in both financial years 2009-10 & 2010-11 and accordingly the generating units of 2x300 MW of JSWEL fail to qualify as a captive generating plant.
- (2) Supply of energy to captive consumers by JSWEL generating plant is not made through DTL nor there is any Open Access that has been availed.
- (3) There is a distribution system in place by JSWEL.

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

Sd/-
(K. Srinivasa Rao)
Member