

**No.N/59/102**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 7<sup>th</sup> 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 35/2010**

**Between**

Gulbarga Electricity Supply Co. Ltd.  
Station Road  
GULBARGA – 585 101  
(Represented by Just Law Advocate)

....      **Petitioner**

**And**

1. M/s. JSW Steel Ltd.,  
Vijayanagar Works  
Vijayanagar  
Toranagallu  
Bellary District – 583 275

2. M/s. JSW Energy Ltd.  
P.O. Box No.9  
Village & Post Toranagallu  
Bellary District – 583 275

....      **Respondents**

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

1. This petitioner in this petition has made the following prayers :

- (a) Declare that the Respondent No.1 Company is not a Captive Power Generator as defined by the Electricity Act, 2003;

- (b) Direct the Respondents not to supply power to entities within its industrial complex without obtaining a valid license for supply of such power, in accordance with Section 12 of the Act, 2003;
- (c) Direct the Respondents to pay all levies required under the Act and regulations including surcharge, wheeling charge, etc., to the Transmission and Distribution licencees;
- (d) Initiate proceedings under Section 142 of the Electricity Act, 2003 for blatantly violating the provisions of the Act;
- (e) Grant cost of this proceedings;
- (f) Pass any other orders as this Hon'ble Commission deems fit in the facts and circumstances of the case.

2. On notice the Respondents JSW Steel and JSW Energy have put in appearance and filed detailed statement of objections dated 29.11.2010. The petitioner has filed a rejoinder dated 23.12.2010. Parties have also filed written submissions in addition to addressing oral arguments.

3. We have considered the petition and the objection averments and also documents produced along with them, as also the arguments addressed by both the parties.

4. In the connected Petition Nos. 33/2010 and 34/2010 wherein the same facts were involved and which were heard along with this petition, we have considered the issues raised in this petition also and after consideration of averments and the materials placed before us have passed the following orders :

In OP 33/2010 –

- “(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”.

In OP 34/2010 –

“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”.

In view of the above findings in OP Nos. 33 and 34 of 2010, the issue that remains to be considered by us relates to whether it is necessary for the Respondents herein to obtain distribution licenses under Section 12 of the Electricity Act, 2003 to supply electricity to non-captive consumers.

5. It is contended by the petitioner that the supply of electricity by respondents to the other entities situated in the industrial complex is in violation of Section 12 of the Electricity Act, 2003 as the same is without obtaining a valid license. In support of this contention, the petitioner has relied upon the judgment of the Hon'ble Supreme Court in AP Gas Company's case.

6. In our view, the above contention cannot be sustained in view of the amendment brought into effect to the second proviso to Section 9(1)

of the Electricity Act, 2003, vide Central Act 26 of 2007 w.e.f. 15.6.2007. In the Kadodara's case, the Hon'ble ATE has held after considering the 2007 amendment that captive generating companies can sell surplus power to any person of their choice subject to the rules made under 42(2) of the Electricity Act, 2003 without obtaining a license. Duly following the said decision, we hold that the supply to the non-captive consumers by the respondents does not require any license and therefore the supply is legal and valid.

7. As regards the direction sought to the respondents to pay all levies required to be paid under the Electricity Act, 2003 and the regulations including surcharge, wheeling charge, etc., to the petitioner, we need not issue a separate direction as the same are payable in accordance with law. In the instant case, if in any year consumption of electricity by the captive consumers falls short of 51 per cent or proportionality rule, all charges including cross subsidy surcharge have to be paid to the petitioner. The petitioner is entitled to seek the generation and consumption details every year from the respondents and determine the charges payable and collect the same.

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

Sd/-  
(VISHVANATH HIREMATH)  
Member

**No.N/59/10**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 7<sup>th</sup> 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 35/2010**

**Between**

Gulbarga Electricity Supply Co. Ltd.  
Station Road  
GULBARGA – 585 101

.... **Petitioner**

(Represented by Just Law Advocate)

**And**

1. M/s. JSW Steel Ltd.,  
Vijayanagar Works  
Vijayanagar, Toranagallu,  
Bellary District – 583 275.

2. M/s. JSW Energy Ltd.  
P.O. Box No.9  
Village & Post Toranagallu  
Bellary District – 583 275

.... **Respondents**

(Represented by its Advocate Sri Adarsh Gangal)

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

1. This petitioner in this petition has made the following prayers :

- (g) Declare that the Respondent No.1 Company is not a Captive Power Generator as defined by the Electricity Act, 2003;
- (h) Direct the Respondents not to supply power to entities within its industrial complex without obtaining a valid license for supply of such power, in violation of Section 12 of the Act, 2003;
- (i) Direct the Respondent to pay all requisite levies required under the Act and regulations including surcharge, wheeling charge, etc., to the Transmission and Distribution licencees;
- (j) Initiate proceedings under Section 142 of the Electricity Act, 2003 for blatantly violating the provisions of the Act;
- (k) Grant cost of this proceedings;
- (l) Pass any other orders as this Hon'ble Commission deems fit in the facts and circumstances of the case.

1.1 Petitioner had also given a set of interim prayer clauses seeking direction to respondent for furnishing information, records etc.

8. The facts in this case are identical to that of OP 33/2010. In fact, the appellant JSWSL in OP 33/2010 is the 1<sup>st</sup> Respondent in this case.

9. The petitioner has contended that the 1<sup>st</sup> Respondent Company is not a Captive Generating Plant as defined under Section 2(8) since energy generated at such a plant have to be used primarily by members of the association in proportion to their shareholding with a variation not exceeding 10 % as association of persons. The

consumption by the members of the AOP are not as per requirements of Rules seen from the records produced. Further, Open Access has not been obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents nor the companies for getting supply as per KERC (Open Access) Regulations, 2004 nor the supply is made to the companies through dedicated transmission line. Out of 23 companies in the premises of JSW Steel and JSW Energy, 20 companies have not taken power from petitioner GESCOM. He also contends that as per the Order of KERC in OP 14/2003, if a person intends to supply power to a group of persons with its own dedicated transmission line and with its own distribution network, he would come under the purview of Part-IV of the Electricity Act, 2003 and would require a distribution license. It is submitted that if the 1<sup>st</sup> Respondent as claimed, is not a person nor an association of persons the basis on which the status of captive generating plant is claimed by him is not clear.

On the part of the Respondents, it is averred that the decision in Appeal OP 33/2010 filed by the 1<sup>st</sup> Respondent would apply to Appeal OP 35/2010 also. It is submitted that the power plant (1x100, 1x130 MW) has been set up by JSWSL and four other companies by way of contribution to the share capital in the plant of JSWPL, thereby entitling themselves for a certain MW shares in the plant. It

has also been stated by the respondents that all rights and obligations of JSWPL including that of captive supply to the said JSWSL and four other companies came to be vested by operation-of-law in JSWSL.

4. I have considered all material placed on records, submissions by both the parties – both written and verbal during the hearings. Respondents have not produced material to show of open access having been availed.

(ii) I deal with the prayers of the petitioner and hold as under:

(a) The CGP status of JSWSL has been dealt with by me in great detail in OP 33/2010 and I hold that the 1x130 & 1x100 MW plants of JSWSL do not qualify as a CGP during each of the financial years 2005-06 to 2009-10, and hence the main prayer viz. (a) gets answered in the affirmative. i.e., the plant does not qualify a captive Generator.

(b) I hold that the companies are not supplied by JSWSL through DTL;

(c) I 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 7<sup>th</sup> May 2008 in appeal No. 27/2006 by M/s. Jindal Steel & Power Ltd., Vs.

CSERC and others; Section 12 of EA 2003 has been violated; action under Section 142 becomes liable on the First respondent.

(d) Liability to pay wheeling charge, cross subsidy surcharge as claimed, befalls on the respondents.

Regarding reliefs, if any, on account of my order terms, liberty is reserved to the petitioner to move a separate petition, if so desired.

Sd/-  
(K.SRINIVASA RAO)  
Member