Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Review Petition No. 2 of 2013 in Appeal No. 137 of 2011

Dated: 30th April, 2013

Present: HON'BLE MR. JUSTICE KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

1 M/s JSW Energy Ltd.,
P.O. Box No.9,
Village & Post Torangallu,
Belleary District – 583 275,
Karnataka

2 M/s JSW Steel Limited
Vijayanagar Works
P.O. Vidyanagar, Toranagallu
Belleary District – 583 275,
Karnataka …Appellants/Review Petitioners

Versus

1. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
9/2, M.G. Road,
Bangalore-560001.

2. Chief Electrical Inspector to Government of Karnataka,
32/1-2, 2nd Floor,
Crescent Tower, Crescent Road,
Bangalore-560001.

3. Deputy Chief Electrical Inspector to Government of Karnataka
No.54, 3rd Cross, Parvatinagar,
Bellary – 58310 …….Respondent s

Counsel for the Appellants/petitioners : Mr M G Ramachandran
Mr Anand Ganeshan

Counsel for the Respondents : Mr Anantha Narayana for R-2

Order

PER MR. V J TALWAR TECHNICAL MEMBER

1. This Review Petition has been filed by M/s JSW Energy Limited and M/s JSW Steel Limited against the judgment dated 21.12.2012 of this Tribunal in Appeal No. 137 of 2011 relating to Captive Status of consumption of electricity by the 2nd Appellant/petitioner from the generating Units of 1st Appellant/petitioner.

2. In this Review Petition, the Petitioners/Appellants have pointed out that one of the primary issues raised by the Appellants/petitioners for decision has not been considered by this Tribunal and there was no finding or decision of this Tribunal on the issue raised by the Appellants/petitioners in Appeal No. 137 of 2011, which warrants Review.

3. According to the Appellants/petitioners, the matter in issue in the Appeal No. 137 of 2011 was the captive status of the consumption of electricity by the 2nd Appellant/petitioner from the 2 x 300 MW generating units of the 1st Appellant/petitioner. The 2nd Appellant/petitioner holds more than 26% of the equity shares in the power plants of the 1st Appellant/petitioner. The only issue that arose was with regard to the minimum 51% consumption of electricity from

the generating units by the 2nd Appellant/petitioner. The State Commission rendered the finding that the 2nd Appellant/petitioner did not consume the minimum of 51% of the total aggregate generation from both the Units, inter-alia, on the ground that the full auxiliary consumption by the generating units cannot be included as the consumption of the 2nd Appellant/petitioner. However, on the issue as to whether the consumption should be considered unit wise or on the aggregate generation of both the units of 300 MW each, the State Commission has not given any finding.

4. The Appellants/petitioners had filed an Appeal being No 137 of 2011 before this Tribunal. One of the grounds raised by the Appellants/petitioners in the said Appeal was that in terms of the Explanation (1) to Rule 3 of Electricity Rules 2005, it is not necessary for the consumption of the captive user to constitute the minimum 51% of the generation from both the units for the purpose of determination of captive status of the Appellant. The learned Counsel for the Appellants/petitioners submitted that by application of the above provision, the consumption by the 2nd Appellant/petitioner would constitute more than 51% of generation from any one unit. It is further contended that though the Appellants/petitioners had raised this contention before the State Commission, it was not considered by the State Commission and as such there was no finding of the State Commission on the said issue, which was one of the grounds of challenge by the Appellants/petitioners in the Appeal before this Tribunal.

5. In the judgment dated 21.12.2012, this Tribunal recorded the above contention of the Appellants/petitioners on the issue of unit wise consumption in para 26 of the said judgment.

6. However, this Tribunal has not given finding on this specific issue raised by the Appellants/petitioners. On this basis, it is contended that the Tribunal's judgment dated 21.12.2012 suffers from an error apparent on the face of record on this issue and consequently it deserves review under the review jurisdiction of this Tribunal.

7. The learned Counsel for the 2nd Respondent has submitted that issue of unit wise consideration to determine the captive status of the Appellant/petitioner was not raised before the State Commission and therefore, the Tribunal has rightly ignored the issue, which was raised only in the Appeal before this Tribunal. It was also contended that issue raised but not answered by the Court in favour of the party raising the said issue was deemed to have been rejected by the Court. For such type of rejection, the only remedy available is challenging the same in an appeal under Section 125 of the Electricity Act, 2003.

8. Perusal of the written submissions of the Appellants/petitioners before the State Commission would indicate that the Appellants/petitioners did not raise this issue before the State Commission. In para 16 of the Written Submission before the State Commission it had just reproduced the requirements of Rule 3 for captive consumption. However, in view of our specific recording of the issue raised by the Appellant in Para 26 of the Judgment dated

21.12.2012, we are inclined to deal with the said issue on its merits. Let us now refer to Para 26 of the judgement

> *"26...It is the further case of the Appellant/petitioners that the Commission has failed to appreciate that the two units of 300 MW generating units at the power plant are independent units and in any event the Commission ought to have considered the consumption by the JSW Steels Ltd. qua one unit if it had come to the conclusion that the consumption on both units is less than 51%. The consumption of the JSW Steels Ltd. ought to have been considered unit wise, even assuming for the sake of argument that the Appellant/petitioner did not satisfy 51% consumption requirement based on the entire power plant. "*

9. The main claim of the Appellants/petitioners is based on the Explanation (1) to the Rule 3 of Electricity Rules 2005 notified by the Central Government on 8th June 2005. Rule 3 of Electricity Rules 2005 is reproduced below:

> ***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 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. The contention of the learned Counsel for Review Petitioners is as follows.

The consumption of electricity is required to be reckoned for each unit separately and not necessarily for the aggregate consumption from both the units. The captive status can be considered unit wise and not for all the generating units or generating station as a whole. This is specifically provided for in the Explanation No. 1 to Rule 3 of the Electricity Rules, 2005. The illustration after the explanation further clarifies the position. Even accepting the Commission's findings that full auxiliary consumption of the plant and the consumption of M/s

JPOC cannot be considered to be the consumption of the Appellants/petitioners, the consumption of the Appellants/ petitioners during the year works out to be around 27% of the total generation by both the units and the same would qualify to be captive consumption as it would be more than 51% of the generation from any one of the two units.

11. The learned Counsel for the Respondent, while refuting the contentions of the Appellants/petitioners, submitted that in order to avail the benefit of Explanation (1) to Rule 3 of 2005 Rules, the Appellants/petitioners were required to indicate that it did not intend to use both the generating units as captive and had to pre-identify particular generating unit which it intended to use as captive and till date the Review Petitioners have not identified the unit intended for captive use.

12. We have heard the rival submissions of the parties on the issue. The only question emerges from the rival contentions for our consideration is as to **"Whether the term 'identified for captive use' used in the Explanation 1 to Rule 3 of the 2005 Rules denotes that the unit/units are required to be pre-identified or could be indicated at the end of financial year."**

13. Let us again refer to the Explanations to Rule 3 of Electricity Rules 2005 reproduced below:

"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."

14. The Conjoint reading of Explanation (1) & (2) along with the illustration as referred to above would establish that the unit/units intended for captive use are required to be identified in advance at the stage of induction of equity. Explanation (2) dealing with unit wise equity participation, read with illustration appended to it, makes this proposition quite clear. Let us apply the illustration to a case where two units are of different capacity for better understanding.

A generating station has two unit viz., Unit A of 100 MW and unit B of 200 MW. In case the captive user desires to identify Unit A of 100 MW as the Captive Generating Plant, the captive user shall hold not less than 8.666 percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 100 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive user. However, in case the

consumer desires to identify Unit B of 200 MW as the Captive Generating Plant, the captive user ought to hold minimum of 17.333 percent of the equity shares in the company (being the twenty six percent proportionate to Unit B of 200 MW) and ought to have consumed not less than fifty one percent of the electricity generated in Unit B determined on an annual basis. In other words, if any person has infused equity between 8.67% to 17.33% in the company, he would have to identify Unit A for its captive use. If he has equity shares in the Company in the range of 17.34% to 26%, he could identify either of the units for its captive use. In case he has more than 26% equity shares in the company he would be entitled to identify both the units for its captive use. However, he is required to identify the unit/units for captive use at the time of infusion of equity.

15. Thus, it is evident that the captive user is required to identify the unit/units intended for captive consumption at the time of induction of equity stage itself.

16. Pre-identification of the unit/units is also essential from prevention of gaming aspect as illustrated by the following example:

> Two units at a generating station of 100 MW and 200 MW produced say 1000 MU and 2000 MU in a year respectively. The Captive user consumed around 2000 MU in a particular year. Consumption of 2000 MU is more than 51% of total generation of two units, therefore the captive user would claim total consumption as captive identifying both units as captive generators. Suppose captive user could consume only 1100 MU, it would identify Unit B as captive and claim full 1100 MU as captive consumption. Whereas consumption of 1100 MU, being less than 51% of total generation from both units, would not have qualified to be captive if both the units were identified as captive generators. Further, assume in a particular year the captive generator could consume only 900 MU. It would identify Unit A as captive and claim 900 MU as captive consumption

which it could not have, if both the units or unit B was identified as captive generator. Table below would explain the possible gaming aspect if the captive user is allowed to identify the unit after the closure of the year.

	Units identified as captive (all figs. in MU)		
	Both units	Only Unit B	Only Unit A
Generation	3000	2000	1000
Consumption by Captive user	Consumption qualified to be captive consumption (more than 51%)		
1530 – 3000	1530-3000	1530 - 2000	1000
1020 – 1529	**Nil (< 51%)**	1020 – 1529	1000
510 – 1019	**Nil (<51%)**	**Nil (<51%)**	510 – 1000

17. It is clear from the above discussion that a captive consumer may indulge in gaming and identify any unit as captive depending upon its own consumption during the relevant year. Such an arrangement would frustrate the very purpose of issuance of Rule 3 of Electricity Rules 2005.

18. To sum up: Since the Appellants/petitioners did not identify any of the two units as captive generator at the time of infusion of equity, they are not entitled to invoke provisions of Explanation to Rule 3 to their benefit.

19. With these observations and findings, the Review Petition is disposed of. There is no order as to costs.

(V J Talwar)
Technical Member

(Justice Karpaga Vinayagam)
Chairperson

Dated: 30th April, 2013

REPORTABLE/~~NOT REPORTABLE~~