

PRISM CEMENT LIMITED VS MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION & ORS. [APPEAL NO. 02 OF 2019 AND APPEAL NO. 179 OF 2017]

June 03, 2019

I. Introduction

- Recently, the Ld. Appellate Tribunal for Electricity (**APTEL**) in the matter of **Prism Cement Limited vs Madhya Pradesh Electricity Regulatory Commission & Ors.** [Appeal No. 02 of 2019 and Appeal No. 179 of 2017; decided on 17.05.2019] had the occasion to render findings on several issues which have time and again plagued the generating stations being operated by Special Purpose Vehicle (**SPV**).
- The Ld. APTEL rendered its finding on the issues of, “*whether an arrangement/transaction in which a generating plant supplying electricity through Power Purchase Agreement enters into an arrangement with a third party for supply of electricity to the third party in return of investment by such third party in the generating plant by way of shares is permissible and whether such supply to third party by generating plant would qualify as captive generation under the ambit of Electricity Act, 2003*”.
- The Ld. APTEL in the facts of the above case concluded (for the reasons set forth below) that there is no infirmity in such kind of arrangements, till the time the criteria as set forth in the Electricity Act, 2003 (the **Act**) and Electricity Rules, 2005 (**Electricity Rules**) are adhered to by the parties.

II. FACTS of the case

- BLA Power Private Limited (**BLA**) signed a Memorandum of Understanding (**MoU**) on 10.08.2007 and an Implementation Agreement (**IA**) on 01.09.2008 with the Government of Madhya Pradesh (**GoMP**) regarding setting up of a thermal power plant in the State of M.P.
- The MoU and the IA provide GoMP to exercise the first right to purchase 30% of the available aggregate capacity of the BLA’s proposed project at the tariff determined by the Commission and additional 5% of the net power on an annualized basis at a price equivalent to the Variable Cost only (excluding fixed charges).
- On 05.01.2011, a PPA was executed between BLA and M.P. Power Management Co. Ltd. (**MPPMCL**) (earlier known as MP Power Trading Co. Ltd.) for sale of thirty percent (30%) of Installed Capacity of the Generating Station, for a period of 20 years (hereinafter referred to as the **30% PPA**).
- In June 2016, Prism Johnson Ltd. (**Prism**) acquired 1,75,00,000 equity shares of BLA, which corresponded to more than 26% shareholding in Unit-1 of BLA’s Generating Station.
- Simultaneously, Prism and BLA entered into a Power Supply Agreement (**PSA**) on 07.06.2016 for supply of 25 MW of power generated by Unit-1 of BLA’s Generating Station whereby Prism agreed to procure more than 51% of the power generated by the said Unit-1 so as to qualify as captive consumers.
- On 20.10.2016, M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd. (**MPPKVVCL**) directed Prism to deposit an amount totaling to Rs. 8,66,99,753/- as Cross Subsidy Surcharge (**CSS**) as it was of the view that consumption of power from Unit-1 of BLA by Prism amounted to supply to a consumer from a generator and not as captive consumption.
- Being aggrieved by the demand, Prism filed an appeal before Madhya Pradesh Electricity Regulatory Commission (**State Commission**). However, the State Commission opined that CSS was leviable on Prism. The State Commission was of the view that as BLA entered a long term PPA for 20 years in the capacity of an IPP (Independent Power Purchaser) in terms of MoU & IA signed with GoMP it cannot be treated as a Captive Power Plant.

- Being aggrieved, both Prism and BLA preferred the captioned Appeal.

III. Key issues framed by APTEL

- Whether the power plant i.e. Unit-1 of BLA Power's generating station satisfy the twin conditions under Rule 3 so as to qualify as a Captive Generating Plant?
- Whether Cross Subsidy Surcharge is leviable / applicable on the power consumed by Prism (captive user) from Unit-1 of BL?
- If Unit-1 of BLA Power qualifies as a Captive Generating Plant, will the tariff for supply of 30% capacity under the Long Term PPA be determined under the MPERC Generation Tariff Regulations or the MPERC Captive Regulations?

IV. Main arguments by Prism and BLA before APTEL

- It is not in dispute that the shareholding of Prism in BLA exceeds 26 percent and it is also undisputed that it consumes more than 51 percent of the power produced from Unit 1 of BLA. Therefore, in terms of sections 2(8) and 9 of the Act read with Rule 3 of the Electricity Rules, Unit 1 of BLA qualifies as Captive Generating Plant (**CGP/CPP**). *For the relevant sections and rules please see Annexure 1.*
- It has not been disputed by any of the parties that both criteria of 26% shareholding and minimum 51% consumption have not been satisfied. Hence, in terms of 4th Proviso to Section 42(2) of the Act, no CSS is leviable.
- The existence of long-term PPAs does not in any manner disqualify Unit-1 of BLA's Generating Station from being a CGP. Once the twin test under Rule 3 is met, status of a CGP is conferred by operation of law and it is of no consequence whether for a quantum of power otherwise generated by the same plant has a long-term or short term PPA whose tariff is determined or not by the State Commission.
- The provisions of the MoU, the IA, the 30% PPA, the 5% PPA and the records show that the Generating Station was neither envisaged as an IPP, nor was it envisaged by BLA exclusively for the benefit of GoMP. There was no embargo for the Generating Station (or a Unit thereof) to subsequently qualify as a CGP.
- Therefore, the finding in State Commission order that Unit-1 is partially IPP and partially "CPP", "hybrid", "part captive", "part of the regulated Unit-1 and the same" is impermissible is factually and legally incorrect.
- The State Commission wrongly relied upon the MP Grid Code. The MP Grid Code does not apply at all in the present case, for the reason that the conferment of captive status is in accordance with the provisions of the Act read with the Rules. The MP Grid Code only applies to manner of dispatch and scheduling and MP Grid Code cannot take away captive status of power plant.

V. Main arguments by respondent

- The CSS is levied in terms of Section 42 of the Act to compensate the distribution company for the loss of cross subsidy (revenue) which the distribution company would have recovered from the subsidising consumers like the Appellant Prism.
- The applicable tariff regulations notified by the MPERC are Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 (**MPERC Generation Tariff Regulations**). Regulation 3 clearly provides that *it applies to generating station other than those based on renewable sources supplying power to distribution licensee*. While the other set of regulations which apply to generating stations other than those based on renewable sources is Madhya Pradesh Electricity Regulation Commission (Power Purchase and other matters with respect to conventional fuel based captive power plants) Regulations, (Revision-I) 2009 (**MPERC Captive Regulations**).
- On reading the MPERC Generation Tariff Regulations and MPERC Captive Regulations together it is clear that either an IPP (or a complete unit thereof) or a CPP (or a complete unit thereof) can have agreement for sale of power with the Distribution Licensee in the State of Madhya Pradesh.

- However, an IPP and a CPP would not be similarly treated for the purposes of tariff payments. Therefore, a generating station (or a complete unit thereof) can either be an IPP or a CPP. In other words, if a generating station or a complete unit thereof is being treated as an IPP and is subject to the provisions of the MPERC Generation Tariff Regulations; it cannot simultaneously treat itself as a CPP also. As such, unit of an IPP cannot be treated as a hybrid unit of an IPP and CPP. A part of the unit cannot be treated as a CPP.

VI. Findings by APTEL

- The definition of captive generating plant in Section 2(8) of the Act is to be read with Rule 3 of the Electricity Rules. Rule 3(1)(b) of the Electricity Rules deals with the requirements for a generating station owned by a generating company or for any one unit of such generating station to qualify as a CGP. Hence it is clear that a CGP is a Generating station or a unit of such generating station.
- It is clear from the Act, and Rules and from judgements of Hon'ble Court that to qualify as 'captive generating plant' under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;
 - a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and
 - b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.
- It is also not in dispute that a unit or units of such generating station could be identified for captive plant and there is no need that the entire generating station should be recognized or notified as captive generating plant. **Further, it is not in dispute that Prism is in contravention of the conditions set forth in the Act and the Electricity Rules and that Prism has been complying with the said conditions.**
- It is clear from the records that simultaneous with the infusion of equity by Prism in BLA, Appellants had identified Unit-1 of BLA as the specific unit of the power plant from which electricity will be supplied to Prism. These facts are not in dispute. None of the contesting respondents have raised any argument that the flow of power to Prism was made from any unit other than the unit specifically identified for captive purposes, i.e. Unit-1 of BLA.
- Therefore, Prism has complied with the ratio of Tribunal judgement in JSW Energy Ltd. and Another v. Karnataka Electricity Regulatory Commission and Others, wherein the Ld. Tribunal observed that ***the captive user is required to identify the unit/units intended for captive consumption at the time of induction of equity stage itself.***
- Section 2(8) and Section 9 read with the Rules only lay down the conditions in Rule 3 for a power plant to qualify as a CGP. Rule 3(1)(a)(ii) imposes a condition that **"not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use"**. Rule 3 permits a captive generating plant to dispose off the balance 49% of electricity generated in such plant in any manner as it may deem fit. **Since the Act specifically states that generation is a delicensed activity, supply of such balance 49% of electricity generated in a CGP can be made to users who are not captive users of such power plant including to distribution licensees.**
- BLA has been supplying approximately 35% of power generated from its Unit-1 to MPPMCL under its Long term PPAs. Hence, BLA is in a position to give up to 65% to a captive user, which is more than the threshold requirement of 51% consumption required under Rule 3. As the law does not place any restriction on disposal of the balance 49% power, the same cannot be unilaterally imposed by the State Commission.
- The findings in the impugned order using terms such as "Regulated IPP", "Unit-1 is partially IPP and partially CPP", "hybrid", "part captive", "part of the regulated Unit-1 (untied capacity of Unit-1) was identified as CPP", are legally and factually incorrect. If such an interpretation is to be given effect to, then captive user(s) of every captive generating plant will have to consume 100% of the electricity generated from the CGP, which is contrary to the express provisions laid down in the Act and the Electricity Rules.

- We are unable to accept the view of the State Commission that since BLA's Unit-1 was initially an "IPP", and has a long term PPA, it is not possible for Unit-1 to subsequently qualify as a CGP.
- We are unable to accept that the MPERC Captive Regulations apply for the supply of "Contracted Capacity" by BLA Power to MPPMCL under the long-term PPA. Tariff for such supply of "Contracted Capacity" under the long-term PPA dated 05.01.2011 between BLA and MPPMCL can therefore be determined only under the MPERC Generation Tariff Regulations

VII. Conclusion of APTEL

- In light of the fact that the twin-conditions as per Rule 3 were met by Prism and BLA in terms of Unit-1, APTEL was pleased to hold that Unit-1 of BLA is a CGP with Prism as its captive user. Therefore, in terms of the 4th Proviso to Section 42(2) of the Act, **cross-subsidy surcharge cannot be levied on power captively consumed by Prism from BLA's Unit-1.**

VIII. ELP's view on the judgement

It would be noteworthy to mention that ELP was instrumental in assisting BLA Power in the structuring of Prism Cement's investment in the company. APTEL's decision has upheld the structuring.

The said judgement will bring in a much-desired clarity as regards to the applicability of CSS on supply of electricity from generating plants/units of generating plants to users who agree to purchase equity in such generating plants.

Annexure 1

The relevant sections of the Electricity Act, 2003 and Electricity Rules, 2005 are as follows:

- 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 cooperative society or association.”
- Rule 3(1) of the **Electricity Rules** provides:

“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 percent of the ownership is held by the captive user(s), and
- (ii) not less than fifty one percent 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 cooperative 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 percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent 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 percent;

(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 (s) 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 percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 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 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.

42. Duties of distribution licensee and open access: ... (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

Disclaimer: The Respondent may prefer an Appeal to the Hon'ble Supreme Court against the said order and the said findings will be considered as final, unless and until, the same are set aside/stayed by the Hon'ble Supreme Court.