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Analysing developments impacting business

SPECIAL PURPOSE VEHICLES CANNOT BE EQUATED WITH 'ASSOCIATION OF PERSONS' FOR VERIFYING CAPTIVE STATUS

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Introduction

On 07.06.2021, the Appellate Tribunal for Electricity (APTEL) passed its judgment (Judgment) in Appeal No.131 of 2020: Tamil Nadu Power Producers Association vs. Tamil Nadu Electricity Regulatory Commission. APTEL *vide* the Judgment (uploaded on the website of APTEL on 11.06.2021), has settled various issues pertaining to verification of captive status of a Captive Generation Plant (CGP) under the Electricity Rules, 2005 (Rules).

For captive users to enjoy their captive status and the allied benefits, 2 (two) conditions have to be met in terms of Rule 3(1)(a)(i) and (ii) of the Rules:

- (i) captive users to hold 26% equity shares in the financial year; and
- (ii) captive users ought to have consumed at least 51% of the aggregate electricity generated.

Additionally, an Association of Persons (AOP) in terms of the second proviso to Rule 3(1)(a) is required to meet the criterion of proportionate consumption, i.e., such captive user(s) shall consume not less than 51% percent of the electricity generated in proportion to their shares in ownership of the power plant. In terms of Rule 3(1)(b), in case of a CGP formed as a Special Purpose Vehicle (SPV), the conditions under Rule 3(1)(a)(i) and (ii) are applicable.

The Judgment was passed in an Appeal against Order dated 28.01.2020 (Impugned Order) passed by the Tamil Nadu Electricity Regulatory Commission (TNERC) in R.A. No. 7 of 2019, wherein TNERC had formulated a fresh procedure for verification of status of captive user(s) and CGPs located in the State of Tamil Nadu. The Appellant was aggrieved by various directions passed by TNERC in the Impugned Order, including the requirement imposed on the CGPs formed as SPV to consume power in proportion to their shareholding in terms of the second proviso of Rule 3(1)(a)(i) of the Rules.

APTEL *vide* its Judgment has set aside the Impugned Order to the extent detailed hereunder:

Judgment of APTEL

- **Distribution Company (Discom) cannot be the adjudicating authority for verification of captive status:** APTEL has held that TNERC could not have delegated its power to verify the captive status of CGP to Tamil Nadu Generation and Distribution Corporation (TANGEDCO). The jurisdiction to verify the captive status of a CGP lies solely with the State Electricity Regulatory Commission.
- **SPVs cannot be equated as AOPs:** APTEL, pursuant to analysing Rule 3 of the Rules as well as judgments passed by the Supreme Court regarding interpretation of proviso as exception to the general rule, held that SPVs cannot be equated with AOPs under Rule 3 of the Rules. APTEL was of the view that the second proviso to Rule 3(1)(a) is a stand-alone provision and as such does not relate to Rule 3(1)(b). Therefore, APTEL has held that the requirement of proportionate consumption is only applicable to AOPs and not SPVs.

Pertinently, APTEL in differentiating between SPVs and AOPs has held that the judgment dated 22.09.2009 previously passed by APTEL in Appeal No. 171 of 2008: Kadodara Power Pvt. Ltd. vs. Gujarat Electricity Regulatory Commission & Ors. & the batch (Kadodara Judgment) to the extent it equates an SPV and an AOP is '*per incuriam*'.

- **Captive users are only required to meet the minimum requirements under Rule 3:** APTEL held that in terms of previous judgments passed by APTEL it is already established that the requirement of 26% shareholding and 51% captive consumption are the minimum requirements to be fulfilled by a set of captive users, and once the same is done, the rest of the captive users not fulfilling the above conditions will have no impact on the overall captive structure.
- **Weighted average shareholding method cannot be made applicable:** APTEL refused to accept the contention of the Respondents for using weighted average shareholding method in case of varying shareholding pattern through the year. APTEL noted that it is impossible for a CGP to predict the varying shareholding in a given year due to exiting captive users and therefore, the verification of minimum shareholding along with minimum consumption is to be done annually at the end of the financial year only.
- **The documents to be provided for availing open access cannot be linked to Wheeling/ Open Access with captive verification:** APTEL held that the verification of shareholding criterion under Rule 3 cannot be made mandatory pre-condition for grant of open access. APTEL further noted that the verification of captive status regarding both shareholding and consumption criterion, can only be done annually at the end of the financial year.
- **TNERC cannot implement the draft amendment to the Rules and change the methodology retrospectively:** It was held that the proposed amendment to the Rules in terms of which verification of ownership and consumption ought to be done for each corresponding period of change and not at the end of the year, cannot be made applicable by TNERC at this stage. APTEL further noted that there cannot be any retrospective application of procedure formulated under the Impugned Order. However, it was clarified that for the past years TANGEDCO can verify data for the purpose of verification of CGP status on the basis of data already furnished by CGP/ captive user(s) while availing open access.

Comments

The Judgment passed by APTEL appears to have settled various issues which have plagued the growth of CGPs in the country in the recent past. The Judgment is a material shift from the previously accepted position (as per the Kadodara Judgment) that the requirement of proportionate consumption has to be met by SPVs as well and not just AOPs. The Judgment has further underscored the position that Discoms cannot be entrusted with the power to verify the captive status of CGPs themselves. It has further been clarified that as per Rule 3 of the Rules in its present form, the verification of not just the shareholding criterion, but even the consumption criterion has to be done on an annual basis, i.e., at the end of the year. The Judgment may have a positive impact on the future growth of CGPs in the country and ensure that the captive users complying with the requirements under Rule 3 are not made to suffer on account of other non-complying consumers.

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