

# Captive generation by CTU under the Electricity Act, 2003 - contextually prohibited?

Devansh A. Mohta\*

*"The starting point of this article is to analyse the meaning of "person" under the Electricity Act, 2003 especially in light of the expression "unless the context requires otherwise", occurring at the beginning of Section 2 (Definition). It is settled law that the above expression enables a contextual interpretation of the provisions. The Electricity Act, 2003 in furtherance of its objective of promoting the electricity industry for the first time allowed "captive generation" to any "person". The present article proposes to demonstrate how upon a contextual interpretation the statutory entity (Central Transmission Utilities) under Section 38 of Act, would be excluded from the purview of "person" who are allowed, under Section 9 of Act, to set up captive generation plants."*

## Introduction

The Electricity Act, 2003 (2003 Act) consolidated the law relating to "generation, transmission, distribution, trading and use of electricity". The aim of the law was to develop the electricity industry, promote competition and inter alia encourage private participation. In furtherance of these objectives the 2003 Act delicensed generation and freely permitted captive generation.

For the first time a provision- Section 9 of 2003 Act- has been incorporated under Electricity Law by which "any person" was allowed to set up captive generation plant.

In this background it has become necessary to examine the impact or effect of the new provision on the provision governing statutory entities like "CTU" which have been in existence.

## Central Transmission Utility

Section 2(10) defines "**Central Transmission Utility**" ("CTU") to mean any government company which the Central government may notify under Section (1) of Section 38 of Act. A bare perusal of Section 38 of the Electricity Act brings out the impact of being notified a "CTU".

Section 38 reads thus:

"38. Central Transmission Utility and functions.- (1) The Central Government may notify any Government company as the Central Transmission Utility:

Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:

Further, sub-section (2) of Section 38 of Act prescribes the functions of CTU. It is pertinent to note that "CTU" is prohibited from "engaging in the business of generating or trading in electricity".

## Captive Generation Plant

A "**captive generation plant**" is defined under Section 2(8) as follows:

"Captive Generation Plant means a power plant set up by any person to generate electricity 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 co-operative society or association"

By virtue of Rule 3 of the Electricity Rules, 2005; for a power plant to qualify a "captive generation plant", require the following:

"3. Requirements of Captive Generating Plant:

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\* The author is practising as a counsel in the Supreme Court of India and can be contacted on devanshmohta@gmail.com

(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 cooperative 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.

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."

The setting up of captive generation plant is regulated by Section 9 of the Electricity Act, 2003. Section 9 of the Electricity Act reads thus:

"9. Captive generation.- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of Section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission."

Upon perusal of the above provision the *inter alia* following emerge:

- (a) that a captive generation plant can be set up (construct, maintain and operate) by any person;
- (b) that such person would have the right to open access for the purpose of carrying electricity from its "captive generating plant" to the destination of his own use.
- (c) that the open access would be subject to the adequate transmission facilities to be determined by CTU or State Transmission Utility (STU).
- (d) that "captive user" must consume atleast 51% of the total electricity generated by the captive generation plant, also must hold 26 per cent ownership of the said captive generation plant.

#### **MEANING OF "ANY PERSON"**

Therefore, the following aspects need consideration in order to, harmoniously apply the provision of Section 9 to Section 38.

- (a) Whether the expression "any person" found under Section 9 of the Act, includes "Central Transmission Utility"?
- (b) If yes, whether a "CTU" while acting under the provision of Section 9 would violate the mandatory obligation of Section 38?

Section 2(49) of the Electricity Act 2003 defines "person", to include "any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person".

It is settled principle of law by using the expression "include" in a definition the legislature intends to define a word in a statute 'illustratively' and not exhaustively. In other words, "inclusive" definition has always been to treat the other entities, which would not otherwise have come within the definition, to be a part thereof, because of the illustrative enactment of such definition. (*See: Karnataka Bank v. State of AP (2008) 2 SCC 254*)

Whereas, "CTU", as stated above, is a government company notified by Central Government. Section 2(31) of the Electricity Act, 2003 has adopted the meaning assigned to "government company" under Section 617 of the Companies Act, 1956. Therefore, in order to assess whether "government company" was excluded from the definition of "person" under Section 2(49) of the Electricity Act, 2003; it is relevant to examine the meaning of "government company" under the Companies Act, 1956.

It may be noted that a "government company" as per Section 617 of the Companies Act, 1956 is also "company" with the certain criteria prescribed therein.

Section 617 reads thus:

617. Definition of "Government company". For the purposes of [this Act] Government company means any company in which not less than fifty-one per cent of the [paid up share capital] is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments [and includes a company which is a subsidiary of a Government company as thus defined].

Further Section 3(1) (i) of the Companies Act, 1956 means a company "formed and registered" under the Companies Act, 1956 and similar definition of "company" is found in Section 2(13) of the Electricity Act, 2003.

Moreover, Section 616 of the Companies Act, 1956 extend the application of the Companies Act, 1956 to the companies engaged in generation or supply of electricity, to the extent those provisions are not inconsistent.

Therefore, *prima facie*, there did not appear an intention to exclude “Central Transmission Utility” from purview of the definition of “person” under the Electricity Act, 2003. However, a provision or expression in a statute ought not to be in isolation.

### Contextual Interpretation

It is pertinent to note that not only did Section 616 of the Companies Act, 1956 extended the provisions of that Act only if there was no inconsistency but also Section 2 of the Electricity Act, 2003, which contains the definition of person, opens with the phrase “unless the context otherwise require”.

In *Printers v. Asst. CTO*<sup>1</sup> the Hon’ble Supreme Court of India held that it was held that where the context does not permit or where the context requires otherwise, the meaning assigned to it in the definition need not be applied. (See also: *Ramesh v. Sanwal*<sup>2</sup>)

In *Tata Power v. Reliance*<sup>3</sup> the Hon’ble Supreme Court dealt with the expression “supply” which was defined under Section 2(70) of the Electricity Act, 2003. The question was whether “supply” should have been the same meaning as the definition. The Court applied ‘contextual interpretation’ test; (“the entire Act has to be read as a whole and then chapter by chapter, Section by Section and word by word”) and held that the expression “supply” may contextually mean differently than its definition.

Thus, upon a contextual interpretation, the expression “person” under Section 9 of the Electricity Act excludes from its purview “Central Transmission Utility” as notified under Section 38 of the Electricity Act, 2003 for the following reason:

- (i) A CTU is a government company which is notified by the Central Government to act as “CTU” under Section 38. Therefore, the Electricity Act, 2003 has meted out different treatment to the CTU by providing a separate statutory scheme provision setting out its obligations and function;
- (ii) additionally where legislature has taken care of using different phrases in different section, normally different meaning must be assigned to the language used. (See: *Oriental Insurance v. Hansraj*<sup>4</sup>)

Under Section 9, once a person (also the captive user, as per Rule 3) has set-up a captive generation plant, he is entitled to the following:

- (i) the “open access” to be made available by CTU “for the purpose of carrying electricity” from his captive generation plant to the destination of his use, in other words “captive use” which must comply with Rule 3 of the Electricity Rules 2005;
- (ii) the *proviso* to sub-section (1) of Section 9 allows supply of electricity to the grid or licensee or consumers.

In my view, the usage of the expression “carrying” [(under Section 9(2))] as distinguishable from the word “supply” in *proviso* to Section 9(1) is significant.

It is pertinent to note that while “carrying” is not defined the Electricity Act, 2003 contains the definition of expression “supply” under Section 2(70) means, in relation to electricity, means sale of electricity to a licensee or consumer.

Therefore, it is clear that *proviso* to Section 9(1) permits sale of the surplus electricity generated by the “captive generation plant”. Further, supply of electricity from a captive generation plant to licensee or consumer, is regulated in the same manner as the generating station of “generating company”.

At this juncture, it is pertinent to note that the Electricity Act, 2003 makes no distinction between a “generating company” and a “captive generation plant” except on the levy of cross-subsidy by virtue of *proviso* to Section 38 (2) which prohibits levy of surcharge on cross-subsidy when the open access is obtained by captive user- “*Provided* also that surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for “carrying” electricity to the destination of his use.

In *AP Gas v. A.P. Electricity Regulatory Commission*<sup>5</sup> the Hon’ble High Court held “generating company” and “captive generating plant” are the same for the purpose of Electricity Act, 2003- except with respect to levy of cross subsidy from which “captive generation plant” has been exempted. It was held:

“17. Part V of the Act contains the procedure for Inter-State transmission of electricity, grid standards and also trader. As noticed, for distribution and trading electricity, a licence is required under Section 14 of the Act. Be that as it is, Section 39 of the Act in Part V and Section 42 in Part VI are relevant to the consideration of question. Section 39(2) of the Act enumerates the functions of State Transmission Utility. As per clause (d) of sub-section (2) of Section 39, it shall be the function of State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. It is also competent for the State Utility to fix transmission charges and surcharge thereon as specified by State Electricity Regulatory Commission to be utilised for the purpose of meeting the requirement of cross-subsidy but as per fifth proviso to Section 39(2) of the Act, when State Transmission Utility provides open access to a captive generating plant, surcharge for the purpose of cross-subsidy cannot be levied. Except to the extent of prohibition for collection of surcharge for the purpose of cross-subsidy, Section 39 of the Act treats generating company and captive generating plant equally. So to say, the “generating company” appearing in Section 39(2)(d) also includes a captive generating plant. If such an interpretation is not opted, it would result in absurdity. For instance, in a given case, State Transmission Utility may deny open access to its transmission system to a captive generating plant on the ground that no such obligation is cast on it. In such an event, Section 9 of the Act, which confers a right on a person with captive generating plant to have open access to transmission system would be rendered redundant and meaningless. There is no provision which enumerates two different types of functions of State Transmission Utility, one in respect of generating company and other in respect of captive generating plant.”

Therefore, it is the manner of utilisation of electricity generated which would render the unit “captive generation plant”.

In the above background the prohibition contained under Section 38 needs to be examined. Section 38 imposes upon a “CTU” the following restrictions:

- (a) that a “CTU” shall not engage in the business of generating of electricity;
- (b) that a CTU shall not engage in trading of electricity.

It is pertinent to note that “CTU”, by virtue of section 14 is “deemed to be a transmission licensee”. Section 40 of the Electricity Act, 2003, prescribes the duties of “transmission licensee”

Section 41 prohibits a transmission licensee from undertaking the “business of trading in electricity”. It is pertinent to note that Section 2(71) defines “trading” to mean purchase of electricity for resale.”

Thus the restriction upon “CTU” from trading must be understood in the aforesaid context.

On the restriction from engaging in the business of generation of electricity, in my view, “CTU” is required to grant non- discriminatory open access to licensee or generation company, which is a statutory function and require independence. There is nothing in the provision of Section 9 which permits CTU to provide “open access” to itself. This duality would run contrary to the scheme of the Electricity Act, 2003. In view of the above, to the extent Section 9 allows sale of electricity to third party, a CTU would be in breach of its statutory obligation and act inconsistent with the provision of Section 38.

### **Effect of Non-Obstante Clause**

Now the only issue that remains to be examined is with respect to the *non-obstante clause* of Section 9 of the Electricity Act, 2003.

It is settled law that even though a “notwithstanding” could be very widely worded, its scope may be restricted by the construction having regard to the intention of the legislature gathered from the enacting clause, especially when *non obstante clause* does not refer to any particular provision which it intends to override.<sup>6</sup> It must be given contextual meaning.

### **Conclusion**

Therefore, upon a contextual interpretation a CTU being excluded from the purview of “person” under Section 9 is prohibited from setting up, on its own, a captive generation plant.

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**Endnote**

- 1 MANU/SC/0644/1994: (1994)2 SCC 434
- 2 MANU/SC/0395/2004: (2004)5 SCC 409
- 3 MANU/SC/1991/2009: (2009)16 SCC 659
- 4 MANU/SC/0235/2001: (2001)5 SCC 175