Chhattisgarh State Electricity Regulatory Commission

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Petition No.05 of 2008(M)

In the matter of declaration of the power plant of M/s Hira Ferroalloys Ltd., as captive generating plant and its three sister concerns as captive consumers

Hira Ferro Alloys Ltd., Raipur ……. Petitioner

V/s

Chhattisgarh State Electricity Board ……. Respondent

Present: S.K.Misra, Chairman
B.K.Sharma, Member

ORDER
(Passed on 27.08.2008)

This is a petition filed under sections 9, 42 and 86 of the Electricity Act, 2003 (hereinafter 'the Act'), by M/s Hira Ferro Alloys Limited (HFAL), a company incorporated under the provisions of the Companies Act, 1956, which has industrial units manufacturing ferro-alloys in Urla Industrial Area in Raipur. M/s HFAL has three sister concerns, viz. M/s Hira Cement Ltd (HCL), M/s RR Ispat Ltd (RRIL) and M/s Hira Industries Ltd (HIL) which have shareholdings in M /s HFAL. All have their own industries. M/s HFAL has set up a 20 MW thermal power plant. By this petition the petitioner company has requested the Commission to declare its power plant a captive generating plant and also to hold M/s HCL, M/s RRIL and M/s HIL, the three sister companies, 'captive users' of the electricity generated by this power plant.

2. The facts of this case are that M/s HFAL has set up a 20 MW power plant aforementioned, said to be on utilization of industrial waste such as char/dolachar generated from manufacturing of sponge iron. The company has paid up equity share capital of Rs.391.77 lakh comprising of 39,17,700 equity shares with the face value of Rs.10/- per share, out of which M/s HCL, RRIL and HIL hold 33.49% of the shares, as under:

Name of company	Shares held in HFAL	%
Hira Cement Ltd (HCL)	130000	3.32
RR Ispat Ltd (RRIL)	394000	10.06
Hira Industries Ltd., Jagdalpur (HIL)	788000	20.11
TOTAL	12,12,000	33.49

The company has enclosed the certificate of the Company Secretary as proof of share holding as above. The generation capacity of the power plant is 151.10 MU per annum, considering 90% plant load factor and 350 working days. The auxiliary consumption of the power plant is said to be 12.10 MU per annum (approx. 8%) and the net units available for consumption is 139 MU per annum. Of this, the two industrial units of HFAL, one co-located with the power plant and the other about 500 meters away, consume about 92 MU supplied through the company's own dedicated feeder. The petitioner proposes to wheel the balance 47 MU per annum to its shareholder companies, HCL and RRIL (both situated in Urla Industrial Area), through its dedicated feeder and to HIL's industry at Jagdalpur through Chhattisgarh State Electricity Board's (CSEB or the Board, hereinafter) grid. HFAL has applied to CSEB for open access under section 9 and section 42(2) of the Act, on 22.2.2008; a revised application has since been made on 4.4.2008 for wheeling 1MW power. The petitioner seeks the Commission's permission to declare the three companies, as above, which together hold 33.49% of the shareholding of M/s HFAL 'as captive users' of the electricity generated by the plant of the latter, under rule 3 of the Electricity Rules, 2005 (hereinafter 'the Rules').

3. The further facts relevant to this case are that the same petitioner had earlier approached this Commission for permission to supply 47 MU from the same power plant to six sister concerns including HCL and RRIL. Since these six so-called sister concerns, including HCL and RRIL, then held only 9.04% of the shareholding of HFAL and did not hold at least 26% of the shares as required under the rule 3 of the Rules, the petition to declare the six sister concerns as captive consumers was rejected by this Commission by the order passed on 5.4.2006, in petition No.36 of 2005(M). Subsequently, on a complaint by CSEB that HFAL was supplying electricity to its sister companies M/s RRIL and HCL through dedicated 33KV feeder, without any legal authority, the Commission took suo motu cognizance and a notice was issued to the petitioner and proceedings under section 142 of the Act started against him. This case was registered as petition No. 27 of 2007(M). In this case the Commission came to the conclusion that M/s HCL and RRIL were being supplied electricity by the petitioner without obtaining a licence as required under section 12 and in violation of the provisions of the Act. By order dated 15.2.2008 the Commission imposed a penalty of Rs. one lakh on the petitioner under section 142 of the Act. The Commission allowed one month's time to him to secure supply of electricity to the two industries from CSEB and in case of default to pay Rs.5000 as penalty for every day the illegal supply continued.

4. The petitioner has now come up with the present application for declaring the three sister concerns aforementioned as 'captive users', under rule 3 of the Rules, on the ground that they now satisfy the requirements laid down in rule 3 for being so categorized.

5. CSEB, the respondent in this case, has opposed the plea of the petitioner on the following grounds:

(i) The Board has contended that there is no provision in the Act which empowers and enables this Commission to decide the status of a power plant being a captive generating plant (CGP) and the status of 'captive users'.

(ii) CSEB also disputed the pattern of shareholding of the three companies, submitted by the petitioner, on the ground that this was inconsistent with the pattern given earlier in petition No.36 of 2005(M) and 27 of 2007(M). The Board requested that the petitioner be asked to explain the inconsistency and furnish details of transfer of shares.

(iii) The petitioner has proposed to supply mere 1.2MU from the CGP, which constitutes 0.86% of the net total available energy from the CGP and mere 2.55% of the exportable energy, to HIL's industry located at Jagdalpur through CSEB's transmission system, while it is said to hold as much as 20.11% of the shareholding of the petitioner company, which constituted the largest shareholding of the three companies, sought to be categorized as captive consumers. Thus the largest shareholder shall have the smallest share of power. It has been contended that this is not in keeping with the spirit of the Act and the Rules and that if the present petition is allowed any person holding a small share in the petitioner company would be entitled to use energy generated by the CGP of the petitioner company as a captive user. Such a situation would never have been intended in the law.

(iv) CSEB has further contended that section 2(8) of the Act and rule 3 of the Rules do not permit the claim as set out in the petition. The definition of "captive generating plant" in section 2(8) of the Act comprises of two distinct categories: In the first category is the case of a power plant set up by any person to generate electricity 'primarily for his own use'. A "person" as defined in section 2(49) includes any company or body corporate or association or body of individuals. Under this dispensation the 'person' only is the captive user. The second category, by reason of the inclusive part of the definition in section 2(8) is that of a power plant set up by a society or association or persons for generating electricity primarily for use of members of such co-operative society or association. An 'association of persons' for the purpose of this category includes a company. Such members (shareholders) should together consume at least 51%, on an annual basis, of electricity generated by a power plant, *in proportion to their shares in ownership within a variation not less than 10%* (Emphasis added*)*. Captive consumption of power by each of the users could only be in proportion to his shareholding and no more.

(v) During the hearing of the case, the Board also contended that the nature of consumption of the HIL at Jagdalpur is such that its total consumption in a year would be less than 1MW. HIL Jagdalpur is a consumer at 33 KV with 400 KVA contract demand and that the

consumer draws electricity from the respondent Board through his 500 KVA transformer. On the basis of the particulars of maximum demand recorded, the consumption and the consequent load factor of HIL, Jagdalpur, for the period April 2007 to June 2008, has never been more than 316 KVA. The Board has sought to establish that the demand of HIL, Jagdalpur, cannot be 1MW and that the demand has been jacked up only to satisfy the Open Access Regulations of the Commission which permits open access for 1MW and above only. The Board has, on this basis, claimed that the permission for open access to the extent of 1MW has been sought only to avail power from the petitioner's captive plant so that the three sister concerns together meet the requirement of holding 26% of the shareholding of the petitioner company and are eligible to be declared as 'captive consumers' under rule 3 of the Rules. In case HIL's case for open access is not accepted, since the company holds as much as 20.11% of the total 33.49% shares held together by the three sister concerns, the other two would not be entitled to the status of captive user. Therefore, it has been vehemently argued that the petitioner company has made out a case only to avail power from the captive plant through abuse of the provisions of law.

6. First, we would like to deal with the issue of jurisdiction raised by the respondent. We have already held in another case (petition No. 37 of 2006) in which the present respondent was also a party, that declaration of a captive generating plant as such is necessary for compliance of the various provisions of the Act. We have held in para 4 of our order dated 13.11.2007 as under: "The Act thus makes special provision regarding the captive generating plant and such a plant has been provided the benefit of the right to open access for the purpose 'of carrying electricity from his captive generating plant to the destination of his use'. Rule 3 as above lays down the criteria by which to judge a captive generating plant and the captive user(s). The National Electricity Policy in paragraph 5.5.24 to 5.2.26 makes special provisions for such power plants. Special provision has been made in Act and the two national policies to promote captive generating plants as decentralized generation and as a source of supply of power to the grid. The State Government policy offers incentive to such plants by way of exemption from electricity duty for a specific period. Unless a power plant is declared upfront a captive generating plant, on the basis of the criteria laid down in the rule 3 of the Rules, it will not be able to avail the incentives offered by the State Government. More importantly, it will not be able to avail open access as a matter of right which the Act provides. Secondly, unless the captive users are identified right at the beginning, on the basis of qualification laid down in rule 3, an annualized assessment of total consumption by captive users to determine whether the plant is a captive generating plant would not be possible. This cannot be done by the state transmission utility or a distribution licensee; nor is there any provision in the Act enabling the State Government to do so. Since permission for open access under section 39, 40 and 42(2) of the Act is given by the Commission, we feel that the State Commission would have to take on the responsibility of declaring a generating plant as a captive

one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3."

We have no reason to deviate now from this position.

7. The main argument of the Board is that the scheme of the Act and the Rules do not envisage the shareholders of a company to be captive users and that if the shareholder companies are to be entitled to the captive use of the electricity produced by the company's CGP, it should be in proportion to their shareholding. This calls for an examination of the relevant provisions of the Rules. Rule 3 of the Rules lays down the qualifications of a CGP as under:

"**3. Requirements of captive Generating Plant** – (i) 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 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 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 50MW each namely Units A and B, one unit of 50MW 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 50MW) 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 considered 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 owing, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity".

The provisions of this rule have been examined by the Hon'ble Appellate Tribunal for Electricity (ATE) in the case of Malwa Industries Limited v/s Punjab Electricity Regulatory Commission and Punjab State Electricity Board and, CSEB v/s Bajrang Power & Ispat Limited and this Commission, in appeal No. 32 of 2007, 165 of 2006 and revision petition No. 1 and 2 of 2007. The Hon'ble ATE has confirmed the decision of this Commission that shareholders of a company can partake of the electricity produced by the CGP of the company. The Hon'ble ATE has interpreted the use of the term "captive user(s)" in Rule 3(1)(a) and has held that the framers of the rule have not used the letter 'a' before captive users in rule 3, rather it has used the letter 's' in brackets suffixed (s) to the word 'user' thereby clearly indicating that the ownership of a CGP can be of more than one captive user. The only conditionality is that the ownership of the captive users in the power plant should not be less than 26%. Since "ownership" has been defined in explanation 1(c) of rule 3 of the Rules to mean the equity share capital with voting rights in a power plant set up by a company, holding of 26% shares in

the company by captive users would satisfy the requirement of rule 3. It has also been ruled by the Hon'ble Tribunal that the second proviso to rule 3(1)(a) requires that only in case of association of persons the captive user(s) are entitled to electricity generated by the CGP in proportion to their shares in ownership of the power plant. On the authority of various rulings of the Hon'ble Supreme Court on the implication of a 'proviso', the Hon'ble ATE has concluded in para 13 of their judgement thus: "Having regard to the aforesaid decisions, it can be safely stated that a proviso is in the nature of a qualification or an exception and it does not nullify, subsume or swallow the general rule". "This being the position, the two provisions, which are exceptions to the aforesaid main rule, have no application to the instant case as the case of the Appellant squarely falls in Rule 3(1)(a)". This judgement of the Hon'ble Tribunal is fully applicable to the present case. The three captive users satisfy the two requirements of the captive generating plant laid down in Rule 3(1)(a). The three sister concerns hold more than 26% of the ownership of the power plant by virtue of their total shareholding of more than 33.49% in the petitioner company which has set up the power plant; and the company which is the main captive user, alongwith the three shareholding companies, consume100% of the power produced by the CGP for the captive use. The three sister concerns, therefore, meet the requirements of rule 3 and are eligible to be declared captive users. In fact, the petitioner company itself is using about 92MU which is more than 66% of the net available electricity from the CGP and therefore there is no doubt about the power plant being a CGP. The only issue for consideration is whether the three sister concerns could be categorized as captive users. As we have already stated, by virtue of ownership of captive power plant being more than 26% and the total captive consumption exceeding 51%, these are entitled to be categorized as captive consumers under the provisions of rule 3 of the Rules.

8. As to the question regarding inconsistencies in the pattern of shareholding of the sister companies, as brought up before the Commission earlier and in the present petition, suffice it to say that the Commission has to go by the present pattern of the shareholding as certified by the Company Secretary. It is not within the scope of this case, nor is it within the competence of this Commission, to enquire into how the present pattern of shareholding comes about. In any case, the petitioner has submitted, in his submission dated 29.4.2008, the details of the transfer of shares which have been taken place in the meantime and how the present pattern of shareholding of the company has come about. The respondent's contention that the shares has been transferred to various companies only to enable them to become captive consumers is not tenable as the law does not prohibit such transfer and as already mentioned, this Commission is not competent to enquire into the legality of such transfer of shares. Transfer of shares, and even mergers and acquisition of companies, is a regular feature in the corporate world so long as it is authorized by law. A company cannot be expected to hold on in perpetuity to its present pattern of shareholding only because it has set up a CGP. Only on the basis of how the present position of shareholding has come about, a shareholder company cannot be denied the use of the electricity of a captive plant set up by the parent company.

9. As to the question that quantum of electricity in use should be in proportion to the shareholding, this is applicable only in case of a plant which has been set up by 'an association of persons' as per second proviso to rule 3(1)(a). The ownership of a CGP set up by a company or any other body corporate means the equity share capital with voting rights as per explanation 1(c) to section 3 and this is the main provision of the rules which is only qualified by the second proviso.

9. The only issue which remains to be considered is whether the petitioner has abused the process of law to declare its three sister concerns as captive users. This has been contended on two grounds viz (i) that the transfer of shares has been affected in such a way as to enable the sister concerns as to be eligible to the electricity generated by the CGP as captive users; and (ii) that M/s HIL at Jagdalpur has been brought in and allocated a small quantity of electricity from the power plant only to ensure such eligibility. We have already dealt with the first issue. There is no bar to acquiring ownership of a CGP through acquisition of shares to have a right to use its power. As to the second, the argument runs as follows: M/s HIL's industry, which is located far away from the CGP, does not require 1 MW power; this quantity has been specified for open access only to avail open access from the respondent Board since open access for less than this quantity is not presently permissible under the Open Access Regulations of this Commission; and since HIL holds more than 20% out of 33.49% being the total shareholding of the three sister concerns in HFAL, unless HIL is also a consumer the other two would not be entitled to be categorized as captive consumers, as their shareholding will only be 13.38% which is less than 26%. First, even if the consumption of HIL is less than 1MW, since the total consumption by the petitioner company's industries as also of the three sister concerns far exceeds 51%, HIL will be categorized as a captive consumer. HIL has since made an application for open access to the extent of 1MW of power on 4.4.2008. The application is for long-term open access to the wires of the Board. This application has not been rejected by the Board on any ground so far and presumably is under its consideration. There is no ground on which the Commission may, at this point of time, hold that the company is not entitled to open access Regulations of the Commission i.e. the CSERC (Intra-State Open Access in Chhattisgarh) Regulations, 2005. In view of this position, there is no ground to hold that open access would be denied to HIL, and that it cannot consume any power of the CGP of the petitioner company and that therefore it cannot be declared a captive user of the electricity generated by the CGP and therefore the other two sister concerns would not be entitled to be categorized as captive users as they would not satisfy the requirements of rule 3. We are not convinced that there is any legal basis for treating M/s HIL has not entitled to open access applied for and hence consumption of electricity generated by the CGP. This contention of the respondent is not acceptable.

10. In view of the position the captive generating plant set up by the petitioner company HFAL is declared a captive power plant within the meaning of section 2(8) read with rule 3 and the three sister concerns namely, M/s Hira Cement Limited, M/s RR Ispat Limited and M/s Hira Industries

Limited as captive users under the provisions of rule 3 of the Rules. The temporary permission granted to the three captive users for use of the electricity produced by the CGP of HFAL is confirmed.

Sd/-
Member

Sd/-
Chairman