Chhattisgarh State Electricity Regulatory Commission

In the matter of supply of power by a non-captive generating plant of a company to his own industries

Suo motu petition No. 10 of 2008(M)

M/s Aryan Coal Benefication Pvt Ltd .... Respondent No.1
Chhattisgarh State Electricity Board .... Respondent No.2

Petition No. 11 of 2008(M)

M/s Aryan Coal Benefication Pvt Ltd .... Petitioner
Chhattisgarh State Electricity Board .... Respondent

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

ORDER

(Passed on 23.01.2009)

The facts of this case are that M/s Aryan Coal Benefication Pvt. Ltd., Korba has set up a 30 MW generating plant based on coal washery rejects, at Chakabuda in Korba district in the State, as a captive power plant. From the information, received from the Chief Electrical Inspector of Chhattisgarh Government, regarding consumption of electricity generated by the power plant for the year 2006-07, it came to the notice of this Commission that the plant does not qualify to be a captive generating plant (CGP) within the meaning of the definition of captive generating plant as per sub-section (8) of Section 2 of the Electricity Act, 2003 (hereinafter 'the Act') read with Rule 3 of the Electricity Rules, 2005 (hereinafter 'the Rules'). It was further observed by this Commission that the State Government vide an order dated 25.02.2008 had given permission to the respondent under Sec.68 of the Act to lay 33 KV line for 7 kms. from his plant to his coal washery. It was brought to the notice of the State Government that since the power plant does not fall in the category of a CGP, supply of power to the coal washery, except through open access under Section 42(2) of the Act or under a distribution licence obtained under Section 14 of the Act, would not be legal. The State Government conveyed the Commission's views to the respondent company and advised the company to take necessary steps to obtain a licence for supply of power to the coal washery. The respondent company thereupon informed the Commission by a letter of 10.07.2008, that the company

had set up a 30 MW thermal generating plant based on the rejects of his coal washery and that the present status of utilization of power from the plant was as under:

(i) Auxiliary consumption of the power plant : 3 MW

(ii) Coal processing for own coal washery unit at Chakabuda : 2 MW

(iii) Use in Dipka coal washery : 3 MW

Thus the company's own requirement out of the 30 MW is only 8 MW. The balance power of 22 MW is being supplied to the Chhattisgarh State Electricity Board ('CSEB' or 'the Board' hereinafter) under a PPA signed with the latter. The company also submitted that as per the Electricity (Removal of Difficulty) Fifth Order, 2005, notified by the Ministry of Power, Government of India on 08.06.2005, a generating company or a person setting up a generating plant is not required to obtain a licence under the Act 'for establishing, operating or maintaining a dedicated transmission line. The company pleaded that it had laid the dedicated transmission line for consumption of power in their own coal washeries. The Commission advised the company that the Removal of Difficulty Fifth Order, as above, relates only to 'dedicated transmission line' and not to supply of electricity. The company could supply electricity to its coal washeries either through the open access route or by obtaining a distribution licence. The company was also advised that while there can be no objection to the company setting up a dedicated transmission line, and Sec. 10 of the Act authorizes any generating company to lay such transmission lines, but supply of electricity by him for use in an industry is not permissible under the Act. Since it is not a captive generating plant; he had not obtained open access for carrying electricity for its own use; and did not have a licence for supply, the company committed violation of Sec. 12 of the Act. The Commission, therefore, directed the company vide letter dated 31.07.2008 to stop supply of electricity to its two coal washery units forthwith, failing which the Commission would be constrained to initiate action under the provisions of Sec. 142 of the Act for violation of the provisions of the Act and Rules. The reply received from the company on 04.08.2008 stated that it would file a separate petition to the Commission for grant of open access for supply of power to its coal washeries in two weeks' time and requested the Commission to withhold further action in this regard pending such application. Since the Commission did not find the company's reply sufficient as not to take cognizance of violation of the provisions of the Act aforementioned, a notice was issued to the company under Sec. 142 of the Act.

2. In the meantime the company submitted a petition to the Commission on 14.08.2008 praying that permission be granted to the company for supply of power to its three coal washeries at Chakabura with load requirements of 1000 KW; Dipka with load requirement of 2000 KW and Gevra with load requirement of 1000 KW, on payment of cross-subsidy surcharge as applicable to HT consumers, as per the prevailing tariff order of the Commission. This petition has been registered separately as 11 of 2008 (M). This petition has been submitted under Clause 11(6)(b)(ii) of this Commission's Intra-State Open Access in Chhattisgarh Regulations, 2005(hereinafter the 'Open Access Regulations'). This

provision mandates that "cross-subsidy surcharge shall also be payable by such consumers who receive supply of electricity from a person other than the distribution licensee in whose area of supply is located, *irrespective of whether he avails such supply through transmission/distribution network of the Board or licensee or not*". (Emphasis added). It was reiterated in the petition that in view of the Removal of Difficulty Fifth Order no licence was required by the company to lay dedicated transmission lines. This case has been heard along with the present case, as the matter in issue in both is the same.

3. The respondent has not contested the fact that his generating plant does not come under the definition of a 'captive generating plant' as given under Sec. 2 (8) of the Act and also that it does not meet the requirements of rule 3 of the Rules. However, he has averred as under:

(1) The plant making available electricity to its own coal washeries does not constitute 'supply of power to a consumer'.

'"Supply" has been defined in Sec. 2(7) as follows: "**Supply**", in relation to electricity, means the sale of electricity to a licensee or consumer'. Since the coal washeries are the company's own, there is no sale involved in this case. 'Supply' as defined under the Act necessarily involves sale of electricity. Sale means transfer of property or title for price or some consideration in any other form. In the absence of a price paid as consideration supply of power to the coal washeries is not 'supply' under the Act for which alone a distribution licence may be required.

(2) It has also been argued that this is also not a case of supply to 'consumers'. "**Consumer**" has been defined in Sec. 2(15) of the Act to mean 'any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force. xxxx xxxx". The company is not a licensee nor is it engaged in supplying electricity to the public. Therefore, the coal washeries are not consumers. Thus the two main conditions under which a distribution licence is required are not present in this case. The company, therefore, does not require a licence under Sec. 12 and hence has not violated any provision of the Act.

4. In the related petition of 11 of 2008 aforementioned, the respondent CSEB has submitted that there is no provision in the Act for supply of power by a generator to an industry except through open access. It has also been averred by CSEB that the request of the respondent company (petitioner in that case) for regularization of the case through payment of cross-subsidy is not maintainable under Clause 11(6)(b)(ii) of the Open Access Regulations of the Commission. It has been argued that it is one of the duties of a generating company under Sec. 10 of the Act to establish, operate and maintain 'dedicated transmission lines' but that only authorizes carriage of electricity to any transmission lines or load centre. Dedicated transmission lines do not authorize a generator to supply electricity to an industry. The Board has further pleaded that under section 42(2) cross-subsidy surcharge is recoverable in the area of a distribution licensee when open access is provided to a consumer through the licensee's distribution system, not otherwise. In fact, the Board has termed the provision of Clause 11(6)(b)(ii) of the Commission's Open Access Regulations as legally untenable

on the ground that as per the provision of the Act cross-subsidy surcharge is payable only incase of open access. In short, the Board has contended that unless it is a captive generating plant or it avails open access the company cannot supply power to industries be they its own.

5. The following issues need consideration in this case:

(1) Can a company set up a generating plant and use part of the electricity produced in his own industries without being a captive generating plant, or obtaining open access?

(2) Is supply of electricity by a generating company to its own industries 'supply' and to 'consumer' which alone requires a distribution licence?

6. In this case it is undisputed that the generating plant of the company is not a captive generating plant as it does not meet the requirements of rule 3(2) of the Rules. This rule requires that to be a CGP 'not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use'. As per the respondents' own admission the captive consumption from the generating plant is only 8 MW out of a total 30 MW generation capacity. The question arises whether a generator, other than a captive generator, can legally make captive use of electricity in its own industry. The duties of a generating company has been laid down in section 10 of the Act, as under:

"10. **Duties of generating companies** – (1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder *and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer"*. (Emphasis added)

Dedicated Transmission lines has been defined in Sec. 2(16) of the Act as under:

'(16) "**Dedicated transmission lines**" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load center, as the case may be'.

Thus a dedicated transmission line is not meant for supply of electricity to a consumer.

It is quite clear from the above that a generating company may supply electricity to any consumer subject to the regulations made under sub-section 2 of section 42. Section 42(2) reads as under:

"(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 of 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".

Thus a generating company may supply electricity only through open access and not otherwise. The only other way by which supply of electricity to a consumer may be effected is only through a distribution licence. Section 12 of the Act lays down that "no person shall distribute electricity (supply to consumers) unless he is authorized to do by a licence issued under section 14 or is exempted under section 14".

7. The respondent's contention is that he is not a 'consumer' because there is no sale of electricity involved in his case is correct as per the letter of the law. But the fact is that electricity is being used in industries and there can be no use without supply. The power being consumed in the industry also carries a cost and hence the respondent cannot hide behind technicalities. It would be relevant to mention here that the term 'consumption' has been used in the Act in the sense of 'use'. In section 9 which relates to captive generation, there is a reference 'supply'. The first proviso to section 9 says 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*'*. In this provision the word 'supply' has been used to refer to supply by a captive generating plant to its own captive user, where no sale is involved. Similarly Rule 3, which deals with captive generating plants, also refers to consumption of electricity by way of captive use. Therefore, considering the spirit of the provisions of the law and the context in which these are sought to be applied it is quite clear that use of electricity by any industry should be treated as consumption of electricity and there can be no consumption without supply.

8. It is to be noted that under the repealed Electricity (Supply) Act, 1948, there were restrictions on the establishment of new generating stations. A generating station could be established only with the previous consent of the Board and even expansion or replacement of existing generating station could be effected only if the Board expressed inability to supply electricity within a

reasonable time as specified in Section 44 of this Act. Similarly, under section 43A, a generating company could sell electricity to any person only with the consent of the competent Government. Under the present Act all restrictions on generation have been removed and any person can set up a generating plant. However, supply of electricity by a generator to a consumer has been relaxed, which was a licensed activity earlier under the Electricity (Supply) Act, 1910, only to the extent of supply by a captive generating plant generating electricity primarily for his own use, to its captive consumers. The only mode by which a generator may supply power to a consumer, as stipulated in Section 10(2) of the Act, is through open access under Section 42(2), which is a new feature of the present Act. If the intentions of the legislature were to allow any generator to supply to any consumer, including his own industry, a clear provision would have been made. The provision regarding captive consumption would have been made more liberal and the expression 'primarily for his own use' would not have been included in the definition of CGP, as is presently the case. Although 'primarily for his own use' has not been defined in the Act, rule 3 of the Rules has elaborated its meaning and laid down certain qualifications of CGPs, the most important of which is that self-consumption should be at least 51% of the electricity generated in the plant. The provision regarding a generator laying dedicated transmission line and making self-use of power is applicable only in case of a captive generating plant and not in case of any other generator. The whole scheme of the Act - of making distribution a licensed activity under section 12; making provision for supply by a generator to a consumer only through open access; and making an exception only in the case of a captive generating plant - does not provide for any generator supplying to any consumer even by laying dedicated transmission line. Section 10(2) is very clear and supports this scheme of the Act. Therefore, our answer to issue (1) is in the negative.

9. As to the second issue whether cross-subsidy surcharge can be imposed when open access is not availed, the provision of this Commission's Open Access Regulations aforementioned, which were notified in 2007, have not been challenged by the Chhattisgarh State Electricity Board before a competent court; nor did they raise any objection when the regulations were being framed and when the draft regulations were pre-published inviting objections, if any. In fact, the draft regulations were specially sent to the Board inviting their comments and objections. As to the legality of a such provision, we have considered this issue in suo motu petition Nos. 14 and 15 of 2008(M). We have observed in in para 8 of order passed on 27.11.2008 in those cases as under:

"A provision for surcharge to meet the current requirement of cross subsidy has been prescribed in the Act because of the prevailing pattern of electricity tariff all over the country. There are certain category of consumers such as, agricultural and small domestic consumers, who have been traditionally provided electricity at a subsidized rate, below the cost of supply, and the industrial and commercial consumers have generally been cross-subsidizing such consumption. The Act recognizes the existence of cross subsidy which is a historical fact. In fact, while earlier there was a provision in the Act (Section 42) for progressively reducing and 'eliminating' the cross subsidy, the Act was amended in 2007 to provide for only 'progressive reduction' and not elimination of cross-subsidy. There is a provision for payment of cross-subsidy surcharge for

open access customers because the licensee has to be compensated for the loss of a consumer who has been subsidizing other consumers. The licensee is entitled to a cross-subsidy surcharge when a subsidizing consumer migrates outside his fold and avails supply from a different source, through open access. The same logic can be applied to this case and the industrial consumer, who has been earlier availing supply from the Board and has now switched over to sourcing his own generating plant, asked to pay cross-subsidy surcharge to the licensee. It has been argued by the respondent No.2 that cross-subsidy surcharge is applicable only in case of open access and since open access is not involved in this case, the industry is not liable to pay cross-subsidy surcharge. We are unable to agree with this argument. As already mentioned, cross-subsidy relates to prevailing electricity tariff and not to open access as such and it is recovered to compensate the loss of a subsidizing consumer to the licensee. We, therefore, hold that cross-subsidy, as determined by this Commission in the relevant year's tariff order, should be paid by the company for use of electricity generated by its power plant in all such cases".

10. There is a general shortage of electricity in the country and in this State. The respondent has set up a generating plant of 30 MW capacity and is selling more than 22 MW thereof to CSEB (now the Distribution Company after restructuring) for distribution in the State. The only alternative left to the respondents to using its power in its own industries, is to sell the entire power to the State Distribution Company and meet its small requirement of power of its coal washeries from supply by the distribution company. As we have already observed in the other case, if a company is permitted to source power from any generator for use in its industry through open access, it would not be logical to deny the use of its own power through open access. The requirement of law is to ensure that the interest of the distribution utility, which along has a universal supply obligation, is safeguarded through cross-subsidy surcharge. This is a case where a company has set up a generating plant which is not a CGP. He can use the electricity generated by his generating plant in his industries either by availing open access to the wires of the transmission/distribution licensee or by obtaining a distribution licence. He is not entitled to a distribution licence as he does not meet the minimum area criterion (at least a revenue district) laid down in rule 3 of the Distribution of Electricity Licence (Additional Requirements of Capital adequacy etc.) Rules, 2005. He did not seek open access as he set up his own dedicated transmission line. Under these circumstances, the only solution is to allow him to use his power while safeguarding the interest of the distribution licensee in whose area his industries are located. We would, therefore, approve of the plea of the respondent in petition No.11 of 2008 (M) in which he is the petitioner. The respondent in this case has prayed that he should be permitted to continue to use his power in its coal washeries by payment of cross-subsidy surcharge at the current rate as per the tariff order of the Commission. This is accepted in regard to past use and the proceedings under section 142 of the Act are dropped. However, while we order regularization of the use of power till date through payment of cross-subsidy, as we have discussed above, supply of power by a non-captive generator to industries without availing open access is not permissible under the law. The respondent is therefore directed to discontinue his supply and either obtain supply of electricity to its industries from the distribution licensee or supply his industries own power

through open access under Section 42(2) of the Act and the Open Access Regulations of the Commission. The respondent is given three months' time for the same.

11. The respondent has also submitted that it has paid parallel operation charges to the Board which he is not liable to pay not being a captive generating plant. Parallel operation charges are levied only on captive generating plants and are not leviable on other generators. In our order regarding parallel operation charges passed on 31.12.2008 in case No. 39 of 2006, it has been reiterated that such charges are applicable only to captive generating station which have their own industrial/commercial load. Since admittedly the respondent in this case [petitioner in case No.11 of 2008(M)] is not a CGP, parallel operation charges are not payable by him. We also direct that in all cases, in which a generator is not a captive generation plant, or otherwise has been declared a non-captive generating plant in pursuance of the provision of sub-rule (2) of Rule 3, parallel operation charge shall not be leviable on them. In the present case if the respondent is paying parallel operation charges, it should be stopped and the charges already paid by the generator so far, be adjusted against the cross-subsidy surcharge payable by him to the distribution company being the Board's successor.

With this order both the petitions No. 10 and No. 11 of 2008 (M), are disposed of.

Sd/-
Member

Sd/-
Chairman