



Chhattisgarh State Electricity Regulatory Commission

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Petition No.14 of 2006(M)

In the matter of third party sale in respect of biomass based power plants.

**M/s Vandana Vidyut Ltd.,
Bilaspur.**

Petitioner

Versus

Chhattisgarh State Electricity Board

Respondent

ORDER

(Passed on 05/06/2006)

This petition has been filed by Vandana Vidyut Ltd. (VVL), Bilaspur for permission of the Commission to sell power produced by its biomass-based power plant to some consumers (the co-called third party sale).

2. The facts of this case are that the petitioner has a biomass based non-conventional power generation plant with an installed capacity of 8 MW in Bilaspur in the State. He had entered into a Power Purchase Agreement (PPA) with the then MPEB on Sept.2, 2000, when the plant capacity was only 6 MW. The PPA is valid for a period of ten years. Clause-7 of this agreement provides that the petitioner can 'sell power to a third party after obtaining necessary NOC from MPEB in advance' subject to the condition that the third party should necessarily be an HT consumer of MPEB and should not be its defaulter. Clause-8 of this agreement also provides that 'the company shall nominate third party normally once in a year with the written approval of the MPEB'. xxxxx 'In between this period a change in the allocation of third party shall not be permitted'. xxxxx The petitioner entered into a supplementary PPA on 24 April, 2003 with the Chhattisgarh State Electricity Board (CSEB), which had by then come into being with the creation of the new State of Chhattisgarh, when its generation capacity was enhanced from 6 MW to 8 MW. This supplementary agreement is primarily for enhancement of capacity of the power plant from 6 MW to 8 MW, but with one significant change about wheeling charges, as we have discussed later. In terms of these agreements, the petitioner was earlier supplying 52.560 lakh units to 24 industries by way of third party sale, and now seeks permission to change the allocation of power to third parties of the same quantum of power but to only 13 industries.

3. We have heard Shri Rajendra Shukla, Advocate, who appeared on behalf of the petitioner and Shri Arun Bhatnagar, Addl.SE representing the CSEB. On behalf of the CSEB it has been submitted that the petition does not contain any issue which need adjudication by the Commission and hence it is not maintainable. The CSEB is competent, as per the original agreement, to permit change in allocation to third parties, once in a year, subject to compliance of Open Access Regulations framed by the Commission for wheeling of power to such third parties. In fact, the Commission had also ruled that the petitioner should follow the open access route in its order dated 2.8.2005 passed in suo motu petition No.20 of 2005(M). The CSEB has, therefore, pleaded that the petition should be rejected and the petitioner directed to seek open access under the relevant regulations of the Commission. The petitioner, on the other hand, has argued that he is merely complying with the directions given by the Commission in para 22 of the order dated 11.11.2005 passed in petition No.7 aforementioned.

4. First we would like to deal with the issue of maintainability of the petition raised by the CSEB. Para 22 of the order referred to above is as follows:

“22. Existing biomass-based generation plants:

So far as the existing biomass-based generation plants are concerned, the Commission has noted that these plants i.e. M/s Vandana and M/s Indo Lahari are selling power to the Board at Rs.2.25/unit, under a PPA. For changes in PPAs already existing, if desired by the CSEB or these plants, approval of the Commission shall be necessary.”

The directions in this para of the order is quite clear that in case there is any change in the rate at which power is to be supplied to the Board by these two existing biomass-based generation plants, approval of the Commission would be necessary. This direction does not relate to the other conditions of agreement. For change in the third party sale for which the agreement contains clear provision, the approval of this Commission is prima facie not required. To that extent the plea of the CSEB is valid. However, the whole issue of third party sale and its modalities need some discussion. In this connection two issues have been raised by the respondent in their reply, namely supply of power to third party has to be through open access on payment of the open access charges. These issues are relevant and important and we would like to examine these. The petitioner has contended that the proposal for sale of power to third parties is as per the agreement entered into between him and the CSEB and what he seeks through this petition is what is already provided in the agreement. The petitioner has also contended that the terms of wheeling of power are provided in the agreements. He has also claimed that he is exempted from payment of cross-subsidy surcharge in terms of the Electricity (Removal of Difficulty) Second Order, 2005, of the Ministry of Power issued on the 8 June, 2005 ('Removal of Difficulty Order', for short).

5. There is no dispute regarding the agreement dated Sept. 2, 2000 with the erstwhile MPEB and the supplementary agreement dated April 24, 2003 with CSEB, being saved under the provisions of sub-section 2(a) of Sec. 185 of the Electricity Act, 2003 (the 'Act', for short). However, it must be pointed out that under this provision, only such of the agreements are saved 'which have been executed under the provisions of the repealed laws' and 'in so far as it is not

inconsistent with the provisions of this Act'. Let us examine if these agreements clear these tests. The petitioner has submitted the scheme of the then Govt. of Madhya Pradesh, Energy Deptt. notified on 7.9.1994, for permission of non-conventional energy sources. Clause 3 of this policy (Annexure-III of the petition) lays down that the non-conventional energy generators 'may use the power generated themselves at the point of generation, or at an other place or sell it to MPEB or to a third party'. It also provides in clause 4 that the wheeling of power, whether for own use or sale to a third party, through the MPEB's transmission/distribution system will be allowed on payment of 2% wheeling charges. This clause also lays down that 'the State Government will separately compensate MPEB towards line losses etc @ 4% of the power wheeled'. The agreement dated 2 Sept. 2000 provides in the preamble itself that the MPEB had accorded approval under Sec. 44 of the Electricity (Supply) Act, 1948 (1948 Act) to the petitioner to install the said biomass based power plant and had also decided that it 'may also issue NOC for sale of power to third parties under Sec. 28 of the Indian Electricity Act, 1910 subject to approval of the State Government'. This Commission had occasion to examine these provisions of the 1910 and 1948 Acts in an earlier petition bearing No. 20 of 2005(M). This was a suo motu petition in which the Commission had questioned CSEB's authority to grant permission to the petitioner for wheeling power to 24 third party consumers. We have clearly held in that order, after examining the relevant provisions of the 1910 Act and the 1948 Act, that the agreement with third parties by the generator are not saved under Sec. 185(2)(a) of the Act as they do not have the approval of the State Government under Sec 43(A)(C) of the 1948 Act. To quote our earlier order on the subject:

"A plain reading of the two provisions would indicate that while Sec. 28 of the 1910 Act is regarding permission for supply of electricity 'to the public' by a non-licensee, Sec. 43A of the 1948 Act specifically provides for grant of permission by the State Govt. to generating companies to enter into contract with third parties for sale of electricity. Neither the Board nor the two companies have clarified why they did not seek the permission of the State Govt. under Sec. 43A of the 1948 Act before they entered into agreements with third parties. Thus, while the companies had a general sanction for supply of electricity to third parties, the agreements they have entered into with specific consumers do not appear to have the sanction of the State Govt. There is no doubt that the agreements the companies have entered into with the CSEB are saved under Sec. 185(2)(a) of the Act. However, the agreements entered into by the generators with individual third parties may not be saved because they do not have the sanction of the State Govt. under Sec. 43A of the 1948 Act, notwithstanding the provision in the agreement they have entered into with the MPEB (now CSEB, the successor of MPEB in Chhattisgarh).

We have further held in this order:

"Since the agreements entered into by the generators with third parties do not have the sanction of Sec. 43A of the 1948 Act, the new agreements will have to comply with the provisions of the present Act. Supply of electricity by a generator, whether a non-conventional energy generator or otherwise, to consumers using the wires of the Electricity Board has to be through the provisions of open access under Sec. 42(2) of the 2003 Act. Either the generators or the consumers will have to seek open access under Sec. 42(2)(d) of the Act. Such open access will be introduced

by the Regulatory Commission. The position of open access in the State presently is that draft open access regulations framed by this Commission are under final publication. These would be in operation only after their publication in the official gazette. In these regulations as per the schedule for introduction of open access, for consumers of one MW and above open access would be available only from April 2008. However, in case of non-conventional energy generators supplying electricity to third parties, these restrictions have been relaxed and they would be in a position to avail open access with immediate effect”.

6. Thus while there is no dispute regarding the petitioner’s right under the agreement to sell power to third parties, which is also permitted under the Act, this right has to be exercised within the provisions of the present Act. The only way a generator can supply power to a consumer is through open access, as provided in the duties of generating companies under Sec. 10(2) of the Act. Under this provision supply to a consumer can be made subject to the Regulations made under sub-section (2) of Sec. 42, which relates to open access. In fact, in the order referred to above, we had advised the petitioner to seek open access. Para 8 of the order is as under:

“8. In order to ensure that the supply of electricity by the generators to certain consumers under an arrangement permitted by the CSEB, rightly or wrongly, is not disrupted, the Commission allows the present arrangement to continue till it is validated by the Commission. For such validation either the generating company or the concerned consumers should seek permission for open access from the State Transmission Utility under the provisions of the Regulations being made by the Commission”.

7. The Commission has since notified the Chhattisgarh State Electricity Regulatory Commission (Intra-State Open Access in Chhattisgarh) Regulations, 2005 on 26 July, 2005 (‘Open Access Regulations’, for short). These Regulations were, in fact, notified a few days before the above order was passed. (The date of notification was conveyed to the Commission later). The Commission has also passed necessary orders regarding the open access charges on 15 Feb. 2006. Sale of power by a generator to a consumer has to comply with the provisions of the Open Access Regulations. The agreements entered into by the petitioner with the MPEB and CSEB can not override the provisions of the Act. We would also like to mention here that the Electricity (Removal of Difficulty) Second Order, 2005 of the 8 June, 2005, exempts from payment of cross-subsidy surcharge, only such of the transactions for supply of electricity for which the generator had obtained permission under Sec. 43A of the 1948 Act. We have held that the petitioner did not have the consent of the State Government for supply of electricity under the provision of the repealed Act. The learned counsel for the petitioner has argued that since third party sale is clearly permitted under the scheme framed by the State Government mentioned earlier, the consent of the Government to the agreement for third part sale is implied and should be presumed. As we have already mentioned, there is no doubt about the non-conventional energy generators’ right to sell electricity to third parties, but all contracts for third party sale to specific consumers required the consent of the competent Government under Sec. 43A of the 1948 Act and the petitioner had not obtained such consent. In view of this, we hold that the petitioner is not entitled to the advantage of the Removal of Difficulty Order of 8 June, 2005. In short, the Open Access Regulations

shall be applicable to the petitioner if its power is to be wheeled to individual consumers by the CSEB.

8. We would also like to mention here that the provision regarding wheeling charges of 2% of the energy exported, in the original agreement of 2 September, 2000 has been modified in the supplementary PPA entered into with the CSEB on 24 April, 2003 in which the last para of the preamble to the original agreement has been substituted by the following:

'AND WHEREAS the CSEB has agreed to the proposal of the above company and also agree to wheel the additional power so generated through CSEB's transmission system for sale to third part/sale to CSEB/Captive Consumption subject to deduction of wheeling charges as prescribed by the Board from time to time'.

After the Act has come into force wheeling charges are to be determined by the Commission. Hence the current wheeling charges, as determined by the Commission vide order passed on 11.11.2005 in Petition No.7/2005 shall be applicable in this case.

9. This petition is, therefore, disposed of with a direction to the petitioner to apply for open access to the STU for wheeling of power as per the Regulations notified by the Commission in this regard. The open access shall be subject to all the applicable charges. The petitioner, however, shall be entitled to the special dispensation granted to non-conventional energy generators, based on biomass, by the Commission's order dated 11 Nov. 2005 passed in Petition No. 7 of 2005 in the matter of determination of tariff and related dispensation for procurement of power from biomass based generation projects.

Sd/-
Member

Sd/-
Chairman