



## Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E. Road, Raipur – 492001

Tel: 0771-5073555, Fax-5073553

### Petition No. 03 of 2005

#### **In the matter of application for distribution licence by M/s Jindal Steel and Power Limited**

M/s Jindal Steel and Power Limited ..... Applicant  
Post Box No. 16, Kharsia Road  
Raigarh(C.G)

#### **ORDER (Passed on 29.09.2005)**

M/s Jindal Steel and Power Limited (JSPL or applicant) has applied for a distribution licence, under section 14 of the Electricity Act, 2003 (hereinafter called the 'Act') and Regulation 3(1) of the CSERC (Licence) Regulations, 2004 (hereinafter called the 'Licence Regulations') for supply of electricity to industries in its own industrial estate (Jindal Industrial Park or JIP, for short) in Tumdih and Punjipathra villages of Raigarh District. JSPL, the applicant, is a company engaged in the manufacture of sponge iron, ferro-alloys and various steel products in their manufacturing unit at Raigarh in which the company has also set up a captive power plant, comprising 3 units with a total generating capacity of 265.70 MW. The application is for distribution of electricity in the industrial estate (JIP) being set up in an approximate area of 750 acres, which will accommodate 70 industrial units, comprising mostly of rolling mills, ferro alloys units etc. The proposal is to supply to JIP 400 MVA (300 MW) of electricity on full implementation of the industrial park for which 120 MVA (90 MW) is proposed to be supplied from the existing captive power plant at Raigarh and 280 MVA (210 MW) from the proposed 1000 MW capacity power plant being put up by the applicant company in the same district. The applicant has submitted along with the application, the layout plan of the area (i.e. JIP) in which distribution of electricity is proposed, details of the transmission and distribution network already created/proposed to be created and other details as required under the License Regulations.

2. As required under section 15(2) of the Act and clause 8 of the Licence Regulations, the applicant published a notice of the application in form-4 in two local newspapers of Raigarh on 06/02/2005 (A-1/2). Three persons filed their objections to the grant of licence viz, (i) ) the Chhattisgarh Vidyut Mandal Abhiyanta Sangh; (ii) Chhattisgarh State Electricity Board (CSEB or Board); and (iii) Shri R.K.Agrawal of Raigarh (O-1,2,3 respectively). The applicant submitted affidavits of consumers on 17.03.2005 (A-3) and additional pleadings on 07.05.2005 (A-4), 03.09.2005 (A-5) and 10.09.2005 (A-6). The objector CSEB also submitted additional pleadings on 29.03.2005 (O-2/2), 23.04.2005 (O-2/3) and 13.09.2005 (O-2/4) as did the Abhiyanta Sangh on 21/04/2005 (O-1/2), 07/05/2005 (O-1/3) and 23/07/2005 (O-1/4). During the proceedings, the locus standi of objector Shri R.K.Agrawal was called in question by the applicant. The Commission heard both sides on this issue and ruled, by its order passed on 27/08/2005 that Shri R.K.Agrwal had no locus standi in the case and hence his objections were not taken into consideration. The final hearing in the case was held on 27/08/2008 in which the applicant as also the two objectors were given full opportunity to put forth their respective cases. The applicant and the two objectors have also submitted written arguments on 27.08.2005 (A-7), 16.09.2005 (O-1/5) and 13.09.2005 (O-2/5) respectively. This order is being passed after taking into account and on due consideration of the facts of the case and the oral and written pleadings of the parties.

3. It would be necessary at the outset to discuss the legal position of the application for distribution licence which is as follows:

(i) This is an application for distribution licence in an area in respect of which the CSEB is a deemed licensee under the transitional provisions contained in section 172 of the Act. A second licence in the area of an existing licensee has implications, which we will discuss shortly. Natural justice demands that the interest of the existing licensee is not adversely affected because of the grant of a second distribution licence in part of the same area.

(ii) The provision of law applicable to a second licensee is the sixth proviso to section 14 of the Act which is as under:-

“Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements relating to the capital adequacy, creditworthiness, or Code of Conduct as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose”.

The Central Government have laid down under this provision capital adequacy and creditworthiness norms and code of conduct required for a second licensee in the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 notified on 23/03/2005 (hereinafter called Distribution Licence Rules). The applicant is required to satisfy the norms laid down in this notification to be eligible for a second distribution licence.

(iii) The National Electricity Policy (NEP, for short) adopted by the Central Government resolution No.23/40/2004-R&R (Vol.2) dated 12.05.05 lays down certain policies with regard to second distribution licensee. Para 5.4.7 of the NEP is relevant which is as under:

“5.4.7 One of the key provisions of the Act on competition in distribution is the concept of multiple licensees in the same area of supply through their independent distribution systems. State Governments have full flexibility in

carving out distribution zones while restructuring the government utilities. For grant of second and subsequent distribution licence within the area of an incumbent distribution licensee, a revenue district, a Municipal Council for a smaller urban area or a Municipal Corporation for a larger urban area as defined in the Article 243(Q) of Constitution of India (74<sup>th</sup> Amendment) may be considered as the minimum area. The Government of India would notify within three months, the requirements for compliance by applicant for second and subsequent distribution licence as envisaged in Section 14 of the Act. With a view to provide benefits of competition to all sections of consumers, the second and subsequent licensee for distribution in the same area shall have obligation to supply to all consumers in accordance with provisions of section 43 of the Electricity Act, 2003. The SERCs are required to regulate the tariff including connection charges to be recovered by a distribution licensee under the provisions of the Act. This will ensure that second distribution licensee does not resort to cherry picking by demanding unreasonable connection charges from consumers”.

The policy thus imposes an area restriction for a second licence, within the area of an incumbent distribution licensee, that it should be for the minimum area of a Revenue District, a Municipal Corporation or a Municipal Council. Secondly, the policy also mandates that the second distribution licensee shall supply electricity to all consumers in accordance with the provisions of section 43 of the Act.

4. There is no dispute regarding the applicant confirming to the capital adequacy and creditworthiness norms prescribed by the Central Government in the Distribution Licence Rules aforementioned. M/s JSPL is a reputed company with an authorized share capital of Rs.120.00 Cr. On a paid up capital of about 16.40 cr it has a sales turnover of Rs.1561cr (2003-04) and a profit after tax of Rs.305.46 cr. The Company's reserves are Rs.839.80 cr. The company generates adequate surplus to invest in the proposed distribution business. The

company has already developed the industrial estate and set up the entire transmission and distribution network for supply of electricity to the industries in JIP at an investment of Rs.25.34 Cr. The applicant's compliance with the norms of conduct has, however, been called in question by the objectors. But the main objections with regard to conduct do not relate to the good conduct norms laid down in the Distribution Licence Rules which deal mainly with the company's conduct vis-à-vis appropriate provisions of the Company Law, Income tax Act etc. In any case, these objections have been discussed later in this order.

5. The application has a history which is relevant to its disposal. In fact, it is this history which is the basis of this application for distribution licence. The Government of Chhattisgarh (GoC, for short) agreed to a proposal submitted by the JSPL vide letter No.695/F/20/1/2002-11-9003/सं.स/वा.उ/2002 dated 26/04/2002 of the Commerce and Industries Department (A-8) to set up an industrial estate through public-private participation. The Government agreed to provide 500 acres or more of land for the purpose. In para 3 of the letter JSPL was informed that as regards sale of power to the units which may be set up in the industrial park and laying of transmission lines necessary action for grant of permission was being taken by the Energy Department. JSPL prepared a detailed project report for the proposed industrial estate through a consultant and submitted the same to the GoC (Annexure 'K' of application). Apparently following the project report, a MoU was signed between the Chhattisgarh State Industrial Development Corporation (CSIDC) and JSPL on 23.10.2002 (A-9). In this MoU the CSIDC, on behalf of GoC, agreed to 'provide all help, prevailing incentives and facilitate clearance necessary for setting up aforesaid industrial estate in the State of Chhattisgarh, consistent with the various constitutional and statutory provisions relating to the said industrial estate'. It was agreed that land for the proposed industrial estate would be acquired by the State Government in the name of JSPL while the latter shall have absolute power and authority to allot such land to industries. In para 4 of the MoU, which is important, JSPL was

allowed to directly sell power to the industrial units in the proposed industrial estate. Para 4 reads as under:-

“JSPL shall be allowed to draw power transmission line(s) from its existing captive power plant situated at Raigarh or from the proposed independent power plant of Jindal Power Limited, to the proposed industrial estate and to directly sell power to the industrial units set up in the proposed industrial Estate, as per provisions of the Power Policy of the Government of Chhattisgarh on terms and conditions to be mutually agreed between the entrepreneurs and JSPL.”

Subsequently, the Energy Department of the GoC issued a letter on 29.1.2003 bearing No. 437/वि.क.अ/रुवि/2003 (A-10) conveying the Government's *no objection* to supply of power by JSPL, from their captive power plant, to industries which may be set up in their private industrial estate proposed in Raigarh District. There are certain conditions attached to this 'no objection'. The important and relevant ones of which are –

- (i) JSPL was permitted to sell electricity only to those new HT consumers who may come up in the industrial estate, after obtaining permission of the Government under section 28 of the Electricity Act, 1910 (1910 Act, for short). Secondly, these industries should not be the consumers of the Board
- (ii) The company shall comply with all legal and other essential conditions under prevalent rules and regulations, in supply of power directly to industries.
- (iii) The company was not permitted to sell power to an industrial unit which was previously the consumer of the Board but after closure shifts to the proposed estate.
- (iv) The company shall comply with the provisions of 1910 Act, the Electricity (Supply) Act, 1948 (the 1948 Act, for short) and the Indian Electricity Rules, 1956.

On 31.5.2003, the CSEB granted permission/no objection (A-11) to the company for laying transmission and distribution lines for supply of power to prospective units in the proposed industrial estate from its captive power plant on the basis of the application made by the company on 12.2.2003 to the Board. On 28.2.2004 GoC issued two letters. The first vide order No. 603/पा.ला.नि.अनु/ऊवि/2004 (A-12) permitted the company under section 68(1) and 68(3) of the Electricity Act 2003, which had since come into force, to lay transmission and distribution lines in the JIP for supply of 299 MW to 70 industrial units which were being set up in the first phase in the industrial estate. This permission was granted on the recommendation of the Board and the Chief Electrical Inspector (para 2). In para 2(iii) of the letter the State Government stipulated that the applicant has to obtain necessary licence for transmission and distribution of electricity to the industries as may be set up in the industrial estate, from the competent authority, such as the State Electricity Regulatory Commission. It also says that laying of line should not be construed as recommendation for the grant of the licence. The second letter issued on the same date i.e. 28.2.2004, (No.601/ पा.का.नि.अनु/ऊवि/2004) (A-13) by the Energy Department, addressed to the company, is regarding the State Government's 'no objection' to JSPL supplying electricity to the industrial units in JIP. This letter was issued in response to of JSPL's application in this regard dated 6.10.2003. In this letter the Government refers to permission with certain condition given earlier on 29.1.2003 and says that since the 1910 Act had been repealed and the present Act had come into force, any person may transmit and distribute electricity as per section 12 to 14 of the Act with necessary permission/licence from the SERC. It goes on to say that since the SERC had not been constituted and it was likely to take some time to be set up and become functional, the State Government under these circumstances conveys 'no objection' on the condition that the company would approach the SERC for licence/permission no sooner it is constituted and that if

the Commission refuses permission for licence the Government's no objection would automatically lapse.

6. As per the present application, JSPL commenced supply of electricity to the industrial units which were already set up, w.e.f. 1.3.2004. The distribution licence, therefore has been sought w.e.f. 28.2.2004. The company made an application to this Commission for the grant of distribution licence only on 15.9.2004, (A-14) more than six months after it commenced distribution of electricity. This was not in the prescribed form and the applicant was advised accordingly on 4.10.2004. The application for licence in the prescribed form was submitted as late as on 25/01/2005. Whether the company should have started distribution on the basis of the 'no objection' of the State Government aforementioned or should have waited for obtaining necessary licence under the Act is a moot point. The issues raised by the above background of the case have been discussed subsequently in the order.

7. There are two objectors in this case, the first is Shri P.N.Singh, President of Chhattisgarh Vidyut Mandal Abhiyanta Sangh (hereinafter Objector-1). In their application filed on 5.3.2005 (o-1/1) in response to the notice published by JSPL referred to para 2 above, in a local newspaper "Raigarh Sandesh" on 6.2.2005, The main objections raised are the following: (i) There is no provision in the Act for captive power plant to distribute power to third parties directly. The State Government's captive power policy of 12.7.2002 does not permit such sale; and that the NEP also speaks of sale of power by captive power plants to licensees; (ii) and that in any case, the 'no objection' issued by the State Government on 28.2.2004 can not be construed as a licence and does not entitle JSPL to distribute power which they have been doing. Subsequently, on 23.4.2005 (O-1/2) the objector reiterated the above objections and added that a second and subsequent distribution licence can not be granted for supply of electricity to an industrial estate in view of the area restriction imposed in para 5.4.7 of the NEP (referred to in para 3 above). The objector also added that the grant of a

distribution licence for supply to a particular class of consumers is against the provisions of the section 43 of the Act and para 5.4.7 of the NEP. In a third set of objections filed on 07/05/2005 (O-1/3) and on 23/07/2005 (O-1/4) more issues were raised regarding the conduct of the applicant: Their conduct has been questioned on the ground that the applicant sells power to the Board @ Rs.2.32 per unit while their cost of production is much lower; no electricity duty has been paid by JSPL for the units sold to the industries; and that JSPL is transmitting and distributing electricity without a valid licence which is illegal.

The CSEB (Objector-2) filed its objections on 07/03/2005 (O-2/1). Their main objections are:

(i) The CSEB is fully capable of supplying electricity to industrial and domestic consumers in the area for which necessary transmission and distribution network had been created in Raigarh area.

(ii) The State Government had given only a conditional 'no objection'. The company was never granted any permission either by the CSEB or by the State Government to supply electricity to industries. The captive power plant, in any case, can not supply electricity to third parties.

(iii) The declared industrial policy of the State Government is that private industrial estate could be set up and allowed to install captive power plant to generate and distribute electricity within the industrial estate. This is not a case of that nature.

(iv) The CSEB as the sole distribution licensee in the State carries the social responsibilities of developing electrical network for supply of power to rural consumers and weaker sections of the society and the cross subsidy element is met mainly by the tariff of industrial consumers. The grant of licence to JSPL will deprive the Board of this cross subsidy. In their second application of

29/03/2005, (O-2/2) CSEB reiterated its stand that they were in a position to supply quality power to these industries. A third submission on 23/04/2005 (O-2/3) objected to the grant of licence on the ground that it is contrary to para 5.4.7 of the NEP.

8. The Commission has heard the applicant as also the two objectors in detail. The applicant's case which was presented by the eminent Senior Advocate Shri Shanti Bhushan, is the following: (i) The State Government's letter dated 29/01/2003 (A-10) is a permission/licence to supply electricity to the units in the industrial estate, under section 28 of the Act of 1910 and that this is saved/continued, and that JSPL should be treated as a deemed licensee under the present Act, by virtue of the provisions of section 172(b) and 185(2)(a) of the Act. (ii) JSPL does not require a licence for supply of electricity. Under the provisions of Section 10(2) of the Act, it is competent, as a generating company, to supply electricity to any person without using the transmission lines of the Electricity Board. Thus the main arguments of the applicant is that it does not need a distribution licence at all and that an application for licence has been made as a matter of abundant caution. The applicant has, however, added that in case the Commission does not accept the above pleadings, it should consider the application, and that it is a fit case for the grant of a distribution licence. The case of the CSEB was presented by the learned Senior Advocate Shri Valmiki Mehta. The Board has pleaded that (i) the conditional no objection issued by the GoC on 29/01/2003 can not be treated as a permission/licence. The validity of no objection dated 28/02/2004 of the State Government is questionable as, the Act having come into force, distribution of electricity could be permitted under a valid licence only by the State Regulatory Commission. Even otherwise, JSPL's plea, in their application for retrospective operation of distribution licence w.e.f. the date the no objection of the State Government was issued i.e. 28.2.2004, would go to show that even they are not claiming an absolute right to distribute electricity in their industrial area on the basis of the 'no objection'. In their

application itself they have mentioned that there is no existing licence in their favour.

9. In the light of the above position, the Commission considers the following issues as relevant in this case:-

- (i) Does JSPL require a distribution licence at all in the presence of the provision of section 10(2) of the Act?
- (ii) Should the 'no objection' of the State Government dated 29.1.2003 be treated as grant of permission under section 28 of the 1910 Act?
- (iii) What would be the implications of refusal of licence in view of the history of the case?
- (iv) If a licence is to be granted, should it be only for an industrial area? It would violate the provision of the NEP.
- (v) If a licence is to be granted, what should be the conditionalities? Some of the relevant conditions are:
  - (a) Should a cross subsidy surcharge be imposed on the consumers because of the loss of subsidizing consumers of an existing licensee?
  - (b) Does JSPL require a transmission licence for transmission of electricity to the industrial area?
  - (c) Any other special conditions to be imposed?

- (vi) How should the period from 01/03/2004 till the disposal of this application, during which distribution of electricity has been carried on without a valid licence under the Act, be viewed and treated?

10. The issues at (i) and (ii) above do not find mention in the application submitted on 25.1.2005 and these were also not part of the original pleadings of the applicant. In fact, if the applicant believed either of these two pleadings to be true, he need not have made an application for distribution licence in the first place. These pleadings would prima facie appear to be an attempt at justifying certain steps which the applicant had taken for supply of electricity to industrial units in JIP without appropriate legal authority. In this attempt the applicant has only succeeded in complicating the issues in this case, as we shall presently see.

11. It has been pleaded by the applicant that a generating company desirous of supplying of electricity to any person has the authority to do so under section 10(2) of the Act and for that he does not need a distribution licence. Section 10(2) reads as under:-

“(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-sec.(2) of Sec. 42, supply electricity to any consumer.*” (Emphasis added)

Sub-sec. 2 of section 42 referred to above, deals with introduction of open access in distribution of electricity. It 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 may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Government”.

‘Open access’ has been defined in Sec. 2(47) of the Act as under:-

“47 *Open access* means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;”

Section 12 of the Act provides for licensing for transmission and distribution of electricity and trading in electricity as under:-

“12. **Authorized persons to transmit, supply, etc., electricity** – No person shall –

transmit electricity; or

- (a) distribute electricity; or
- (b) undertake trading in electricity,

unless he is authorized to do so by a licence issued under Sec. 14, or is exempted under Sec. 13.”

A harmonious reading of the above provisions of the Act clearly brings out that a generating company can supply electricity to a consumer under the provisions of Sec. 10(2) only subject to the provision of open access. It further provides that an existing State transmission utility or a transmission licensee is required to provide open access (Secs. 39 & 40 of the Act). A distribution licensee, however, may provide open access [Sec. 42 (2)] subject to the State Commission introducing open access which can be in phases and subject to certain conditions, the most important of which is cross-subsidy surcharge.

Distribution of electricity can be undertaken only under a licence as mandated under Sec. 12 and 14 of the Act. It has also been argued in this connection that since the Commission had not introduced open access, a generating company can distribute/supply electricity. In this connection, the judgment of the Hon'ble Supreme Court in Surinder Singh V/s Central Government & Otrs. (1986) 4 SCC 667 in which the expression "subject to the rules that may be made" was interpreted, has been cited. We are of the view that this ruling of the Hon'ble Supreme Court is not applicable to this case. It is clear from the provision of sub-Sec. 2 of Sec. 10 that a generating company may supply electricity to any consumer, not subject to the rules and regulations as may be made for such supply, but only under open access which is a substantive provision of the law. The scheme of the Act, particularly in view of the provisions of its part IV (Licensing) thereof, is such that it can not be said to authorize a generator to supply electricity to a consumer without a licence. This is possible only through open access. Clearly it is not the intentions of the framer of the Act to allow supply of electricity by any generator to any consumer at his sweet will. It has to be kept in mind that presently there is only one distributor in the State (i.e the Board) and supply of electricity by anybody else has implications for this licensee which has to be taken into account. Cross subsidy is one such implication and the most important one and the other is compensation for his fixed cost. It has also been stated by the applicant that the concept of a distribution licence under the Act is that of supply to general public in a particular area, it would not, according to him, apply where a generating company supplies power to a limited number of consumers. The second part of this statement is correct to the extent that this can be done only through open access. The present application is not for supply through open access. The application is for distribution of electricity to a significant number of industries in an industrial area set up under specific permission of the State Government.

12. The second, which is an alternative submission, is that the permission of the State Government dated 29.1.2003 should be deemed to be a

permission/licence under section 28 of the 1910 Act. Sec. 28 of the 1910 Act provides as under:-

**“28. Sanction required by non-licensees in certain cases – (1)** No person, other than a licensee, shall engage in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such conditions as the State Government may fix in this behalf, and any agreement to the contrary shall be void.

(1A) The State Government shall not give any sanction under sub-section (1) – (a) except after consulting the State Electricity Board;”

The provision is quite clear that supply of electricity to the public requires the ‘previous sanction of the State Government’. By no stretch of argument can the letter of the State Government dated 29.1.2003 may be treated as ‘sanction’ of the State Government under a specific provision of law. The letter clearly says that the Government has ‘no objection’ to supply of power by JSPL from their captive generation plant to the industries set up in their private industrial estate under certain conditions. One of the conditions (condition No.2) is that they shall supply power to only HT industrial consumers which may be set up after the permission of the Government under Sec. 28 of the 1910 Act has been obtained (Emphasis added). This letter clearly does not confer any right on JSPL under Sec. 28 of the 1910 Act to supply electricity. There is, therefore, no question of the so-called permission/licence being saved/continued under Sec. 185(2)(a) of the Act. That the petitioner also thought it to be so is clear from the fact that he submitted an application to the State Government on 6.10.2003 seeking sanction under Sec. 28 of the 1910 Act (O-2/4) for supply of power to sector-1 for the proposed industrial estate which was ready. The operative part of the letter says: “We request you to accord your sanction under Sec. 28 of the Indian Electricity Act, 1910, for supply of power to the units in Sector-1 of the proposed industrial estate in village Punjipathra, Tumdih”. Certain documents have also been submitted in support of this application. The main plea, that the applicant should

not supply electricity to the existing consumers of the Board had been strictly complied with, does not help. The 'no objection' conveyed in letter dated 29.1.2003, can not be deemed to be a licence under Sec. 14 of the Act. It is quite clear from the provisions of the 1910 Act that specific sanction of the State Government was required and it is also clear that in this case no such sanction was given.

13. In our view, even the 'no objection' letter of 28.2.2004 of the State Government also does not confer any such right on the applicant. JSPL had apparently no doubt about it as is evident from the fact that the application for distribution licence seeks retrospective operation from 28.2.2004, the date on which letter was issued. It is unfortunate that the petitioner should have pressed on with this plea after making an application for distribution licence under Sec. 14 of the Act before the Commission. If the no objection dated 28.2.2004 of the State Government conferred any legal right for supply of electricity on the applicant either the application for licence would not have been made or a claim of existing right should have been made. The application clearly says that the applicant does not have a licence. In any case, the legal validity of the letter dated 28.2.2004 is also questionable. The Electricity Act, 2003 had already come into force in the State w.e.f. 10.12.2003 and the Government's letter recognizes that position. In fact, as has already been mentioned in the history of the case (para 5 above) two letters were issued by the State Government on the same date. The first was an order under Sec. 68(1) & 68(3) of the Act permitting the petitioner to set up his transmission and distribution lines in the industrial estate, the second letter conveying the Government's 'no objection' to supply electricity in JIP. It recognizes that the new Act had come into effect and that no person can distribute electricity without a licence from the Regulatory Commission under Sec. 12 and 14 of the Act. It, however, goes on to say that since it would take time for the Regulatory Commission to become functional in the State, the Government conveys 'no objection' to supply of electricity to new industries which may be set up in the industrial estate of the applicant. It adds that the

petitioner should approach the State Electricity Regulatory Commission no sooner it is constituted for necessary licence/permission. There is no provision for such no objection by the State Government in the Act. The letter itself is also not quite clear and is liable to various interpretations. The 'no objection' could be interpreted as no objection to commence supply and approach the Regulatory Commission in due course; it can also be interpreted as State Government's recognition of the need for supply and recommendation enabling the petitioner to approach the Regulatory Commission for licence. In view of the history of the case, the Commission would consider the latter interpretation as logical, considering that the first letter gives permission for laying transmission and distribution lines, and the second, for supply of electricity to industries which may be set up in the industrial estate in due course. The State Government could not have assumed that industries had already been set up, that transmission lines had already been laid and that supply could commence immediately w.e.f. 1.3.2004. As has already been mentioned, there is no provision in the Act for the State Government to exercise the powers of the Commission in the latter's absence. The Government's directive to the petitioner was clearly to await the grant of distribution licence by the Commission. The various letters of the State Government conferred no clear right on the petitioner to commence distribution of power to the industries set up in his industrial estate; and after the Act came in to force no such authority could have been given except under the provisions of the Act, and through a licence granted by the Commission. Therefore, as on date, distribution of electricity to industries by the applicant is without legal authority.

14. Two other objections raised by the Objector No.1 need to be discussed. The first that a captive power plant (CPP) can not be granted a licence for distribution of electricity because supply of electricity by a CPP to a third party is not intended in the Act nor is it permitted under the State Government's captive power policy issued on 12.7.2002. The 31<sup>st</sup> report of the Parliamentary Standing Committee on Energy (2002), Ministry of Power has also been quoted to buttress

this view. However, this averment hardly needs any discussion as there is no such prohibition in the Act if open access is introduced. The second objection is that the grant of a distribution licence to a particular class of consumers in an industrial estate is against the provisions of Sec. 43 of the Act and the NEP. Sec. 43 deals with the distribution licensee's duty to supply on request. This responsibility would extend only to the area of the licensee. The application is prima facie not contrary to this provision of the Act. However, the matter regarding universal supply obligation of a distribution licensee has been discussed in the next para.

15. An important issue is the question of the area for which the licence has been applied for. The present application for licence for supply of electricity in a private industrial estate would prima facie be contrary to explanation to Rule 3 of the Distribution Licence Rules, and also to para 5.4.7 of the NEP (quoted in para 3 above) according to which a second distribution licence should be for the minimum area of a Revenue District/Municipal Corporation/Municipal Council. The area of the application does not confirm to this stipulation. Secondly, the licence applied for would also be against the universal service obligation of a distribution licence in that the applicant seeks to supply electricity to specific consumers in a limited area. The Commission is of the considered view that the present case has to be treated as an exception to the rule, for the reasons discussed in the next para. Effective steps for setting up of the industrial estate in question and an understanding with the State Government (if not a sanction by the latter) that JSPL would provide electricity from its captive power plant to the industries to be set up in this estate were taken much before the NEP was notified. A part of the industrial estate was operational with 18 industries having been set up there also happened before the NEP. As per the application, supply of electricity has commenced w.e.f. 1.3.2004 to some industries on the basis of the State Government's letter of 28.2.2004. It would not be logical to invoke the provision of the NEP to deny distribution licence in this case. The applicant has offered to undertake supply of electricity to all consumers who may seek such

supply in the two villages (Punjipathra and Tumdih) including the industrial estate (A-5). In view of the history of this case we feel that this would satisfy the universal service obligation of a distribution licensee under Sec. 43 of the Act albeit in a small area of two villages.

16. The logical next question would be should a licence be refused to the applicant on the ground of supply of electricity by him without legal authority. We would like to discuss the consequences of such refusal in view of the history of the case. If a distribution licence is refused at this stage, which is one and half years after supply of electricity has commenced, whether with or without legal authority, it is bound to impact on the applicant's consumers. The fact remains that the petitioner had an understanding with the State Government for setting up a private industrial estate (for which the Government had even acquired private land and allotted to him); laying the necessary transmission and distribution facilities, and supplying electricity to the industries which may be set up in the industrial estate from his captive power plant. It has been argued that the power plant(s) of the applicant do not qualify to be called 'captive power plant'. This question is not directly relevant to the grant of a distribution licence. A distribution licensee may procure electricity from any source subject to the terms and conditions of his licence and under the regulatory supervision of the Commission. However, the applicant's plea has all through been supply of power from his captive power plant. Now that the application has been made for use of power from the surplus capacity of captive power plant and also the IPP of 1000 MW being set up by the company in the same district, this would not be so relevant. As already mentioned the industrial estate has been set up. Out of 70 industries planned to be accommodated in the estate, as many as 18 have already been set up (as per written arguments 24 as on 27.8.2005) and 12 are under construction. The company has a transmission line from his existing generating plant(s) at Raigarh to their coal mining facility at Tamnar. Only a spur of approximately 6.4 kms. of line was required to be taken from this 222 KV transmission line to carry power to the industrial estate. This has already been

done. The company has also erected the requisite distribution network in the industrial estate including installation of necessary substations. It may be noted that CSEB had conveyed its no objection to laying transmission and distribution network as early as 30.5.2003. Apparently in pursuance of this no objection that the petitioner set up the required distribution network and the transmission lines to carry power to the industrial estate. It would appear from the history of the case that the petitioner went ahead with the industrial estate project in full, including distribution of power, on the basis of the understanding with the State Government, and the Board, though without the requisite legal authority. The present position is that (i) he has made large investment (Rs.17.79 crore) in setting up of the transmission and distribution network and the attendant facilities for supply of electricity (ii) More importantly, there are as many as 18 (now 24) industries, most of them power intensive which are being supplied power by him through a long-term agreement for 5 years and at a rate which is much cheaper than the rate of the CSEB for similar industries (at Rs.2.50 per unit as against the CSEB's average rate of Rs.3.37 per unit). If a distribution licence is denied today these consumers become unviable, as has been pleaded at least by four consumers (A-15 to 18), and will have to close down their industries. The Commission had specifically asked CSEB as to the time period within which they would be in a position to supply electricity to these consumers. CSEB has responded that they would be in a position to commence supply to the existing consumers within a period of 30 days subject to the petitioner providing open access for transmission and distribution of power. In case such open access is not provided by JSPL, CSEB would take six to nine months' time to start supply (O-2/5). This is clearly contrary to what had been stated by the CSEB earlier in their first objection that they are in a position to supply power to the industrial estate. In any case, JSPL's transmission facility is for their own use and since they have no transmission licence there is no provision in the Act under which they could be asked to provide open access. Similarly, since they have no distribution licence they can not be asked to provide open access to CSEB through their distribution system. It is also to be noted that the industrial estate of

JSPL is a private estate. Apart from that, the consumers will be forced to buy power from CSEB at a much higher rate than at present. The Commission may not endorse this considering that this would be against competition and consumers' interest. Therefore, the grant of distribution licence in this case may be in the interest of competition and in the interest of consumers who have already entered into long-term supply contract with the petitioner.

17. The Commission would also like to observe that at no stage of this case has CSEB clarified to our satisfaction why it is opposed to a distribution licence in a limited area. The CSEB is not in a position to supply quality power to their existing industrial consumers and there is an overall power shortage in the State, the peak shortage going upto 10 to 15%. It is purchasing power from the applicant at Rs.2.32 per unit and from other sources at a higher rate. It has given consent to extension of transmission and distribution network to the private industrial estate. At no time did CSEB oppose the proposal of JSPL on the ground that it was in a position to supply power in the area. It does not have the necessary transmission or distribution network in the area and will have to create such network at a substantial cost. It is also not a case of loss of consumers in that area since there is a clear understanding with the applicant that it will not wean away the existing consumers of the Board and will supply electricity only to new consumers. The only logical ground on which the CSEB may have objection to a second licence and for specific consumers is the loss of subsidizing consumers and the loss of cross subsidy. This issue has been discussed later in the order. The Commission is convinced that in view of the overall position of this case, the balance of convenience lies in grant of a distribution licence to the applicant and there is adequate justification for the same.

18. If a licence is to be granted, the next question would be whether the petitioner meets the eligibility criteria for grant of such a licence and, if yes, what should be the conditions under which a licence may be issued. The petitioner meets the requirements of capital adequacy and creditworthiness and code of

conduct as laid down by the Central Government in the Distribution Licence Rules, as discussed in para 4 above. Of the conditionalities that appear relevant to this case, the main is that of cross subsidy surcharge. The licence is for supply of electricity to industrial consumers that are subsidizing consumers of the CSEB, the present licensee. Although as per the MoU signed with the Government and the clear understanding of the applicant with the Government, as also the Board, is that it would not lure the existing consumers of the Board, the fact remains that the industries which are being served, and would be served, by the applicant, are prospective consumers of the Board. Hence it has been argued that the consumers of the applicant should be liable to pay cross subsidy surcharge. What is 'Cross subsidy surcharge' has not been defined in the Act. Sec. 42 of the Act provides that payment of surcharge to cover the cross subsidy, should be considered by the State Commission while allowing open access. A distribution licensee may be required to provide open access to consumers on payment of the cross subsidy surcharge in addition to the wheeling charges as may be determined by the Commission. However, it is to be noted that the present case is not one of open access. JSPL is not seeking to transmit/distribute power through the transmission lines of the CSEB. The company has laid its own dedicated transmission and distribution lines. Therefore, as per the specific provisions of the Act, a cross subsidy surcharge is not leviable on the consumers of JSPL. The applicant has sought to take shelter behind the Electricity (Removal of Difficulties) second Order, 2005 of the Central Government (A-15) according to which no such surcharge would be required to be paid on the electricity being sold by the generating companies with the 'consent of the competent Government under Clause (c) of sub-section (1) of Sec. 43A of the Electricity Act, 1948. In support, again the same MoU of 23.10.2002 with the State Government and the Government's letter dated 29.1.03 have been cited. We have already held that these documents did not confer any right on the applicant for supply of electricity. This plea of the applicant is, therefore, not tenable.

19. However, the Commission is of the view that there is no justification for levy of cross-subsidy surcharge, on the following grounds:

(i) As already mentioned above, it is not a case of open access. Neither the applicant nor the consumers are seeking open access of the transmission/distribution facilities of the existing licensee i.e. the Board.

(ii) While theoretically the proposed distribution licence would mean a loss of prospective subsidizing consumers to the existing licensee, the fact that electricity is being supplied by the applicant to the industries in JIP at Rs. 2.50 per unit and the contract for supply at this rate is for five years. The applicant's rates are less than the Board's tariffs for even a domestic consumer, which is a subsidized category, consuming more than 200 units per month.

(iii) The scheme of the Act is such that a distribution licensee can not recover cross-subsidy surcharge from another distribution licensee. The consumer has the rights to avail electricity from either of the two licensees.

(iv) The applicant has undertaken to supply electricity to all consumers in the area for which licence is proposed to be granted. (A-6)

20. The applicant does not prima facie require a transmission licence for transmission of power to the industrial estate in question. As already mentioned elsewhere, for distribution of electricity in the industrial estate the applicant company's existing transmission line from Raigarh to Tamnar has been tapped and a 220 KV lines of approx. 6.4 kms. laid. This line should be considered a part of the distribution network only. Besides, as per the provision of Secs. 9 & 10 of the Act, no licence is required for laying dedicated transmission lines.

21. The only special condition which would appear to be necessary is that the applicant should supply electricity to all consumers in the two villages in which

his industrial estate is located, who may seek such supply. The supply should be at a rate which shall be Rs.2.50 per unit, being the rate at which electricity is being supplied by him at present to the existing industries, or at the rate at which the Board supplies power to that category of consumers whichever is lower. The applicant should also take steps for laying necessary distribution lines in the two villages and undertake electrification at his own cost. This would to an extent fulfill his universal supply obligation.

22. The last issue for discussion is the treatment of the period from 1.4.04 till the date of the grant of distribution licence, during which supply of power by the applicant has been without legal authority. As already discussed in para 11 to 13 ante, the applicant did not have the necessary legal authority either under the 1910 Act or under the present Act to supply electricity in his industrial estate. This constitutes a clear contravention of the provisions of Sec. 12 of the Act that mandates licence to be obtained for supply of electricity. This act of the applicant is punishable under Sec. 142 of the Act. The applicant is clearly liable for penalty under this provision of law. Although no opportunity has specifically been provided to the applicant of being heard in this regard as required and the provision of this section, the elaborate proceedings in this case has provided sufficient opportunity to the applicant to prove that he had not contravened the provision of the Act, in supply of power to his industrial estate. In fact, his main case is that he had the legal authority for his action, which we have not accepted. The Commission, therefore, feels that there is no need for another opportunity being given to the applicant of being heard in the matter. The Commission directs that the applicant pay a penalty of Rs. one lakh for contravention of the provisions of the Act aforementioned. The amount shall be deposited with the Secretary of the Commission within seven days of this order.

23. In the light of the discussion above, the Commission is in favour of grant of a distribution licence to the applicant under Sec. 14 of the Act on the following

conditions, apart from the general and special conditions applicable to such licences under the Licence Regulations:

(i) The licence will be for the area of the two villages, Tumdih and Punjipathra of Gharghoda Tahsil of Raigarh District. However, the number of industrial consumers in the JIP shall be limited to 70 and their total demand for electricity not exceeding 299 MW, as agreed with the State Government.

(ii) The applicant shall lay necessary distribution lines and put up sub-station at his own cost in the two villages for supply of electricity to any person who may apply for it and supply electricity at a rate not more than Rs.2.50 per unit or at the supply rate of the Board for that category of consumer, whichever is lower. This will include domestic, agriculture, industrial and other consumers. The option to choose between the licensee and the Board shall be with the consumer.

(iii) All other general and special conditions applicable to a distribution licensee as per the provisions of the Licence Regulations.

24. The decision of the Commission to grant a distribution licence may be published through a notice in two local newspapers as required under sub-section (5) of Sec. 15 of the Act and clause 13 of Licence Regulations, inviting suggestions and objections within a period of 15 days from the date of publication of notice.

Sd/-  
**Member**

Sd/-  
**Chairman**

**True Copy**

**(Ajay Srivastava)**  
**Dy. Secretary**