



Chhattisgarh State Electricity Regulatory Commission

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Petition No.20/2005 (M)

Suo motu petition by the Commission

Against the **Chhattisgarh State Electricity Board** and two others.

COPY OF ORDER SHEET DATED 02/08/2005

The Chhattisgarh State Electricity Board (CSEB) vide letter No.02-02/SE-I/2412 dated 30.12.2004 has granted permission to M/s Vandana Vidyut Ltd. (VVL) for wheeling of their power to 24 consumers. Similar permission has been granted to M/s Indo Lahari Bio Power Ltd. (ILBP), Raipur on 12.5.2005 vide No.02-02/I-1/ILBPAL/Vol.IV/432 for wheeling of power to 10 consumers. The letters do not state under what provisions of law or rules such permission has been granted. As per the provisions of the Electricity Act, 2003 (the Act) a generator can supply electricity to consumers only by seeking open access under Sec. 42 of the Act. The permission granted by the Board is, therefore, prima facie a violation of provisions of the Act. A show cause notice was, therefore, issued to the CSEB as also the two generators under Sec. 129. The CSEB submitted their reply on 21st July '05. The reply refers to the policy of the Govt. of Chhattisgarh with regard to non-conventional energy generators issued vide notification No.38 dated 8.4.2002 according to which any non-conventional energy generator can sell electricity to third parties with the permission of the State Govt. The State Govt. had apparently granted them permission for sale of power to third parties under Sec. 28 of the Indian Electricity Act, 1910 (the 1910 Act). The impugned letters issued by the CSEB seek only to renew the permission already granted. In their reply dated 21.7.2005 ILBP made no particular plea except that the National Electricity Policy is in favour of promotion of non-conventional energy sources and that they would, in future, seek the permission of the Commission for supply of electricity to third parties. No reply was filed by VVL.

2. In the hearing on the matter on 27.7.2005 on behalf of the CSEB it was submitted that both the companies were generating non-conventional energy which had been permitted under the policy guidelines of the Govt. of India and the State Govt. They have obtained permission under Sec.28 of the 1910 Act for supply of electricity to third parties. In the agreement which they have entered into with the CSEB in pursuance of this permission, they can change the third parties once in a year. It is in pursuance of these provisions in the agreement that the two companies had applied to the Board for permission to supply electricity to some old and some new industries (8 out of 24 in case of VVL and one out of 10 in case of ILBP) and permission has been accorded vide the impugned letters. The two companies submit that they had obtained permission from the State Govt. under Sec. 43A of the Electricity Act, 1948 (the 1948 Act) and the present permission is only renewal of the same.

3. The issues for consideration are:
- (i) Whether the CSEB had authority to issue the impugned permission under the Act?
 - (ii) Whether permission has been granted by the State Govt. under the provisions of any law/rule for supply of electricity to third parties and, if yes, under what terms and conditions?
 - (iii) Whether this permission and the agreement the companies have entered into with the CSEB are saved under Sec. 185(2)(a) of the Act?

4. After the coming into force of the Act of 2003, the Board in any case is only a deemed licensee and has no authority for grant of the dispensation it has granted, to any generator. It is quite clear from a plain reading of Sec. 28 of the 1910 Act that the competent authority to sanction supply of power by a non-licensee to the public under this section is the State Govt. Although the State Govt. is required to consult the Board before it gives any sanction, there is no provision in this Act which authorises the Board to renew such permission from time to time. The Board has thus acted clearly without jurisdiction. The Board's plea that the agreement it has entered into with the generating companies provides for supply of electricity to third parties by the generators as also change of parties, if the generators so desired, once in a year is not acceptable. As already mentioned since the State Govt. was competent to sanction such dispensation, it is the State Govt. which alone could renew/alter/amend it and not the Board.

5. The M.P. Electricity Board under powers delegated by the State Govt., had granted permission to the two generators to establish new generating stations under Sec. 44 of the 1948 Act. However, sanction has been granted by the State Govt. to the generators for supplying power to third parties under Sec. 28 of the 1910 Act and not under Sec. 43A of the 1948 Act. The relevant provisions are as under:

Section 28 of the 1910 Act

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; xxxxxxxx

Section 43A of the 1948 Act

43A. Terms, conditions and tariff for sale of electricity by Generating Company - (1) A Generating Company may enter into a contract for the sale of electricity generated by it -

- (a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;
- (b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and

- (c) with any other person with consent of the competent government or governments.
XXXXXXX

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).

6. It would appear that there has been some lapse somewhere in the application of the correct provisions of law in this case. The Commission would not, however, like to take cognizance of such a lapse at this late stage when the Board has permitted third party sale to specific consumers under the authority of the State Govt. The only issue that remains to be considered is whether the permission granted by the MPEB could have been renewed by the CSEB and sale to new parties permitted after the Electricity Act, 2003 has come into force and the 1910 and 1948 Acts have been repealed. The answer would appear to be clearly in the negative. 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.

7. It may, however, be mentioned that supply of energy to consumers through open access is subject to payment of transmission/wheeling charges and cross subsidy surcharge. Only those generators who had permission for supply of electricity under Sec. 43A of the 1948 Act are not required to pay cross subsidy surcharge as per the Electricity (Removal of Difficulty) Second Order, 2005 issued by the Ministry of Power on the 8th June, 2005. The matter regarding formulation of an appropriate policy for promotion of non-conventional energy sources in the State, so far as jurisdiction of this Commission is concerned, which includes the issue of determination of transmission/ wheeling charges as also cross subsidy, is being separately

considered by the Commission. These would be applicable to the present cases when orders are issued by the Commission. In the meantime, the generators may submit petitions to the Commission for seeking open access.

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.

9. The Board is advised that it should desist from taking action without authority, as in this case, in future.

Copy of this order may be sent to the parches to this petition. This case is closed.

Sd/-
Member

Sd/-
Chairman

True Copy

(Ajay Srivastava)
Deputy Secretary