

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 270 of 2006**

**Dated: 21<sup>st</sup> February, 2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**In the matter of:**

**Chhattisgarh State Power  
Distribution Co. Ltd.**

**... Appellant(s)**

**Versus**

- 1. Shri J.P. Saboo, Urla Industries  
Association Ltd.  
Urla Industrial Complex, Raipur**
- 2. Jayswal's NECO Ltd.  
Siltara Growth Centre  
Siltara, Raipur**
- 3. Shri Bajrang Power and Ispat Ltd.  
522/C, Urla Industrial Area  
Raipur**

- 4. Bharat Aluminium Co. Ltd.  
Korba**
  - 5. Chhattisgarh State Electricity  
Regulatory Commission, Civil Lines  
GE Road, Raipur**
  - 6. Chhattisgarh State Power Generation Co.Ltd.**
  - 7. Chhattisgarh State Power Transmission Co.Ltd.**
  - 8. Chhattisgarh State Power Trading Co.Ltd.**
  - 9. Chhattisgarh State Power  
Holding Co. Ltd.**
- ....Respondents**

Counsel for Appellant(s)

Mr. K. Gopal Chowdhary

Counsel for Respondent(s):

Mr. P.C. Sen Advocate with  
Ms. Aanchal Yadav, Adv. for  
BALCO  
Ms. Shikha Ohri for ACPCL  
Mr. M.G. Ramachandran,  
Ms. Sneha Venkataramani for  
CSERC

**JUDGMENT**

**PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

Chhattisgarh Power Distribution Co. Ltd., the Appellant herein, has filed this Appeal as against the Review Order dated 29.9.2006 passed by the Chhattisgarh State Commission.

2. The Appellant, on being aggrieved by the Main order dated 6.2.2006 passed as against the Appellant filed Review Petition. The State Commission though allowed the Review Petition on some issues in favour of the Appellant but rejected the other issues.

3. Hence the Appellant filed this Appeal against the said Review Order dated 29.9.2006 rejecting the issues raised by the Appellant. The short facts are as follows:

4. Urla Industries Association, the 1<sup>st</sup> Respondent herein, filed a Petition on 12.7.2005 before the State Commission, on behalf of members of that Association who were having their own Captive Power Plants praying the State Commission for deciding the Power-Purchase and related matters connected with the Captive Power Plant. Respondent Nos.2-4, the other Captive Consumers, were also subsequently added as parties in the above Petition.

5. The State Commission thereupon took up the said petition for consideration on various issues. Ultimately, the State Commission after hearing the parties including the Appellant passed the main order dated 6.2.2006 giving various directions in respect of the issues to the Appellant.

6. Thereupon, the Appellant filed a Petition for review being Petition No.16/2006 before the State Commission for review of the order dated 6.2.2006 in respect of those issues.

7. In the meantime, the Urla Industries Association, the 1<sup>st</sup> Respondent herein, filed an Appeal before this Tribunal as against the said order dated 6.2.2006 in respect of some of the issues in Appeal No.99/2006. The same was disposed of by the Tribunal by Order dated 12.9.2006.

8. Thereupon, the Review Petition which had been filed by the Appellant in Petition No.16/2006 was disposed of by the State Commission by Order dated 29.9.2006 modifying the earlier order dated 6.2.2006 allowing some of the issues in favour of the Appellant and rejecting the other issues raised by the Appellant. Those issues rejected by the Order dated 29.9.2006 by the State Commission are as under:

- (i) Waiver of minimum energy charges;
- (ii) Zero Contract Demand,
- (iii) Monitoring of status of Captive Power Plant.

9. On these issues, the learned Counsel urged the following grounds.

- (i) The State Commission ought not to have waived the minimum energy charges being paid by Captive Consumers of the Captive Power Plant as it would amount to undue preference of Captive Consumers as against the other consumers which would result in financial loss to the Appellant, namely, Electricity Board.
- (ii) The State Commission is wrong in allowing the consumers of the Captive Power Plant to reduce their contract demand to zero as the Appellant cannot be

obliged to supply electricity to a consumer with zero contract demand.

- (iii) State Commission went wrong in vesting the powers of monitoring Captive Power Plant status with itself and such vesting of jurisdiction is repugnant to law and cannot be presumed in the absence of express provision in the statute.

10. In reply to the above grounds, the learned counsel for the Respondent refuted these grounds by contending that various reasonings given by the State Commission in the impugned order for holding the issues as against the Appellant are legal and in the absence of any reasons to conclude that the said findings are wrong, the impugned order does not call for any interference.

11. The learned counsel for both the parties argued the matter at length and also cited various authorities. We have carefully considered those submissions and given our thoughtful consideration over this.

12. Let us deal with the 1<sup>st</sup> issue, namely, waiver of minimum energy charges. According to the Appellant, the State Commission, by exempting the Captive Consumers from the payment of the minimum energy charges, has given undue preference to the Captive Consumers as against the other consumers thereby left a portion of fixed cost of the Appellant as unserved.

13. Let us now refer to the relevant portion of the impugned order dated 29.9.2006 passed by the State Commission with respect to the above issue:

*“7..... The tariff approved by the Commission for HT consumers provides for recovery of both fixed charges and variable charges in case of regular consumers and also in case of temporary connections. For all HT consumers there is the minimum charge in terms of a charge on demand to the extent of demand contracted with the licensee. It is only in case of an EHT consumers that there is also a minimum charge in terms of energy. In the impugned order we have taken into consideration the fact that unlike a regular customer of the licensee, who has to source entire requirement from the licensee, a captive consumer sources electricity from his own captive plant and hence while is liable to pay the fixed charge to the extent of his demand contracted with the licensee, he should not be asked to pay for the minimum energy consumption*

*irrespective of whether he consumes energy to that extent or not.....”*

8. *The Commission does not agree with the petitioner that the recovery of minimum charges in terms of energy would adversely affect its revenues as determined by the Commission. As pointed out by the respondents, not only does the licensee recover the full demand charges on the demand contracted, the transmission and wheeling charges paid by the consumers of the CPP availing open access also go to partly reimburse the fixed costs of the licensee. In any case, the licensee has not furnished any data to substantiate his contention.”*

14. The above observation made by the State Commission would indicate that the State Commission has held that the Captive Consumers are different from the other Consumers as

the Captive Consumers would normally take electricity only from Captive Power Plant. In other words, the Captive Power Plant instead of drawing power from the grid will use its electricity generated by it thereby supporting the grid with its own generation. The Captive Power Plant and Captive Consumers will be taking electricity from grid only as stand-by supply, that too, only in circumstances when Captive Power Plant is under an outage.

15. This Captive consumer has been already paying demand charges for the contract demand as is applicable to all other consumers. Only a very small amount of minimum energy charges has been waived off. As a matter of fact, the transmission and wheeling charges are being paid by the Captive Consumers to compensate the fixed cost incurred by the Appellant.

16. That apart, there is no prejudice caused to the Appellant by way of non-recovery of minimum energy charges from the Captive Consumers. In fact, the Tariff order passed by the State Commission for the year 2005-06 was applicable only up to September, 2006, that is, till next Tariff Order for the year 2006-07 was issued. The main impugned order was passed by the State Commission on 6.2.2006. Therefore, the order dated 06.02.2006 was applicable only for the period of 8 months.

17. The Appellant has contended that the State Commission has wrongly given a favourable treatment to Captive Consumers as against the other consumers by exempting them from paying the minimum energy charge. The State Commission in the impugned order has observed that in the State of Chhattisgarh, the Captive Power Plant capacity is more than the installed capacity of the Appellant.

18. Many of the Captive Power Plants are based on co-generation and use industrial waste for fuel generation. Some of the Captive Power Plants are based on biomass and other renewable sources of energy. As a matter of fact, the Appellant is unable to supply the power to the extent of demand and the State has a constant peak deficiency of 200 MW which is likely to go up. The State Government also showed a positive approach towards the Captive Power Plants and granted various concession to them. In fact, the State Government has given a dispensation to promote Captive generation and use of electricity.

19. The Captive generation and captive uses are encouraged under the Electricity Act. Promotion of generation including Captive generation is done in national interest. Captive users are a class by themselves. They acquire electricity from grid

only as a stand-by. Captive Power Plant also supports the grid unlike a consumer. There is, therefore, a reasonable classification, nexus to the purpose and objective for Captive users being treated differently.

20. The State Commission also found that the Electricity Act, 2003, National Electricity Policy and the National Tariff Policy place Captive Consumers in a separate category. The State Commission has dealt with the issue of differentiation between the captive and other consumers in the impugned Review Order dated 29.9.2006 which is as follows:

*“The question is whether the consumer of a CPP who may continue to be consumer of the licensee, should be treated like the other regular consumers of the licensee. The relevant provisions in the Act, the NEP and the NTP do place the ‘captive consumers’ in a separate category. There are justifiable grounds for treating them*

*differently. **The first and the foremost, consumers of CPP source power either fully or partly from a CPP and if at all, only partly from the licensee. Standby power has to be treated by its very nature in a different category.** We shall come to that shortly.*

*The CPP has a right to open access for the purpose of supply of electricity to its captive consumers [Section 9 (2) of the Act] and the captive consumer is not liable to pay cross subsidy surcharge (proviso 4 to sub section (2) of section 42 of the Act). The very objective of a separate provision for captive power plant would be nullified in case they are to be treated like any other generator. The importance of captive generation, which contributes to the overall electricity generation capacity of the country and help in decentralized generation and distribution of electricity, has been recognized in the Act, the NEP and NTP. The captive consumers of the*

*CPP have to be treated as a different category of consumers of a licensee, if the objectives of captive generation have to be subserved. The main issue is clearly defining the relationship of CPP consumers with the licensee whose consumers they continue to be.”*

21. In view of the reasonings given by the State Commission as referred to above, we are not inclined to accept the contentions urged by the learned Counsel for the Appellant in respect of the issue relating to waiver of minimum energy charges. This point is answered accordingly.

22. The next issue is relating to the Zero Contract Demand. According to the Appellant, the State Commission has wrongly allowed the Captive users to reduce the contract demand to zero and instead, the State Commission put the obligation on the Appellant to supply electricity to them on demand. The

main allegation of the Appellant is that by permitting reduction of the contract demand to zero, a financial benefit has accrued in favour of the captive generators at the cost of other consumers.

23. The State Commission has dealt with the above issue in the main order dated 6.2.2006 as a necessary corollary of the issue related to set off of contract demand. While the State Commission did not allow the set off of contract demand, it dealt with the provisions of Supply Code which permit reduction in contract demand by a consumer in the period of 2 years. We will now quote relevant observations made by the State Commission in the impugned order passed on 6.2.2006:

*“6.7 ..... The Supply Code (clause 7.9) permits reduction in CD to the extent of 50% by a consumer only once within the period of the agreement which is two years. Further liberalizing this provision, the*

*Commission directs that the captive and non-captive consumers of a CPP may reduce their CD, on availing power supply from the CPP, any time during the period of the agreement and to any extent. However, that such reduction shall be permitted only once in a year. In case CD is reduced to zero level to avail only standby power from the Board/licensee, the charges will be tariff for temporary connection to that consumer for the period during which power is availed from the licensee, following the provisions of para 8.5.6 of the NTP. So far as the CPP itself is concerned, it can avail of start-up power as per para 8 of this order.”*

24. In the light of the above observations made by the Commission, we notice that the Appellant has failed to demonstrate as to what is the actual benefit that has accrued in favour of the captive generators in financial terms. In this

context reference may be made to 62(3) of the Electricity Act, 2003. This section recognizes the power of the State Commission while determining the tariff, to differentiate consumers on the basis of load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which supply is required or the geographical position of any area, the nature of supply and the purpose for which supply is required. The Captive users do not require supply during normal condition. The licensee is only required to supply temporarily, that too, when the generating plant is under outage.

25. This point has been further clarified in review order dated 29.9.2006. The said observation by the State Commission is as follows:

*“10. The Commission recognizes that the case of consumers availing power only from the CPP who*

*reduce their CD to zero is more complex. Such a consumer does not have any contracted demand with the Board and the question of billing on the demand charge, therefore, is open. As we have already mentioned, he continues to be a consumer of the Board as per the definition of consumer under section 2 (15) of the Act. In our order we have said that such consumers whenever they draw power from the licensee shall pay tariff as applicable for temporary supply. The Commission has relied on para 8.5.6 of NTP in this regard. This provision is reproduced below: -*

*“In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission.”*

*Thus, whenever there is an outage in the CPP its consumers, both captive and non-captive, should get supply from the licensee as it would not be possible for them to shut their plants no sooner the CPP comes under outage. Standby power by its very nature may be availed in an emergency at any time and it may even be without prior intimation to the licensee. Thus, a responsibility has been cast on the licensee to come forward and supply electricity to a consumer at a critical time. The Board has to keep its infrastructure ready to extend such supply to the consumers at any time. In view of this obligation, the Commission feels that the licensee definitely needs compensation including recovery of fixed charges. But since there is no contractual demand in these cases, the question is how is the demand charge to be determined? The demand charge is generally for the whole month and for*

*the demand availed by the consumer, as the tariff designed by the Commission is for a full month. As the CSEB has brought out, even in case of a temporary connection, the demand is indicated as also the period for which temporary connection is to be availed. In case of consumers of CPP neither time nor demand can be indicated in advance. That is not practicable. Under the circumstances, the Commission feels that some way would have to be found to meet such a special situation. A single part tariff which takes care of the components of demand charge and also the energy charge appears to be a practical solution. Since such consumers are most likely to be in EHT and HT categories in view of the open access regulations, the Commission feels that per unit average tariff of HT and EHT consumers in the tariff order for the year 2006-07 should apply to such consumers. The average tariff takes care both of the*

*demand charge and the energy charge. In para 4.12 of the tariff order for 2006-07 (passed on 13.09.2006 in petition No.24 of 2006) this average tariff has been worked out at Rs.3.79 per KWh. The average tariff is being/or as preferred the only method, in the absence of any contract demand of consumers. The Commission directs that this tariff be made applicable to such consumers of the CPP who reduce their CD to zero, at the rate of one-and-a -half times of this tariff as is applicable to all temporary connections. This tariff will be applicable till the tariff order for 2006-07 is in force. However, we direct this facility will be provided for the maximum drawal of power to the extent of the quantum for which the consumer is availing open access.”*

26. Thus this aspect has been clarified by the State Commission in detail as mentioned above.

27. It is contended by the Appellant that it has to keep special infrastructure ready to supply to any Captive Consumers having zero contract demand as and when such Captive Consumer asked for supply and in that process, the Appellant has incurred substantial expenditure. This contention has no basis as the Appellant has not established the incurring of any such expenditure either before the State Commission or before this Tribunal. In fact, the State Commission has protected the interest of the Appellant by ordering Captive Consumers to pay 1½ times for the power drawn as per the Open Access Agreement and 2 times for the power drawn in excess of the capacity prescribed in the Open Access Agreement.

28. As pointed out by the learned Counsel for the State Commission if and when the Appellant has material to show the extra expenditure incurred, it is open to the Appellant to

approach the State Commission for appropriate consideration. That apart, as pointed out by the learned Counsel for the Respondent, ordinarily the Captive Consumers will not take electricity from the Appellant. As indicated above, the very nature of the supply by the Appellant to the Captive Consumer in the event of outage of a Captive Power Plant is that of stand-by supply. This stand-by supply has to be treated as a separate category.

29. In view of the above factors, we are not able to accept the contention urged by the learned Counsel for the Appellant in regard to the issue of Zero Contract Demand. Accordingly, the same is rejected.

30. The next issue is monitoring status of Captive Power Plant. In respect of this issue, the Appellant has contended that the State Commission has usurped the power which has

not been conferred on it by the statute by taking upon itself the responsibility to decide and monitor the status of the Captive Power Plant.

31. Let us discuss this issue. The Electricity Act makes a special provision regarding the captive generating plant and such a plant has been provided with the benefit of right to Open Access for the purpose of carrying electricity from its captive generating plant to the destination of its use. Rule 3 of Electricity Rule, 2005 lays down the criteria to judge a captive generating plant and the captive users.

32. This apart, special provisions have been made in the Act as well as in two National Policies in order to promote captive generating plants as decentralized generation and as a source of supply of power to the grid. The State Government policy offers incentive to such a plant by various exemptions from

electricity duty for specific period. Unless a power plant is declared as a captive generating plan on the basis of the criteria laid down in Rule 3 of the Electricity Rules, those plants will not be able to avail the incentives offered by the State Government.

33. Unless the Captive users are identified, on the basis of qualification laid down in rule 3, an annual assessment of total consumption by captive users and by captive generating plant would not be possible.

34. Admittedly, this cannot be done by the State Transmission Utility or a Distribution Licensee. Similarly, there is no provision in the Act enabling the State Government to do so. Since open access has to be regulated by the State Commission, we feel that the State Commission has to take the responsibility of declaring the generating plant as a

captive one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3 of the Electricity Rules. This ratio has already been decided by the Tribunal in appeal No.116/2009 dated 18.5.2010 – CSPDCL Vs. M/s Heera Ferro Alloys.

35. As mentioned in the above judgment, there is no prohibition in the Electricity Act, 2003 or the Electricity Rules, 2005 for the State Commission to determine the Captive Power Plant status. Since the State Commission exercises the regulatory powers in the State to decide about a dispute between the Captive Power Plant and any Licensee in terms of Section 86(1)(f) of the Act, the State Commission alone would be the appropriate authority to decide about the status to monitor the said Captive Power Plant status.

36. As pointed out by the learned Counsel for the State Commission, the Appellant is not prejudiced in any manner by raising of dispensation granted by the State Commission to Captive users and the Captive Power Plant. Even if there is any revenue shortfall to the Appellant on account of the above issue, the same will be considered by the Commission in the revenue requirement truing up.

37. In view of the above discussion, this contention of the Appellant would fail.

**38. SUMMARY OF FINDING:**

**I. The 1<sup>st</sup> issue is the waiver of minimum energy charge. The Captive Consumers are different from other consumers as the Captive Consumers will normally take electricity only from Captive Power Plant. The Captive consumer will be taking electricity from grid only in**

**exceptional circumstances, that too, when the Captive Power Plant is under an outage. The Captive consumers have been already paying demand charges for the contract demand as is applicable to all the other consumers. That apart, the transmission and the wheeling charges are being paid by the Captive Consumer to compensate the fixed cost incurred by the Appellant. The Electricity Act, National Electricity Policy and the National Tariff Policy place Captive Consumer in a separate category.**

**Therefore, the Captive Consumers of the Captive Power Plant have to be treated as different categories of consumers of a Licensee. Therefore, the finding given by the State Commission to waive the minimum energy charge to be paid by Captive Consumers of the Captive Power Plant is perfectly justified.**

**II. The next issue is the Zero Contract Demand. Section 63(3) of the Electricity Act, 2003 recognizes the**

**power of the State Commission while determining the Tariff to differentiate consumers on the basis of the various categories, such as, load factor, power factor, voltage, total consumption of electricity, the nature of supply and the purpose for which supply is required, etc. The captive users do not require supply during normal conditions. The Licensee is only required to supply temporarily, that too, when the generating plant is an outage. According to the Appellant, it has to keep special infra-structure ready to supply to any Captive Power Plant/Captive User with Zero Contract Demand as and when the demand for supply is made, in that process, the Appellant has incurred substantial expenditure. This contention has not been substantiated as it has not been established that due to the same, substantial expenditure had been incurred by the Appellant. As a matter of fact, in the impugned order, the State Commission has**

**protected the interest of the Appellant by ordering the Captive Consumers to pay 1½ times for the power drawn as per the Open Access Agreement and 2 times for the power drawn in excess of the capacity prescribed in the Open Access Agreement. Therefore, there is nothing wrong in the order of the State Commission allowing the captive users to reduce the contract demand to zero.**

**III. The next issue is monitory status of Captive Power Plant. According to the Appellant, the State Commission has no power to decide and monitor the status of the Captive Power Plant. The Electricity Act makes special provisions regarding the Captive Generating Plant to the destination of its use. These special provisions have been made in the Act as well as in the National Policy in order to promote Captive Generating Plants as decentralized generating plant and also to make it as source of supply of power to the**

**Country. The State Government Policy also offers incentive to such plants by various exemptions. Unless a power plant is declared as Captive Generating Plant on the basis of criteria laid down in Rule 3 of the Electricity Rules, these plants will not be able to avail the incentives offered by the State Government. This cannot be done either by the Utility or by the Government as there is no provision. Since Open Access has to be regulated by the State Commission, we feel that the State Commission has to take the responsibility of declaring the generating plant as captive one and monitoring on an annual basis, if it satisfies the criteria laid down in rule 3 of the Electricity Rules.**

39. In view of our findings referred to above, we conclude that there is no merit in this Appeal and in the light of our views expressed above, the impugned order does not call for interference. We dismiss this Appeal as devoid of merits. No order as to cost.

**(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)**  
**Judicial Member    Technical Member    Chairperson**

**Dated: 21<sup>st</sup> February, 2011**

**REPORTABLE/NON-REPORTABLE**