

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 72 OF 2015

Dated: 17th February, 2016

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**Salasar Steel & Power Ltd.
Manisha Mohta, S/o Shri H.K. Mohta,
Regd. Office – 1st Floor, Bhatia Complex,
Opp. Rajkumar College, G.E.Road,
Raipur, Chhattisgarh-492001. ...Appellant**

Versus

**Chhattisgarh State Power Distribution Company Ltd.
Dagania, Raipur,
Chhattisgarh-492013 ...Respondent No.1**

**The Chhattisgarh State Electricity Regulatory
Commission, Irrigation Colony, Shanti Nagar,
Raipur, Chhattisgarh-492001. ...Respondent No.2**

Counsel for the Appellant(s) : Mr. Raunak Jain

**Counsel for the Respondent(s) : Ms. Suparna Srivastava,
Ms. Neelmani Pant,
Ms. Nistha Sikoria,
Mr. Kumar Harsh &
Ms. Anuska Arora for R-1
Mr. C.K. Rai,
Mr. Manish Kumar &
Mr. Paramhans for R-2**

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal has been filed by M/s. Salasar Steel & Power Ltd. (hereinafter referred to as “**Appellant**”) under Section 111 of the Electricity Act, 2003, challenging the Impugned Order dated 23.12.2014 passed by the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as “**State Commission- Respondent No. 2**”) in Petition No. 55/2013(D).

The Appellant is a company registered under the Companies Act, 1956 and has installed 15 MW and 65 MW power plant along with 2x100 TPD sponge iron manufacturing unit at Raigarh in the State of Chhattisgarh, out of which 4.5 MW is generated through waste heat.

2. The Appellant is connected to the 132 KV/220KV Raigarh sub-station through 132 KV dedicated single circuit line for evacuation of power and has been permitted to operate its power plant in parallel with the grid system of Chhattisgarh State Power Distribution Company Limited (hereinafter referred to as “**Respondent No.1**”). Respondent No. 1 is responsible for distribution of electricity within its

licensed distribution area as well as procurement of surplus power from various sources.

3. The Appellant's plant is within the distribution area of Respondent No.1.
4. In the Petition No. 55/2013(D) filed by the Appellant before the State Commission on account of dispute arising out of the Supplementary Bill dated 29.06.2013 issued by the Respondent No.1, the State Commission by its Impugned Order dated 23.12.2014 partly allowed the said petition, however, upheld the challenged methodology adopted by the Respondent No.1 on account of computation of Parallel Operation Charges (POP) payable by the Appellant for the period January, 2009 to May, 2013 during which the Appellant's 15 MW power plant alongwith sponge iron manufacturing facility could not qualify as a Captive Power Plant (CPP).
5. Aggrieved by the Impugned Order dated 23.12.2014 issued by the State Commission, the Appellant has filed the present Appeal challenging the methodology adopted by the Respondent No.1 regarding billing of POP.

6. The State Commission vide their Impugned Order dated 23.12.2014 held that POC and cross subsidy charges are for different purposes and may be recovered at the same time for the same period if the Captive Power Plan (CPP) is not fulfilling the criteria for captive status.
7. The Appellant states that such a decision of the State Commission vide their Impugned Order dated 23.12.2014, is directly contrary to the Judgment dated 09.02.2010 passed by this Tribunal in Appeal Nos. 119 and 125 of 2009.
8. Consequent upon issuance of the Impugned Order dated 23.12.2014, the Respondent No.1 has issued a bill dated 18.02.2015 amounting to Rs.84,02,097/- and the earlier supplementary bill dated 29.06.2013 for Rs. 64,86,699/- was recalled.
9. The Appellant is CPP but based on the actual consumption for the period in question, the Appellant was not CPP, as alleged.
10. The only issue in the above Appeal requires to be considered:

Whether POC could be levied on the Appellant, when it was not a CPP for the period in question; and

Whether POC and cross subsidy surcharges can be recovered at the same time for the same period?

11. We have heard at length the Learned Counsel Mr. Ranuak Jain for the Appellant, Ms. Suparna Srivastava for Respondent No1 and Mr. C.K. Rai for Respondent No.2 and considered various submissions made by them and the arguments put forth by the rival parties during the pleadings in respect of the present Appeal and the relevant issues are as follows.

12. The Appellant alleged that once it does not qualify as CPP, it becomes an independent power plant and hence, there would not be any justification for recovery of any POC for that period. In support of the same, the Learned Counsel for the Appellant quoted this Tribunal's Judgment dated 09.02.2010 in Appeal Nos. 119 and 125 of 2009 rejecting therein the submissions of the Respondents that POC ought to be paid by the generator as it has also availed the facility of POC even when based on the annual captive consumption, it does not qualify as CPP. In the opinion of the Appellant, vide above Judgment of this Tribunal, POC is applicable only towards CPP and if a generator is not a CPP, it does not liable to pay POC. For the period in question, the Appellant claims that it is not CPP and the

Respondent No.1 having charged cross subsidy surcharge on the captive consumption by the Appellant, is not entitled to recover any POC and as a result, is liable to refund the same.

13. The Appellant stated that for the reasons that while differentiating the purpose for which POC and cross subsidy surcharges are levied, the State Commission has erred by not taking into consideration that cross subsidy surcharge as per Hon'ble Supreme Court's decision in Sesa Sterlite case (Civil Appeal No. 5749 of 2013) is the compensatory charges paid to the distribution licensee as a consequence of a consumer going out of distribution licensee's ambit and the cross subsidy charge is for meeting the loss caused due to exit of a consumer i.e. loss caused on account of (i) ability to cross subsidize the vulnerable sections of the society, as well as (ii) recovery of fixed costs that the licensee might have incurred as part of its obligation to supply electricity to that consumer (stranded cost). The exit of a consumer is, however, exempted from payment of cross subsidy surcharge, if such supply is from CPP to its consumer. On the loss of captive status, therefore, the distribution licensee is levying the cross subsidy surcharge because the consumer is no longer having captive status. For the very reason

that the State Commission vide its Impugned Order dated 23.12.2014 has held that the POC is for the grid support, in opinion of the Appellant for the use of Respondent's system i.e. "grid support", the consumer would have compensated either by paying POC or cross subsidy surcharge.

14. The Appellant in the present Appeal prayed for quashing the Impugned Order dated 23.12.2014 passed by the State Commission and stated therein that in the event, this Tribunal of the view that the Appellant is liable to pay POC, then it should be billed on actual number of units consumed by the captive and non captive load of the Appellant.
15. Respondent No.1 stated that the Appellant has been recognized as CPP based on the requirement of the Appellant before the Respondent Nos. 1 & 2 and fulfilled for criteria laid down in law for grant of CPP status. Number of CPPs has been set up by the various industries to generate power primarily for their own use in the state of Chhattisgarh and at times subject to availability of surplus power, if any, generated from such CPPs and in accordance with the contractual arrangements and / or availability of open access in the State or the inter-state system, the CPPs also supply such surplus

power from their power plant. State utilities for the purpose of providing Grid Support so as to ensure stability and efficiency in the operation of their generating stations, allow CPPs to operate in parallel with the grid system and for that purpose, CPPs seek connectivity with the grid system of the Respondent No.1. Parallel operation as defined by the State Commission in its order dated 13.10.2009 is reproduced as under:-

“1. The parallel operation is any activity where one electrical system operates with the connectivity to another system in similar operating conditions. The CPPs opt for parallel operation to seek safety, security and reliability of operation with the support of a much larger and stable system as afforded by the grid.”

The activity of parallel operation undertaken by CPPs involves injection of shock, pollution and disturbance in the system of the State and as a result, the disadvantages of parallel operation to a distribution utility such as Respondent No.1 as enumerated in the State Commission's Order dated 13.12.2008 are as under:-

“(1) Load fluctuations of captive consumer are passed on to the utility's system thereby the efficiency of utility's system may be affected, which may also impact on utility's other consumers.

(2) In case of an ungrounded (or grounded through resistance) system supply, fault on interconnecting line (consumer's side) results in interruption of system. For single phase to ground fault which are 80 to 85% of the short circuit fault level, the grounding of the system is achieved through the neutral or step down

transformer of the utility, when the generator runs in parallel with the utility's grid. Thus supply is likely to cause damage to the terminal equipments at utility's sub-stations and line insulators, as voltage on the other two healthy phases rise beyond the limit, under such conditions.

(3) The utility has to sustain the impact of highly fluctuating peak loads like that of arc furnace, rolling mill, etc. for which it does not get any return on the capital invested to create system reserve.

(4) The variation in reactive power requirement increases the system losses and lowering of the voltage profile. Utility has to bear the cost of such effects.

(5) The lower voltage profile and fluctuations affect the service to the neighboring consumers due to deterioration in quality of supply, thus resulting in revenue loss to the utility.

(6) Non-recording of high fluctuating/sudden active and reactive demand by the meter results in financial losses.”

To compensate the distribution utility for the disadvantages caused to its system as enumerated above, it has been considered appropriate to levy a charge on the CPPs for burdening the system of Respondent No.1 in the course of stabilization and optimizing their own system by such CPPs. Such levy is in the form of POC for Grid Support. These parallel operation charges are defined in the State Commission's Regulation from time to time.

16. Respondent No.1 further submitted that the liability of payment of cross subsidy surcharge occurs when power is transmitted by means of open access under the provisions of Section 42(2) of the Electricity

Act, 2003. However, the fourth proviso to Section 42(2) of the Electricity Act, 2003 provides that such surcharge is not leviable in case of open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use. For qualifying as a captive generating plant, not less than 51% of the aggregate electricity generated in such plant, determined on annual basis, must be consumed for captive use and in the event such captive consumption is less than 51% of the aggregate electricity generated on annual basis, the entire electricity generated is to be treated as if it is a supply of electricity by a generating company. There could be a situation in a given year a CPP which is running in parallel with the grid and is availing open access without any requirement of payment of cross subsidy surcharge is found at the end of the year to have not qualified as CPP on account of captive consumption less than 51% of the total generation, the CPP becomes liable to pay cross subsidy surcharge to the area distribution licensee with respect to power transmitted through open access in that year. Notwithstanding, this situation, the generating plant as a CPP has in any case been running in parallel with the grid of the Respondent No.1 – distribution licensee during the year and thus causing shocks, pollution and disturbances in its

system so that its liability to pay POC to the Respondent No.1 continues irrespective of its loss of captive status at the end of that year and in such a case generator operating as CPP during the year and ceasing to be eligible for the status of CPP at the end of the year, becomes liable to pay both cross subsidy surcharge as also POC to the Respondent No.1.

17. Respondent No.1 states that the POC and cross subsidy surcharge could be recovered at the same time for the same period on the merits of the case. Respondent No.1 submitted that vide Judgment dated 28.04.2010, this Tribunal held that cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee were used or not.
18. The learned Counsel for the State Commission states that the cross subsidy surcharge is a compensatory charge and it does not depend upon use of distribution licensee's lines. It is a charge to pay the compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would have taken the quantum of power from the distribution licensee and as a result the consumer would have paid tariff applicable for such supply which would include an element

of cross subsidy surcharge for subsidizing other vulnerable categories of consumers. In support of the same, the State Commission relied on the observations made by this Tribunal in earlier Judgment in the case of OCL India Limited V/s. OERC and relevant extracts are reproduced below:-

“It is settled law that underlying philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee”

On the above principle, there is nothing wrong on the part of the State Commission to have held that cross subsidy surcharge is payable to the distribution licensee even when the lines of distribution licensee have not been used.

19. In support of their arguments, the Respondents quoted judgment of the Hon'ble Supreme Court in Civil Appeal No. 5479 of 2013 in the case of M/s. Sesa Sterlite V/s. Orissa Electricity Regulatory Commission & Ors. and relevant portion of the Judgment is reproduced below:-

“(2) Open Access and CSS

- 22. Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression “open access” has been defined in the Act to mean “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". The Act mandates that it shall be duty of the transmission utility/licensee to provide nondiscriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination. This would facilitate sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.

- 23. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.**

(3) CSS: Its Rationale

- 25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts –one, on its ability to cross subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.**
- 26. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.**
- 27. With this open access policy, the consumer is given a choice to take electricity from any Distribution Licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for:**

- (a) **Current level of cross subsidy to be gradually phased out along with cross subsidies; and**
- (b) **obligation to supply.**

28. Therefore, in the aforesaid circumstances though CSS(cross-subsidy surcharge) is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay Cross Subsidy Surcharge under the Act. Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee."

It is abundantly clear from the above Judgment that the cross subsidy surcharge is payable by the consumer if it has not availed the supply from the Distribution Licensee of the area in question. As such, the

Appellant after having failed to qualify as CPP is liable to pay cross subsidy surcharge in addition to POC.

20. After looking into all the issues put forth by the rival parties before us, our conclusion is as follows:-

(a) The Appellant conceived the generating station as CPP and had supplied electricity to its captive load, licensee of the State and for consumption outside the State.

(b) During the period under dispute, the Appellant could not qualify as CPP since the captive consumption reduced from threshold limit of not less than 51% of the total generation on annualised basis.

(c) It is also noticed that the Appellant has been paying cross subsidy surcharge for availing open access of the Chhattisgarh State as well as outside the State through inter-state open access, in accordance with the applicable Regulations of the Appropriate Commission.

(d) For drawing the Grid Support of the Respondent No.1 for generation in parallel mode, POC is payable as per the prevailing rates to compensate the utility for the disturbance,

shocks, distortion etc. caused to its system by virtue of CPP operating in parallel with the system of the utility.

- (e) In a situation that in a given year a CPP which is running in parallel with the grid of the Respondent No.1 is found at the end of that year to have failed to qualify as a CPP in term of the applicable rules of the Electricity Act, 2003 then it becomes liable to pay cross subsidy surcharge to the Respondent No.1 since the generating plant as in any case operated in parallel with the system of the Respondent No.1 and in such a situation, the generator would be liable to pay both cross subsidy surcharge as also POC to the Respondent No.1 since both these charges are for the different purposes.

- (f) As alleged by the Appellant that there could be no levy of POC at all on the Appellant as the Appellant was not a captive power plant during the relevant period of January, 2009 to May, 2013 since the Appellant did not qualify to attain captive status as the captive consumption during this period was less than 51% of the total generation on annualised basis, this argument is not acceptable as the Appellant was having the captive status right from the beginning and was maintaining its captive power plant

even during the period under dispute since it was only at the end of the year it was ascertained that based on its captive consumption, it could not qualify as CPP and hence, would still have to pay the POC since the grid of the Respondent No.1 did provide it the requisite technical support for the various operational benefits drawn by the Appellant by generating in parallel with the States system.

- (g) POC and cross subsidy surcharge are for different purpose and as such could be recovered at the same time for the same period, if the CPP is not fulfilling the criteria to qualify for captive status.
- (h) Appellant's arguments on the question of recovery of POC and cross subsidy surcharge relying upon this Tribunal's Judgment dated 09.02.2010 in Appeal No. 119 of 2009 and Appeal No. 125 of 2009 has been examined and the relevant portion of the Judgment dealing with the issue has been reproduced below:-

“33. It has been argued by the learned counsel for the Appellant in Appeal No. 119 of 2009 that the parallel operation charges can not be directed to be adjusted towards cross subsidy charges since the Aryan Plant

had already paid parallel operation charges after having availed of the parallel operation facilities, the subsequent finding that it is not a captive generating plant can not alter the fact that it had used the parallel operation facilities provided by the Distribution Licensee after payment of parallel operation charges and therefore the order ordering for adjustment of parallel operation charges toward cross subsidy charges is wrong. This contention in our view is misconceived. Once it is found out that the generating plant who claimed as a captive generating plant did not consume 51% of the energy generated by it, it was never a captive generating plant then the Appellant namely Power Distribution Company Limited can not claim that they are entitled to collect parallel operation charges. Therefore, the order impugned had been correctly passed by the State Commission holding that the Aryan Plant could never be a captive power plant and therefore, there was no liability to pay parallel operation charges. Consequently, the State Commission held that the charges which were paid earlier as parallel operation charges have to be adjusted as cross subsidy charges for the past use. There is no illegality in this order. Further, no prejudice can be attributed to the Power distribution license especially when the amount of cross subsidy surcharge which the power distribution company is entitled to claim is much higher than the parallel operation charges which were paid earlier.

- 34. The learned counsel for the Distribution Licensee submits that his client does not want cross subsidy charges, merely because it is higher than the parallel operation charges. This submission is quite strange. It is not open to the distribution licensee to contend that it does not want cross subsidy charges even through it is higher than the parallel operation charges. This stand of the distribution licensee is not only against the interest of the consumers, but also**

contrary to the provisions of the Electricity Act. 2003.”

In above case, the main contention urged by the Learned Counsel for the Aryan Plant that it being generator which has not been qualified as a captive generating plant could transfer power generated by it for its own use to its own coal washeries through its own dedicated transmission line. The Judgment of this Tribunal is on the premise that the Aryan Plant has been declared as non-captive generating plant, hence the direction was given to adjust the POC paid by it shall be adjusted towards the cross subsidy charges payable by Aryan. This decision was based on the information of the Chief Electrical Inspector certifying that Aryan plant did not qualify to be captive plant.

However, the present Appeal of the Appellant is different on the sole premise that it conceived its generating plant as captive from inception and had been availing the benefits of captive status from beginning and it is only in the period under dispute that it was not considered 'captive plant' since it could not fulfill the criteria of captive consumption of "not less than 51% of the total generation on annualized basis".

- (i) It is not open to the Appellant that on its requirement of attaining captive status by meeting the specified criteria which has been granted since the time it was sought, but due to annualized captive consumption being less than that specified for meeting the captive status for some period, it should not be considered captive for that period and POC paid by it for that period should be refunded. This plea of the Appellant is not acceptable since the Respondents' system did take into consideration even during the period under dispute for catering to the requisite grid support to the generating station of the Appellant considering it as captive plant as has been considered for the prior period of operation of the Appellant. As even during the period under dispute, the Appellant's plant has in any case run in parallel with the system of the Respondent No.1, the Appellant is liable to pay POC for period under question to the Respondent No.1.
- (j) It is upto the Appellant if it considers that it would not have captive consumption to the specified threshold for meeting captive status in future it could get its generating plant categorized as non-captive generating station and in that case

after obtaining the statutory clearance, it would not have to pay parallel operation charges.

However, in the present Appeal, it was only after the captive consumption becoming less than the specified threshold limit for securing captive status after the period has elapsed, the Appellant during the disputed period based on actual consumption of power for captive use is claiming its plant as non captive. Hence, it would not be entitled to the benefit of recovering POC paid by it during the period under dispute.

- (k) As regards the issue regarding the recovery of POC as well as cross subsidy surcharge from the same generating source during the same period, we are of the considered opinion that since POC and cross subsidy surcharge are for different reasons, the same could be recovered at the same time if such situation warrants so. In the present case, recovery on account of POC as well as cross subsidy surcharge under the period in question has been rightly done so and the State Commission in the Impugned Order has dealt with all these aspects in the proper perspective in detail and has come to its correct conclusion.

ORDER

We do not find any infirmity which warrants interference of the Impugned Order. Hence, This Appeal is dismissed as devoid of merits. No order as to costs.

Pronounced in the open court on this **17th day of February, 2016.**

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

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