

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal Nos. 27/06, 179/05, 188/05 and 16/06

Dated this 07th day of May, 2008

**Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member**

IN THE MATTERS OF:

Appeal No. 27 of 2006:

M/s. Jindal Steel and Power Ltd.

Post Box No. 16, Kharsia Road,
Raigarh (Chhattisgarh)

... Appellant

Versus

**1. The Chhattishgarh State Electricity
Regulatory Commission**

Civil Lines, GE Road,
Raipur (Chhattisgarh) 492 001
Through its Secretary

2. Chhattisgarh State Electricity Board

P.O.Sundar Nagar, Danganiya
Raipur (Chhattisgarh)

3. Chhattisgarh Vidyut Mandal Abhiyanta Sangh

M-9, Krishna Nagar,
Danganiya,
Raipur – 492 013

... Respondents

For the Appellant(s) : Mr. Shanti Bhushan, Sr. Adv.
Mr. Avinash Menon, Adv.
Mr. Jayant Bhushan, Sr. Adv.
Mr. Sanjeev K. Kapoor, Adv.
Ms. Gauri Rasgotra, Adv. and
Mr. Rahul Roy, Adv.
Mr. Vishal Gupta, Adv.
Mr. Kumar Mihir

For the Respondent(s) : Mr. Ravi Shankar Prasad, Sr. Adv.
Mr. M.G. Ramachandran, Adv.,
Mr. Anand K. Ganeshan, Adv.
Ms. Swapna Seshadri, Adv.
Mr. Valmiki Mehta, Sr. Adv.
Ms. Suparna Srivastava, Adv.
Ms. Nidhi Minocha, Adv.
Mr. Arun Bhatnagar, Adv.
Ms. Rashmi Singh for R.No.3

Appeal No. 16 of 2006:

Chhattisgarh State Electricity Board

P.O. Sundar Nagar, Danganiya,
Raipur (Chhattisgarh)

... Appellant

Versus

1. The Chhattisgarh State Electricity Regulatory Comm.

Civil Lines, GE Road,
Raipur (Chhattisgarh) 492 001.

2. M/s. Jindal Steel and Power Ltd.

Post Box No. 16, Kharsia Road,
Raigarh (Chhattisgarh)

... Respondents

Counsel for the appellant : Mr. Ravi Shankar Prasad, Sr.Adv.
Ms. Suparna Srivastava
Ms. Nidhi Minocha

Counsel for the Respondents: Mr. Shanti Bhushan, Sr. Adv.
Mr. Jayant Bhushan, Sr. Adv.
Mr. Avinash Menon for JSPL
Mr. Sanjeev K. Kappor,
Mr. Rahul Ray

Mr. M.G.Ramachandran
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri for CSERC

Appeal No. 188 of 2005:

P. N. Singh, General Secretary

Chhattisgarh Vidyut Mandal Abhiyanta Sangh
M-9, Krishna Nagar, Daganiya,
Raipur (CG)

... Appellant

Versus

Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E.Road,
Raipur – (CG) – 492 001

... Respondent

Counsel for the appellant : Ms. Suparna Sriastava
Ms. Nidhi Minocha
Ms. Rashmi Singh
Mr. Avnish Pandey

Counsel for the respondent : Mr. Shanti Bhushan, Sr.Adv
Mr. Jayant Bhushan, Sr.Adv
Mr. Sanjeev K. Kapoor,

Mr. Rahul Ray
Mr. Avinash Menon for JSPL
Mr. M.G.Ramachandran,
Mr. Anand K. Ganesan for
CSERC

Appeal No. 179 of 2005:

Chhattisgarh State Electy. Bd.

Versus

Chhattisgarh State Electy. Regulatory Commission & Anr.
... Respondents

Counsel for the appellant : Mr. Ravi Shankar Prasad,
Sr.Adv
Ms. Suparna Srivastava
Ms. Nidhi Minocha

Counsel for the respondents : Mr. Shanti Bhushan, Sr.Adv.
Mr. Jayant Bhushan, Sr.Adv.
Mr. Sanjeev K. Kapoor
Mr. Rahul Roy
Mr. Avinash Menon
Mr. M.G.Ramachandran
Mr. Anand K. Ganesan

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1) This judgment will dispose of four appeals mentioned on the title of this judgment. The appeals No. 188/05, 179/05

and 27/06 are directed against the order of the Chhattisgarh Electricity Regulatory Commission, Raipur (Commission for short) dated 29.09.05. The appeals No. 16/06 is directed against the order dated 29.11.05. The appeals were disposed of earlier by this Tribunal vide a judgment dated 11th May, 2006. That judgment was challenged in three appeals, being No. 4268, 3996 and 4529/06 which were disposed of by the Supreme Court vide a judgment dated 11.05.06 setting aside the judgment of this Tribunal and remanding the matter for a fresh judgment. The Supreme Court, in particular, wanted this Tribunal to decide the issue of application of section 10(2) of Electricity Act 2003 to the facts of this case. We have heard the parties on all the issues involved.

The History:

2) Jindal Steel and Power Ltd. (JSPL for short) established a sponge iron / steel plant at Raigarh, Chhattisgarh in the year 1990. It also set up a captive power plant at Raigarh at a distance of 40 km from the steel plant. The newly created State of Chhattisgarh formulated its industrial policy for 2001-06 which encouraged establishment of industrial estates in private-public partnership as well as installation of Captive Power Plant (CPPs). JSPL submitted a proposal for permission to set up an industrial estate at Raigarh vide letter dated

28.12.01. The estate was proposed to be set up in 500 acres of land, adjacent to the existing plant at Raigarh. The land was to comprise the villages of Kosampali, Dhanagar, Barmuda or at a site in the Tehsil of Gharghoda comprising villages Tarai Mal and Ujjalpur. The JSPL gave a detailed proposal vide its letter dated 09.04.02. The Government of Chhattisgarh, vide its letter dated 26.04.02, informed the JSPL that it is possible to provide it with approximately 500 acres of land for the purpose of setting up an industrial units at Raigarh in public-cum-private sector and facilities as per the new industrial policy to be given to the new entrepreneurs for setting up their industrial units in the estate. JSPL was further informed that :

“The Energy Department is taking action to grant permission for sale of power and to lay transmission line to various units being established in this private industrial estate being established by M/s. Jindal Steel & Power Limited.”

3) On 16.07.02, JSPL requested the Chief Minister for appropriate directions for grant of permission to supply power to the units in the proposed industrial estate. On 14.08.02, the Government of Chhattisgarh sent a reply, the English

translation of which has been placed on the record by the appellant. The relevant part of the letter is as under:

“The company has submitted application on the above subject for development of industrial estate in private sector and M/s. Jindal Power and Steel has sought permission to supply power to industrial units proposed to be set up in the aforesaid industrial estate.

In this connection, it is informed that the company will be required to take following actions/steps with regard to supply of power to the proposed industrial units showing physical boundary of Industrial Estate being set up in the private sector by the Company:-

1. M/s. Jindal Power & Steel Limited will have to submit an application to the State Government for obtaining permission for supply of power under Indian Electricity Act 1910.

2. *The company will have to obtain permission from the State Government under Section 28 of Indian Electricity Act 1910 for sale of power.*

3. *The company will have to obtain all the necessary legal permissions required for construction of different infrastructural facilities related to transmission and distribution and also for their operation and maintenance.*

4.*The Company will be required to submit application with recommendations from Chhattisgarh State Electricity Board and Chief Electricity Inspection Directorate under the rules prevailing for approval of the State Government required for transmission, distribution and supply of power in private sector. The State Government after considering the said application will be able to accord permission as per the provisions.*

5. *Information about nature of industrial units to be set up in the proposed private industrial estate such as whether they will be the sister concerns of M/s. Jindal Steel & Power or fully independent units*

and details of technical information etc. relating to power supply to them.

6. Whether proposed units will be interested for construction power during the duration of construction from Chhattisgarh State Electricity Board and thereafter whether they would be interested in obtaining stand by supply from Chhattisgarh State Electricity Board. The information on this may be furnished.

You may please submit proper application with aforesaid detailed information so that the action as per rules could be taken thereon.”

4) JSPL wrote to the Government on 04.09.02 on the subject “*Supply of power to prospective industrial units in the industrial estate being established by our Company from our captive power plant*”. The relevant part of the letter is as under:

“1. ... We would request you to please grant your permission U/s 28 of the Indian Electricity Act, 1910 for sale of power to the proposed units in

the industrial estate from our captive power plant.

2. *We also request you to grant your permission to set up transmission and distribution line/system for supply of power to the industrial units in the proposed industrial estate.*

We will obtain necessary permission under Electricity Supply Act, 1948, for setting up transmission and distribution lines from CSEB. Necessary applications in this respect are being submitted to CSEB. We will also obtain necessary permission from Chief Electrical Inspector.

3. *...*
4. *Power required for construction will also be supplied from our captive power plant through our own transmission and distribution lines. No support is, therefore, required from CSEB for supply of power for construction.”*

5) On 23.10.02 a Memorandum of Understanding was signed by the Chhattisgarh State Industrial Development Corporation (CSIDC), Government of Chhattisgarh and JSPL. The CSIDC, as per the averment in the memorandum, was acting on behalf of Government of Chhattisgarh. A few paragraphs of the memorandum of understanding are extracted below which may be required to be referred to in the later part of this judgment:

“WHEREAS, the Corporation, acting on behalf of the Government of Chhattisgarh, agrees to provide all help, prevailing incentives and facilitate clearances 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, on the Corporation’s initiatives as well as through the Intervention of the State Investment Promotion Board (SIPB) under. The Chhattisgarh Investment Promotion Act, 2002 (hereinfter referred to as the ‘ACT’)

NOW THEREFORE, in consideration of the foregoing and all other related factors, the Corporation and JSPL have agreed to do and hereby execute this MOU in order to enable the establishment of the proposed Industrial Estate in private sector in Raigarh District. The parties hereto have agreed upon the terms, assurances, obligations and commitments as set out herein below:

- 1. The Corporation shall provide all necessary assistance in acquiring approximately 500 acres of land for the proposed Industrial Estate and another adjoining land of approximately 250 acres for development of common facilities, viz, transport area, housing and other social amenities. In Villages Punjipatra, Tumdih, Jorapalli, Dhanagarh and/or nearby villages, all in Raigarh District subject to compliance of the state government's policy for acquisition of land.*

- 2. The land for the proposed Industrial Estate shall be acquired by the State Government in the name of JSPL. JSPL shall have absolute*

power and authority to allot the land comprised in the proposed Industrial Estate to different entrepreneurs desirous of setting up their units in the proposed Industrial Estate on such terms and conditions as may be mutually agreed upon from time to time between JSPL and the proposed transferees.

3. *JSPL shall have absolute power and authority to develop, maintain and manage the proposed Industrial Estate to be established over the land of Villages Punjipatra, Tumdih, Jorapalli, Dhanagarh and other villages in Raigarh District.*
4. *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.

5. ...

6. ...

7. *The Corporation shall assist in taking necessary steps for the grant of expedition approvals under the purview of the State Government for the speedy implementation of the project (establishment of the industrial Estate). Specifically, the Corporation shall assist in obtaining clearances from the SIPB within the time limits for each such clearance set out under the provisions of the ACT in respect of approvals from the relevant agencies such as The Chhattisgarh Environment Conservation Board, the Chhattisgarh State Electricity Board, other Departments and authorities under the control of the State Government.*

8. ...

9. ...

10. ...

11. ...

12. ...”

6) The Government of Chhattisgarh wrote a letter dated 29.01.03. Relevant part of the letter is as under:

“As per the State Investment Promotion Board’s Memo. No. 196 dated 19.12.2002 under the Industrial Policy of the State, there is no objection to supply of power to new industrial units being set up on the Private Industrial Estate proposed in four village of Raigarh Distt. i.e. Punjipathra, Tumdih, Jorapalli and Dhanagarh by M/s. Jindal Steel & Power Limited from its Captive Power Plant - directly on the following terms and conditions:-

1. The company is developing the proposed area for setting Private Industrial Estate which shall be done in accordance with the State’s declared Industrial Policy and Energy Policy.

2. M/s. Jindal Power & Steel shall have permission for direct power supply to only those new High Tension consumers which shall be set up in the proposed area after the approval of the Government

under Section 28 of Indian Electricity Act 1910 and who have not been the consumers of Board earlier.

3. ...

4. *The Company shall carry out all the constructions relating to power, generation, transmission, distribution, operation and maintain thereof as per the provisions/rules and sub-rules prevailing in the area.*

5. ...

6. ...

7. ...

8. ...

9. ...”

7) JSPL accordingly applied to the Chhattisgarh State Electricity Board “for grant of permission/NOC for laying transmission and distribution lines for supply of power to prospective units at Industrial Estate at Raigarh”. The Chhattisgarh State Electricity Board (CSEB) responded vide a letter dated 31.05.03. Vide this letter, CSEB informed the JSPL that JSPL’s request for permission to lay 220 kV line to the proposed Industrial Estate by tapping 220 kV JSPL’s CPP to Tamnar line for which permission had already been granted along with permission for laying distribution lines within the

proposed Industrial Estate had been considered and approved by CSEB under section 27 D(4) of the Indian Electricity Act 1910. The letter, inter alia, further stated:

- “(1) ...*
- (2) As Chhattisgarh State Electricity Regulatory Commission has not yet started functioning, State Govt. permission under section 28 of Indian Electricity Act 1910, shall be required by the firm for transmitting/wheeling of power.*
- (3) The approval under section 27(D)(4) to the firm would be provisional subject to its approval from the Chhattisgarh State Electricity Regulatory Commission, which has already been notified by the State Government, and also fulfillment of the conditions laid down in the captive power policy and fulfillment of other conditions stipulated under section 27(D)(4) of Indian Electricity Act 1910.*
- (4) ...*
- (5) ...”*

8) A formal application for sanction under section 28 of Indian Electricity Act 1910 of Indian Electricity Act was made on 06th October 2003 giving details of the project and enclosing relevant documents. The application, inter alia, said that *“JSPL plans to supply power required by the units in the Industrial Estate from its captive power plant at Raigarh and also by purchasing power from 1000 MW power project of Jindal Power Limited which is being set up in Dist. Raigarh. ...”* JSPL made a request *“to accord sanction under 28 of the Indian Electricity Act 1910 for supply of power”* to those units in Villages Punjipathra and Tumdih.

9) The Government of Chhattisgarh passed two orders on 28.02.04. By the first order, being No. 603/PW/2004, the Government, being empowered in this behalf by section 68(1), 68(3) of the Electricity Act 2003 accorded permission for construction of power transmission and distribution line as recommended by the CSEB on certain terms and conditions. One of the conditions was as under:

- (i) ...
- (ii) ...
- (iii) *After construction of power transmission and distribution line, the applicant company before starting supply of power to industrial units to be*

set up as per proposal shall obtain licence for transmission and distribution of power from the competent authority such as State Electricity Regulatory Commission. The approval issued for construction of power lines be not treated as recommendation to procure licence.

- (iv) ...*
- (v) ...*
- (vi) ...*
- (vii) ...”*

10) The other order of the same date being No. 601/P.L.N.A./U.V./2004 dated 28.02.2004 related to “*No Objection of State Government – Regarding direct power supply by M/s. Jindal Steel & Power Ltd. from their power plant to Industrial units proposed to be set up in Private Industrial Estate in Raigarh*”. In the introductory part of the order, the Government said that since the Electricity Act 2003 was in force in the State from 09.12.03 and the Indian Electricity Act 1910 stood repealed, no permission could be granted under the repealed Act. Nonetheless, the Government proceeded to say

“..... The State Electricity Regulatory Commission is at present not functioning and some time is likely to be taken for formation of State Electricity Regulatory Commission and commencement of its functioning. As such, in the above circumstances, after consideration of opinion received from Chhattisgarh State Electrical Board and Chief Electrical Inspector’s Directorate, no objection of State Government is given subject to following terms and conditions:

- (1) The State Government has no objection to the applicant company supplying about 299 MW power to 43 new units being set up as per Project Report of the Company in the Private Industrial Estate being developed as per sanction of Industry Department.*

- (2) The applicant company shall submit application for licence/permission from State Electricity Regularity Commission as per provisions of Electricity Act 2003 immediately on constitution of State Electricity Regulatory Commission.*

(3) *In case the State Regulatory Commission does not grant licence/permission for direct power supply to new industries being set up in the Private Industrial Estate of the applicant, the No Objection of State Government will automatically be treated as cancelled.”*

11) JSPL commenced supply of power to the units which had already come up in the industrial estate. The Commission became functional on 01.07.04. On 15.09.04 JSPL submitted an application for distribution license before the Commission. The Commission returned the same on 04.10.04 with the advice to apply in the prescribed format.

12) On 25.01.05, Jindal Power applied to the Chhattisgarh State Electricity Regulatory Commission for license for distribution of electricity under section 14 of the Electricity Act 2003 in the Form 1-A with all the necessary enclosures as per Regulation 3(1) of the Chhattisgarh State Electricity Regulatory Commission (License Regulations) 2004. In the column requiring particulars of existing license Jindal Power said “*no existing license*”. However, it mentioned that it had received a “*no objection*” from the Government vide a letter dated 28.02.04.

13) The application averred that the area to which it wanted to supply was the Jindal Industrial Park in Punjipathra and Tumdih villages of Garghoda Tehsil, Raigarh District covering an area of 750 acres. It further said that the expected demand in the area of supply would be 400 MVA (300 MW) on full implementation of the Industrial Park. The source for power was given as (i) 120 MVA (90 MW) from Jindal Steel & Power Ltd. at Patrapali Village of Gharghoda Tehsil, Raigarh District and (ii) 280 MVA (210 MW) from the proposed 1000 MW capacity power plant of JSPL Tamnar Vilage, Gharghoda Tehsil, Raigarh District.

14) On 29.09.05, the Commission decided to grant license to JSPL, imposed on JSPL a penalty of Rs. 1 Lac and issued public notice inviting objections to the application of Jindal Power. The CSEB filed objections to the application and also challenged the Commission's order dated 29.09.05 before this Tribunal in appeal No. 179/2005. The appeal No. 188/2005 was filed by Chhattisgarh Vidyut Abhiyanta Sangh against the order. The appeal No. 27/06 is filed by JSPL to challenge the part of the impugned order dated 29.09.05 to the extent it is adverse to it viz the imposition of penalty of Rs. 1 Lac.

15) Vide impugned order dated 29.11.05, the Commission granted license to JSPL for distribution of electricity in the Jindal Industrial Part limited to 70 industrial consumers with a maximum demand not exceeding 299 MW, as approved by Government of Chhattisgarh, in Tumdih and Punjipathra villages of Tehsil Gharghoda, District Raigarh and also in the remaining areas of these two villages.

16) The impugned order dated 29.11.05 also enumerated the terms and conditions of the license. This is challenged by CSEB in appeal No. 16/06.

The Impugned Order:

17) The Commission examined the application of JSPL in the light of the rules and regulations prevailing at the time when the application was being examined.

18) The CSEB was the distribution licensee already existing in the entire State of Chhattisgarh. The Electricity Act 2003 (referred to as the Act) ruled the field. The sixth proviso to section 14 of the Act prescribed the conditions of license to more than one person in the same distribution area. The same 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:”

19) The Central Government issued the Distribution of Electricity License (Additional requirements of capital adequacy, Credit worthiness and code of conduct) Rules 2005 notified on 23.03.05 (hereinafter referred to as the Distribution License Rules). The explanation to Rule 3(2) of these Rules prescribed as under:

“3. Requirements of capital adequacy and creditworthiness. – (1)

(2) ...

Explanation. – For the grant of a licence for distribution of electricity within the same area in terms of sixth proviso to section 14 of the Act, the area falling within a Municipal Council or a Municipal Corporation as defined in the article 243(Q) of the Constitution of India or a relevant district shall be the minimum area of supply.”

20) On 12.05.05 the Central Government declared the National Electricity Policy (NEP for short). Para 5.4.7 dealt with the eligibility of a second license on the distribution area of one preexisting license which is as under:

“5.4.7. One of the key provisions of the Act on competition in distribution is the concept of multiple licenses 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 (74th 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.”

21) The important condition in the Rules quoted above as well as in the NEP is the condition that the 2nd license should be for supply to a minimum area of a revenue District,

Municipal Corporation on Municipal Council. Both the Rules and the NEP were in force when the application for distribution license was filed by JSPL.

22) The order dated 29.09.05 was passed after a public notice. Two objectors responded to the notice. They were the Chhattisgarh Vidyut Mandal Abhyanta Sangh (herein referred to as the Sangh) and the CSEB. Both the objectors raised the question of minimum area of supply as obtained in the Rules, quoted above and the NEP. The Sangh further raised the objection that there was no provision for distribution license being given to captive power plant and that the State Government's no objection dated 28.02.04 could not be construed as a license. So far as CSEB is concerned, further objection taken was that the application of JSPL was not as per the industrial policy of the State Government and further that if JSPL gets the license to distribute power within the industrial estate it will deprive the CSEB of the cross subsidy element which is recovered by tariff of industrial consumers and used for supplying power to weaker sections of the society. On behalf of JSPL the submissions were as under:

1. The State Government's letter dated 29.01.03 is in itself a permission or license to supply

electricity under section 28 of the Indian Electricity Act 1910 and is saved under the saving clause under section 185 (2)(a) of the Electricity Act 2003.

2. JSPL does not require a license for supply of electricity by virtue of provision of section 10(2) of the Act as it is a generating company.

23) On behalf of the Board, it was reiterated that no objection dated 29.01.03 cannot be treated as a license and the no objection dated 28.02.04 was questionable since the Electricity Act 2003 has already come into force and only a State Regulatory Commission could have issued a license. The Commission posed before it the following issues:

“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?"

24) Under issue (i) Commission considered the provisions of section 10(2) of the Electricity Act 2003 which is as under :

“10. Duties of generating companies- (1)

(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-section (2) of section 42, supply electricity to any consumer.

(3) ...”

25) The provision of 10(2) of section 42(2) which needs to be read along with the provision is as under:

“42. Duties of distribution licensees and open access.- (1)

(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 Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

.....

.....”

26) Open access is defined in section 2 (47) which is as under:

“2(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:”

27) The Commission also considered the provision of section 12 of the Electricity Act 2003 which requires a license for the

purpose of transmission of electricity, distribution of electricity and trading of electricity. The Commission observed that JSPL was entitled to supply electricity in the Industrial Estate only if it takes open access through the existing transmission and distribution lines of the distribution licensee namely CSEB but since JSPL does not want to distribute power in the Industrial Estate through open access, it was not entitled to take the benefit of section 10(2) of the Electricity Act 2003.

28) On issue (ii), the Commission rejected the contention that the earlier 'No Objection' dated 29.01.03, amounted to a license under section 28 of the Indian Electricity Act 1910 in as much as the same letter said that one of the conditions for 'No Objection' was that supply of power to only HT industrial consumers could be made only after permission of Government was obtained under section 28 of the Indian Electricity Act 1910 Act. So far as the 'No Objection' vide letter dated 28.02.04 is concerned the Commission felt that the same did not amount to a license. The Commission observed that JSPL itself had said in the application for license that it did not already have a license and further that having noticed that the Electricity Act 2003 had come into force the Government had advised the JSPL to seek a license as soon as the Commission came into existence. The Commission

interpreted the 'No Objection' of 28.02.04 as the State Government's recognition of the need for supply and as a recommendation enabling the petitioner, JSPL to approach the Regulatory Commission for license. The Commission also observed that the State Government had no power to grant any right to the JSPL to commence distribution of power.

29) JSPL further pleaded that it should be entitled to a licence as it set up lines for supply of electricity by huge investments on account of a promise for such a licence held out by the Government and consent given by CSEB and if it is now denied such a licence it would lead to loss to JSPL and also to the industries dependent on JSPL's supply. Its contention was rebutted by CSEB but was noted by the Commission.

30) The Commission then proceeded to deal with the objections raised by the Sangh and the CSEB. The Commission found that there was no prohibition in the Act for granting distribution license to a captive power plant. The objection based on section 43 of the Act imposing the universal supply obligation was dealt with along with the issue of National Electricity Policy and the Rule requiring the second distribution licensee to cover the minimum area which could

be the Revenue District/Municipal Corporation/Municipal Council. The Commission observed that JSPL was not seeking a license for such minimum area. However, the Commission proceeded to consider the case as an exception to the rule. The Commission took note of the fact that there was an understanding between the Government and JSPL that JSPL would provide electricity from its captive power plant and that electricity supply had already commenced w.e.f. 01.03.04 to some of the industries based on the State Government's letter dated 28.02.04 and therefore it would not be proper to invoke the provision of NEP which came into existence after 01.03.04. It also took note of the fact that JSPL had transmission lines from its existing generation plant at Raigarh and CSEB had already given its no objection for laying distribution lines. The Commission also took note of the availability of 100 MW of power from another IPP. It may be mentioned here that the Commission considered the other IPP of 100 MW as belonging to JSPL which was a mistake since this IPP was owned by M/s.Jindal Power. The Commission observed that if distribution licence was denied, the industries which were being given power by JSPL at a rate much cheaper than at which CSEB could supply, it would work adversely against those industries. The Commission also took note of the fact that CSEB itself was not in a position to give electricity to

these industries within the next 6-9 months since the lines put up by JSPL were not subject to the rules of open access and CSEB itself did not have any parallel lines. So far as loss of subsidizing customers are concerned the Commission handled the objection by saying that JSPL could be granted a license to supply only to those consumers who were not already consumers of CSEB. The Commission held that no cross subsidy surcharge was payable by JSPL or by the consumers of JSPL under the rules. The Commission observed that the JSPL did not require transmission license for supply of power to the industrial estate as the already existing line laid by JSPL from Raigarh to Tamara had been tapped and 220 kV lines of approximately 6.4 km laid and therefore there was a kind of distribution network already present. Coming to universal supply obligation the Commission felt that JSPL could be made responsible to supply electricity to all applicants within the two villages namely Tumdih and Punjipathra. The Commission accordingly said that license will be for an area of two villages Tumdih and Punjipathra, that number of industrial consumers in the industrial estate would be 43 and total demand for electricity limited to 229 MW as agreed with the State Government. The Commission ended by saying that the decision to grant distribution license may be published

inviting suggestions and objections within 15 days from the date of publication of notice.

31) In paragraph 22 of the impugned order dated 29.09.05 the Commission observed that JSPL having commenced supply of power without a valid license had committed an act punishable under 142 of the Act, that no further opportunity of being heard in this regard was required as an elaborate proceedings in the case had provided sufficient opportunity to the JSPL to prove that it had not contravened the provision of the Act and that JSPL's case of having the legal authority to commence supply was already rejected by the Commission. The Commission, therefore, imposed a penalty of Rs.1 Lac for contravening the provisions of the Act. This has given rise to appeal No. 27/06.

32) The second impugned order of 29.11.05 is an order implementing its first order of 29.09.05 by saying:

“the Commission, in exercise of the powers vested under section 14 of the Act and in pursuance of the order aforementioned grants a license to the applicant for distribution of electricity in the Jindal Industrial Park, limited to 70 industrial

consumers with a maximum demand not exceeding 299 MW, as approved by the Government of Chhattisgarh in Tumdih and Punjpathra villages of Gharghoda Tehsil of Raigarh District and also in the remaining areas of these two villages.”

This order is challenged in appeals No. 16/06 by the CSEB.

33) The grant of licence to JSPL is challenged in the appeals No. 179/05, 188/05 and 16/06. As the facts of the case stand, these appeals need to be decided before taking up appeal No. 27/06.

The appeals no. 179/05, 188/03 & 16/06:

34) Both JSPL and CSEB have filed written submissions wherein they have crystallised their respective contentions. The Commission itself has filed its written submission to explain its position. The contentions of JSPL in support of its case not only in the three appeals challenging the grant of license but also in its own appeal challenging the imposition of fine which is as under : (i) permission or license had already been granted to it by the State Government of Chhattisgarh while the MoU dated 23.10.02 and by the letter dated 29.01.03 and vide the letter dated 28.02.04. The JSPL further

contends that even if all the documents mentioned by it does not amount to a license to sell or distribute, the Government and the CSEB are estopped from challenging the right of JSPL to obtain a license. The contentions of JSPL are that JSPL is entitled to a license despite the clause regarding the minimum area of supply for a second license as the application of JSPL for license was submitted before the Rules in this regard were framed. JSPL further contends that as a generating company acting under section 10(2) of the Electricity Act 2003 no permission or license is required by it. All these contentions have been disputed by CSEB as well as by the Commission.

Was license already granted and if JSPL can plead estoppel?

35) We will first deal with the contention that the licence was already available with the JSPL. The correspondence exchanged between the JSPL and the Government has already been described in detail in the previous paragraph of this very judgment. Let us first take the case of MoU. MoU has a specific clause that JSPL shall be allowed to “*directly sell power to the industrial units set up in the proposed industrial estate*”. JSPL wants this to mean that the Government granted permission under section 28 by including this clause in the MoU. In our opinion, this is not a correct way of reading the MoU. The MoU was written when the industrial

estate had not even come into existence. The terms mentioned in the MoU were only envisioning what would happen in the future. It was too early to grant license for supply or distribution of electricity by JSPL. In fact JSPL itself never treated this clause in the MoU as grant of license. Had the MoU itself meant grant of license there would have been no occasion for the subsequent correspondence between the JSPL and the Government of Chhattisgarh. There would have been no need for “No Objection” dated 29.01.03. Even in the earlier letter dated 14.08.02 dealing with the proposed industrial estate the Government wrote *“the Company will be required to submit application with recommendations from Chhattisgarh State Electricity Board and Chhattisgarh Electricity Inspection Directorate (CEID) under the Rules prevailing for approval of the State Government required for transmission, distribution and supply of power in private sector. The State Government after considering the said application will accord permission as per provision.”* JSPL thereafter made an application on 04.09.02 seeking grant of permission under section 28 of the Indian Electricity Act 1910. It is nobody’s case that the MoU dated 23.10.02 intended to dispose of the application for the grant of permission under section 28, which was pending with the Government of Chhattisgarh. Even in the letter dated 29.01.03 which is a ‘No Objection’ from the Government of

Chhattisgarh there is a clear stipulation that JSPL was required to take permission for direct power supply only after permission under section 28 of the Indian Electricity Act 1910. The paragraph relied upon by the JSPL is as under:

“2. M/s. Jindal Power & Steel shall have permission for direct power supply to only those new High Tension consumers which shall be set up in the proposed area after the approval of the Government under Section 28 of Indian Electricity Act of 1910 and who have not been the consumers of Board earlier.”

36) Obviously even till that date neither the Government nor the JSPL were acting under an understanding that JSPL had already been granted license or sanction to supply power to the proposed industrial estate.

37) We can now examine to what extent other letters amounted to grant of licence. JSPL claims that letter dated 29.01.03 and the two letters of 28.02.04 amount to grant of license. In the letter dated 29.01.03, the first paragraph shows it is merely conveying the Government’s “No Objection” for supply of power by JSPL from its captive power plant to the industrial estate. The paragraph 2 of the letter, being part of

the terms and conditions of 'No Objection', said that 'JSPL shall have permission for direct supply to those new voltage consumers set up in the **“proposed”** area **“after”** approval of Government under section 28 of the Indian Electricity Act 1910' (emphasis supplied). Clearly this letter was written by the Government even when the industrial area had not been set up and the scheme was only in the proposal level. Further it was the term of 'No Objection' that the supply would be made only after approval under section 28 of the Indian Electricity Act 1910. Clearly this letter does not take JSPL any further. If JSPL could take approval of the Government under section 28 of the Electricity Act there would be no requirement of any further 'No Objection' from the Government. But the 'No Objection' itself is subject to JSPL obtaining an approval under section 28 of the Indian Electricity Act 1910. The opening words of paragraph 2 namely that M/s. Jindal Steel and Power Ltd. shall have permission cannot be read even as a promise. It only means that Jindal Power is required to have permission. It means that Jindal Power will be entitled to supply power in the industrial estate only after the Government gives its approval under section 28. This letter cannot be even be read as Government's promise to give licence under section 28 of the Indian Electricity Act 1910. The other conditions in this letter dated 29.01.03 are also

indicative of the fact that JSPL was required to take several steps other than obtaining approval under section 28 of the Indian Electricity Act 1910 as condition for the “No Objection” granted vide the letter. Thus in our opinion this letter neither grants the approval under section 28 nor holds out a promise to grant any such licence.

38) The two documents dated 28.02.04 can now be examined to scrutinize if they can be construed as a promise or approval under section 28 of the Indian Electricity Act 1910. The first is the order dated 28.02.04 being No. 603/PW/2004 which deals with the JSPL’s application dated 06.10.03 seeking permission for construction of transmission and distribution lines for supply of 299 MW power from the power plant of the JSPL. Vide this order the State Government accorded permission for construction of power and transmission and distribution lines under section 68(1) and 68(3) of the Electricity Act 2003 subject to certain terms and conditions. There is no mention in this document of any permission under section 28 of Indian Electricity Act 1910 permitting distribution of power. The other letter of the same date deals with the prayer for approval under section 28. The Government vide this letter gives only ‘No Objection’ to JSPL for supply of 299 MW power to 43 new units being set up as

per project report of the Company in the private industrial estate being developed. The 'No Objection' is further subject to the following two conditions:

- “(ii) the applicant company shall submit application for licence/permission to the State Electricity Regulatory Commission as per provisions of Electricity Act 2003 immediately on constitution of State Electricity Regulatory Commission*

- (iii) incase the State Regulatory Commission does not grant licence/permission for direct power supply to new industries being set up in the private industrial estate of the applicant, the No Objection of the State Government will automatically be treated as cancelled.”*

39) It has been sufficiently made clear in this letter that section 28 of Indian Electricity Act 1910 was no more applicable on account of repeal of the Indian Electricity Act 1910 and as such no permission under the repealed Act could be given. It has also been made clear that JSPL will have to get the permission/licence from the Commission. In fact, it is a direction on JSPL for submitting an application for license.

Further the letter makes it sufficiently clear that in case the Commission does not grant permission the 'No Objection' will automatically be treated to have been cancelled. As such the document takes away by one hand what it gives by the other. The 'No Objection' is not only of a short duration but it is quite fragile in nature. In the letter itself the Government says that eventually it will be the Commission which will have the power to grant licence and that the Government has been giving the 'No Objection' only because the Commission had not come into existence. The Government does not disclose under what power this 'No Objection' was given although it has hinted on the uncertainty of it having any such power. We are unable to read this document as granting a licence under section 14 of the Electricity Act 2003. Nor can it be read as approval under 28 of the Indian Electricity Act 1910. Nor can it be held as a promise for granting a licence as and when applied for under the new Act even if the conditions of the new Act and its rules are not fulfilled. It is, therefore, clear from the reading of the two letters relied upon by JSPL that no permission or sanction or approval was ever given to it by the State of Chhattisgarh for distribution of power to the industries being set up in the industrial estate known as Jindal Industrial Park (JIP). This also disposes of the plea of JSPL that any promise was ever

made to JSPL on account of which JSPL was entitled to the licence on application of the principles of promissory estoppel.

40) It can be added that there can be no estoppel against the statutes. The present authority to grant licence is the Commission. Licence is to be obtained by JSPL on terms and conditions prescribed under section 14 of the Electricity Act 2003. Unless those terms and conditions are fulfilled licence cannot be granted by the Commission. The Commission cannot be compelled to grant a licence in the absence of fulfillment of those terms and conditions because JSPL, on account of letters mentioned above, nurtured the hope that eventually it will get a distribution licence for supply to those industries.

41) It has further to be noticed that even if the letters mentioned above or any other letter is construed as a promise the same will bind only the Government of the State of Chhattisgarh and not the Commission which is not subordinate to the Government or successor or assignee. The Commission is a creature of the statute. It does not bear the legacy of any perceived promise made by the Government of Chhattisgarh as no such burden has been cast upon by the Commission, by the statute or by operation of any law. JSPL

therefore cannot take advantage of the doctrine of promissory estoppel.

Is JSPL entitled to license / minimum area of supply?

42) The next important question is whether JSPL is now entitled for permission under section 14 of the Electricity Act 2003. The impediment in the way of JSPL is the condition of minimum area of supply. JSPL has been granted licence to distribute despite non-adherence to the minimum area of supply. The Commission has granted distribution licence to JSPL for two villages and feels satisfied that this would meet the universal supply obligation which is the obligation of any distribution licence under the Act. Arguing on behalf of JSPL, Mr. Shanti Bhushan has cited certain authorities of the Supreme Court. In *P. Mahindran & Others Vs. State of Karnataka_1990(1) SCC 411* the Supreme Court recalled the well settled rule of interpretation that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. It also reiterated that the rule cannot be given retrospective effect except in matter of procedure. In *A. A. Carlton Vs. Director of Education 1983 (3) SCC 33* the Supreme Court dealt with the effect of an amendment on proceeding under 16(F) of the UP Intermediate Education Act. The process of selection

under 16(F) of UP Intermediate Education Act commencing from the stage of calling for applications for the post upto the date on which the Director becomes entitled to make the selection under 16(F)(4) as it stood then was found to be an integrated one as at every stage in that process certain rights were created in favour of one or the other candidate. The Supreme Court held that section 16(F) of UP Intermediate Education Act could not be construed as procedural provision. It held that the Director exercised the power subsequent to the amendment but the selection made by him could not be said to be illegal since the amendment Act was not retrospective in effect and it did not effect the proceedings which were commenced prior to the amendment. In *Gopal Krushna Rath Vs. M.A.A.Baig* 1999 (1) SCC 544 the eligibility conditions for recruitment for a post were changed after the last date for submission of application was over. The appellant before the Supreme Court who had applied for the post had obtained higher marks than the respondent No.1 and there was no challenge to the process of selection. The appellant's selection was upheld despite change in the eligibility criterion as it was in accordance with the educational qualification prescribed at the time of advertisement.

43) As against these citations the CSEB has cited three other judgments of the Supreme Court Viz. *Howrah Municipal Corporation & Others Vs. Ganges Rope Company Ltd. & Others* 2004(1) SCC 663, *Union of India & Others Vs. Indian Charge Chrome & Another* 1999 (7) SCC 314 and *Sudhir G Angur & Others Vs. M. Sanjeev & Others* 2006(1) SCC 141. In the case of Sudhir G. Angur (supra) the Supreme Court only reiterates that procedural laws can be retrospective. The Howrah Municipal case deals with the amendment in the Building Rules and Regulations pending disposal of an application for sanction to build. The respondent Company in this case applied for sanction for construction of its complex on G.T.Road upto seven floors. The respondent approached the High Court on account of delay in sanction and the High Court directed disposal of the application within 4 weeks which was subsequently extended by 3 weeks. Despite the extension of time the Corporation failed to consider the application. Hence, the respondent Company approached the High Court again. The High Court disposed of the application by order dated 23.12.93 directing the Corporation to grant sanction to the respondent's plan to 4th floor provided other requirements were complied with. The High Court also noted that the Company would be at liberty to apply for further sanction if the same was permissible at a later date. The Company after

having received the sanction upto 4th floor again approached the corporation for sanction to build further floors. This time when the High Court had to be approached on account of delay the High Court passed an order saying that Corporation was expected to pass appropriate orders within 4 weeks from the date of submission of the plan and receipt of the copy of the order. When the application for further sanction was pending the Government of West Bengal amended the Building Rule restricting the height of the building to the prescribed level depending upon the width of the street on which the building was proposed to be constructed. Besides, under another amended rule, the Corporation was granted power to further restrict the height of the buildings in specified wards keeping in view the limited civic amenities. Accordingly the Corporation limited the construction upto 10 meter in height in the prescribed wards and streets including G.T.Road. Consequently, the Corporation informed the respondent Company that sanction for construction of three additional floors could not be granted. While a Single Bench Judge of the High Court took a view that amended Building Rule and resolution of the Corporation thereunder prohibited the construction, the Division Bench took a contrary view and held that the High Court in the earlier Writ Petition having granted sanction upto 4th floor reserving the right to further

sanction, it was not open to the Corporation to refuse sanction on the basis of amended building rules. The main issue before the Supreme Court was whether by the order of the court in which the period was fixed for Corporation to take a decision on the application for sanction for construction of additional floors any vested right had been created in favour of Company irrespective of subsequent amendments to the building rules and regulations restricting the height of high rise buildings on G.T.Road. The Supreme Court held that on the subject of seeking sanction for construction no vested right could be claimed by any citizen divorced from public interest or public convenience. Further it held that merely by submitting an application for sanction for construction no vested right is created in favour of any party. The Supreme Court further held that accepting a plea of the vested right on the basis of amended building rules would militate against scheme of the Act and building rules which intended to regulate the building activities in a local area for general public interest and convenience. Further it observed that in *Usman Gani Vs. Cantonment Board (1992) 3 SCC 455 & State of West Bengal V. Terra Firma Investment and Trading (P) Ltd. (1995) 1 SCC 125* the Building Rules and Regulations prevailing at the time of sanction were held to govern the subject of sanction and not

the rules and regulations existing on the date of application for sanction.

44) The case of Indian Charge Chrome dealt with successive notifications under section 25 of the Customs Act. Notification No.71/85 dated 17.03.85 exempted goods covered under Heading 84.66 of Customs Tariff Act wholly or partially from customs duty when imported for (i) power projects and (ii) industrial plants and projects. Notification No. 133/85 dated 19.4.85 wholly exempted such goods when imported for power projects. Notification No. 306/86 dated 01.05.86 amended Notification No.133/85 by adding explanation to the effect that the expression power projects would not include captive power plants set up by units engaged in activities other than power generation. Notification No.133/85 was superseded by Notification No. 67/87 dated 01.03.87 which exempted partially, power projects and other projects covered under heading 98.01 of Customs Tariff Act, 1975 when imported. Captive power plants set up by projects engaged in activities other than power generation were excluded from the scope of “power projects”. The respondent Company which was an export oriented unit of Indian Charge Chrome, having contracted with G & A for supply of power generation equipments for construction of captive power plant moved an

application on 28.01.86 for registration of his contract so as to enable it to be assessed for exemption as item No. 84/66 read with Notification No. 71/85 dated 17.03.85. On 07.02.86 it was informed that its contract with “G” was allowed registration under 1965 Regulations. The application with regard to “A” remained pending as certain clarifications was demanded. On 17.08.87 in view of the amendments introduced by amendment vide Notification No. 306/86 the Assistant Collector refused to register the contract with “A” and also cancelled the contract with “G”. The Supreme Court, inter alia, held that mere making of an application for registration does not confer any right on the applicant. The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration. The Supreme Court held that no fault can be found with the refusal to register the contract entered into with “A”. The Supreme Court held that registration with “G” could not have been cancelled.

45) It is contended on behalf of CSEB that the minimum area of supply condition is central to the fair competition and integral to the level playing field and it is also necessary to fulfill the statutory obligation of universal supply provided by

section 43 of the Electricity Act 2003. It is contended that the minimum area of supply has been included in the rules in public interest and therefore cannot be given a go by while examining the application for licence filed by JSPL on the ground that the rule had come subsequent to the filing of the application for licence.

46) It can be noticed that in case of *Indian Charge Chrome* (supra) the Assistant Collector of customs wanted to apply a notification with retrospective effect when it cancelled the registration already granted. It was a case of retrospective application of a notification. However, the application which was pending had to be considered on the basis of the notification in force at that time. This would not mean retrospective application of any notification.

47) The rulings cited by Mr. Shanti Bhushan related to the field of service law and in each of these cases some kind of vested interest has been created when the amended/new provision came into existence. The case of *Howrah Municipal Corporation* (supra) as also that of *Indian Charge Chrome* (supra) are actually in the arena of administrative law. Both these judgments have unequivocally ruled that filing of an application before any administrative authority will not create

any vested right. These judgments also hold that the authority has to apply the rules and legal provisions as in force on the date on which the applications are considered. Accordingly on the date when the application for licence under section 14 filed by JSPL was under consideration the Commission was required to apply the regulation then in force which included the rule related to minimum area of supply. Hence, the Commission could not have ignored the rule and grant a license in violation thereof. It may further be added that the rules and regulations do not empower the Commission to make any exception in their application and hence the Commission made a mistake in granting the license by making such an exception. Hence, we have no option but to set aside the grant of license.

Interpretation of Section 10(2):

48) We can now proceed to examine to what extent the JSPL's supply to the Industrial Park can be held to be permissible activity by virtue of section 10(2) of the Electricity Act 2003. We have already extracted section 10(2) in paragraph 24 above. It allowed a generating company to supply electricity to any licensee or to any consumer. It further prescribes that supply to the licensee will be in accordance with the Act, Rules and Regulations made under

the Act. It says further that supply to a consumer will be subject to the Regulations made under sub-section 2 of section 42. The Act does not make supply as a licensed activity. But how does a generating company supply? “Supply” in the Electricity Act 2003 has been defined as sale of electricity to a licensee or consumer. Section 2(70) provided the definition of “supply” which is as under:

“2(70) “supply”, in relation to electricity, means the sale of electricity to a licensee or consumer.”

49) A sale can be done at bus bar of the generating company. If it is so done, a purchaser of power, whether it is a licensee or a consumer, has to organize its wheeling up to the load centre. However, if this function is not undertaken by a consumer then the wheeling or carrying of electricity from the generating station up to the load centre has to be done either by a licensee or by a generator. Section 12 speaks of license for transmission, distribution and trading. The transmission and distribution can be done only by a licensee. A transmission licensee cannot reach upto the load centre. In order to reach the loads centre the generating company can take the help of a distribution licensee by using the

distribution system of the distribution licensee. Here we may briefly say that ‘distribution’ is not defined in the Act although distribution licensee, distribution main and distribution system have been defined in section 2 (17), (18) and (19). Distribution system means the wires and associated facilities between the delivery points on the transmission lines or generating station connection and the point of connection to the installation of the consumer. The distribution licensee operates and maintains a distribution system for supplying electricity to the consumer. “Transmission” on the other hand is defined in section 2(72) as under:

“2(72). “transmission lines” means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such

transformers, switch-gear and other works.”

50) In view of this definition, transmission lines cannot be any essential part of the distribution system of a licensee and would not reach the load or installation of a consumer.

51) The generating company can reach the consumer for “supplying” electricity through dedicated transmission lines as defined in section 2(16). Section 10(1) says that the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected therewith. The “dedicated transmission lines” as defined in 2(16) is as under:

“2(16). “dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or

generating stations, or the load centre, as the case may be;”

52) Thus dedicated transmission lines which the generating station can establish can go upto the load centre. Therefore, a generating station can sell electricity to a consumer through dedicated transmission lines upto the load centre. However, if the generating company, instead of establishing a dedicated transmission line from its generating station upto a particular load centre wants to supply electricity to a large group of consumers in a particular area then what he requires is not a dedicated transmission line but a distribution system for he is certainly not contemplating to have dedicated transmission line for each consumer. If this is the situation i.e. a generating company intends to supply to a group of consumers but not through a dedicated transmission line, does the intended activity become distribution. In that case section 12 of the Electricity Act 2003 makes no exception for him and he would need a license.

53) Further light on this point can be thrown by a few judgments which have been cited before us by the learned counsel for the parties. In case of *A.P. Gas Power Corporation Ltd. Vs. A.P. State Electricity Regulatory*

Commission and certain other cases decided by a common judgment passed in Civil Appeal No. 4660/01, 2004 (10) SCC 511, the Supreme Court had an occasion to deal with the provisions relating to licensing in the Andhra Pradesh Electricity Reforms Act. That Act which created the Andhra Pradesh Electricity Regulatory Commission, had a provision for licensing. As per section 14 of that Act no person, other than those authorised to do so, by license or by virtue of exemption could engage in the business of transmission of electricity or as supplier of electricity. The Commission was granted power to grant licence. The question that was required to be answered by Supreme Court was whether a captive power plant could sell its surplus power, i.e. over and above 51% of its consumption by an owner, without grant of a licence. The provision of section 14 of the Reforms Act 1998 is reproduced below:

“14. Licensing.- (1) No person, other than those authorised to do so by licence or by virtue of exemption under this Act or authorised to or exempted by any other authority under the Electricity (Supply) Act, 1948, shall engage in the State in the business of-

(a) transmitting electricity; or

(b) supplying electricity.

(2)-(3) ...

(4) Notwithstanding anything contained in any other provisions of this Act and until the establishment of the Commission in terms of Section 3, the State Government shall have the power to grant provisional licences under this section having a duration not exceeding twelve months to any person or persons to engage in the State in the business of transmission of supply of electricity on such terms and conditions as the State Government may determine consistent with the provisions of this Act, subject to the following conditions, namely –

(a) upon the establishment of the Commission, each of the provisional licences granted by the State Government shall be placed before the Commission and shall be deemed to constitute an application for grant of a licence by the Commission under the provisions of this Act; and

(b) each provisional licence granted under this section shall cease to be valid from the date notified by the Commission.”

54) The Reforms Act also had provisions of exemption from the requirement of a licence under regulations to be framed by the Commission for supplying electricity. The appellant A.P. Gas Power Corporation Ltd. obtained a provisional licence dated 30.01.99 for a period of 12 months for the purpose of supplying electricity. After the expiry of the provisional licence A.P. Gas Power Corporation Ltd. sought exemption from licence for supplying to its sister concern and equity share holders. The Regulatory Commission held that it was not necessary for A.P. Gas Power Corporation Ltd. to have a licence in view of section 26(A) of the Electricity (Supply) Act 1948 and section 14 of the Reforms Act 1998. Section 26(A) of the Electricity (Supply) Act 1948 prescribed that no licence would be required by a generating company for the purpose of carrying out its activities. Generating company was defined as one established with the object of establishing operation and maintenance of a generating station. The Supreme Court, keeping in view the nature of duties of the generating company as given by section 15(A) and 18(A) held that “*no licence was required to be taken by a generating company consuming the*

electricity generated by itself.” However, coming to the question of supplying to sister concern, the Supreme Court held that sister concerns were independent entities and when electricity is consumed by a sister concern of a generating company, it would amount to supply to a non-participating industry and it would be necessary to have a licence under the relevant provisions of law.

55) The judgment in the case of A.P. Gas Power Corporation Ltd. was relied upon by the High Court of Bombay in the case of Maharashtra State Electricity Board Vs. State of Maharashtra and Others (Writ Petition No. 882/05). The High Court of Bombay in this case was hearing an appeal from the judgment of the Maharashtra State Electricity Regulatory Commission in an application seeking declaration that the respondent No.2 therein namely Bhushan Steel Strips Ltd. was not entitled to sell power to the third party in the absence of a valid licence as required under section 12 to 15 of the Electricity Act 2003. The respondent No.2 set up a captive power plant and was supplying power to respondent No.3. The Maharashtra State Electricity Board the writ petitioner filed an application seeking declaration that the respondent No.2 was not entitled to sell power to a third party in the absence of a valid licence under section 12 to 15 of the

Electricity Act 2003. That case was dismissed by the Commission vide an order dated 03.08.04. The High Court of Bombay took note of the provisions of section 12, 13 & 14 of the Electricity Act 2003 and observed that section 14 of the A.P. Electricity Reforms Act 1998 had a provision very similar to section 12 of the Electricity Act 2003 and that the Supreme Court in paragraph 35 of its judgment in the case of A.P. Gas Power Corporation Ltd. (supra) held “*in the absence of the element of self- consumption by the generating company, it would not fall in the category of “captive consumption”. It would surely be a supply to a non-participating industry and in that event it would be necessary to have a licence under the relevant provisions of law.*” The High Court of Bombay held that in view of similarity between section 12 & 14 it could not but be guided by the decision of the Supreme Court. The High Court observed that if the intention of the Legislature was to give complete freedom to the captive power plants to sell excess power, the Legislature would have said so. The High Court itself discarded the plea that a CPP is not required to have a licence merely because 51% of its power is used by itself and it sells only the surplus power. The High Court held further that the intention of the Legislature was clear and un-ambiguous and there was no need to read anymore into the section 12 to 15 than the fact that licenses are mandatory to

CPPs the moment the element of sale to a third party came in. The judgment of the High Court of Bombay was challenged in an Special Leave Petition (SLP) being special leave to appeal (civil) No. 1088/05 which was decided on 12.05.05. The Supreme Court said the following :

“We have heard Mr. M. L. Verma, learned counsel at great length. In our view, there is absolutely no infirmity in the impugned judgment. We see no reason to interfere. The special leave petition is dismissed. We, however, clarify that if the petitioner applies for licence, their application can be considered expeditiously keeping in view the judgment of the High Court which clearly states that the petitioner requires a licence.”

The Supreme Court has thus confirmed the High Court’s view that a CPP requires a licence when it wants to sell to third parties. It may be mentioned here that the Electricity Act has since undergone an amendment and section 9 has been specifically amended to allow a CPP to sell surplus power without a licence.

56) Although neither A.P. Gas Power Corporation Ltd. (supra) or the judgment of High Court in Writ Petition No. 882/05 directly deal with section 10(2) of the Electricity Act 2003, the principles laid down in these two judgments are clear and unambiguous. Since sections 12 to 15 say that without a licence the activities of transmission, distribution and trading are not permissible. The generating company, when it wants to do any of these three activities, will require a licence. If a generating company wants to undertake a function of distribution by reaching upto the consumer either through its own lines or through open access, it has to obtain a licence. Although the decision of the Supreme Court in AP Gas case (supra) and of the Bombay High Court in the case of Maharashtra State Electricity Board (supra) have been rendered in the context of captive power plants, the principles laid down by these two judgments are squarely applicable to supply of power from a generating company. Section 9 of the Electricity Act 2003 which deals with captive power plant says that “supply of electricity from the captive generating plant through the grid shall be regulated in the manner as the generating station of a generating company”.

57) Although the Act of 2003 does not specifically say supply as an activity which is licensed, the High Court of Bombay in

the case of Maharashtra State Electricity Board (supra) held that section 12 of the Electricity Act 2003 is similar to section 14 of the AP Electricity Reforms Act 1998 and further that while dealing with the provisions of section 14 of AP Electricity Reforms Act 1998 the Supreme Court held that supply to a non-participating industry would attract the provision of license; It is to be noted that section 12 of Electricity Act 2003 has a caption “authorised persons to transmit supply electricity”. The High Court of Bombay in the above noted case said that in view of similarity of section 12 of the Electricity Act 2003 and section 14 of the AP Electricity Reforms Act 1998 and the judgment of the apex court AP Gas Power Corporation Ltd. (supra) it could be concluded that licenses are mandatory the moment there is an element of sale to the third party. This conclusion has been arrived at not on account of contents of section 9 of the Electricity Act 2003 but on account of contents of section 12 of the same Act. Section 12 will apply to Section 9 & 10 both. If the judgment of High Court of Bombay has to be followed, the generating company supplying electricity will also need license.

58) However, as noted above, if we see the definition of supply – meaning sale and the duties of a generating company as given by section 10(1) and section 2(16), permitting

dedicated transmission lines to be laid upto the load centre from the generating station, one can possibly say that a generating station may through a dedicated transmission line upto a particular load centre supply electricity without being hindered by section 12 of the Electricity Act 2003. However, as we have already noted above, this is not what JSPL intended to do. JSPL in fact wanted to distribute electricity through a distribution system and not lay dedicated transmission line to a particular load centre/consumer of the Jindal Industrial Park. Such an activity whether by a CPP or by a generating company necessarily needs license.

59) Having said this, it is our bounden duty to say that JSPL in fact is a captive power plant and is governed by section 9 of the Electricity Act 2003 and not by section 10 of the same Act. JSPL had applied for a distribution license because it intended to purchase power from another generating company called Jindal Power. In fact, the major portion of the supply required for the area of the Jindal Industrial Park or for the two villages mentioned above was to be met by the purchase from Jindal Power. JSPL as such, as a CPP, at the relevant time could not have made any supply to any third person without license as has been held by Hon'ble High Court of Bombay and the Supreme Court in the Maharashtra State Electricity Board

case (supra). It is also our duty to point out that section 9 has since undergone a change in 2007. With amendment coming into force, no license is required under the Act for supply of electricity generated from a captive generating plant to any licensee in accordance of provisions of this Act and Rules and Regulations made thereunder and to any consumer subject to Regulations made under sub-section (2) of section 42.

60) The next question that arises for consideration is the effect of sub-section 2 of section 42. It has been submitted by senior counsel Mr. Ravi Shankar Prasad appearing for the Chhattisgarh State Electricity Board that the supply from a CPP or even under section 10(2) is permissible only when the same is made by use of the grid or the transmission lines of the distribution licensee or a transmission licensee by use of open access. According to him unless open access is availed of the supply cannot be made. When open access is availed of the CSEB is able to recover the cross subsidy surcharge. In case the open access is not availed of the CSEB has to lose the cross subsidy surcharge which may affect the income of the CSEB and also the section of consumers who are subsidised by using the money recovered through the cross subsidy surcharge.

61) The question really is what is the meaning of “subject to”. In our opinion, open access is an enabling provision. This is a provision to help expansion of the electricity sector and not to limit its development. In case the supply is made through the grid then certainly the supply will be subject to regulations made for using open access. However, it will not be correct to say that even if electricity generated by a CPP or a generating company can be supplied to a consumer without the use of the grid, such a supply will not be permissible. If the dedicated transmission line can be laid from a generating company or a generating plant upto a load centre, supply can be made through dedicated line. No provision of the Electricity Act 2003 restricts the supply through a dedicated line because such supply is not going through the grid and does not avail of the feasibility of open access. If the intention of the Act was that no sale is possible except by availing open access it could say so. Instead of saying “subject to regulations made under sub-section (2) of section 42” it could say “by availing access through the grid or a distribution system of the licensee of the concerned area”. The provision of Section 42(2) would be attracted only when the access through the existing distribution system is sought. When no such access is sought the question of application of section 42(2) will naturally not arise.

62) We raised an issue of the effect of amendment in section 9 of the Electricity Act 2003 on the interpretation of section 10 of the same Act. However, now that we have held that section 10 even before the amendment did not allow distribution, the intended activity of JSPL, without license we need not go into this question raised by us.

63) The above analysis disposes of the three appeals which have challenged the grant of distribution license to JSPL. We are constrained to hold that JSPL could not have been granted a distribution license in view of the minimum area of supply. We also hold that section 10(2) of the Electricity Act 2003 did not permit the JSPL to undertake any work of distribution of electricity without license to the Jindal Industrial Park.

Appeal No. 27 of 2006:

64) The question that remains to be determined is whether the Commission's order regarding imposition of penalty of Rs.1 lac on JSPL can be sustained. In view of our findings above, JSPL did not have a license when it started supplying electricity to Jindal Industrial Park. This, however, does not mean that a penalty is automatically attracted to the act of the JSPL. Section 142 itself says that a person sought to be

punished under section 142 of the Electricity Act 2003 has to be given an opportunity of being heard in the matter. This opportunity has admittedly not been given to JSPL. The Commission felt that the question of non-compliance with the provisions of this Act came up for consideration during the hearing before it and therefore there was no further requirement of serving a specific notice to show cause on JSPL. We cannot agree to this view of the Commission. Before imposing any penalty on any person for any offence the cardinal principle of natural justice requires that the person has to be served with a notice of the intended punishment and is given an opportunity to defend himself against such punishment. This requirement is not fulfilled by simply hearing the parties on issues distinct from the issue of penalty. It may be recalled that the Commission was merely hearing the application for grant of distribution license. The other parties in this appeal were merely opposing grant of license. The question whether JSPL had rendered itself liable to punishment was not at all an issue before the Commission. Hence the order imposing penalty without complying with the express provision of section 142, namely to give an opportunity of being heard, cannot be sustained. Accordingly, we are also constrained to set aside the penalty imposed on JSPL.

Conclusion:

65) We, therefore, allow all the appeals. The order granting distribution license to JSPL, as also the order imposing penalty on JSPL, are set aside.

66) Pronounced in open court on this **07th day of May, 2008.**

**(Ms. Justice Manju Goel)
Judicial Member**

**(H. L. Bajaj)
Technical Member**