

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.216 OF 2013
AND
APPEAL No.262 OF 2013

Dated: 30th June, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No.216 of 2013

Chhattisgarh State Power Distribution Co. Ltd.
Vidyut Seva Bhavan, PO- Sunder Nagar,
Danganiya, Raipur-49 2 013
Chhattisgarh

... Appellant

Versus

- 1. Chhattisgarh State Electricity Regulatory
Commission
Irrigation Colony, Shanti Nagar,
Raipur-492 001
Chhattisgarh**
- 2. Jindal Power Limited
Tamnar-496 107
District-Raigarh
Chhattisgarh**
- 3. M/s. Jindal Steel & Power Limited
OP Jindal Marg,
Hissar-125 005
Haryana**

.....Respondent(s)

Counsel for the Appellant : Ms.Suparana Srivastava
Ms. Shivani Rana
Mr. A Bhatnagar

Counsel for the Respondent (s): Mr. C K Rai for R-1
Mr. M G Ramachandran
Ms. Ranjitha Ramachandran for R-2&3

Appeal No.262 of 2013

1. **Jindal Power Limited**
Mandir Hasaud, Raipur
PIN-429 101
Chhattisgarh

2. **M/s. Jindal Steel & Power Limited**
Post Box No.18, Kharsia Road,
Raigarh
PIN-496 001
Chhattisgarh

.....Appellant(s)

VERSUS

1. **Chhattisgarh State Electricity Regulatory Commission**
Irrigation Colony, Shanti Nagar,
Raipur-492 001
Chhattisgarh

2. **Chhattisgarh State Power Distribution Co. Ltd.**
Vidyut Seva Bhavan, PO- Sunder Nagar,
Danganiya, Raipur-49 2 013
Chhattisgarh

.....Respondent(s)

**Counsel for the Appellant : Mr. M G Ramachandran
Ms. Saman Ahsan**

**Counsel for the Respondent (s): Mr. C K Rai for R-1
Ms.Suparana Srivastava for R-2**

J U D G M E N T

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

- 1. Chhattisgarh State Power Distribution Company Limited is the Appellant in Appeal No.216 of 2013.**
- 2. M/s. Jindal Power Limited and Another are the Appellants in Appeal No.262 of 2013.**
3. Both these Appeals have been filed by the respective parties against the same Impugned Order dated 10.7.2013.
4. Since the Impugned Order as well as the parties are the same, this common judgment is being rendered.

5. The short facts are as follows:

(a) The Chhattisgarh State Power Distribution Company Limited, being the successor of the State Electricity Board, the Appellant in Appeal No.216 of 2013, is the Distribution Company.

(b) The Jindal Power Limited (the First Appellant in Appeal No.262 of 2013) the 2nd Respondent owns a Generating Company.

(c) The Distribution Company and the Jindal Power Limited entered into a Power Purchase Agreement on 23.3.2007. By this Power Purchase Agreement, the Jindal Power Limited offered to sell power up to 300 MW to the State Power Distribution Company, the Appellant through its independent power plant situated in District Raigarh, Chhattisgarh and the Appellant agreed to purchase the same as per the terms stipulated in the PPA.

(d) As per the agreed terms, the Appellant, Distribution Company was to make all efforts so that its 220 KV dedicated transmission line is ready by July/August, 2007 to receive power from Jindal Power Limited's sub station. It was also further provided in the PPA that in the event the 220 KV line of the Appellant was not ready by the time the first unit of

power plant of Jindal Power Limited became operational, the possibility of availing power by the Appellant would be explored through the 220 KV lines of the Jindal Power Limiter's sister concern namely M/s. Jindal Steel & Power Limited (JSPL), the third Respondent and the adjustment of losses was to be done as per the mutual agreements.

(e) The Appellant, the Distribution Company did not complete the construction of the transmission line in time. Therefore, it was agreed by the Jindal Power Limited that the power would be supplied to the Appellant through the 220 KV line of JSPL, the sister concern of the Jindal Power Limited.

(f) Thereafter, on 11.5.2007 and 9.1.2008, two Supplementary Agreements were entered into between the Jindal Power Limited and the Appellant Distribution Company. During that period, the transmission lines of JSPL, the sister concern of the Jindal Power Limited were used for supply of the electricity to the Appellant Distribution Company.

(g) Hence, the JSPL raised the bill for transmission charges on the Jindal Power Limited. The Jindal Power Limited, in turn, forwarded the bills to the Power Distribution Company demanding for an

amount of Rs.19,60,43,203/- for usage of JSPL's transmission lines.

(h) In respect of this issue, there was a meeting. Pursuant to the said meeting, a committee was constituted. Before the said Committee, both the parties made submissions regarding the claim of the transmission charges.

(i) Ultimately, the Committee had recommended to the Appellant that no transmission charges were payable by the Distribution Company to Jindal Power Limited for transmission of power through JSPL's transmission line.

(j) This report was conveyed by the Appellant to the Jindal Power Limited by the letter dated 4.9.2010.

(k) Aggrieved by this letter sent by the Appellant in refusing to pay the transmission charges, both the Jindal Power and JSPL filed a Petition in Petition No.43 of 2012 before the State Commission under section 86(1)(f) of the Electricity Act,2003 for issuing a suitable direction to the Appellant to pay the transmission charges.

(l) The State Commission after hearing both the parties passed the impugned order dated 10.7.2013 holding that for the period from 8.12.2007 to

19.6.2008 the Appellant, the Distribution Company is not liable to pay any transmission charges as the said charges have to be borne by the Generating Company itself but for the other period, namely from 20.6.2008 to 9.3.2009 during the period in which the JSPL became the transmission licensee, the Appellant is liable to pay the transmission charges for availing supply from Jindal Power Limited by using the lines of JSPL.

6. **The Power Distribution Company, the Appellant has filed this Appeal No.216 of 2013** against the direction to the Appellant to pay the transmission charges for the period from 20.6.2008 to 9.3.2009.
7. **Similarly, the Jindal Power Limited and JSPL** on being aggrieved over the findings by the State Commission that the Appellant is not liable to pay the transmission charges for the period from 8.12.2007 to 20.6.2008 to JSPL, as it was not the Transmission Licensee during that period, **have filed the Appeal in Appeal No.262 of 2013.**
8. Let us now deal with the submissions of the parties separately in each Appeal as the grounds raised in these Appeals are different.
9. Let us first deal with the submissions made by the Chhattisgarh State Power Distribution Company Limited, the

Appellant and Jindal Power Limited and its sister Company, JSPL, the Generating Company and the Transmission Licensee respectively and the issues raised in Appeal No.216 of 2013.

10. While assailing the Impugned Order dated 10.7.2013 with reference to the directions issued to the Appellant to pay the transmission charges to the JSPL, the transmission licensee for the period from 20.6.2008 to 9.3.2009, the learned Counsel for the Appellant in Appeal No.216 of 2013 has made the following submissions:

(a) The Impugned Order dated 10.7.2013 passed by the State Commission directing the Appellant to pay the transmission charges to the JSPL (R-3) for using its line while availing power supply from Jindal Power Limited (R-2), is contrary to the contractual agreement entered into between the Power Distribution company, the Appellant and the Jindal Power Limited, the Generating Company, the 2nd Respondent.

(b) As per the PPA, the purchase rate to be paid by the Appellant to the Jindal Power Limited, the Generating Company for the purchase of power is inclusive of all the charges. No extra amount is permitted to be paid on any ground. The payment

of Open Access charges is the liability of the person who avails the Open Access. The Appellant has not sought Open Access into transmission system of JSPL(R-3). The Jindal Power Limited itself has supplied power to the Appellant through the transmission lines of JSPL (R-3). Therefore, the Jindal Power Limited (R-2) alone is liable to pay transmission or open access charges to the sister Company (R-3). This aspect has been completely over looked by the State Commission.

(c) The transmission charges are payable when Open Access is availed in the system of transmission licensee. Under the applicable Open Access Regulations, written request with prescribed fee is to be made by the Open Access customer seeking open access. The Appellant has neither applied for nor has availed Open Access in the transmission system of JSPL (R-3). In the absence of any contractual agreement in their behalf between the Appellant and JSPL (R-3), the Appellant cannot be asked to pay the transmission charges to JSPL (R-3).

(d) Availing of Open Access in the transmission system of JSPL (R-3) has been inter-se arrangement between the Jindal Power Limited and

JSPL. No liability in that behalf can be fastened on the Appellant.

(e) The PPA dated 23.3.2007 read with Supplementary PPAs dated 9.1.2008 and 21.4.2009 recorded the agreed terms for supply of power by Jindal Power Limited to the Appellant for the period in question where there is no provision regarding payment of transmission charges by the Appellant to Jindal Power Limited. The Jindal Power Limited, Respondent and the Appellant are bound by the terms and conditions of the PPA executed by and between them. The JSPL (R-3) is a 3rd party. The Appellant has no privity of contract with JSPL so as to entitle it to demand transmission charges from the Appellant either directly or through Jindal Power Limited. That being so, the dispute between the Appellant and Jindal Power Limited alone could be agitated with regard to the issue of power supply and that too in terms of the PPA executed between them.

(f) It is settled principle of law that when the Agreement between the parties is written Agreement, the parties of that Agreement, are bound by the terms and conditions of the said Agreement.

(g) The claim for transmission charges as raised by the JSPL is not admissible as the same is not on agreed terms under the PPA. Therefore, the claim of the Jindal Power Limited arising out of a demand raised on it by the JSPL (R-3) from the Appellant is not at all tenable because the JSPL is a 3rd party in the contractual arrangement between the Appellant and Jindal Power Limited.

(h) The reasonings given by the State Commission in the Impugned Order for fastening the liability upon the Appellant to the effect that since generally the Appellant bears the transmission charges for its power purchase is completely wrong in as much as no transmission charges have ever been paid by the Appellant for short term intra-State purchase of power.

11. On the basis of these grounds, the Appellant has prayed for setting aside the Impugned Order.

12. In reply to the above grounds urged by the Appellant, the Generating Company (R-2) and the Transmission Licensee (R-3) have made the following reply:

(a) Pursuant to Clause 5 of the PPA, the Appellant was to make all possible efforts to finish the construction of its own transmission line before

the first unit of JPL's Power Plant became operative. As per Clause 7.01, if the Appellant fails to complete the construction of its own transmission line within the time frame, the power supplied to the Appellant would be routed from the JPL's Plant through its sister Company JSPL transmission line. On the basis of these provisions, several communications were sent by Jindal Power Limited to the Appellant claiming transmission charges for use of JSPL's transmission line when the power was being supplied by Jindal Power Limited to the Appellant. The Appellant at no stage objected to this demand of transmission charges made by Jindal Power Limited on the ground that PPA did not contemplate payment of transmission charges. Even otherwise, the transmission charges are payable under the common law. If the transmission lines of 3rd party were to be used, additional charges would become payable. Therefore, this charge would have to be borne by the party who receive supply of power through the transmission lines of JSPL. It is a common law that when a party to the contract has rendered service to the other party not intending to do so gratuitously, the former party is entitled to get the value of services u/s 70 of the Contract Act. Therefore even in the

absence of the specific provision in the PPA, the actual transmission charges incurred for using the transmission lines belonging to 3rd party are payable.

(b) U/s 40 of the Electricity Act, the JSPL (R-3) as a transmission licensee is entitled to the recovery of transmission charges as a transmission licensee from the other party. The reading of Section 40 clarifies that payment of transmission charges is an essential pre-condition for allowing use of a licensee's transmission system.

(c) Jindal Power Limited had written several reminding letters requesting the Appellant for making payment towards use of JSPL transmission lines. This claim was never disputed by the Appellant at any point of time. In the above circumstances, there is no occasion for the JSPL to raise the issue as dispute during the finalisation of the Supplementary PPAs.

(d) The JSPL (R-3) had offered its transmission lines only on account of failure of the Appellant to construct its transmission lines within time. The same cannot be held against the JSPL as it would

amount to the Appellant taking advantage of its own wrong.

(e) It is settled law that the real test is the intention of the parties which depends on the facts and circumstances of each case. The intention can be ascertained from not only expressed words used in the contract but also the surrounding circumstances. In the present case in accordance with Clause 7.01 of the PPA, the modalities of using JPSSL transmission line was to be decided subsequently by mutual agreement. Therefore, the same was not incorporated in the PPA at the time when the parties were entering into the Agreement. Despite Jindal Power Limited claimed transmission charges through various letters the same were not rejected by the Appellant until 4.9.2010.

(f) Even assuming that there was no stipulation in the PPA or no privity of contract between the Appellant and the JSPL, then also the transmission charges would be payable u/s 70 of the Indian Contract Act.

13. On these grounds the Respondents argued in justification of the Impugned Order.

14. On the very same grounds, the learned Counsel for the State Commission also contended that there is no infirmity in the findings rendered by the State Commission directing the Appellant to pay the transmission charges to the JSPL for the limited period from 20.6.2008 to 9.3.2009 during which the JSPL was the transmission licensee.

15. In the light of these rival contentions, the following question has been raised for consideration of this Tribunal in this Appeal No.216 of 2013:

“Whether in the facts and circumstances of the case, the State Power Distribution Company Limited, the Appellant is liable to pay the transmission charges to JSPL (R-3) for using its transmission lines for the period from 20.6.2008 to 9.3.2009?”

16. The Impugned Order which had been passed on 10.7.2013 by the State Commission originated from the Petition No.43 of 2012 filed by the Jindal Power Limited (R-2) and JSPL (R-3) u/s 86 (1) (f) of the Electricity Act, 2003 for recovery of transmission charges from the Appellant for the entire period from 8.12.2007 to 9.3.2009.

17. In the Petition filed before the State Commission, the Respondent has prayed for the following relief:

“Direct the Respondent to make payment of transmission charges amounting to Rs.19,60,43,204.00 together with interest @ 18% per annum from the date of such surcharges being due till realization of the same.

18. On consideration of this issue, the State Commission passed the Impugned Order directing the Appellant to pay the transmission charges not for the whole period namely 8.12.2007 to 9.3.2009, but only for the limited period from 20.6.2008 to 9.3.2009.
19. According to the Appellant, the State Commission has wrongly passed the Impugned Order directing the Appellant to pay the transmission charges to the Respondent in respect of the above period even when the Appellant has no privity of contract with JSPL (R-3) and when such a payment had not been agreed to between the Appellant and JSPL (R-3) under the PPA.
20. While dealing with this issue raised in the present Appeal, it would be worthwhile to refer to the relevant facts to understand the core of the issue:
 - (a) The Appellant, the State Power Distribution Company Limited is a successor company of the State Electricity Board. It is a distribution licensee. It is performing all functions and duties pertaining to

the distribution of electricity in the State of Chhattisgarh.

(b) Jindal Power Limited (R-2) is a Generating Company. It is engaged in the business of generation and sale of power from its independent power plant situated in the State of Chhattisgarh.

(c) JSPL (R-3), a sister concern of Jindal Power Limited, is a transmission licensee under the transmission license granted by the State Commission on 22.5.2008 which is effective from 20.6.2008.

(d) Jindal Power Limited (R-2) had entered into a Power Purchase Agreement on 23.3.2007 with erstwhile Chhattisgarh State Electricity Board for sale of power up to 300 MW.

(e) On 11.5.2007 and 9.1.2008, two Supplementary Agreements were entered into between Jindal Power Limited and the Appellant. As per the agreed terms of the PPA, the Appellant was to make all efforts so that its 220 KV direct transmission line was ready by July/August, 2007 to receive power from the Jindal Power Limited sub station.

(f) As per Clause -5 of the PPA, the power from Jindal Power Limited's sub station was to be supplied to the Appellant at the bus bar of Jindal Power Limited.

(g) As per Clause 7.01 of the PPA in the event the 220 KV lines of the Appellant between the Jindal Power Limited and the Appellant's Grid was not ready, by the time, the Jindal Power Limited's Power Plant became operational, the possibility of availing power by the Appellant would be explored through the 220 KV lines of JSPL (R-3) the sister Company of Jindal Power Limited and for the said interregnum period the adjustment of losses was to be done as per the mutual agreement.

(h) The first Supplementary PPA was entered into between the Appellant and the Respondent No.2 on 11.5.2007. In this PPA, the rates of purchase of power before the date of commercial operation of Jindal Power Limited's power plant to be approved by the Commission were duly incorporated in the PPA. Subsequently, the transmission lines of the JSPL were used for supply of electricity to the Appellant.

(i) The second Supplementary Power Purchase Agreement was executed between the parties on 9.1.2008. This agreement provided that the State Electricity Board had agreed to supply power to the Appellant by using the JSPL's transmission line by closing the bus coupler at JSPL's sub station. The parties also agreed for the modalities for energy accounting with the aforesaid arrangement for availing power.

21. The above facts have to be borne in mind while discussing the issue.
22. According to the Respondents before the State Commission, the Appellant was to make all efforts to complete its 220 KV dedicated transmission lines within the time frame and the since the Appellant had failed to do so, in accordance with Clause 7.01 of the PPA, it was agreed between the parties that the power would be supplied to the Appellant by the Jindal Power Limited (R-2) through the 220 KV lines of JSPL (R-3).
23. It is further contended by the Respondents that by virtue of Clause 7.01 of the PPA, both the parties by mutual agreement, had agreed for the supply of power through JSPL's transmission lines and the modalities for supply was to be worked out by the parties.

24. On that basis, the Respondent Jindal Power Ltd started supplying power to the Appellant as per the commissioning of its plant through JSPL's transmission lines on various dates.
25. The Jindal Power Limited through the letter dated 29.2.2008 brought to the notice of the Appellant that due to acute shortage of power in the State, the Jindal Power Limited was supplying maximum power as per its capacity by curtailing its own production and in case additional power was not required by the Appellant, then the Jindal Power Limited be informed of the same.
26. Thereupon, on 6.8.2008, the Jindal Power Limited wrote a letter to the Appellant that the Appellant was liable for payment of transmission charges by using 220 KV lines of JSPL. Reminding the same, several request letters were sent.
27. At this stage, the Appellant through its letter dated 3.2.2008, requested the Jindal Power Limited to continue the supply of power beyond 8.12.2008 on which date the PPA dated 23.3.2007 would expire.
28. The Jindal Power Limited wrote a letter dated 3/12/2008 to the Appellant that Jindal Power Limited will continue the supply of power beyond 8.12.2008 on prevailing rates and

as per terms and conditions, as approved by the State Commission for a further period up to 31.3.2009.

29. On 29.1.2010, the JSPL (R-3) raised the bill amounting to Rs.19,60,43,203/- and forwarded the same to the Jindal Power Limited (R-2) towards the transmission charges for the usage of its transmission lines to supply electricity to the Appellant. The Jindal Power Limited, in turn forwarded the said bill on 3.2.2010 to the Appellant for the payment of the said amount for usage of JSPL's transmission lines.
30. On this issue, there was a meeting between the parties.
31. To resolve this issue, a committee had been constituted. Both the parties attended the meeting of the Committee and expressed their views.
32. Ultimately, the Committee sent a report to the Appellant giving its opinion that the Appellant was not liable to pay the transmission charges as there was no provision for the same in the PPAs.
33. On the basis of this report, the Appellant wrote a letter on 4.9.2010 informing the Jindal Power Limited that the Appellant was not liable to pay the said amount.
34. Aggrieved by this letter, the Respondents filed a Petition before the State Commission seeking for the direction to the

Appellant to make the payment of transmission charges for the entire period.

35. The issue before the State Commission was whether in the absence of specific clause for payment of transmission charges in the PPA for the use of transmission line of a 3rd party, the 3rd party would be entitled for raising the bill claiming the transmission charges for the entire period from the Appellant, the beneficiary of the supply.
36. Taking note of the background of the case, the State Commission went into the issue with regard to the direction sought for by the Jindal Power Limited and JSPL to the Appellant to make the payment of transmission charges for the entire period.
37. The State Commission after considering the submissions of both the parties and the perusal of the materials available on record, passed the Impugned Order dated 10.7.2013 as mentioned below.
38. The relevant portion of the Impugned Order is as follows:

“Further, the Commission has determined the ARR for M/s JSPL’s transmission licensed business for the financial year 2008-09 vide order dated 30.12.2011 in P No. 07 of 2011(T) from the period of effectiveness of licence i.e. 20.06.2008 till March 2009.

29. Generally CSPDCL bears the transmission charges for its power purchase. In the view of above,

the Commission decides that CSPDCL should pay to JSPL(T) for using its line for the period 20.06.2008 till 09.03.2009. As per OA Regulations, 2005 the power transaction can be categorized as short-term open access. The parties can mutually decide transmission charges considering following points:

(a) The power transaction is short-term open access.

(b) JSPL(T) is entitled for short-term transmission charges as per OA Regulations 2005 and its first amendment Regulations, 2007, for the period 20.06.2008 to 09.03.2009

(c) Short-term transmission charges of JSPL(T) can be computed on the basis of the Annual Revenue Requirement (ARR) approved by the Commission for the year 2008-09(P No. 07 of 2011(T)) and transmission capacity of JSPL(T).

(d) JSPL (T) is entitled for claiming short-term transmission charges in proportion to the use of its facilities i.e. 230 MW only.

(e) The short-term charges can be mutually settled within rates derived by above modality.

We order accordingly and dispose off the case.”

39. Thus, the State Commission directed the Appellant to pay the transmission charges for using the transmission lines of JSPL (R-3) only for the period 20.6.2008 to 9.3.2009. This order is challenged in this Appeal in Appeal No.216 of 2013.

40. The main contention of the Appellant in the present Appeal is that the State Commission has wrongly directed the

Appellant to pay the said transmission charges to the JSPL (R-3) even when the Appellant has no privity of contract with JSPL (R-3) and when such payment had not been agreed to in the PPAs entered into between the Appellant and the Jindal Power Limited (R-2) for power supply from Generating Plant of the Jindal Power Limited to the Appellant.

41. In this context, the State Commission has pointed out an important aspect which is quite relevant.
42. The said aspect is this: “Even though, the supply was made by the Appellant through the transmission lines of JSPL (R-3) from 8.12.2007, the JSPL obtained transmission license from the State Commission only by the Order dated 22.5.2008. As per the order, the transmission license granted to the JSPL became effective from 20.6.2008. So, till the license is obtained, the JSPL, the transmission licensee cannot claim under law any transmission charges from the Appellant. Therefore, so far as the period of power supply between 8.12.2007 up to 20.6.2008 is concerned, the charges had to be borne by the power supplier namely Jindal Power Limited for having used the transmission lines of the sister company”.
43. There is no dispute in the fact that for the period from 20.6.2008 up to 9.3.2009, the Appellant purchased the

power from Jindal Power Limited by using the transmission lines of the JSPL who was then the transmission licensee. Therefore, for that period, the Appellant should have negotiated the rates with the transmission licensee so that the power purchase cost at delivery point of Appellant's system was within the maximum ceiling short term power purchase specified by the State Commission.

44. In fact, the State Commission had notified the Open Access Regulations in 2005 itself. Therefore, the applicable Regulations are required to be applied by both the parties. The transmission licensee admittedly became a regulatory entity only from 20.6.2008. In that view of the matter, the State Commission concluded that the transmission licensee is entitled to claim transmission charges for the facility given by it as a transmission licensee to the parties for the period between 20.6.2008 and 9.3.2009.

45. At this juncture, the learned Counsel for the State Commission has pointed out Section 35 and 36 of the Electricity Act, 2003 which confers the powers to the State Commission to pass the order relating to the transmission charges. The same is as follows:

“35. The Appropriate Commission may, on an application by any licensee, by order require any other licensee owning or operating intervening transmission facilities to provide the use of such facilities to the extent of surplus capacity available with such licensee.

Provided that any dispute regarding the extent of surplus capacity available with the licensee, shall be adjudicated upon by the Appropriate Commission.

36. (1) Every licensee shall, on an order made under section 35, provided his intervening transmission facilities at rates, charges and terms and conditions as may be mutually agreed upon :

Provided that the Appropriate Commission may specify rates, charges and terms and conditions if these cannot be mutually agreed upon by the licensees.

(2) The rates, charges and terms and conditions referred to in subsection (1) shall be fair and reasonable, and may be allocated in proportion to the use of such facilities”.

46. The perusal of the above provisions would make it clear that the appropriate Commission is vested with the powers to resolve the dispute with reference to the transmission charges.
47. The JSPL's (R-3) transmission business is primarily for the power transmission for JSPL's distribution business. Since it has surplus capacity available with it, it can provide service to other users also as per law.
48. It is settled law that it is entitled for the price rendered to the beneficiary for the supply.
49. The Chattisgarh State Commission framed the Open Access Regulations, 2005 as well as the Open Access First

Amendment Regulations, 2007. Both the Regulations were prevalent during the relevant period. The same is as follows:

Clause 7- *Short term Open Access customer is a consumer who avails Open Access for a period of one year or less:*

“11. Charges for Open Access:

The licensee providing open access shall levy only such fees and/or charges as may be specified by the Commission from time to time.

The principles of determination of the charges shall be as under:

(a) Transmission Charges- The transmission charges for use of the transmission system of the STU/transmission licensee for intra-State Transmission shall be regulated as under:

XXXXXXXXXXXXXXXXXXXX

(b) The transmission charges payable by a short-term customer for the use of intrastate transmission system shall be calculated as per the following formula:

$$ST_TC=0.25x [ATSC/Max_CAP]/365$$

Where:

ST_TC is the transmission charge for short term customers in Rs.Per MW per day.

“ATSC’ means the annual revenue requirement of the transmission system as determined by the Commission time to time Max_CAP” means the maximum capacity in MW served by the intra-state transmission system of the transmission licensee in the previous financial year.”

50. As per Open Access Regulations, 2005, the power transactions can be characterised as a short term open access. Generally, it is the Distribution Licensee who bears the transmission charges for its power purchase and therefore, the claim made by the Respondent that the Appellant should pay to JSPL for using its line for the period from 20.6.2008 till 9.3.2009 is justified.

51. Further, it is noticed from the Impugned Order that the State Commission, apart from deciding about the liability to pay the transmission charges, has not proceeded to fix the transmission charges.

52. On the other hand, the State Commission in the Impugned Order directed the parties to mutually decide the quantum of transmission charges taking into consideration all the following points. These points are as follows:

(a) The power transaction is short term Open Access.

(b) JSPL (T) is entitled for short term transmission charges as per Open Access Regulations, 2005 and its first amendment Regulations, 2007 for the period 20.06.2008 to 09.03.2009.

(c) Short-term transmission charges of JSPL (T) can be computed on the basis of the Annual

Revenue Requirement (ARR) approved by the Commission for the year 2008-09.

(d) JSPL (T) is entitled for claiming short-term transmission charges in proportion to the use of its facilities i.e. 230 MW only.

(e) The short term charges can be mutually settled within rates derived by above modality.

53. As indicated above, as per the relevant provisions, the JSPL (R-3) is statutorily entitled to recover transmission charges from the Appellant notwithstanding the provisions of the PPA entered into between the Jindal Power Limited and the Appellant.

54. The JSPL is a transmission licensee. As per Section 40 of the Electricity Act, 2003 it is the duty of the transmission licensee to provide non discretionary Open Access to its transmission system for its use by any licensee on payment of transmission charges. Thus, notwithstanding the absence of the specific nomenclature in the PPA of the term “transmission charges” accruing on account of the Appellant’s use of transmission line, the Appellant asked the Jindal Power Limited to supply power by using the transmission line of JSPL and therefore it is statutorily obliged to pay the same.

55. It is contended by the Appellant that the transmission charges are payable only where Open Access charges are sought by it.
56. The said contention cannot be countenanced since the charges claimed have been raised by the JSPL which was not the party to the PPA. Furthermore, the JSPL had offered its transmission line only on account of the failure of the Appellant to construct its transmission line and such being the case, the same cannot be held against the JSPL.
57. As mentioned earlier, the main contention of the Appellant is that the PPA does not contemplate the transmission charges. This cannot be considered to be a valid argument. As mentioned earlier, in accordance with Clause 7.01 of the PPA, the modalities of using JSPL transmission line was to be decided subsequently and therefore, the same could not be incorporated into the PPA at the time when the parties were entering into an Agreement. The usage of JSPL's transmission lines in the event of failure on the part of the Appellant to make its transmission line ready has been specifically incorporated in the PPA.
58. Thus, it can be seen that as per the PPA, it was certain that transmission charges would be payable by the Appellant and the quantum of the same was to be decided later.

59. The reading of the PPA would clearly show the intention of the parties taking into consideration all the surrounding circumstances as well.
60. It is settled law as held by the Hon'ble Supreme Court in the case of Swarnam Ramachandranand Anr V Arvacode Chakungal Jayapalan (2004) 8 SCC 689 and R N Gosain V Yashpal Dhir, AIR 1993 SC 352 that where one knowingly accepts the benefits of a contract or an order, is estopped to deny the validity or binding effect on him of such contract or order.
61. In view of the above discussions, we conclude that the directions given by the State Commission to the Appellant to pay the transmission charges for the later part of the period namely from 20.6.2008 to 9.3.2009, is perfectly justified. Hence, there is no merit in this Appeal No.216 of 2013 filed by the State Power Distribution Company.
62. Now **let us deal with** the other Appeal which has been filed by Jindal Power Limited & Anr in **Appeal No.262 of 2013**.
63. This Appeal has been filed by both the Jindal Power Limited, the Generating Company as well as the JSPL, the transmission licensee as against the Impugned Order dated 10.7.2013 refusing to allow the claim for the transmission charges for the 1st part of the period namely from 8.12.2007 to 19.6.2008.

64. Although the State Commission allowed the recovery of transmission charges for the period from 20.6.2008 to 9.3.2009 in favour of Jindal Power Limited & JSPL, the State Commission disallowed the recovery of transmission charges from the State Power Distribution Company for the period of 8.12.2007 to 19.6.2008.
65. Since by virtue of the Impugned Order dated 10.7.2013, the claim for recovery of transmission charges for the period from 8.12.2007 to 19.6.2008 made by M/s. Jindal Power Limited and JSPL was denied, the **present Appeal has been filed in Appeal No.262 of 2013.**
66. The ground on the basis of which the transmission charges for the period from 8.12.2007 to 20.6.2008 were disallowed by the State Commission was because of the fact that JSPL did not have the transmission license during that period. Due to this reasoning the State Commission has held that the JSPL being a non licensee could not have give its transmission lines to the Jindal Power Limited for the supply of power to the State Power Distribution Company.
67. The learned Counsel for the Jindal Power Limited and JSPL, the Appellants in this Appeal have raised the following grounds as against the said findings:
- (a) The transmission authorisation was initially granted to JSPL on 2.2.2000 by the Government of

Madhya Pradesh. The said license was subsequently cancelled by the State Commission through its order dated 20.4.2007. In the said order, the transmission license of JSPL was regularised only up to a period 10.12.2003. The JSPL on 24.8.2007 had applied for revival/regularisation of its transmission licence in Petition No.22 of 2007 before the State Commission. In the said petition, the interim order was sought by the JSPL for restoration of its transmission license pending disposal of the petition No.22 of 2007.

(b) After considering the Petition, the State Commission had passed the Interim Order provisionally renewing the transmission license by the Order dated 1.9.2007. The said provisional license continued to be in operation until the main petition was decided by the State Commission through its final order dated 22.5.2008. Therefore, the JSPL had its authorisation to grant its transmission lines for supply of power at the relevant point of time and therefore, the JSPL was entitled to recovery of transmission charges from the State Power Corporation through the Jindal Power Limited.

(c) The State Commission has failed to consider the fact that even though the transmission license was granted to JSPL, pursuant to the orders of the State Commission dated 22.5.2008 with effect from 20.6.2008, even prior to that period of time, the JSPL had been granted provisional license through the Interim Order dated 1.9.2007. Hence, the findings of the State Commission that the Appellants are not entitled to claim transmission charges for the earlier period is wrong.

68. On the above grounds, the Appellants Jindal Power Limited and JSPL in this Appeal have claimed that the JSPL was entitled to claim transmission charges for the earlier period namely 8.12.2007 to 20.6.2008 also during the period in which the transmission lines of the JSPL being the provisional licensee was used by Jindal Power Limited supplying the power to the State Power Distribution Company.

69. This contention urged by the Appellants is stoutly refuted by the State Power Distribution Company as well as the State Commission on the strength of the Impugned Order.

70. Having regard to the above rival contentions, the question which arises in this Appeal is **“Whether the Jindal Power Limited and JSPL, the Appellants are entitled to recover**

the transmission charges from the State Power Corporation for the earlier period of 8.12.2007 to 19.6.2008?

71. Before dealing with this issue, we shall refer to the relevant portion of the Impugned Order dated 10.7.2013:

“We may examine the governing provisions of Act and Regulations which are relevant for this case. The Commission had specified maximum ceiling price and terms and conditions for short-term power purchase of respondent for the said period. The rates specified are applicable at injection point of CSPDCL/CSPTCL sub-station. As per orders and State Grid Code, generating station/captive generating plant is required to bear losses of its dedicated transmission lines. The Commission has given transmission licence to M/s JSPL vide Order dated 22.05.2008 in P No 22 of 2007 (L) and the transmission license is effective from 20.06.2008. So far the period of power supply upto 20.06.2008 the charges had to be borne by power supplier, i.e. JINDAL POWER LIMITED. For the period after 20.06.2008 upto 09.03.2009 the CSPDCL had purchases power by using the transmission lines of licensee JSPL (T). Ideally, CSPDCL should have negotiated the rates with petitioner such that the power purchase cost at delivery point of CSPTCL/CSPDCL system is within maximum ceiling short-term power purchase specified by the Commission. In principle, as JSPL(T) came into existence from 20.06.2008, JINDAL POWER LIMITED or respondent must have sought open access from JSPL(T) for using its line. The Commission had notified open access Regulations in 2005, and applicable Regulations should have been complied by both the parties. JSPL (T) becomes a regulated entity from 20.06.2008. As such, it is entitled

to claim transmission charges for the facility given by it to the parties for the period 20.06.2008 to 09.03.2009”.

72. Thus, the State Commission has come to clear conclusion that since the transmission license had been given to the JSPL only on 22.5.2008 which is effective from 20.6.2008, JSPL is not entitled to transmission charges prior to the date of license.

73. According to the Appellants, the State Commission in the Impugned Order erred in disallowing the transmission charges on the factually erroneous assumption that during the period of 8.12.2007 to 19.6.2008, the JSPL did not have the transmission license but the fact remains that the JSPL was given provisional license for the said period.

74. While dealing with this contention, the relevant facts as pointed out by the learned Counsel for the State Commission have to be borne in mind. They are as follows:

(a) JSPL was initially granted transmission license by the erstwhile Madhya Pradesh State Electricity Regulatory Commission in the year 2000. The said transmission license was granted by the Order dated 2.2.2000 by the State Commission for transmitting the power generated by its captive power plant to its steel plant situated at Raigarh by laying down its own 220 KV transmission line. This

license was granted subject to some conditions. The conditions are as follows:

(i) The transmission line shall be from 110 MW generating plant to the Steel Plant at Raigarh;

(ii) The transmission of power should be exclusively for the licensee's use.

(iii) The power shall not be supplied or sold to anyone else nor shall be utilised for any other purpose.

(b) Originally, the Generating Plant was proposed to be set up at village Tamnar but was set up in Raigarh only. Hence, the transmission line which was laid between Raigarh and Tamnar was used for transmission of power from the power plant at Raigarh to the Company's coal washery at Tamnar.

(c) After formation of Chhattisgarh, the JSPL obtained permission from the State Government of Chhattisgarh for supply of 2 MW power to M/s. Nalwa Sponge Iron Pvt Ltd situated in the village Taraimal by laying dedicated 220 KV line by tapping the transmission line setup in terms of the transmission license. This was approved by the

State Government through the modification dated 6.6.2003 after getting permission from the Chhattisgarh Electricity Board.

(d) In the meantime, the JSPL had set-up an industrial park named as OP Jindal Industrial Park in village Punjipatra and Tumdih of the same Raigarh District after obtaining 'No Objection Certificate' from the State Government for supply of power from its captive power plant to the industries being set-up in the industrial park. The transmission line was made LILO for supply of power to industrial area. The JSPL paid the license fee for the transmission license as required under the orders of the Madhya Pradesh Electricity Regulatory Commission till January, 2003.

(e) After formation of the Chhattisgarh State, the Chhattisgarh State Commission took suo motu cognizance of the default in payment of the annual license fee by the JSPL which was required to be paid as per the Chhattisgarh (Fee and Charges) Regulations. The State Commission then asked the JSPL to pay the requisite annual license fee. At that stage, the JSPL applied for renewal of the transmission license till 10.12.2003, the date on

which the Electricity Act came into force in the State of Chattisgarh.

(f) This Petition was registered by the Chhattisgarh State Commission as Petition No.22 of 2006. In this petition, the State Electricity Board was the Respondent. The State Commission after hearing the parties passed the Order dated 20.4.2007 to the following effect:

(i) The JSPL shall pay the annual fee of Rs.1.50 lacs as prescribed in the Order passed by the Madhya Pradesh State Commission.

(ii) The license be regularised for the period 2003-04 till 10.12.2003, the date on which the Act came into force in the State. Thereafter, the license shall stand cancelled.

(g) Upholding the contention that no license was required by JSPL for a dedicated transmission line for carrying power to the coal washery and to Jindal Industrial Park, the State Commission held that the lines for supply of power to Nalwa plant cannot be treated as part of the dedicated line under the Electricity Act, 2003. Consequently, the

State Commission directed the JSPL to cease the operation of that part of the transmission line which was used for supply of electricity to the Nalwa plant within a period of three months.

(h) Challenging this Order dated 20.4.2007, the JSPL filed Review Petitions before the State Commission regarding ceasing the operation of that part of the transmission line for supply of power to Nalwa Plant within a period of 3 months. The Nalwa Power Plant also filed a Review Petition seeking relaxation on the order dated 20.4.2007 on the same issue.

75. The State Commission after hearing the parties passed the Order on 14.8.2007 in the Review Petition upholding the earlier order dated 20.4.2007 but directed that the supply of power to Nalwa's plant by the JSPL shall continue till the State Electricity Board is in a position to supply power to Nalwa.
76. Being not satisfied with this order, the JSPL filed an Appeal before the Appellate Tribunal against both the main order and the Review Order dated 20.4.2007 and 14.8.2007.
77. This Tribunal while disposing the said Appeal by the order dated 20.5.2009, gave a direction to the State commission to reconsider the petition for grant of license.

78. The relevant portion of the direction given by this Tribunal is as follows:

“The Commission will have to reconsider the Petition for grant of license in the light of our observation that the sanction under Section 28 of the Indian Electricity Act, 1910 survives despite the repeal of the Indian Electricity Act, 1910. The Commission will have to take into account the existence of two tap offs including that of Nalwa and will have to reconsider if Raigarh-Nalwa-Tamnar line needs a license. The Commission will have the liberty to call for a revised application and the JSPL will have the right to submit more details in respect of the liens including those leading up to Nalwa in order to facilitate the consideration of the JSPL’s requirement of an entitlement to a license.”

79. In accordance with this direction, the JSPL filed an Application before the State Commission for grant of transmission license in Petition No.22 of 2007 on 6.9.2007 praying for revival/regularisation of the transmission license granted in favour of the JSPL in the year 2000 by the erstwhile MP State Electricity Regulatory Commission with certain amendments in the license.

80. The State Commission after entertaining the Petition passed an Interim Order. The relevant portion of the Order dated 1.9.2007 is reproduced below:

“Generally, after cancellation of a license it should not be revived and the Applicant should seek a new license, but in view of the circumstances of the case, this application is admitted for hearing as a case for

both revival, and amendment of the transmission licence u/s 18 of the Act and Clause 17 & 18 of our Licence Regulations, as if the licence is in existence.

We accept the plea of the Petitioner for revival of the transmission licence and provisionally review the licence in consideration of the fact that this is the first mega power plant in the private sector in the State being commissioned which will supply 300MW of power to CSEB and benefit the State which faces shortage of power. Since, the procedure for amendment of the licence shall be as per Clause 18 aforementioned, i.e. in the same manner as an application for licence, the provisional revival of the licence may not prima-facie pose any legal problem. However, the amended licence has to be as per the provisions of the Act and our Licence Regulations...

8. The Petitioner has also prayed for interim order for permission to use its existing transmission lines for availing start-up power from CSEB for commissioning the 1000 MW capacity IPP stated to be fully owned by the subsidiary M/s. Jindal Stel & Power Ltd. It is pleaded that the first unit of this is almost ready for commissioning, but it would not be possible to commission it unless start up power is provided by CSEB and the letter has expressed inability to supply start up power through the Petitioner's transmission line as the company is not a transmission licensee.

We, however, note that while the existing (revised) transmission licence is only for point to point transmission between JSPL's generating unit and the coal mines, this is a different transmission line through which they now want to avail start up power from the CSEB's supply. We are informed that this line has been constructed with necessary permission from the state Government under Section 68 of the Act. The Petitioner has not submitted a copy of such

permission along with the application and shall do so as early as possible. We agree to the interim order prayed for subject to the condition that necessary permission of the State Government has been obtained by the Petitioner for erecting the transmission lines.”

81. The crux of the Order dated 1.9.2007 is as follows:

(a) This is the first Mega power plant in the private sector in the State. This will supply 300 MW of power to Chhattisgarh State Electricity Board and benefit the State which faces the shortage of power. Since the procedure for amendment of the license shall be as per Clause 18 of the license Regulations, the provisional revival of the license may not prima-facie pose any legal problem but the amended license has to be as per the provisions of the Electricity Act and the License Regulations.

(b) The Petitioner prayed for the Interim Order for permission to use existing transmission lines for availing start-up power from the State Electricity Board for commissioning 1000 MW capacity IPP which is stated to be fully owned by M/s. JSPL. While the existing transmission license is only for point to point transmission between the JSPL generating unit and the coal mines, this is different transmission line through which the JSPL wants to

avail start-up power from the Electricity Boards' supply.

(c) It is informed that this line has been constructed with necessary permission from the State Government u/s 68 of the Electricity Act. However, the copy of such permission has not been furnished by the State Commission. Therefore, the Interim Order is granted as prayed for subject to the condition that necessary permission of the State Government has to be obtained by JSPL for erecting the transmission lines.

82. The above order with the observations would clearly indicate that the Petition filed by JSPL was treated as a fresh Application for grant of transmission license u/s 14 of the Electricity Act, 2003.

83. This order was passed only in respect of the transmission lines falling in the geographical area of Raigarh and Ghargoda Tahsils of Raigarh District.

84. The details of the transmission lines are as follows:

(a) 220 KV Double Circuit from JSPL to Jindal Industrial Park Length-23.7 Kms.

(b) 220 KV Double Circuit from OP Jindal Industrial Park to Jindal Power Limited Length-19.5 Kms.

(c) Apart from these two 220 KV lines, there are other 33 KV lines. The first from JINDAL POWER LIMITED to Coal Washery of JSPL which is part of dedicated supply line of JSPL for supply of power from its captive generating plant to the coal washery for captive use and the second from JSPL to two intake wells, also of similar nature, have also been included in the application.

85. So, this order would relate to these lines. Thereafter, by the Order dated 27.2.2008, the State Commission passed the Order proposing to issue transmission license with respect to the following lines:

(a) 220 KV double circuit transmission line from JSPL to OP Jindal Industrial Park, Punjipatra-23.7 Kms and;

(b) 220 KV double circuit transmission line from OP Jindal Industrial Part, Punjipatra to Jindal Power Limited – 19.5 Kms.

86. This order dated 27.2.2008 relates to these lines. The State Commission finally granted the transmission license to JSPL

by the Order dated 22.5.2008 with reference to the above mentioned lines.

87. This order has clearly stated that this will come into effect only from 20.6.2008. The operative portion of the order dated 22.5.2008 is reproduced below:

“7. In view of the above discussions we reiterate our earlier proposal and decide to grant a transmission license to the applicant for transmission lines as given at Para 1 above, subject to the provisions of the Act and the standard terms and conditions, as laid down in the License Regulations. A copy of the license shall be forwarded to the State Government of Chhattisgarh, the Central Electricity Authority and Collector, Raigarh district as required under sub Section (7) of Section 15”.

88. So, this final order would indicate that the State Commission as per the earlier proposal decided to grant transmission license subject to the provision of the Act and standard terms and conditions as laid down in the license Regulations.

89. Thus, it is clear that the State Commission has ultimately granted the transmission license to M/s. JSPL through the order dated 22.5.2008 with reference to the transmission lines in question indicating that the order would come into effect only from 20.6.2008.

90. In this context, it is to be noticed that the JSPL has not been a transmission licensee at the time of execution of the PPA

dated 23.3.2007. As such, the claim for transmission charges till the license is granted cannot be said to have arisen under the said PPA. Till 10.12.2003 on which date the 2003 Act came into force in the State of Chhattisgarh, the JSPL has been a transmission licensee as per grant of license dated 2.2.2003 issued by the MP Electricity Regulatory Commission. It's license has been revoked on the account of failure on the part of the JSPL to deposit the subsequent annual license fee in accordance with the terms of license as referred to in the Order dated 20.4.2007 passed by the State Commission.

91. As per this order, the said license stood cancelled thereafter.
92. Thus, a fresh transmission license has been granted to the JSPL only through the order dated 22.5.2008.
93. In view of the above, the JSPL cannot claim for the transmission charges for the period from 8.12.2007 to 19.6.2008 as the JSPL did not have the valid authorisation to give its transmission lines for supply of power to Chhattisgarh State Power Corporation.
94. On that ground, the State Commission correctly disallowed the recovery of transmission charges for the period 8.12.2007 to 19.6.2008 though the State Commission allowed the transmission charges for the subsequent period during which the JSPL obtained transmission license.

95. Therefore, this Appeal as against the Impugned Order with reference to disallowance of the transmission charges for the earlier period which is perfectly justified has no merits.

96. Consequently, we have to conclude that there is no infirmity in the Impugned order and as such the same is liable to be confirmed.

97. **Summary of Our Findings:**

- (a) **State Power Distribution Company is liable to pay transmission charges for use of transmission system of M/s JSPL, a transmission licensee for the period 20.6.2008 to 9.3.2009.**
- (b) **JSPL was granted transmission license by the State Commission only w.e.f.20.6.2008. Hence, no charges are payable by the State Power Distribution Company prior to 20.6.2008 i.e. prior to grant of the transmission licence.**

98. In view of the above, both the Appeals are dismissed as devoid of merits.

99. However, there is no order as to costs.

100. Pronounced in the Open Court on this **30th day of June,2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 30th June, 2014

√REPORTABLE/~~NON-REPORTABLE~~