

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 103 of 2011

Dated: 11th Nov, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,

In The Matter Of

M/S. Sai Chemicals Private Limited.,
8-B Part Industrial Estate,
Bhillai, Distt-Durg, Chhattisgarh-492 014

... Appellant(s)

Versus

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

- 2. Chhattisgarh State Load Despatch Centre,**
Khedamara, Bhillai,
Chhattisgarh

Now relocated at:
Daganiya, Raipur-492 014

....Respondent(s)

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

Counsel for Respondent(s):Mr. M G Ramachandran for R-1

Mr. Anand K Ganesan for R-1
Ms. Sneha Venkataramani for R-1
Ms. Swapna Seshadri for R-1
Mrs. Suparna Srivastava for R-2
Mr. Avijit Bhushan for R-2
Mr. Sudhir Kathpalia for R-2

JUDGMENT

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

1. M/s. Sai Chemicals Private Limited is the Appellant. Chhattisgarh State Electricity regulatory Commission (State Commission) is the first Respondent. State Load Despatch Centre is the second Respondent. The Appellant has challenged the order dated 5.10.2010 passed by the State Commission.
2. Aggrieved over the directions issued by the State Commission to the Appellant to make a payment of wheeling and transmission charges for use of intra-state transmission system for inter-state transmission of electricity generated from its bio-mass based generating plant, the Appellant has filed this Appeal. The short facts are as follows.
 - (a) The Appellant has setup an 8 MW Bio-mass based power producer in the State of Chhattisgarh. It executed PPA dated 7.5.2008 with the distribution Company for supplying 1.5 MW power. The Appellant is free to sell remaining 6.5 MW power to any person.
 - (b) The State Load Despatch Centre (R-2) is responsible for keeping the accounts of the quantity of the electricity transmitted through the State Grid and collecting the fees and charges prescribed by the State Commission.
 - (d) On 22/5/2008, the State Commission notified the CSERC (Terms and Conditions for determination of generation tariff and related matters for electricity generated by plants based on non-conventional source of energy) Regulation 2008 (in short 2008 Regulation). These regulations provide a special dispensation to power plants based on non conventional source of energy.
 - (e) The Appellant sought permission from the State Load Despatch Centre (R-2) for sale of electricity to 3rd party by way of short term open access. While open access was granted and sale of electricity to the third party was permitted to the Appellant, the SLDC (R-2), proceeded to recover the open access charges including the wheeling and transmission charges.
 - (f) Aggrieved over this, the Appellant filed a Petition before the State Commission under section 86 (1) (e) and Section 142 of the Act praying for the action as against the SLDC for non compliance of the Commission's 2008 Regulations by charging and collecting excess open access charges from the Appellant for wheeling its power through the State Grid.

- (g) The State Commission after hearing the parties, dismissed the said petition on the ground that the Regulations 2008 are for determination of tariff for non-conventional sources of energy for sale to distribution licensee and covers only intra State supply and since the Appellant has been selling the power generated from its bio-mass base plant to the parties outside the State of Chhattisgarh the provisions of tariff Regulation 2008 will not be applicable to the Appellant.
 - (h) Being aggrieved over this order, the Appellant has filed the present Appeal.
3. The main issue raised by the Appellant in the present Appeal is that tariff Regulations 2008 are applicable to the Appellant and as such the Appellant is liable to pay only the beneficial open access charges as per the said Regulations and therefore, the act of the SLDC (R-2), collecting the excess open access charges is liable to be proceeded with under section 142 of the Act. The Appellant submissions on this point in brief are as follows:
- (a) The Appellant being a non conventional energy based power plant for sale of power generated by its power plant should be governed by the Chhattisgarh Electricity Regulatory Commission (Terms and Condition for Determination of Generation Tariff and related matters for Electricity generated by plants based on non-conventional source of energy) Regulations, 2008. Therefore, the sale is chargeable only to transmission/wheeling charges as prescribed in Regulation 7 of these Regulations.
 - (b) There is no provision for levy of charges other than wheeling charges while undertaking 3rd party sale in the specific dispensation provided for the non conventional energy producers through the adjudicatory process before the State Commission.
4. On these two points, the State Commission while rejecting the contentions of the Appellant specifically held in the impugned order that the tariff Regulations 2008 and the earlier orders passed by the State Commission and this Tribunal are in relation to sale of power generated using non conventional source of energy inside the State of Chhattisgarh but in the present case, the Appellant is selling the power outside the State of Chhattisgarh and therefore the concessional rate regarding transmission and wheeling charges under Regulation 2008 can not be made applicable to the Appellant.
5. On the strength of these findings, the Learned Counsel for the State Load Despatch Centre (R-2) submitted that there is no infirmity in the findings of the State Commission since the tariff order referred to by the State Commission in the impugned order has prescribed the transmission and wheeling charges as also operating charges are applicable only for the inter State sale of power to 3rd party

under 2005 Regulation and therefore, the Respondent-2 has billed the impugned charges rightly as per the tariff order. Thus, according to the Appellant, 2008 Regulations alone would apply whereas according to the R-2, 2005 Regulation alone would apply.

6. In the light of the above contention, the following question would arise for consideration:

“Whether any restrictions prescribed in the orders of the State Commission or the 2008 Regulations that the dispensation provided to open access to the customer based on non conventional source of energy are applicable only in case sale of electricity is intra state and not applicable to inter State ?”

7. Before dealing with this question, it would be appropriate to refer to the findings rendered by the State Commission in the impugned order in which it is held that the Tariff Regulations 2008 are special Regulations covering only intra state supply and that the inter-state supply would not be governed by these Regulations. The relevant portion of the impugned order in this regard is as follows:

“5. *Before examining the case on merit, we would like to go to the history of the related orders and Regulations issued by this Commission and Hon’ble ATE. The Chhattisgarh Biomass Energy Developers Association filed a petition before this Commission for review and revision of tariff structure, wheeling charges and other policy issues as laid down by the Government of Chhattisgarh vide notification No.38/N.C/E-D/2002 dated 08.04.2002 and its amendment as per notification No.33/N/E-D/2002-03 dated 04.02.2003. These notifications of the Government of Chhattisgarh were related to the promotion of the power generation through the renewable energy source and its utilization in the State of Chhattisgarh. This petition was registered as petition No.7 of 2005 and an order on this petition was passed by this Commission on dated 11.11.2005. The Petitioner association and separately 4 members of association filed an appeal to the Hon’ble ATE challenging the Commission’s order dated 11.11.2005 for seeking modification in the order in respect of tariff, wheeling and other charges and some other reliefs. By their judgement in order dated 07.09.2006 passed in appeal No.20 of 2006, the Hon’ble ATE was pleased to set aside some of the parts of the order dated 11.11.2005 of this Commission and remanded the cases back to the Commission for review. A modified order to that extent on petition No.7 of 2005 was passed by this Commission on dated 15.01.2008. Aggrieved with order dated 15.01.2008 the Chhattisgarh State Power Distribution Company filed an appeal before Hon’ble ATE as appeal No.61 of 2008. Order on this appeal was passed by the Hon’ble ATE on 6.11.2009 along with appeal No.48 of 2007. Thus, it is apparent that order of this Commission*

dated 11.11.2005, 15.01.2008 and orders of Hon'ble ATE dated 07.09.2006 and dated 06.11.2009 are actually related to petition No.7 of 2005 registered with this Commission, which is in fact related to power generated through non conventional source of energy and its use within the State. Further, on compliance of the orders of Hon'ble ATE dated 07.09.2006 passed in Appeal no. 20 of 2006 in which there was a specific direction for framing of Regulations for determination of the tariff for procurement of power by Distribution licensee from non-conventional energy source, CERC (Terms and Conditions for determination of generation tariff and related matters for electricity generated by plants based on non-conventional sources of energy) Regulations, 2008 was notified by this Commission on dated 22.5.2008. The Respondent has argued that the Petitioner is pleading for the charges related to 5 MW of the power which, it is exporting out of the State under inter-State short term open access for which the separate provision for billing of transmission, wheeling and operating charges has been made in the tariff order issued by this Commission for utilization of the State Grid. It is also pleaded by the respondent that since the petitioner is not utilizing the 5 MW power in the State but selling outside of the State by availing inter-State open access, hence they are not entitled for billing of 3% wheeling charges and also not liable to get exemption of payment of transmission and wheeling charges.

Thus, it is evident that all the above orders and Regulations issued by this Commission and also the orders of Hon'ble ATE referred to by the Petitioner relates to the power supply by the generators based on non-conventional source of energy and its utilization in the State. Since the 5MW of power on which the petitioner is asking for relaxation is being sold outside the State through inter-State open access, we find that the petitioner is not entitled for the relaxations pleaded for, and the petitioner is liable to pay transmission and wheeling charges and operating charges as fixed by this Commission in tariff order. Since we do not find the case suitable for taking action under Section 142 of the act, we decide not to proceed against respondent under section 142 of the act. We order accordingly”.

8. So, the above observations would make it clear that the earlier orders passed by the State Commission and the Regulation 2008 would relate to the intra State supply only and therefore, the Petitioner/Appellant is liable to pay transmission, wheeling charges and operating charges as fixed by the State Commission in the tariff order and as such, the Petitioner/Appellant is not entitled for any relaxation sought for.
9. The main contention urged by the Appellant before the Commission is that in accordance with the earlier orders of the State Commission dated 11.11.2005 and

15.8.2008 and the judgement of the Tribunal dated 6.11.2009 and in accordance with the provisions of the Electricity Act, 2003, National Electricity Policy and National Tariff Policy, the generation of power using non-conventional source of energy must be incentivized and therefore, the tariff regulations 2008 providing for the beneficial charges must be applied to the Appellant's plant as well.

10. As mentioned above, this contention is rejected by the State Commission rightly in our view in the light of the objects and reasons of the Tariff Regulations 2008.

11. Let us now refer to the statements of the objects and reasons of Tariff Regulations 2008 which is as follows:

*".....These regulations are being framed for the purpose of determination of tariff for electricity generated by biomass based generation plants and small hydel projects, the two non-conventional sources of electricity which have scope in the State of Chhatisgarh, **for supply of electricity to distribution licensees**. Wind and solar energy are not covered in these regulations as presently the scope for such sources is not established in the State, and secondly the terms and conditions of tariff determination of generation of such sources will be different from biomass based/hydel plants. In case the scope for wind energy and solar energy is established these will be added on to these Regulations. Although the Commission has passed comprehensive orders on the promotion of biomass based generating plants as also small hydel projects, separately, these regulations are being issued in compliance of the orders of the Hon'ble Appellate Tribunal for Electricity dated 07.09.2006 passed in appeal No.20 of 2006, in which there is a specific direction for framing of regulations for determination of tariff for procurement of power by distribution licensee from non-conventional energy sources. Hence these Regulations" (Emphasis supplied)".*

12. Further, the Preamble of the Tariff Regulations, 2008 reads as under:

"No.28/CSERC/2008-In exercise of powers vested under section 61 read with Section 181 (zd) of the Electricity Act, 2003 (36 of 2003) and all powers enabling it in that behalf, the Chhattisgarh State Electricity Regulatory Commission hereby makes the following Regulations specifying the terms and conditions of tariff for small hydro electricity generating stations and electricity generating stations based on bio-mass for the purpose of sale of power to distribution licensees".

13. The above objects and reasons as well as the preamble to Tariff Regulations, 2008 would clearly indicate that the tariff regulations 2008 are intended to be applicable only in cases where the electricity generated from the non-conventional source is sold by the generator to the distribution licensees in the State of Chhattisgarh. This is consistent with the objective of the promotion of non conventional source of energy and supply within the State.
14. Let us now refer to the order dated 11.11.2005 passed by the Commission which has been heavily relied upon by the Appellant which is as under:

“.....Considering that promotion of generation from renewable energy sources including bio-mass, is in the overall interest of the State and as a promotional measure the Commission decides that the transmission and wheeling charges payable by biomass plants shall be 6% of the energy input into the system irrespective of the distance. Other than this charge, they shall not be liable to pay any transmission charges or wheeling charges either in case or in kind”.

15. Similarly, the judgement by this Tribunal in Appeal No.48 of 2007 and 61 of 2008 is also relied upon by the Appellant. The observations made by this Tribunal is as follows:

“ 25) Wheeling charges has been fixed at 3% for bio-mass energy producers. It is contended that such charge is not sufficient to take care of transmission losses and so the appellant is not being compensated for the loss of energy in the process of wheeling. The objection of the appellant is not sustainable when we take into account the practical situation. The Appellant has mentioned average loss of energy to the extent of 10%. However, this estimate is the estimate of pooled losses. The energy produced by the smaller units of 2 MW to 15 MW capacities is sold to consumers which are located within short distances from the generating plant. It is not accepted that in transmitting energy within such short distances the loss in transit will be to the extent of 10%. The Commission fixed the wheeling charge at 3% for the respondents keeping in view this particular factor. In our earlier judgements also we had directed that the wheeling charge for the respondents be limited to 3%. The Commission as per direction of the Supreme Court has considered the plea of the Appellant and for good reasons has fixed the wheeling charges for the respondent biomass electricity generators at 3%. In our view the wheeling charge is not so unreasonable as to warrant interference. Accordingly, the challenge to this extent is rejected. For the hydel producers the wheeling charges fixed is 6%. For the same reasons as above, we reject the challenge to the wheeling charge for hydel generators”.

16. The above observations made by both this Tribunal as well as by the Commission would indicate the promotion of renewable energy source and the beneficial concession to the charges payable to biomass energy plant is in overall interest of the State. Much emphasis was laid on the observations made by the Tribunal on “the short distances” . The reference made by the Tribunal on “Short distances” for transmission of energy is with respect to the transmission within the State and not outside the State. Therefore, the Appellant as of a right cannot claim the benefit of Tariff Regulations 2008 for sale of power outside the State of Chhattisgarh.
17. As indicated above, the object and reasons as well as the preamble to the 2008 Regulations framed by the State Commission, specifically stated that the Regulations were applicable for the purpose of sale of power to distribution of licensee which necessarily had to be within the State.
18. Now let us deal with the 2005 Regulations which is said to be applicable to the Appellant as pointed out by the Learned Counsel for the Respondent. Before dealing with said Regulations it would be proper to look into the definition for open access. Open Access is defined in Section 2 (47) of the 2003 Act which is as follows:

“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”.
19. Section 39 (2)(d) enjoins the State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. A similar obligation is cast on the transmission licensee in terms of Section 40 (c). Further, Section 42 (2) mandates the State Commission to introduce open access in such cases as may be specified within one year of the appointed date. In addition, the State Commission is also enjoined under Section 86 (1) (c) to facilitate intra State transmission and wheeling of electricity.
20. In exercise of the power conferred by the 2003 Act for the purpose of facilitating intra-State transmission, the state Commission has framed 2005 Regulations which came into force on 26.7.2005. Regulation 2 of the said Regulations provides as follows:

“These regulations shall apply to open access customers for use of intra-state transmission system and/or distribution systems of licensees in the State, including such system when it is used in conjunction with inter-State transmission system”.
21. This clause would make it clear that the 2005 Regulation would apply even when intra-state systems are in use in conjunction with inter-state transmission system.

22. According to the Appellant, his case is of a bio-mass based generating station seeking open access. Therefore, 2008 Regulations being special enactment meant for non-conventional sources of energy would be applicable. Let us deal with this contention of the Appellant.
23. The contention of the Appellant is misplaced. The present case before us is related to Open Access to the transmission and distribution systems of licensee. Accordingly, 2005 Regulations dealing with Open Access in particular is the special enactment and 2008 Regulations dealing with fixation tariff of Non-conventional sources of Energy is general enactment. Therefore, provisions of 2005 Regulations, being a special enactment would prevail over provisions of 2008 Regulations.
24. Regulation 4 of 2005 Regulations prescribes for eligibility for open access which is as follows:

“4. Eligibility for Open Access

- (1) *Subject to the provisions of these regulations, open access customers shall be eligible for open access to the intra-state transmission system of the STU or any transmission licensee and intra state distribution system of the CSEB or any distribution licensee.*
- (2) *Such access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with these Regulations”.*

25. Thus, use of open access is available on payment of charges as determined by the State Commission. Regulation 11 of 2005 also provides for the charges of open access which says that the licensee providing open access shall levy such fees or charges as may be specified by the Commission from time to time. Regulation 11 is as follows:

“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:

(1) 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:

(a).....

(b) The transmission charges payable by a long term customer for the use of intrastate transmission system shall be calculated in accordance with the following methodology:.....

(2) Wheeling Charges- The Wheeling charges for use of the distribution system of a licensee shall be regulated as under.....

(3) Operating Charge-

(a)

(b) An operating charge as determined by the Commission from time to time shall be payable by a short term customer to the SLDC.....

(4) Imbalance (UI) charges-.....

(5) Reactive Energy Charges-.....

(6) Surcharge-

(a)

(b)

(i)

(ii).....

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

(7) Additional Surcharge-.....

(8) Interconnection Charges.....

(9) Connectivity Charges-.....

(10) Any other charges, in cash or kind as may be specified by the Commission shall be payable by the open access customer.

(11) In case the open access customer uses inter-state transmission system and services of Regional Load Dispatch Centre and State Load Dispatch Centre of any other State, the transmission charges of CTU and STU of the other State and service charges of Regional Load Dispatch Centre and State Load Dispatch Centre

of other State shall be payable by such customer in addition to the charges fixed under these Regulations”.

26. In pursuance of the above provisions of 2005 Regulations, the State Commission has passed the order dated 15.2.2006, determining the transmission charges, wheeling charges, cross subsidy charges and other charges under open access. The perusal of the order dated 15.2.2006 indicates that all the stake holders including the bio-mass energy producers have participated in this process and the said order has been passed by the Commission only after considering the common suggestions made by the parties. It cannot be disputed that the charges determined payable during the financial year 2006 to remain in force till their revision. Subsequently, the Commission carried out such revision in tariff orders for the Financial Year 2008 and 2010.
27. It cannot be disputed that this tariff order has been passed following detailed procedure of public hearing and participation of stake holders.

Summary of Our Findings

28. **In view of the above, we are of the opinion that the open access charges have been rightly levied by the State Load Despatch Centre on the Appellant under 2005 Regulations. The State Commission also has rightly found that no special dispensation can be claimed by the Appellant based on 2008 Regulations. In this case, as mentioned earlier for the power sold outside the State by the Appellant, 2008 Regulations will not apply but only 2005 Regulations which are already in force would apply making the Appellant liable to pay open access charges fixed there under by the State Commission.**
29. In the light of the discussions made in the above paragraphs and the summary of our finding, we do not find any merit in this Appeal. Accordingly, the Appeal is dismissed. However, there is no order as to cost.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 11th Nov, 2011

REPORTABLE/~~NON-REPORTABLE~~