

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 34 of 2006

Dated this 11th day of May 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

M/s Bhushan Limited
J.K. Millennium Centre, 6th Floor, 46-D
Jawaharlal Nehru Road, Kolkatta – 700071

.....Appellant

Versus

1. West Bengal State Electricity Board
Through Chief Engineer (Commercial)
Vidyut Bhawan, 8th Floor, Block DJ
Section II, Bidhar Nagar, Kolkatta – 700091
2. West Bengal State Electricity Regulatory Commission
Poura Bhawan, 3rd Floor, Block FD 415-A, Bidhannagar
Kolkatta – 700106
3. Eastern Regional Load Despatch Centre
14, Golf Club Road, Tollygunge
Kolkatta – 700033
4. West Bengal State Load Despatch Centre
Danesh Sheikh Lane, Andul Road, Howrah

.....Respondents

For Appellant

M/s M.G. Ramachandran, Ms. Taruna Singh Baghel
and Saumya Sharma – Advocates

For Respondents

M/s Pratik Dhar and C K Rai Advocates for
Respondent No.2
Mr. P K Bagchi, CE (Commercial) and Mr.P Gupta,
CE (CLD) for WBSEB

JUDGMENT

The present appeal has been preferred by the appellant herein, seeking for modification of the order passed by The West Bengal Electricity Regulatory Commission, herein after referred as the State Commission, on 21.1.2006 read with its order dated 28.11.2005, in the matter Miscellaneous Application for grant of open access for the use of West Bengal State Electricity Board's transmission network for wheeling power from Kolaghat in West Bengal to the appellant's plant in Bhangihatti and for fixation of transmission charges and other incidental reliefs.

2. Brief facts leading to the present appeal could be summarized. The appellant has set up a Steel Cold Rolling Galvanizing and Pipe Plant at village Bhangihatti in Hooghly district and it is an existing consumer of West Bengal State Electricity Board (WBSEB) with a connected load of 14.9 MVA and a contract demand of 14.9 MVA for its steel plant. The appellant has located a Captive Power Plant (CPP) at Rengali in Sambalpur District in the State of Orissa. The appellant applied for open access for wheeling of electricity from its CPP in the State of Orissa to the steel plant in West Bengal through the inter-State transmission system of Orissa Power Transmission Corporation, Power Grid Corporation of India and West Bengal State Electricity Board. The appellant has already secured the required permission from the Orissa Regulatory Commission. The appellant applied to the WBERC seeking open access. It is an inter-State transmission as defined in Section 2(36) of The Electricity Act 2003. The appellant who had already secured the permission of Orissa Power Corporation for transfer and wheeling of electricity through its system up to the inter-connection point of power grid in the State of Orissa and the entire terms and conditions have been settled in this respect.

3. With respect to the transmission system of power grid the appellant has to follow the procedure and it is claimed that the appellant had already complied with the terms and conditions prescribed by The Central Electricity Regulatory Commission, the Central Transmission Utility and Eastern Regional Load Despatch Centre. The appellant has

already agreed to abide by the terms and conditions for the said portion of the transmission by powergrid. Thereafter, the appellant approached the WBSEB for open access for wheeling of power from the interconnection point of power grid in the State of West Bengal to Bhangihatti, where it has located its plant. The appellant was advised by the WBSEB to secure clearance of the WBERC. While the application was pending, the WBERC had notified its Regulations, namely, (i) WBERC (Terms and Conditions for Open Access) Regulations 2005 and (ii) WBERC (Terms and Conditions for Open Access – Schedule of Charges; Fees & Formats for Open Access) Regulations 2005.

4. After considering the application for the open access, WBERC by its order dated 28.11.2005 held (i) that the appellant is a captive generator and (ii) that for use of captive energy that the appellant is entitled to open access subject to terms and conditions contained in the Regulations framed by it, (iii) that WBSEB shall examine the availability of transmission capacity, (iv) that wheeling charges for transmission over WBSEB system shall be as per the tariff order to be issued by the State Commission from time to time, (v) that WBSEB shall act as the nodal agency, (vi) that the appellant shall be treated as an open access customer on “long-term” basis, (vii) that the appellant shall cease to be a consumer of WBSEB in regard to its connected load of 14.9 MVA, (viii) that the appellant shall discontinue its consumer relationship with WBSEB and (ix) that the terms relating to energy accounting with respect to electricity transmitted to the appellant shall be settled between WBSEB and the appellant.

5. After the passing the said order on 28.11.2005, the State Commission suo motu initiated proceedings to correct its earlier order and Commission also directed the appellant to submit a note on the route of transfer of power. The said requirement was complied with by the appellant. The appellant further submitted that it shall also be allowed to continue as a consumer with WBSEB and that the Commission may settle the issue relating to accounting.

6. By order dated 12.1.2006, the Commission rectified the order its dated 28.11.2005. By the said rectification, the Commission held that the transmission being

an inter-State transmission, the Regulations framed by The Central Electricity Regulatory Commission will govern. However, the State Commission reiterated its conclusion that the appellant shall discontinue its relationship with WBSEB, as a consumer. Being aggrieved by the said two orders, the appellant has preferred the present appeal in so far as they are against the appellant.

7. Heard Mr. M G Ramachandran learned counsel who appeared for the appellant Mr. Pratik Dhar Advocate appeared for the West Bengal State Electricity Regulatory Commission while the representatives of the WBSEB and the representatives of the concerned Load Despatch Centre also took part in the hearing before us. The appellant submitted written arguments.

8. In this appeal, the following points arise for consideration:-

- i. Whether the direction of the Regulatory Commission that the appellant shall cease to be a consumer of the WBSEB as a condition for availing open access is sustainable in law?
- ii. Whether there could be a direction to the applicant to sever its consumer relationship with the area Discom, for grant of open access?
- iii. How the energy accounting should be made and settled for the transmission of electricity through open access? What is the term and procedure to be followed in energy accounting?

9. Concedingly open access from the appellant's CPP in Orissa to its plant in Bhangihatti in West Bengal is an inter-State transmission, as defined in Section 2(36) of The Electricity Act 2003. There is no controversy with respect to the remaining portion of the transmission facility within the State of Orissa as well as the Powergrid and already open access been approved. Only in respect of the section which falls within the State of West Bengal an application was moved by appellant before the State Commission.

10. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff in regard to open access and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), 42 and Section 49 of The Electricity Act 2003 as well as by losing sight of the object behind the said provisions.. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to Sections 42 (4) and see 62 of The Act. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area Discom / distribution licensee.

11. In law and as per statutory provisions so long as the appellant desires to continue its relationship with the area distribution licensee and agree to abide by the stipulations, there can be no direction or compulsion to sever its relationship as a consumer. In the present case, the appellant as already pointed out, had agreed to comply with the terms and conditions of supply and is ready to remit all the charges prescribed as a consumer of electricity to WBSEB. It is rightly pointed out that the appellant has not sought for any variation with respect to its being a consumer of WBSEB for the connected load of 14.9 MVA nor it has sought for any reduction in demand charges or energy charges or other charges on account of open access being allowed in its favour.

12. Taking up the first point for consideration, we are to point out that Sub-Section (2) of Section 42 of The Electricity Act 2003 mandates the State Commission to introduce open access in such phases and subject to such conditions, including cross subsidies and other operational constraints having due regard to all the relevant factors including such cross subsidies. Sub-Section (4) of Section 42 provides that where the State Commission permits a consumer to receive supply of electricity from a person other than the distribution licensee of its area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of its

obligation to supply. Nothing in the The Electricity Act 2003 which either directs or mandates that a consumer who applies for open access should cease to be a consumer of the area Discom.

13. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of area Discom so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that WBSEB has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Bhangihatti is connected to WBSEB system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003.

14. As already pointed out, Section 43 mandates that the area licensee shall supply power so long as the consumer remits the charges prescribed as per Tariff Notification and as provided in Section 45 of The Electricity Act 2003. Section 48 enables the distribution licensee to impose certain additional conditions when open access is permitted.

Section 49 which has a bearing reads thus:-

“49. Agreements with respect to supply or purchase of electricity.- Where the Appropriate Commission has allowed open access to certain consumers, under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.”

Section 49 of The Electricity Act 2003 provides for an agreement being entered between an open access consumer and the distribution licensee for supply or purchase of electricity on such terms and conditions, including the tariff as may be agreed upon by them. Section 56 of The Electricity Act 2003 provides for disconnection of supply.

15. On a careful consideration of various provisions in The Act, we find that there is no provision in the Act which mandates that the consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because open access is applied and allowed. The appellant has unequivocally made it clear that the appellant is willing to pay the charges prescribed by the area distribution licensee including demand charges, energy charges and other charges for the connected load of 14.9 MVA in the same manner as in the case of identically placed industrial consumers in the area and the appellant is ready and willing to remit the charges payable to the area distribution licensee.

16. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing relationship with the area distribution licensee. Section 49 of The Act provides for an agreement being entered into when open access is allowed to consumers for supply or purchase of electricity on such terms and conditions including tariff as may be agreed upon. We do not find any justifiable reason for the direction issued by the Regulatory Commission in this respect. The West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 also do not impose such a condition. In fact, Regulation 12 of the said Regulations provides for entering into a commercial agreement with a distribution licensee and abide by various conditions relevant thereto. Regulation 13.4 also in no way provides for such a direction.

17. We are unable to appreciate the view of the Commission that the appellant cannot demand supply of back-up power from the WBSEB as a matter of right even though nothing could prevent the appellant to enter into a separate agreement for supply of back-up power on terms and conditions mutually acceptable to both. None of the provisions of The Act or the Rules framed thereunder or the Regulations framed by the WBERC has been placed before us to show that the appellant should sever its relationship as a consumer with WBSEB on its being granted open access. So long as the appellant is agreeable to pay the charges prescribed in this behalf to an identical industry, the

appellant, an existing consumer cannot be directed to sever its relationship with area distribution licensee. The construction placed on Section 42 (3) of The Electricity Act runs counter to the very section. The object and scope of the provision has been lost sight and as an existing consumer the appellant could continue its relationship. Such a construction cannot be appreciated as it runs counter to plain meaning of the provisions of the Act.

18. All that Section 42 (3) provides that a distribution licensee shall be a common carrier providing non-discriminatory open access when the consumer seeks for open access and wheeling power in accordance with the Regulations made by the State Commission. On the first point, we hold that the WBSEB Commission has no justification nor authority nor warrant nor jurisdiction to direct the appellant to sever its status as a “consumer” with WBSEB. Such a condition is not contemplated to be imposed while allowing an application for open access in terms of The Electricity Act 2003 or Regulations framed there under either by CERC or WBERC.

19. Taking up the second point for consideration, concedingly the open access sought for is an inter-State transmission as it involves in the present case, the transmission lines of the Orissa Electricity Board, Orissa Transmission Corporation, the Power Grid Corporation and at the end, the WBSEB transmission system. Section 2 (43) defines “inter-State transmission” and the present transmission from CPP to the appellant’s plant is an inter-State transmission. Section 2(36) is an inclusive definition. The definition reads thus:-

“2(36) “inter-State transmission system” includes-

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.”

The transmission is an inter State Transmission and there is no dispute in this respect.

20. The inter-State transmission is governed by the Regulations framed by The Central Electricity Regulatory Commission and there is no dispute in this respect. Sub-Section (2) of Section 38 also provides that the Central Transmission Utility shall provide open access to any consumer under Sub-Section (2) of Section 42 on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission.

21. Section 79 enumerates the functions of the Central Commission. In exercise of powers conferred under Section 178, the CERC has already framed The Central Electricity Regulatory Commission (open Access in inter State Transmission) Regulations 2004 and the same are referred as “Central Regulations”. In terms of the Central Regulations anything less than 25 years is considered to be a short-term open access, said Regulations alone apply to the case on hand. Therefore, the appellant has to be treated as a short-term consumer under the Central Regulations. To treat the appellant otherwise in terms of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 and the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access – Schedule of Charges, Fees & Formats for Open Access) Regulations, 2005 is not permissible nor it could be sustained in law. The said Commission having taken the view that in regard to wheeling, the Central Regulations alone will apply, it automatically follows that the status of the appellant either as a “short-term” or “long-term open access” should also be decided in accordance with the Regulations framed by the Central Commission. The contrary view taken by the Commission cannot be sustained and liable to be interfered. We have already held that the Regulations framed by the CERC with respect to the inter-State open access sought for is applicable and accordingly the appropriate authority shall decide the status of the appellant in terms of the said Regulations and not in terms of the Regulations framed by the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005.

22. Taking up the last point, viz., “Energy Accounting”, it is represented by the learned counsel for the appellant that so far it has not been possible to finalize the energy accounting issues on a bilateral basis with the WBSEB. It is admitted that the power from the appellant’s captive plant is being transferred from one State to the other through open access. Regulations 17 to 21 of The Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations 2004 and The Indian Electricity Grid Code (IEGC) notified by the Central Commission are applicable and it governs the “Energy Accounting” of such open access in Inter-State transmission.

23. Regulation 21, of The Central Electricity Regulatory Commission (Open Access on inter-State Transmission) Regulations 2004 as amended by notification, dated the 21st February, 2005), provides that with respect to the drawal of reactive energy shall be governed by regulations applicable in the State. The said Regulation reads thus :-

21. “The reactive energy drawals and injections by the embedded customers shall be governed by the regulations applicable within State concerned”.

In this respect it is pertinent to note that WBERC (Terms and Conditions for Open Access – Schedule of Charges, Fees and Format for Open Access) Regulations 2005 notified on 21st September, 2005, prescribe the following in the matter of reactive energy charges, while providing open access for transfer of power through West Bengal State Transmission System.

24. The charges payable towards energy accounting and system to be adopted is prescribed by Regulations. The material portion of WBERC (Open Access) Regulations reads thus:

“4.3. Reactive Energy Charges:-

If the voltage at the point of drawl is below 97% of the normal voltage, the open access customer shall pay @ 6 paise/kVARh to the concerned licensee for drawl of reactive energy at the drawl point. If at the injection point the voltage is higher than 103% of normal voltage, the open access customer shall pay @ 6 paise/kVARh to the concerned licensee for injection of reactive energy at the point of injection. Both

drawl and injection of reactive energy shall be measured at 15 minutes time block along with voltage.”

It will be therefore, reasonable for the licensee to charge for the reactive energy as per clause 4.3 of the West Bengal Electricity Regulatory Commission (Terms and conditions for Open Access – Schedule of charges, Fees and Formats for Open Access) Regulations, 2005.

25. As far as accounting for active energy is concerned it is relevant and useful to refer to CERC (Open Access in inter-State Transmission) Regulations 2004 as amended by Notification dated 21st February, 2005. Regulation 18 which is relevant reads thus:

“Unscheduled Inter-Change (UI) charges

- 18(i) The mismatch between the scheduled and the actual drawl at drawl point(s) and scheduled and the actual injection at injection point(s) shall be met from the grid and shall be governed by UI pricing mechanism applicable to the inter-state transactions;
- (ii) A separate bill for UI charges shall be issued to the direct customers and in case of the embedded customers, a composite UI bill for the State as a whole shall be issued, the segregation for which shall be done at the State level”.

That apart, the above Regulations 16, 17 and 18 of the Central Regulations are also relevant for energy accounting.

26. Keeping in view, that the appellant even after providing facility for open access continues to be a consumer of the licensee, as concluded by us in the aforesaid paras above, the appellant shall pay to WBSEB all charges such as demand charges, energy charges etc. as a consumer for continuing the connection as a consumer.. For settling the energy account related to transfer of active power from the Captive Power Plant in Orissa to the Bhushan Steel in West Bengal, the following broad aspects and the above referred Regulations are required to be considered by WBERC:

- i) On supply side in Orissa.
Captive Power Plant will furnish a day-ahead, generation schedule to Orissa SLDC who in turn shall furnish generation schedule to

ERLDC. In case actual generation by CPP varies, UI charge, as applicable, has to be settled by Captive Power Plant with SLDC.

ii) On Drawl side.

Bhushan Ltd. shall furnish a day – ahead Demand Schedule to WBSLDC. In case the Actual Demand equals the Captive Power Plant (in Orissa) generation schedule (Less transmission losses) no payment for Active Energy will fall due to WBSEB.

27. However, any variation in Actual Demand to the Scheduled Demand will be dealt as UI charge. In case Bhushan Ltd. needs power over and above the Scheduled Generation of its captive plant in Orissa (less transmission losses) from the grid, then it must specify the power requirement and furnish the total Schedule Demand to WBSLDC, a day-ahead. This additional active energy demand must be paid for by Bhushan to WBSEB as a consumer. However, if the actual power drawl is still more than the Scheduled Demand, the appellant must pay for the additional drawl over and above the Scheduled Demand at the prevailing UI rates. Similarly, any under-drawl below the Scheduled Demand but above the Generation Schedule from the CPP (Less transmission losses) will be settled at the prevailing UI rates. When no power is scheduled from the Captive Power Plant and the appellant requires power, it will be supplied by WBSEB at its normal tariff rates as applicable.

28. In the light of the above discussions, we direct the West Bengal State Electricity Regulatory Commission to consider the above aspects involved in transmission consequent to grant of open access arrive at a suitable energy accounting methodology according to law and issue such direction or directions as it deems fit after affording an opportunity of hearing to either side. On the third point, we order in the above terms.

29. In the result, the appeal is allowed in the above terms and remanded to the second Respondent WBSER Commission to lay down and prescribes the Energy Accounting after affording opportunity to both parties.

30. Before parting, we take note of the fact that any further delay in providing open access applied for, will result in hardship besides it would cause loss Hence, we direct the West Bengal State Electricity Regulatory Commission to take up “Energy Accounting” expeditiously lay the standards for fixing the “Energy Accounting” and issue such or other appropriate directions as it thinks fit in this respect. It is also well open to the said Commission to forthwith allow open access to appellant pending its directions to fix “Energy Accounting”, if the appellant comes forward without prejudice to its contentions with a consent affidavit to accept energy account as may be fixed by the Commission or the appellate authority as the case may be.

Pronounced in open court on this 11th day of May 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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No. of corrections

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