Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 32. 33 & 118 of 2009

Dated: 28th April, 2010

Present: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER

Appeal No. 32 of 2009,

In the matter of:

Chhattisgarh State Power Distribution Co. Ltd.
Daganiya, Raipur

… Appellant(s)

Versus

1. Salasar Sgteel & Power Ltd
1st Floor, Bhatia Complex
Opp. Rajkumar College, G.E. Road
Raipur-492 001

… Respondent-1

2. Chhattisgarh State Electricity Regulatory Commission
Civil Lines, G.E. Road
Raipur-492 001

… Respondent-2

Counsel for the Appellant(s)	**Mr. K. Gopal Choudhary** **Mr. A Bhatnagar, S.E., CSPDCL**
Counsel for the Respondent(s)	**Ms. Surabhi Sharma &** **Ms. Shikha Ohri for R-1.** **Mr. M.G. Ramachandran** **Mr. Anand K. Ganesan &** **Ms. Swapna Seshadri for CSERC**

Appeal No. 33 of 2009,

In the matter of:

Chhattisgarh State Power Distribution Co. Ltd.
Daganiya, Raipur

… Appellant(s)

Versus

1. Abhijeet Infrastructure Ltd.
Siltara Growth Centre
Raipur-493 111

… Respondent-1

2. Chhattisgarh State Electricity Regulatory Commission
Civil Lines, G.E. Road
Raipur-492 001

… Respondent-2

Counsel for the Appellant(s)	**Mr. K. Gopal Choudhary** **Mr. A Bhatnagar, S.E., CSPDCL**
Counsel for the Respondent(s)	**Mr. Dipak hattacharya &** **Ms. Priyanka Kumar for R-1** **Mr. M.G. Ramachandran** **Mr. Anand K. Ganesan &** **Ms. Shikha Ohri for CSERC**

Appeal No. 118 of 2009,

In the matter of:
Chhattisgarh State Power Distribution Co. Ltd.
Daganiya, Raipur

… Appellant(s)

Versus

1. Jayswal Ispat Alloys Ltd,
Siltara Growth Centre
Raipur-(C.G.)

… Respondent-1

2. Corpore Ispat Alloys Ltd.
Siltara Growth Centre
Raipur-(C.G.) … Responden-2

3. Ind Synergy Ltd.
Raigarh, Village Kotmar
District : Raigarh(C.G.)
… Respondent-3

4. Chhattisgarh State Electricity Regulatory Commission
Civil Lines, G.E. Road
Raipur-492 001
… Respondent-4

Counsel for the Appellant(s) Mr. K. Gopal Choudhary
Mr. A Bhatnagar, S.E., CSPDCL

Counsel for the Respondent(s) Mr. Dipak hattacharya &
Ms. Priyanka Kumar for R-1
Mr. M.G. Ramachandran
Mr. Anand K. Ganesan &
Ms. Shikha Ohri for CSERC

JUDGMENT

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

1. Some of the issues in all these 3 Appeals challenging the impugned orders are common. Hence, this common judgment is rendered.

2. The Appeal Nos. 32/09 and 33/09 have been filed by the Chhattisgarh State Power Distribution Company Limited (Appellant) as against the order dated 27.11.2008 passed by the Chhattisgarh State Commission in suo motto Petition No. 14 and 15 of 2008. Similarly the Chhattisgarh State Power Distribution Company Limited have filed Appeal No. 118 of 2009 as against the order dated 25.05.2009 passed by the Chhattisgarh State Commission in suo motto Petition No. 17 of 2008. Short facts of the case are as under –

3. The State Commission on coming to know that the Respondent Power Plants did not consume 51% of electricity mandated and as such they cease to be a captive co-generation plants, issued Show Cause Notice to the respondents in all these Appeals in suo motto Petition 14 and 15 of 2008 and 17 of 2008 under section 142 of the Electricity Act in order to verify whether they fulfill the conditions to qualify as a captive generation plants. Ultimately, a common

order was passed on 27.11.2008 by the State Commission in respect of suo motto Petition Nos. 14 and 15 of 2008 dropping the 142 proceedings and imposing some conditions on the Respondents.

4. As against this, the Appellants have filed Appeals No. 32 and 33 of 2009 before this Tribunal. The State Commission also passed an order in suo motto Petition No. 17 of 2008. As against this the Appellant has filed Appeals No. 118 of 2009 before this Tribunal.

5. The findings given by the State Commission in the common order dated 27.11.2008 relating to suo motto proceedings in Petition Nos. 14 and 15 of 2008 are as follows:

(i) M/s Salasar Steel & Power Limited (R-1 in Appeal No. 32/09) and Abhijeet Infrastructure Limited (R-1 in Appeal No. 33/09) under suo motto proceedings in Petition Nos. 14 and 15 of 2009 are not captive generation plants.

(ii) Since Salasar and Abhijeet are not captive generation plants, the supply of electricity by them will be as a supply from a generating company and therefore they shall be liable to pay cross subsidy surcharge to the distribution licensee.

(iii) Salasar and Abhijeet are co-generation plants under section 86(1)((e) of the Act. Such a co-generation needs to be encouraged. Therefore, they should be required to pay only 50% of the cross subsidy surcharge as in the case of non-conventional energy.

(iv) In the proceedings of suo motto Petition No. 17/08, which is the subject matter of the Appeal No. 118/09, the State Commission has given the following findings against the respondents namely M/s Jayaswal Neco Industries Ltd. And M/s Ispat Alloys Limited (Corporate Ispat):

(a) The consumption of M/s Jayaswal Neco was only to the extent of 41.68% of the total

electricity generated which was below the requirement of 51%. Therefore, Jayswal Neco was directed to pay cross subsidy surcharge determined by the State Commission for the year 2007-08 to the distribution licensee.

(ii) In respect of the Corporate Ispat, the consumption of the said plant has been calculated only to the extent of 24% of the total electricity generated, which was below the requirement of 51%. Therefore, they were directed to pay cross subsidy surcharge at the rate determined by the State Commission for the year 2007-08 to the distribution licensee.

5. The Learned Counsel for the Appellants in Appeal No. 32 and 33 of 2008 have raised the following points:

(i) The State Commission having issued notice to the respondents under section 142 of the Electricity Act should have confined itself with

deciding whether the penalty should be levied or not and should not have directed the Respondents merely to pay cross subsidy surcharge.

(ii) The State Commission having found that the respondents were not fulfilling the criteria laid down for being a captive power plant, the respondents should not have been allowed to continue to supply electricity on payment of cross subsidy surcharge. Cross subsidy surcharge is a surcharge in addition to wheeling charges and is applicable only when open access has been availed of.

(iii) The State Commission should not have ordered that the cross subsidy surcharge @ 50% in the case of these two plants which are co-generation plants.

(iv) The State Commission erred in directing that the entire annual generation be apportioned

between co-generation and non-co generation in proportion to the capacity of the boilers.

6. The Learned Counsel for the Appellant has raised the first 2 issues mentioned above in Appeal No. 118 of 2009. On these issues, the learned counsel for both the parties were heard. On these issues, let us make analysis over the findings of the State Commission one by one.

7. The first issue relates to the failure of imposition of penalty in the proceedings under section 142 of the Electricity Act. According to the Learned Counsel for the Appellant, the State Commission having initiated proceedings under section 142 of the Act and having found that there is a violation, ought to have imposed some punishment on the respondents and as such the impugned order is illegal. This contention, in our view, is misconceived. It is the judicial discretion of the State Commission to decide whether to impose any punishment or not as it considers

appropriate as against the utilities even when there is any violation. In other words, it is up to the State Commission to decide whether at all to impose any punishment even when it finds that there is some violation. If the State Commission considers that the punishment was required in the facts and circumstances, it may impose punishment. It is not mandatory on the part of the State Commission to impose some punishment where there is some violation. A perusal of section 142 of the Act makes it very clear that is only directory since the expression used in the said section is only "may" and not 'shall". So, it is not compulsory on the part of the State Commission to impose some punishment even assuming that there is some violation. Therefore, it is not open to the distribution licensee, the Appellant to claim that the State Commission ought to have imposed penalty on the respondent utility as there is some violation. It should be made clear that every show cause notice need not necessarily culminate in to the imposition of penalty merely because there is some violation. As mentioned above, the imposition

of penalty under section 142 of the Act is purely directory and discretionary. To this effect, we have already given a judgment in Appeals No. 119 and 125 of 2009, dated 09.02.2010. Therefore, the first contention would fail.

8. The second contention is that, having found that the Respondent plant is not a captive power plant, the respondent cannot be allowed to supply electricity on payment of cross subsidy surcharge especially when the cross subsidy surcharge is applicable only when open access is availed of. This contention also, in our view, does not hold good in view of the settled law as laid down by this Tribunal in earlier judgment in the case of OCL India Limited versus OERC as reported in 2009 ELR APTEL levy of cross subsidy surcharge is permissible even when the dedicated lines are used without availing the open access. The relevant portion of the observations made by this Tribunal in the above referred case is as follows:

"18. It is settled law that the underlying philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee. It cannot be disputed that the surcharge is not payable even after availing the status of the open access customer. Mere submitting the application for availing the power is not enough to put the entire responsibility on the distribution licensee."

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

10. It is not correct on the part of the Learned Counsel appearing for the Appellant to contend that cross subsidy surcharge would be applicable only when the open access is availed of. Section 42(2) of the Act deals with the two issues:

(i) Open Access and (ii) Cross subsidy surcharge. In so far as open access is concerned, section 42(2) is not restricted to open access on the lines of the distribution licensee. In other words, section 42(2) which deals with cross subsidy cannot be read to mean to involve itself with the open access.

11. The cross subsidy surcharge, which is referred to in the proviso to sub section (2) of section 42 of the Act, is a compensatory charge. It does not depend upon use of distribution licensee's lines. It is a charge to pay any compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would have taken the quantum of power from the distribution licensee and in the result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy surcharge on certain other categories of consumers. On this principle, it has to be held that cross subsidy surcharge is

payable irrespective of whether the lines of the distribution licensees are used or not.

12. As a matter of fact, the State Commission has directed the respondents to pay the cross subsidy surcharge to the Appellant being distribution licensee which would be in the interest of the consumers. To this effect, this Tribunal has given a judgment in Appeal No. 119 of 2009, Chhattisgarh State Distribution Company Limited versus Aryan Coal Benefication dated 09.02.10. Therefore, the second contention also would fail.

13. The 3rd and 4th issues would arise only in the Appeal Nos. 32 and 33 of 2009.

14. The third issue relates to the payment of 50% of the cross subsidy surcharge. Section 86(1)(e) of the Electricity Act mandates the State Commission to promote co-

generation. Let us now quote section 86(1)(e) which reads as under:

> ***"86. Functions of State Commission – (1) The State Commission shall discharge the following functions, namely –***
>
> **……**
>
> ***(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee."***

15. So, a reading of the above provision would make it clear that special consideration shall have to be shown to a cogeneration plant in order to ensure that the consumers derive benefits out of this plant. Further, it is noticed from the impugned order that while deciding this issue the State

Commission consulted the Ministry of Power, Ministry of New and Renewable Energy and the Central Electricity Authority with regard to this issue. As a matter of fact by letter dated 27.08.08, the State Commission sought clarification from the Ministry of Power as to whether the Sponge & Iron industry can be allowed to use electricity generated through waste heat recovery by paying cross subsidy surcharge. By letter dated 06.09.2008, the State Commission sought a similar clarification from the Ministry of New and Renewable Energy. By the reply dated 22.12.2008, the Ministry of Power forwarded the opinion of the CEA to the State Commission, which states as follows:

> ***"6. In the situation described by the CSERC the generating plants set up by the sponge iron industry may be treated as co-generation plants acting as independent power producers, which would be at liberty to use part of their power themselves and sell the surplus power to any entity. For sale of such power it would have to adhere to the grid connectivity standards and safety regulations***

mandated by the CSERC. In UP, a large number of sugar mills have established cogeneration plants. They themselves are using less than 51% of their total generation. The surplus power is sold to the distribution licensees at tariffs fixed by the UPERC."

16. Further, by another letter dated 18.08.09, the Ministry of Power gave the following suggestion to the State Commission:

"2. The FOR vide their Letter No. 15.4/2009-GC-MOP/FOR/CERC dated May 12, 2009 has informed tht the issue was discussed in the tenth meeting of FOR held in Chennai on January 30, 2009. A presentation was also made by the Chairperson, CSERC in the meeting, relevant extracts of which are as follows: "CSERC has resolved this issue through imposition of cross subsidy surcharge on the electricity consumed by Sponge Iron Plant. A view also emerged that the SERCs could consider making the cross subsidy surcharge zero for

cogeneration plant in view of the provisions of section 86(1) of the Act"

17. In the circumstances quoted above, the State Commission has decided to extend the benefit of liability to 50% of the cogeneration carried out by the respondents as in the case of non-conventional energy sources.

18. Further, the State Commission has also taken full care to protect the interest of the distribution licensee, the Appellant herein. The advantage of paying only 50% cross subsidy surcharge will not be available in case the power is generated using other boilers which have been installed by the respondents for optimization of its generation capacity. It will be available to the respondents only when their cogeneration of electricity above the electricity generated by the respondents from the waste heat recovery fuel. Hence, this contention also has no substance and the same is rejected.

19. The next issue is with reference to apportionment of the entire annual generation between cogeneration and non-cogeneration in proportion to the capacity of boilers. The State Commission has directed that the annual generation of the respondents apportioned between cogeneration and non-cogeneration in proportion to the capacity of the boilers. The State Commission in the impugned order has duly considered the useful power output and came to the conclusion that the useful power output in he year 2006-07 was greater than 50% of the quantity for generation of power. The above determination is only for the year 2006-07 as pointed out by the Learned Counsel for the Commission. In case in the subsequent, year the distribution licensee is able to show that useful power output for cogeneration is less than 50%, the concessional cross subsidy surcharge will not be applicable to the respondents. Therefore, we are unable to accept this contention of the learned counsel for

the Appellant on this issue. Hence, this contention also would fail.

20. In view of the above discussions, we are of the considered opinion that the State Commission in both the impugned orders have dealt with all the aspects in the proper perspective, in detail and has come to the correct conclusion.

21. As such we do not find any infirmity which warrants interference of the impugned order. Hence, these Appeals are dismissed as devoid of merits. No costs.

(H.L. Bajaj)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th April, 2010.

Index: Reportable/Non-Reportable.