

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal no. 20 of 2009**

Dated: 3<sup>rd</sup> September, 2009

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. H.L. BAJAJ, Technical Member**

**In the matter of:**

**M/s. OCL India Ltd.  
P.O. /P.S. : Rajgangpur,  
District –Sundergarh,  
Orissa – 770017**

**...Appellant**

***Versus***

- 1. Orissa Electricity Regulatory Commission  
Bidyut Niyamak Bhawan  
Unit-VIII  
Bhubaneswar – 751012**
- 2. The State Load Dispatch Centre (SLDC)  
Mancheswar, Bhubaneswar  
District –Khurda,  
Orissa – 7510017**
- 3. The Western Electricity Supply Company of Orissa  
P.O. Burla,  
District – Sambalpur  
Orissa**

**... Respondents**

**Counsel for the Appellant(s) : Mr. Ashok Parija, Sr. Adv.  
Mr. M.G. Ramachandran  
Mr. Anand K. Ganeshan  
Ms. Swapna Seshadri**

Mr. R.M. Patnaik  
Mr. K.N. Tripathy  
Mr. R. Pandey  
Counsel for the Respondent (s): Mr. Rutwik Panda for CERC  
Mr. Suresh Tripathy  
Mr. A. Upadhyay  
Mr. Gaurav Srivastava for Resp. 2  
Mr. R.K. Mehta  
Mr. Siddarth Panda  
Mr. Mragank Sharma

**Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**

### **JUDGMENT**

M/s. OCL India Ltd., Orissa is the Appellant herein. Aggrieved by the order dated 01.12.2008 passed by the Orissa Electricity Regulatory Commission the Appellant has filed the present Appeal. The short facts leading to the Appeal are as follows:

1. M/s OCL India Ltd., the Appellant herein is a large industrial organization presently engaged in the manufacturing of cement and refractories in Rajgangpur Town in the State of Orissa. Earlier the Appellant had the business of manufacturing of sponge iron in addition to the business of cement and refractories. The sponge iron business was demerged as per the scheme of arrangement approved by the High Court of Orissa.

2. Prior to this, the Appellant Company set up a captive power plant with the capacity of 14 MW for the energy requirement of its above business. The Appellant also laid down the dedicated 11 KV lines connecting the cement plant, refractory plant, sponge iron plant with the captive power plant. On 27.11.2007 the iron and steel unit of OCL India Ltd. got demerged from the Appellant Company. After demerger the shareholding of the Appellant in the steel unit of the company has become less than 26% as a result of which 14 MW power plant no longer remained captive to the Appellant. Instead, it has become captive plant to Iron and Steel Limited

3. Thereafter the Appellant decided to avail surplus power of captive power plant of the Iron and Steel Ltd. for use in its unit after demerger through short term open access in accordance with the Regulations.

4. Consequently, the Appellant approached the State Commission and applied for open access for transfer of power from the captive power plant of the iron and steel unit to the cement plant of the

Appellant. He also applied for waiver from the payment of cross subsidy charges payable to WESCO, the 3<sup>rd</sup> Respondent herein. The Orissa State Commission ultimately decided in favour of the Appellant on the issue of open access but rejected the prayer for waiver of cross subsidy holding that since the Appellant is treated as an open access consumer it has to pay cross subsidy surcharge under Clause 4(2) of the Regulations 2006 and under Section 42(2) of the Act.

5. The Appellant, having been aggrieved over the finding of the State Commission regarding the Appellant's liability to pay the cross subsidy charge to the WESCO, the 3<sup>rd</sup> Respondent, has filed this appeal. Assailing the said order impugned, the learned counsel for the Appellant has made the following submissions:

“(I) The Appellant admittedly applied for enhancement of the contract demand of 13.1 MW through its letter dated 06.05.2006. WESCO, the 3<sup>rd</sup> Respondent, did not provide the additional contract demand till 30.04.2009 on the ground that the transmission company did not lay down the line and complete the transmission system. The issue of laying down

the lines for providing supply to the Appellant by the transmission company, or by the WESCO, is the matter between the licensee and transmission company. The delay caused by the transmission company should not be allowed to make the Appellant to suffer.

(II) In terms of Section 42 and 43 of the Act it is the primary obligation of the WESCO, the 3<sup>rd</sup> Respondent i.e. distribution licensee to make available the electricity requirement to the consumers in its area of supply including to arrange from the requisite transmission network and system with the help of transmission licensee. The letters dated 13.09.2007 and 28.04.2009 would clearly indicate that the SWESCO, the 3<sup>rd</sup> Respondent was not in a position to make available the supply to the Appellant as the Transmission System was not completed.

(III) There was delay on the part of the WESCO to provide the enhanced load to the Appellant till 30.04.2009 and as such the Appellant is not liable to pay cross subsidy charge for the period between 30.03.2008 and 30.04.2009.”

6. In reply to the above contentions the learned counsel for the Respondent would make the following submissions:

“(I) The plea of the Appellant that the alleged inability of the WESCO to supply additional quantum of power to the Appellant during the specified period would disentitle WESCO from claiming cross subsidy from the Appellant is a new plea. It was neither raised before the Commission nor referred to in the memorandum of Appeal filed before this Tribunal. Therefore, this plea cannot be allowed to be raised now.

(II) Under Section 42(2) of the Act, the Appellant is liable to pay cross subsidy surcharge once it is considered to be the open access customer. The time taken by the transmission company to complete the transmission system and to obtain the approval from the electrical inspector was beyond the control of WESCO. As per Section 13(6) of the Distribution Code, 2004, the distribution licensee namely WESCO shall not be held responsible for the delay in extending the supply when the said delay was on account of problems relating to the statutory clearances, rights of way, etc.

(III) The underlying philosophy behind the levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee. The Appellant is a consumer of WESCO and it avails power at 132 KV from the state grid. When it draws from the captive power plant, it forgoes an equivalent quantum of power to be obtained from WESCO and thus it denies the volume of such sale. Therefore, the Appellant is liable to pay the cross subsidy charges.”

7. The learned counsel for both the parties have cited a number of authorities in support of their contentions.

8. We have carefully considered the submissions and gone through the records and the impugned order.

9. The learned counsel for the Appellant mainly contended that since WESCO, the 3<sup>rd</sup> Respondent herein was unable to supply the additional power during the specified period the Appellant is not liable to pay cross subsidy charge for that period. According to the learned counsel for the Respondent, there was inability on the part of the

WESCO to supply additional power as the upgradation of the auto transformer and completion of the transmission arrangement had not been executed by the Transmission Company, namely OPTCL and, therefore, WESCO could not be held responsible for the non-supply of the additional power during the said period.

10. In the light of these rival contentions the main question that arises for consideration is this-whether the Appellant is liable to pay the cross subsidy charges to the WESCO, the distribution licensee in the area of supply during the period from 30.03.2008 to 30.04.2009 when the WESCO was not in a position to supply additional power demanded by the Appellant?

11. Before considering the above question it would be proper to refer to the preliminary objection raised by the counsel for the Respondent. The counsel for the Respondent has cited the decision reported as (2000) 2 SCC 734 Modern Insulator Ltd. Vs Oriental Insurance Co. Ltd. in order to oppose the plea regarding the inability of the WESCO to supply during the particular period urged in this Appeal on the ground that this plea is the new plea and as such this



plea should not be allowed to be raised. Refuting this objection the learned counsel for the Appellant would submit that this plea had in fact been raised before the State Commission.

12. We have perused the petition filed by the Appellant before the State Commission in order to verify the respective contentions. On going through the petition, it is evident that the Petitioner has merely requested for the waiver of surcharge, if any, payable to WESCO in accordance with Clause 4(2) of the Orissa State Commission Regulations, 2005 and under Section 42(2) of the Act and there is no specific plea that the Appellant is not liable to pay the cross subsidy charges due to the inability of WESCO to supply additional power demanded. Hence, it has to be held that this is a new plea raised before this Tribunal for the first time, that too only during the arguments.

13. It is alternatively contented by the learned counsel for the Appellant that even assuming that this is the new plea, the Tribunal has the power to allow any such new plea so long as it is not inconsistent with the earlier stand taken by the Appellant before the

State Commission. He has cited (2001) 8 SCC 173, Rachakonda Narayana V. Ponthala Parvathamma, (1965) 3 SCR 499, Bharat Kala Bhandar (P) Ltd. Vs. Municipal Committee, (2003) 6SCC 315 Municipal Corporation of Greater Mumbai Vs. Kamloa Mills Ltd.

14. In light of the rival contentions with regard to the new plea on the strength of the various decisions we feel that instead of merely rejecting this plea on the ground that it is a new plea, the merit of this plea could be gone into.

15. Now, let us see the merit of the point urged by the learned counsel for the Appellant. It is the specific stand taken by the Appellant that WESCO was unable to supply the additional power and therefore the Appellant is not liable to pay the cross subsidy charge. On the other hand the reply by the Respondent with the equal vehemence is that WESCO cannot be held responsible for the delay caused due to the upgradation of the transmission system which was purely in the hands of the transmission company and therefore, the Appellant is liable to pay cross subsidy charges.

16. Admittedly, the Appellant is a consumer of WESCO. It avails power from the state grid through 132 KV sub-station. To this extent it draws power from the captive power plant this means that the Appellant foregoes an equivalent quantum of power off take from WESCO and thereby it denies the volume of such a sale.

17. 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 tariff is designed by the State Commission keeping in view of the aforesaid principle. Therefore, it cannot be contended 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.

18. Admittedly, the Appellant was sanctioned 24.9 MVA in 2005 and the same was enhanced to 29.9 MVA in April 2006. Letter dated 06.05.2006 would establish that the new unit for which additional power was required was commenced sometime in November, 2007,

and it was completed much thereafter i.e. on 30.04.2009. The two letters dated 24.02.2009 and 09.03.2009 written by Chief Electrical Inspector to the Appellant also establish that the new unit was not ready as late as March, 2009. Under these circumstances the Appellant cannot blame the WESCO in regard to any delay in completion of the transmission system. In this context the Clause 13(6) of the State Commission distribution code, 2004 is quite relevant which is as follows:

*“The distribution licensee shall not be responsible for the delay, if any in extending the supply, **if the same is on account of the problems relating to the statutory clearances, right of way, acquisition of land, or the delay in consumer’s application to obtain approval of the Chief Electrical Inspector for his high tension or extra high tension installation or for any delay in compliance with the requirements of the application or delay for any other similar reasons beyond the reasonable control of the distribution licensee.**”*

19. Under this clause if the delay is caused by the transmission company to complete the LILO arrangement and obtain the approval from the Electrical Inspector WESCO, the distribution licensee cannot be held responsible. There cannot be any dispute that LILO

arrangement is a pre-requisite of availing additional power in the light of the stand taken by the WESCO that the time taken for completion of the transmission system and also for obtaining the approval from the Electrical Inspector for clearance was not under the control of WESCO. If that be the situation, it cannot be held that WESCO was responsible for the delay to supply the additional power to the Appellant as referred to in Clause 13(6) of the Distribution Code.

20. In these circumstances there is no merit in the contention of the Appellant. Hence the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

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

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 3<sup>rd</sup> September, 2009

REPORTABLE / NON – REPORTABLE