

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

Appeal No. 25 of 2010

Dated: 24th February, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

**Chattisgarh State Power Distribution Co. Ltd.
Daganiya,
Raipur.**

**Represented by its Superintending
Engineer (RAC)**

... Appellant

Versus

**1. Arasmeta Captive Power Co. Ltd.
8-2-293/82/A/431/A, Road No.22
Jubilee Hills
Hyderabad-500 033.**

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

....Respondents

Counsel for Appellant(s): Mr. K. Gopal Choudhary
Mr. Sanjay Sen, Ms Surbhi Sharma
Mr. A. Bhatnagar

Counsel for Respondent(s): Ms. Surbhi Sharma &
Ms. Shikha Ohri
Mr. M.G. Ramachandran
Mr. Anand K. Ganesa &
Mr. Sneha Venkataramani for CSEERC
Ms Swapna Seshadri for CSEERC
Mr. M.G. Ramachandran
Mr. Achiuty Divedi

JUDGMENT

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

Chattisgarh State Power Distribution Co. Ltd. has filed this Appeal challenging the order dated 5th June, 2009 in Petition No.2/2009 and the order dated 7th September, 2009 passed in Review Petition No.45/2009 by the Chattisgarh State Electricity Regulatory Commission. The short facts are as follows:

2. The Appellant is the entity vested with the assets, liabilities and functions relating to the distribution of electricity upon the unbundling of the Chattisgarh State Electricity Board. The Appellant is, therefore, the successor of the erstwhile CSEB in respect of the distribution of electricity. Arasmeta Captive Power Co. Ltd., is the 1st Respondent. It is a special purpose vehicle for a Captive Generating Plant to cater to the power requirements of the two cement plants of Lafarge Cements Limited, one of which is located at Arasmeta and the other is located in Sonadih District of Chattisgarh.

3. The power generated by the 1st Respondent-Arasmeta Captive Power Co. Ltd. is partly supplied to the cement plant at Arasmeta through dedicated transmission line and

partly supplied to the cement plant at Sonadih through open access.

4. The 1st Respondent is a consumer of the Appellant under HT Supply Agreement dated 14.5.2005 having a 132 KV Service connection with a contracted demand of 3125 KVA for meeting the start-up power requirement of the generating plant and for its own use.

5. On 9.7.2008, the 1st Respondent, Arasmeta Captive Power Co. Ltd., requested the erstwhile Electricity Board, the predecessor of the Appellant, to reduce its contract demand to zero with effect from 16.8.2008. This was not accepted by the Electricity Board and the same was communicated to the Appellant by the letter dated 25.10.2008.

6. On the basis of the meter readings taken for the billing month of June, 2008, the Electricity Board issued bill dated 21.6.2009 demanding the additional charges for the excess demand over and above the contracted demand of 3.125 MVA at 1 ½ times the normal tariff as per tariff order.

7. Challenging the same, Arasmeta Captive Power Co. Ltd., the 1st Respondent filed a petition in Petition No.2/2009 before the State Commission under Section 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 with two prayers, i.e.,

- (i) for the direction to the licensee, i.e. Electricity Board, to permit reduction of existing contract demand to zero and to bill for the power drawn,

if any, at the rate as decided by the State Commission in the order dated 29.9.2006.

- (ii) To clarify that the licensee, the Electricity Board does not have the power to impose penal tariff when there is excess drawal by generator as a result of the *force majeure* event and to quash the demand made by the Electricity Board in accordance with the HT Agreement and Tariff Schedule for HT Consumers.

8. State Commission after hearing the parties passed the impugned order dated 5.6.2009 holding as follows:

- (i) The prayer with regard to the direction for reduction of contract demand is rejected;
- (ii) The plea regarding the penal charges for the excess demand over the contract demand is accepted and the same is waived;

- (iii) The licensee, Electricity Board was directed to make proposals to the State Commission for provisions in the Supply code to take care of such *force majeure* like cases such that it does not hinder the applicability of the existing general provision regarding supply.

9. As against this order, the Appellant filed a Review Petition No.45/2009 in regard to the waiver of penal charges and the direction for making proposals for the provisions in the Supply Code. The said petition was disposed of by the State Commission by the order dated 7.9.2009 partly allowing the same. In this order, the State Commission rejected the prayer for review of penal charges but accepted the Appellant's plea holding that instead of making provision in the Supply Code, such a contingency be examined in future based on merits and demerits.

10. Having been aggrieved by the impugned orders passed by the State Commission, both on 5.6.2009 and 7.9.2009, the Appellant has filed the appeal only on the issue of waiver of additional demand charges for exceeding the contract demand. On this issue, the learned counsel for the Appellant would make the following submissions to question the finding rendered by the State Commission with reference to the waiver of additional demand charges for exceeding the contract demand:

- (i) The dispute with regard to the demand for additional charges for exceeding the contract demand through the bill is in the nature of individual consumer billing dispute between the licensee and the consumer. Therefore, the State Commission had no jurisdiction to entertain and adjudicate upon the said dispute.

- (ii) The additional demand charges for exceeding the contract demand billed by the State Electricity Board strictly in accordance with the Tariff Order of the State Commission, the same had to be implemented without exception in terms of the Tariff Order of the State Commission.

- (iii) The State Commission having held that no distinction should be made in the levy of charges on the basis of the reasons for exceeding the contract demand, was not justified in carving out exception in the facts of the present case by erroneously applying clause 12.10 and 12.11 of the Supply Code which were not applicable. Therefore, the same cannot be invoked to waive or exempt from the charges levied in accordance with the Tariff Order.

11. In reply to the above submissions, the learned counsel for the Respondents, in justification of the impugned orders, contended that this is not a billing dispute, the Appellant is a licensee and the Respondent No.1 is the generating company and the drawal of excess power during the 15 minutes' time cycle was because of sudden failure of protection system of generator of the Respondent No.1 causing non-isolation of the captive generation from the grid and, therefore, this dispute can be adjudicated upon only by the State Commission.

12. In the light of the rival contentions urged by the learned counsel for the parties, the following questions would emerge for consideration:

- I. Whether, in the facts and circumstances of the case, the State Commission had the jurisdiction in the matter on a billing dispute raised on the

question of levy on a consumer of additional charges for excess demand in accordance with the Tariff determination by the State Commission?

- II. Whether, in the facts and circumstances, the State Commission was correct in holding that the case ought to be considered as unforeseen circumstances under Clauses 12.10 and 12.11 of the Supply Code and whether the same was available to waive charges as per the applicable Tariff?

13. We have carefully considered the submissions made by the learned counsel for the parties on these issues. Let us consider these issues one by one:

14. Let us go into the issue of jurisdiction. It is noticed that the Appellant never raised the issue of lack of

jurisdiction before the State Commission either in the original proceedings or in the Review proceedings. Therefore, the State Commission had no occasion to deal with this issue. However, since the point of jurisdiction would go to the root of the matter, it is appropriate to consider the same even though it has been raised belatedly only before this Tribunal.

15. The Petition filed by the 1st Respondent before the State Commission was under Section 86(1)(f) and Section 86(1)(k) of the Electricity Act, 2003. These provisions read as under:

Section 86. (Functions of State Commission): - (1)

The State Commission shall discharge the following functions, namely: -

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(k) discharge such other functions as may be assigned to it under this Act.

16. According to the Appellant, this is a billing dispute between the consumer and a licensee and, therefore, the State Commission had no power to resolve this dispute as held by this Tribunal in Chattisgarh State Electricity Board Vs. Rabhubir Alloys Limited appeal No.125, etc, of 2006 dated 28.11.2006 and the Appeal No. 3, etc, of 2006 dated 29.3.2006. It is true that the Appellant is a licensee but the Respondent No.1 cannot be construed to be a consumer because it being a Captive Power Plant is a Generating Company. It is the plea of the Respondent that

the drawal of excess power during 15 minutes' time cycle was because of sudden failure of protection system of the generator, the 1st Respondent causing non-isolation of Captive generation from the grid and, therefore, it is not a mere billing dispute between the consumer and the licensee.

17. We find force in this plea. As a matter of fact, the Appellant itself filed the review petition against the order dated 5.6.2009 with reference to the issue of amendment of Supply Code as well as in regard to the waiver of the excess demand charges by submitting to the jurisdiction of the State Commission. The State Commission accepted the plea of the Appellant in regard to the proposal for the provisions in the Supply Code and, however, affirmed the main order with reference to the waiver of the penal excess demand charges. So, this issue is not related to the billing

dispute. On the other hand, it relates to the payment of excess demand charges. Therefore, we hold that the State Commission has got the jurisdiction to go into the issue under Sections 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 to resolve the said dispute.

18. Let us go into the 2nd issue. In the present case, the State Commission examined the relevant facts including the tripping of the Captive Power Plant of the Respondent No.1 and came to the conclusion in the peculiar facts and circumstances. The State Commission ordered the Respondent No.1 to pay the energy charges as per the actual penal excess energy consumed and held that the penal demand charges levied on Respondent No.1 shall be waived. The reasonings given by the State Commission in the present order would indicate that the State Commission was of the considered view that in the peculiar

facts and circumstances, it is proper to examine the reasons for the over-drawal of the power by the Respondent No.1. The Captive Power Plant of the Respondent No.1 tripped at 9.45 AM due to failure of DC power supply and excitation. The plant could not be isolated manually. The persons on duty immediately contacted the nearest 132 KV Sub-station and got the supply disconnected from the said Sub-station. The over-drawal of power by the Respondent No.1 was only for a period of 15 minutes. The enquiry by the Appellant's offices as well as reports prepared by them would clearly show that the event was uncontrollable and the penal charges could not be levied.

19. As a matter of fact, the State Commission noted that though such a situation was not covered by Clause 23(a) of the Agreement of supply between the Appellant and the Respondent No.1, the Chattisgarh Supply Code notified in

terms of Section 50 of the Act deals with such unforeseen circumstances as contemplated under Clause 12.10 and Clause 12.11 of the Chattisgarh Supply Code. They are as follows:

“12.10: In any circumstances not envisaged in the provisions of the Electricity Supply Code should arise, the licensee shall, to the extent reasonably practicable in the circumstances, consult promptly and in good faith all affected parties in an effort to reach an agreement as to what should be done. If an agreement between the licensee and those parties cannot be reached in the time available, the licensee shall determine it in the manner best to its ability.

12.11: Wherever the licensee makes such a determination, it shall do so having regard, wherever

possible, to the views expressed by the affected parties and, in any event, to what is reasonable in the circumstances. Each party shall comply with all instructions given to it by the licensee following such a determination, provided that the instructions are consistent with the prevailing Codes and Regulations. The licensee shall promptly refer all such unforeseen circumstances and any such determination to the Commission.”

20. According to the Appellant, the Clauses 12.10 and 12.11 of the Supply Code deal only with those matters which are covered by the Chattisgarh Supply Code and not with any new contingency that may arise. We are unable to accept this contention. On a plain reading of these clauses, it is clear that it deals only with a situation not contemplated or foreseen in the Chattisgarh Supply Code

or the Agreements. On this issue, the State Commission has considered this aspect and observed in the review order dated 7.9.2009 as under:

“The petitioner of this petition has pleaded that it has not been possible to anticipate of such type of contingencies which are exception and to make provision of such contingencies. However, such contingencies which are exceptional can be examined and considered based on its merits and demerits, and has thus requested to review this portion of this Commission order dated 05.06.09. Considering their arguments that all such exceptional type of contingencies can not be anticipated and possibility of occurrence of new contingencies other than the anticipated and provision made can not be ruled out, we are in agreement with the petitioner to examine and review such contingencies in future based on

merits and demerits instead of making general provision in Supply Code.”

21. According to the Appellant, once the Tariff has been determined, any waiver of part of tariff will result in non-recovery of annual revenue requirement by the Appellant. This contention is also not correct as it is impossible to envisage such a situation at the time of passing of the Tariff Order. It is noticed that the State Commission by the order dated 5.6.2009 directed the Appellant to give the details of the instances of said unforeseen circumstances. However, the Appellant in his review petition admitted that such a general unforeseen circumstances cannot be listed. Therefore, it is impossible to anticipate all such unforeseen circumstances during the passing of the Tariff Order.

22. The waiver of penal demand charges is within the regulatory control of the State Commission. It cannot be disputed that the penal demand charges were decided by the State Commission and provided for in the Supply Code and Tariff Order. When the authority has the right to impose penalty, equally it has got the right to vary, waive and modify such a penalty for the justified reasons.

23. In the present case, the State Commission has considered the peculiar facts and circumstances and decided to waive the penalty by giving various reasonings. These reasonings, in our view, cannot be held to be unjustified.

24. SUMMARY OF FINDING:

I) According to the Appellant, this is a billing dispute between the consumer and the licensee and, therefore,

the State Commission had no jurisdiction to resolve the dispute. Of course, the Appellant is a licensee but the Respondent No.1 cannot be construed to be a consumer because the Respondent No.1 being it a Captive Power Plant is a generating company. According to the Respondent, the drawal of excess power during 15 minutes' time cycle was because of the sudden failure of protection system of the generator causing non-isolation of the captive generation from the grid. As such, it is not liable to pay penal excess demand charges. In the light of the above fact situation, this is not a mere billing dispute between the consumer and the licensee but this is a dispute with reference to the liability to pay the excess demand charges by the generator to the distribution licensee. As this issue is not related to billing dispute, the State Commission has got the jurisdiction

to go into this issue and resolve the dispute under Sections 86 (1) (f) & (k) of the Electricity Act, 2003.

II) The Chattisgarh Supply Code notified in terms of Section 50 of the Electricity Act deals with the unforeseen circumstances as contemplated under Clause 12.10 and 12.11 of the Supply Code. On a plain reading of these clauses, it is clear that it deals with a situation not contemplated or foreseen in the Supply Code or the Agreements. Under those circumstances, it is the duty of the State Commission to go into the facts and circumstances relating to the unforeseen circumstances to examine the reasons for the over-drawal of power by Respondent No.1. The Captive Power Plant of the Respondent No.1 tripped at 9.45 AM due to failure of DC power supply and excitation. The plant could not be isolated manually. This was only for a period of 15 minutes. Even the Appellant's offices

mentioned in the Enquiry Report that the said event was not controllable and the penal charges could not be levied merely because such a situation was not covered by Clause 23(a) of the Agreement to supply between the Appellant and the Respondent No.1. Clauses 12.10 and 12.11 of the Supply Code deal with the situation not contemplated or foreseen either in the Supply Code or in the Agreements. Under those circumstances, the State Commission has considered the waiver of the excess penal demand charges. The waiver of penal demand charges is within the regulatory control of the State Commission. Therefore, the State Commission on the valid reasons decided to waive the penalty.

25. In view of the above findings, we are of the opinion that the State Commission has correctly decided this issue and as such, there are no reasons warranting for the

interference. Hence Appeal is dismissed as devoid of merits. There is no order as to cost.

(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

Dated: 24th February, 2011

REPORTABLE/NON- REPORTABLE