



# Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E. Road, Raipur – 492001

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## Petition No.37 of 2006

### In the matter of declaring the petitioner as a captive consumer of KVK Bio-mass based generating plant

M/s UltraTech Cement Company Ltd.  
Hirmi, Raipur.

.... Petitioner

V/s

Chhattisgarh State Electricity Board  
Raipur

.... Respondent

Present: S.K. Misra, Chairman  
Sarat Chandra, Member

### **ORDER**

(Passed on 13/11/2007)

M/s UltraTech Cement Company Ltd. (UTCC) has filed this petition seeking the orders of this Commission to declare them as captive consumer of KVK Bio-Energy Pvt. Ltd. (KVK) on the ground that the company has acquired 26% shareholding in the generating company. The case was first heard by the Commission as far back as on 28/10/06 and the Commission vide order passed on 16/11/06 decided to desist from passing final orders in this regard in view of the observations, by way of obiter dicta, of the Appellate Tribunal in their judgement dated 12/09/06 passed in appeal No. 98 of 2006 that a shareholder of a company does not have any right over the assets and services of the company. The Commission took note of the fact that on the same issue the Hon'ble Tribunal had admitted two petitions in which their judgement was awaited. The petitioner, however, again requested the Commission for grant of captive status to them since the matter was being delayed. The petitioner was heard on 05/04/07 but it was decided not to review the order passed on 16/11/06 in view of the matter being pending before the Appellate Tribunal. The petitioner again submitted an application dated 14/08/07 in which he pleaded that his production was suffering every day for 5-6 hours and that he is incurring financial losses in his investment in KVK as the final order in regard to the status of captive consumer had not been issued by the Commission. The petitioner further requested that in the light of the recent amendment made in the Electricity Act, the relief prayed for in their application could be granted. In view of the circumstances of the case and the fact that delay in decision in this case entailed

financial losses to the petitioner, we decided to hear the case and pass final orders which of course will be subject to the orders of the Hon'ble Appellate Tribunal for Electricity in the cases aforementioned.

2. The petitioner made a written submission also on 24/08/07. The petitioner drew the attention of the Commission to Section 42 (8) of the Electricity Act, 2003 which provides that a CPP can be set up by any person, not necessarily by the person who claims captive status. Rule 3 of the Electricity Rules, 2005 also recognizes this. In a group captive or a SPV, the generating plant need not be set up by the captive consumer. The relationship of captive consumer is established through a share transaction and energy utilization. Once these elements are in place, the transaction should qualify as a captive consumer. The petitioner has further contended that the National Electricity Policy also mandates promotion of captive generation and the National Tariff Policy also intends to give a liberal interpretation to the captive generation. The Commission, therefore, should create an enabling environment that encourages captive power plants to be connected to the grid. Copy of the written submission made by the petitioner was given to the respondent CSEB on the same day but CSEB did not file any rejoinder on this. CSEB reiterated that since the matter was pending before the Hon'ble Tribunal, it had nothing to say.

3. The only issue for consideration in this case is whether UTCC can be treated as a 'captive user' entitled to use the electricity generated by the generating plant of KVK.

4. The legal position with regard to the captive generating plant as given in the provisions of the Act are as follows: A captive generating plant has been defined in section 2(8) of the Act thus:

2(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."

Section 9 defines "captive generation" thus:

"9. Captive generation –

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility – or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

The Act does not define what constitutes ‘primarily for his own use’. For this we have to look at the provisions in the Rules. Rule 3 lays down the ‘requirements of captive generating plant’ i.e. the criteria by which to judge a generating plant as a captive one. Rule 3 provides thus:

“3. Requirements of Captive Generating Plants – (1) No power plant shall qualify as ‘Captive Generating Plant’ under section 9 read with clause (8) of section 2 of the unless-

- (a) in case of power plant-
  - (i) not less than twenty six percent of the ownership is held by the captive user(s), and
  - (ii) not less than fifty one per cent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive:

Provided that in case of power plant set up by registered co-operative society, the conditions mentioned under paragraph (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their share in ownership of the power plant within a variation not exceeding ten percent:

- (b) In case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including-

Explanation –(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

- (2) The equity shares to be held but the captive user(s) in the generating station shall not be less than twenty six percent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration – (1) In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold no less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

- (2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.”

The Act thus makes special provision regarding the captive generating plant and such a plant has been provided the benefit of the right to open access for the purpose 'of carrying electricity from his captive generating plant to the destination of his use'. Rule 3 as above lays down the criteria by which to judge a captive generating plant and the captive user(s). The National Electricity Policy in paragraph 5.5.24 to 5.2.26 makes special provisions for such power plants. Special provision has been made in the Act and the two national policies to promote captive generating plants as decentralized generation and as a source of supply of power to the grid. The State Government policy offers incentive to such plants by way of exemption from electricity duty for a specific period. Unless a power plant is declared upfront a captive generating plant, on the basis of the criteria laid down in the rule 3 of the Rules, it will not be able to avail the incentives offered by the State Government. More importantly, it will not be able to avail open access as a matter of right which the Act provides. Secondly, unless the captive users are identified right at the beginning, on the basis of qualification laid down in rule 3, an annualized assessment of total consumption by captive users to determine whether the plant is a captive generating plant would not be possible. This cannot be done by the state transmission utility or a distribution licensee; nor is there any provision in the Act enabling the State Government to do so. Since permission for open access under section 39, 40 and 42(2) of the Act is given by the Commission, we feel that the State Commission would have to take on the responsibility of declaring a generating plant as a captive one and monitoring on an annual basis if it satisfies the criteria laid down in Rule 3.

5. Coming to the main issue of qualifications of captive generating plants and captive users, Section 2(8) defines a captive generating plant as a plant which generates electricity primarily for the use of the person who sets it up. But as mentioned earlier, what constitutes 'primarily for its own use' has been given only in the Electricity Rules, 2005. Rule 3 clearly lays down the requirements of captive generating plant: (i) not less than 26% of the 'ownership' should be held by captive user(s); and (ii) 51% of aggregate electricity generated annually is for captive use. Thus in case a person has 26% 'ownership' of a power plant he shall be a captive consumer provided his total captive consumption is 51% of the electricity generated by the plant. The Rule clarifies that 'ownership' in relation to a CPP set up by a company shall mean equity share capital with voting rights. [(Explanation (c) to rule 3]. In the present case UTCC holds 26% of the share capital of KVK, the company which has set up the power plant. UTCC shall use more than 51% of the power generated by the plant. Therefore, going by the requirements of captive generating plant, as laid down in Rule 3, UTCC should be treated as a captive user of the plant set up by KVK.

6. The Board has contended that a shareholder has no right to the assets of the company as per the provisions of the Companies Act and UTCC being a mere shareholder of KVK is not entitled to use the electricity generated by the power plant of KVK. It has also been contended by the CSEB that but for the shareholding, these are two distinct companies and have no other relationship. As mentioned above as per rule 3, 'ownership' in case of a company setting up a CPP shall be determined on the basis of shareholding with voting rights. We are of the view that the ownership in relationship to a captive plant, for use of electricity generated by the plant, has to be interpreted in the context in which it has been used in the Rules. 'Ownership' is used for the limited purpose of use of electricity generated by the CPP and such 'ownership' needs to be considered in the context of the Electricity Act and the Rules. Such consideration need not be circumscribed by consideration of other business of the company, nor the other assets and rights of the company. Although the Rules in this regard are not very clearly worded, the provisions have to be read and interpreted in the context in which these have been made. If we go by the Companies Act interpretation even prospective users of electricity setting up an SPV company would not be entitled to a share of the electricity generated by a CPP set up by the SPV. Such a position would be the very negation of the concept of CPP. In this context it has also been argued that a differentiation has to be made between a company set up as a SPV for setting up a captive generating plant and an existing company setting up one. There is no distinction made in the Rules between an SPV owning a captive plant and another company owning one. The only difference between the two is that in case of an SPV, management of the plant is its only the business while in case of an existing company generation of electricity may be in addition to other business it may have. To make a distinction between the two for the purpose of deciding ownership does not appear logical in the face of the clear provisions of the Rules. If we go by this interpretation, a company which has joined one or other companies/individuals to set up a power plant through an SPV company may hold only 5% of the share of the SPV company and yet he shall be entitled to use the electricity generated by the plant set up by the SPV; but if the same company holds more than 26% of the shares of an existing

company which sets up a captive plant it will be denied the use of electricity generated by the plant. If even an association of persons can set up a captive power plant there is no reason why the shareholders should not have the right to use electricity of a plant set up by the company. Going strictly by the restricted Companies Act interpretation of Rule 3, no person shall have the benefit of use of electricity of a captive plant through participation in the shareholding of a company.

7. That leaves us with the question whether a distinction should be made between shareholder ('owner') of a company setting up a CPP and a person who becomes a shareholder after the company has set up the CPP, in the matter of entitlement to use of CPP power. This question has arisen because of the use of the words 'to be set up' in the definition of CPP given in Section 2 (8) of the Act. Because of the use of the words 'to be set up' it is argued that a CPP is not an existing unit but is established afresh with identified captive users. Making such a distinction going strictly by the wording of the definition may not be justified. The requirements of a CPP as in Rule 3 do not make such a distinction. If an industry/company satisfies the 'requirements' there is no valid reason why an enquiry is necessary whether the company/industry was an original shareholder of the CPP - owning company or not. A distinction between an 'owner' who has become one subsequently and an original 'owner' would not be logical. The fact is that today UTCC meets the requirements of being a captive user as per law.

8. In the light of the above discussion, we hold that the power plant set up by KVK is a captive generating plant and UTCC its captive user. We shall assess at the end of one year from the date the plant started commercial production if there has been captive consumption to the extent of 51% of the electricity generated by the plant as required under rule 3 of the Rules. Authenticated data in this regard shall be made available by the petitioner to the Commission within one month of the completion of one year period.

Sd/-  
**Member**

Sd/-  
**Chairman**