Chhattisgarh State Electricity Regulatory Commission
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Petition No.04 of 2007(M)

In the matter of declaration of captive generating plant and captive consumer

G.R. Sponge & Power Ltd .... Petitioner
Raipur.

V/s

Chhattisgarh State Electricity Board .... Respondent
Raipur

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

O R D E R
(Passed on 20.8.07)

M/s G.R. Sponge and Power Ltd (hereinafter 'GRSPL' or 'the petitioner') has submitted this petition under section 9 of the Electricity Act, 2003 (the Act) read with rule 3 of the Electricity Rules, 2005 (the Rules), for permission for use of part of the electricity generated by its captive generating plant by M/s G.R. Minerals & Industries Pvt. Ltd (GRMIPL) as a captive user. GRSPL is incorporated as a company in the State and presently has a 200 TPD sponge iron kiln and avails electricity to the extent of 950 KVA contract demand from the Chhattisgarh State Electricity Board (hereinafter 'CSEB' or 'the respondent'). GRSPL is in the process of installing a power generating plant of 8 MW capacity based on waste heat recovery from sponge-iron kiln with addition of conventional fuel. The present operating capacity of the generating plant is 4 MW. GRMIPL is another company incorporated in the State which has acquired shares with voting rights of Rs. 2.08 crores which constitutes 28.12% of the total share capital of GRSPL, i.e. Rs.10 crore and paid up capital of about Rs.9.95 crore. GRMPIL has set up a ferro- alloys industry and wants to use the electricity generated by GRSPL to the extent of 250 lakh Kwh per annum as a captive user. Supply of power to GRMIPL will be through dedicated transmission line. This petition has been submitted by GRSPL for grant of permission to supply power to GRMIPL as a captive user. The petitioner has submitted that it meets the requirements of a captive generating plant as given in rule 3 of the Rules and GRMIPL qualifies to be a captive user under the same provisions of the Rules.

2. We would like to mention here that the petition was submitted as far back as 18.1.2007 and we had heard the final arguments and closed the case for orders on

15.2.2007. However, the respondent CSEB had drawn our attention to the observations of the Hon'ble Appellate Tribunal for Electricity, made in their judgement dated 12.9.2006, passed in appeal No. 98 of 2006, against our order in another case under section 9 of the Act. The Tribunal has observed, by way of obiter dicta, that the shareholders of a company cannot claim any title or possession or right or privileges in the assets and business of a corporate body. The Hon'ble Tribunal has admitted two revision applications submitted by the CSEB, under section 111 (6) of the Act against orders passed by this Commission in petition Nos. 10 and 2 of 2005 (M). We had, therefore, kept our decision in this case on hold pending the judgement of the Appellate Tribunal in the two revision petitions aforementioned. We, however, took up the case for final orders on the plea of the petitioner, submitted to us on 13.6.2007, that he had already started generation in his 4 MW captive generating plant with effect from 11.4.2007 and that it has been synchronized with the CSEB's 33 KV grid on the same day. The petitioner further submitted that it had entered into a power purchase agreement (PPA) with CSEB for supply of surplus power to the tune of 2 MW, and maximum of 4 MW during peak load hours, on 4.4.2007 and also that he had already started supplying surplus power to CSEB. He also submitted that he had set up the 33 KV dedicated transmission line and started supplying electricity from his plant to GRMIPL through this line. He pleaded that he had to meet his financial commitments made towards repayment of loan availed for installation of the captive generating plant and that delay in decision of this case will adversely affect not only him but also GRMIPL, the captive consumer, which had set up a ferro-alloys industry depending upon power supply by the petitioner. In view of this position and in the interest of justice we deemed it appropriate to consider the case on its merits and pass final orders which will ofcourse be subject to the judgement of the Hon'ble Appellate Tribunal in the two revision petitions aforementioned.

3. The respondent CSEB has made the following submissions in this case:

(i) That a shareholder of a company setting up a captive power plant cannot be a captive user. The observations of the Hon'ble Appellate Tribunal in appeal No. 98 of 2006, as mentioned above, have been cited in support. GRMIPL holds 28.12% share capital of GRSPL which has installed the power generating plant. Except for share- holding there is no other relationship between these two independent companies. Hence, GRMIPL cannot be treated as a captive consumer of GRSPL.

(ii) GRSPL has installed 8 MW power plant, of which presently only 4 MW capacity has started operation. Taking into account auxiliary consumption of 10%, the total power availability from the generating station will be of the order of about 280 lakh Kwh at 100% plant load factor. If 250 lakh Kwh is to be supplied to GRMIPL, as submitted by the petitioner, GRSPL will not be in a position to consume the minimum 51% aggregate power generated annually by the power plant, and hence will not be able to meet the requirements of rule 3 of the Rules to qualify as a captive generating plant.

(iii) Since the power proposed to be supplied to GRMIPL is not for captive use, the dedicated transmission line carrying the power will be treated as a distribution line supplying power to a consumer for which distribution licence is mandatory under the Act.

(iv) The petitioner has not mentioned clearly under which provision of the Act he is seeking adjudication by the Commission for his power plant being declared as a captive generating plant and GRMIPL a captive user.

In their two subsequent rejoinders of 3.7.2007 and 3.8.2007 the respondent has further contended as follows:

(v) That the petitioner has started his generating plant and has not only synchronized it with CSEB's grid on 10.4.2007, without notice to CSEB, but has also started injecting power into the respondent's grid. He has set up a dedicated transmission line without permission of the State Government in violation of the provisions of the section 68 (3) of the Act, which is punishable under section 146 of the Act. He has also supplied power to GRMIPL, the so-called captive user, without the permission of this Commission.

4. The only issue for consideration in this case is whether GRMIPL can be treated as a 'captive user' entitled to use the electricity generated by the captive generating plant of the petitioner. The other issue which has been raised and should be addressed is about the jurisdiction of this Commission to declare a generating plant as a captive plant and the user of electricity generated by such a plant as captive user. We would also deal with the matter regarding alleged violation of the provisions of the Act by the petitioner.

5. First, the legal position with regard to the captive generating plant. A captive generating plant (CPP, for short) has been defined in section 2(8) of the Act thus:

(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

y 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 y 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 to promote captive generating plants as decentralized generation and as 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. To our mind, 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. This addresses the issue of jurisdiction of the Commission to hear the petition

6. 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 for the person who sets it up. But as mentioned before, 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 GRMIPL holds 28.2% of the share capital of GRSPL, the company which has set up the power plant. GRMSIPL alongwith GRSPL 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, GRMIPL should be treated as a captive user and the plant set up by GRSPL a captive generating plant. Secondly, one of the requirements of the captive generating plant, as per the provision of under Section 2(8) of the Act, is that the CPP has 'to be set up' i.e. it is not an existing generating unit but it is established afresh with identified captive users. In this case GRMIPL was a shareholder of GRSPL when the captive plant was set up. In fact, GRMIPL became a shareholder of GRSPL and the captive plant was set up for use of the industries of both.

7. 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 GRMIPL being a mere shareholder of GRSPL is not entitled to use the electricity generated by the power plant of GRSPL. 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. The Rules do not seek to interpret the provisions of the Companies Act. If we go by the Companies Act interpretation even perspective 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.

8. Another question raised in this case is that there can not be two kinds of captive consumers i.e. the company owning the captive plant itself and the shareholders holding 26% or more shares. If we go by the provisions of the Rules we do not find any reason why this cannot be so. The only issue which may remain is the proportion in which the power may be used by the shareholders. This may be left to the company which owns the captive plant to decide. The only requirement is that the company's own use and the shareholder's use together must be at least 51% of the electricity generated by the captive plant, on an annual basis. In view of the above, we are of the view that the rule position is clear and any shareholder(s) in case of a company holding 26% of shares of the company should be treated as captive user(s) within the meaning of rule 3.

9. Another legal issue which has been raised in this case is that while a captive plant may erect 'dedicated transmission lines, such lines by definition are transmission lines and therefore these are not for supply of electricity to the captive user(s) since supply involves the distribution system. Such transmission lines entitles the power plant only to connect the plant to another transmission line or sub-stations or generating stations or load centre, as the case may be', as per the definition of 'dedicated transmission lines' given in Section 2(16) of the Act. Such an interpretation may not be in keeping with the purpose of a separate provision for captive plant in the Act. This is to say that the captive plant requires distribution licence for supply of electricity to himself for his own use. This may not be in keeping with the very concept of a captive plant. A harmonious reading of the provisions of the Act with regard to such generating plants may not warrant such an interpretation. It would be relevant to note here that restrictions were imposed under Sec. 44 of the Electricity (Supply) Act, 1948 on new generating plants, including captive plants and under these provisions no such plant could be set up except with the specific permission of the Electricity Board. The present Act makes a clear departure from such restrictions in respect of generation itself, by delicencing generation and has made special provision for captive plants to enable and facilitate decentralized generation and distribution. A captive consumer, moreover, who uses electricity generated by his captive plant is not a 'consumer' as defined in the Act. The term 'consumer' has been defined in Section 2(15) thus:

'"Consumer" means any person who is supplied with electricity for his own use *by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force* and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person as the case may be'. (Emphasis added).

A captive plant is neither 'a licensee' nor any of the person engaged in the business of supplying electricity to the public under the Act'. The supply of power by a captive plant to a captive consumer also does not fall within the definition of 'supply'. Section 2(17) defines 'supply' thus:

'"Supply" in relation to electricity means the sale of electricity to a licensee or consumer'. (Emphasis added).

Use of one's own electricity cannot be treated as sale. The last proviso to Section 39 as also the last proviso to Section 40 provide that surcharge on transmission charges are not leviable in case open access is provided to a person who has established a captive generating plant for "carrying the electricity to the *destination of his own use"*). Section 42(2) in the fourth proviso makes a similar provision whereby cross subsidy surcharge is not leviable in case open access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use. 'Destination of own use' should not be interpreted as the 'load centre'. A harmonious reading of the provisions of the Act and the Rules would clearly establish that captive use of electricity generated by a captive generating plant is not 'distribution of electricity'. There are a number of companies which have set up captive generating plants within the same premises in which the captive user industry is located. In such cases even dedicated transmission line is not required and power can be transferred straight from the generating station to the captive user industry. It cannot reasonably be argued that a distribution licence would be required for such supply. There is no reason why there should be a distinction between such captive plants and such others which are set up away from their captive consumer industry, on any consideration including availability of coal/fuel, non-availability of land close to the industry or for any other reason.

10. In the present case the respondent CSEB has argued that GRSPL has presently set up only 4 MW capacity plant and supply of 250 lakh Kwh to GRMIPL, as proposed by the petitioner, will not leave enough power for consumption by GRSPL to the minimum extent of 51% of the aggregate power generated annually by the power plant. In rule 3, the provision is that 51% of total power generated has to be consumed 'for the captive use'. The captive use will comprise of the use of the electricity generated by the captive plant by both GRSPL and GRMIPL. Although GRSPL has installed only 4MW capacity so far and has submitted that the second unit of 4MW capacity may be set up within a year, the consumption figures submitted by the company showed that more than 81% of the present consumption is for captive use only. The plant is supplying electricity to the CSEB to the extent of 18.75% only. The petitioner has also requested the CSEB to reduce the quantum of power to be sold to them from 2MW as in the PPA to 0.5 MW. If the company continues with the 4MW capacity plant, the calculation of 51% consumption has to be in relation to that capacity only. This position would be known only at the end of the year. We, therefore, feel that there is no substance in the contention of the respondent CSEB in this regard.

11. As to the violation of the provisions of the Act by the petitioner, it would appear that the petitioner has not only set up dedicated transmission line without permission of the State Government, as required under Sec. 68(3) of the Act, it has also alleged that the petitioner has started supplying power to GRMIPL through dedicated transmission line without permission of this Commission. As far as the first issue is concerned, the petitioner has obtained permission for setting up the transmission line from the Chief Electrical Inspector ostensibly from safety point of view, and from the Chhattisgarh State Industrial Development Corporation (CSIDC)

on whose land the transmission lines have been established, the Siltara industrial area being under the management of the CSIDC. The State Government, however, is free to make necessary enquiry and take suitable action against the petitioner under Sec. 146 of the Act if there has been any violation of the provisions of Section 68(3) of the Act. The petitioner has admitted that it has started supplying power to the captive user GRMIPL. It has pleaded that such supply has been made because (i) the respondent CSEB is not in a position to supply power at present to the ferro-alloys industry of GRMIPL; and (ii) the power plant has started generation of electricity and a decision by the Commission was being delayed. The industry could not have commenced production without supply of power thus rendering substantial investment idle. It is admitted by the CSEB that it is not in a position to supply power to the industry before the proposed new 40 KVA transformer is installed in the Siltara industrial area. The Board has not stated how long it will take to install the transformer and provide electricity. It is a fact that this case has taken a long time for disposal, nearly more than seven months for reasons stated above. Therefore, although there has been a violation of the provisions of the Act we would like to take a lenient view keeping in view the circumstances of the case, and do not propose to take any action against the petitioner.

12. In the light of the above discussion, we hold that the power plant set up by GRSPL is a captive generating plant and GRMIPL its captive user alongwith GRSPL. 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.

13. Copy of the order be given to both the petitioner and the respondent. Copy of the order be given to the State Government also for taking action, as deemed fit, as per paragraph 10 of this order.

sd/- sd/-

Member **Chairman**