
Case No.10 of 2000

..... Respondents

For Respondent No 1 : None
For Respondent No.2 : Mr. L. Pangari, Advocate
For Respondent No.3 : Mr. A.K. Parida, Manager (Liaison)

Date of Order : 16.07.2001

1. This proceeding arises out of an application filed by M/s National Aluminium Company Ltd. (NALCO, for short) to issue direction to M/s GRIDCO for wheeling of its power to M/s Nava Bharat Ferro Alloys Ltd., Khadgaprasad in the first phase and to other Ferro Alloys Industries latter.
2. M/s NALCO has submitted that it has an integrated Alumina, Aluminium and power complex in the State of Orissa. It operates 6X120 M.W. CPP at Angul and 3X18.5 M.W. CPP at Damanjodi in Koraput District. At present, NALCO is feeding the entire surplus power to the State grid at Chainpal, Angul and drawing deficit power at Mines and Refinery Complex, Damanjodi to meet the process requirement. NALCO has obtained approval of OERC for direct sale of power to M/s International Aluminium Products Ltd. (IAPL, for short) to the tune of 14 MVA vide OERC order dt.28.5.1998 in Case No.25/97. Every year NALCO

generates surplus power to the tune of 900 MU per annum and it feeds the entire quantum to the State Grid i.e. GRIDCO, who is the license holder for Bulk Supply & Transmission. The entire energy transaction between NALCO and GRIDCO is governed by MOM dated 25.1.91 and 1.6.94.

3. It is contended by NALCO that although export of energy is continuously going on to the state grid, there is a poor track record on the part of GRIDCO when payments to NALCO for the energy supply arises. As on 31st January, 2000, NALCO has to receive from GRIDCO a sum of Rs.138.40 crores towards its energy billing for the year 1999-2000. GRIDCO had proposals for power requirement from CPP to the tune of 516.05 MU against which the Hon'ble Commission, in its order dated 30.12.99, has approved the purchase of power from CPPs to the tune of 457.36 MU. Assuming that this power is drawn solely from NALCO CPP, still NALCO is left with a surplus power to the tune of 500 MU approximately per annum.
4. Due to low off take of power from NALCO by GRIDCO, NALCO has the following problems.
 - i) NALCO Captive Power Plant is not able to run in its full rated capacity.
 - ii) It is becoming difficult for NALCO to achieve the high plant load factor.
 - iii) Consequently the cost of generation is going up.
 - iv) Low generation of power affects the equipments, accessories, apart from creating low standards of productivity in the organisation.
 - v) Installed generation capacity is not used to its full potential though it is able to produce more.
5. The huge arrears lying with GRIDCO as well as this lower requirement of GRIDCO is causing immense difficulty on the part of NALCO to run its CPP in an efficient manner.
6. NALCO further avers that the policy guidelines issued by Govt. of Orissa on 20th March, 1998, on Alumina and Aluminium Smelting Industries, provides that:

"GRIDCO will permit wheeling of power over its transmission system. It will also allow sale of surplus power by the industries in the State or outside the State to the extent permitted by the State Govt. subject to the carrying capacity of the transmission system and subject to payment of wheeling charges".

- 6.1 Considering the above, NALCO proposes to sell its power directly to M/s Nava Bharat Ferro Alloys with a demand of 26 MVA initially in first phase and other Ferro Alloys Industries in second phase. Therefore it prays the Hon'ble Commission to direct GRIDCO for wheeling of NALCO's power to M/s Nava Bharat Ferro Alloys Ltd. initially in first phase and to other Ferro alloy industries on payment of wheeling charges already fixed by OERC.

7. Subsequently, NALCO requested that State Govt., M/s CESCO, Ferro Alloys should be impleaded as parties for proper and effective adjudication of the case. M/s Nava Bharat Ferro Alloys Ltd. also requested to be impleaded as a party in the proceedings. These requests were allowed and the State Govt., CESCO and M/s Nava Bharat Ferro Alloys Ltd. were impleaded as parties to the proceedings.
8. GRIDCO in its reply has submitted that as per the OER Act, 1995, the following categories can be engaged in the business of supplying electricity.
 - i) Any one authorised by license issued by OERC u/s 15(1) of OER Act, 1995.
 - ii) Those who are exempted u/s 16 of the OER Act, 1995.
 - iii) Those who have been authorised or exempted by any other authority under the Electricity (Supply) Act, 1948.
9. NALCO has not been authorised or exempted by any authority under Indian Electricity Act, 1910, or Electricity (Supply) Act, 1948, except with regard to specific sanction for sale of power M/s IAPL only (formerly M/s Mukund Steels Ltd.) situated within the NALCO Nagar, Angul, as per Deptt of Energy order No.1374 dated 30.4.92 and subsequent approval of OERC vide order dt.28.5.98 in Case No.25 of 1997. GRIDCO being aggrieved by the order dt.28.5.98, permitting NALCO for sale of power to M/s IAPL has gone an appeal to the High Court and the same has been admitted and pending before the Hon'ble High Court.
10. OERC vide their order dt.31.3.99 had issued amended Transmission and Bulk Supply License, 1997 (2/1997) in favour of GRIDCO w.e.f. 1.4.99 and by such amendment the EHT consumers are being treated as consumers of DISTCOS, even though they are connected to the Transmission system. This amendment has been incorporated in view of restructuring of the Retail Supply business.
- 10.1 Further in the order dt.13.5.99 in Case No.4/99, OERC has observed:

"..... OER Act, 1995 is a watershed in electricity regulation in Orissa. It is quite clear that it is neither sustainable in law nor in logic to claim legitimacy for every formal and informal bilateral agreement between the erstwhile OSEB and a private power producer-cum-consumer after the operation of the OER Act, 1995 when the entire regulatory environment has different legal structure and provisions and the licensee's system has to be consonant with the purpose and provisions of the Reform Act".

In view of the above clear cut order of OERC in Case No.4/99, the energy transaction between NALCO and GRIDCO is governed by orders issued by OERC from time to time since 1.4.96 and not as per MoM dt.25.1.91 and 1.6.94.
11. GRIDCO has further submitted that power from CPP is cheaper only if it costs less than the variable cost of other generator connected to the State grid system.

The variable cost of power from NALCO even at the rate of 77 paisa/unit is much higher than that of other power stations, namely OPGC, TSTPS, TTPS etc. The CPP power is infirm in nature. From May'99 onwards NALCO did not supply the scheduled quantum to GRIDCO. Hence reliance on CPP's surplus for meeting the power needs of the State for present as well as that of future is neither technically feasible nor economically viable. GRIDCO has firm Agreements with other generating stations and is expected to procure power economically. It would draw power from NALCO to the extent not available from other stations.

12. GRIDCO has further submitted that it is the sole licensee for Transmission and Bulk Supply of electricity inside the State of Orissa. NALCO has no license to sell electricity to any consumer insider and outside the State of Orissa. GRIDCO is therefore not obliged to lend its Transmission Line for transmission of power from NALCO's CPP at Angul to any other industries inside and outside the State of Orissa.
13. In keeping with the policy directive of Ministry of Power, off-peak power to Ferro-Alloy industries in the State including that of Nava Bharat Ferro Alloys Ltd. is allotted from unallocated power of NTPC, from the cheapest NTPC stations of Eastern region to make their product competitive in the International market. Deptt. of Energy, Govt. of Orissa has also clarified it. of Energy, Govt. of Orissa that the policy guidelines of March, 1998 regarding Aluminium and Alumina Industries in Orissa do not cover Captive Power Stations, which were established prior to promulgation of such policy guidelines.
14. As per amended Transmission and Bulk Supply license issued in favour of GRIDCO w.e.f. 1.4.99 by OERC vide order dated 31.3.99, the EHT consumers shall be treated as consumers of DISTCOS, though they will remain connected to the transmission system of GRIDCO. NALCO is neither a licensee for supply of electricity nor an independent power producer permitted to do business in generation and sale of power. Further, if CPPs are allowed to trade their surplus power, then the interest of both GRIDCO and DISTCOS shall be affected and the CPP and third party may stand to gain. The general public shall be deprived of the same.
15. Owing to the aforesaid grounds and in view of Sec.58 of the OER Act, 1995, GRIDCO has prayed that the application of NALCO, for sale of power to M/s Nava Bharat Ferro Alloys Ltd. may be rejected.
16. CESCO which has been impleaded as a party in the case has submitted that in Case No.25/99, a similar application was made by M/s NALCO for permission for direct sale of surplus power to Ferro Alloys Industries including M/s Nava Bharat Ferro Alloys Ltd. After hearing the parties, the Commission vide order dt.28th May, 1998, has observed as follows.

"In the above facts and circumstances before us and the position of law as indicated by us, we order that while the sanction order of Govt. of Orissa during

July, 1992 permitting NALCO for sale of power to M/s IAPL as to be honoured, M/s NALCO can not be permitted to sell power to any one else within GRIDCO's area of license".

- 16.1 The Commission has also further observed that no general permission to sell surplus power to any party has been given to M/s NALCO under the Electricity (Supply) Act, 1948, and/or in any Govt. order, except for specific sanction to IAPL. M/s GRIDCO are the sole licensee in the State of Orissa and if NALCO is allowed third party sale of surplus power to industries inside the State, GRIDCO as a licensee working in a regulatory regime will face severe financial crisis and may face liquidation. The Commission has upheld GRIDCO's objection that NALCO has no right for sale of surplus power to any one within GRIDCO's licensed area by using GRIDCO's transmission and distribution system sanctions or exemptions.
17. CESCO further submits that CESCO is the sole licensee in the area of supply in which licence has been granted by the Hon'ble Commission as per the provisions of the OER Act, 1995. If NALCO is allowed to sell power to any industry within its area of supply, CESCO, which is operating with difficult financial conditions, shall suffer further financial hardship and shall not be able to discharge its duties, obligations and functions in the licensed area.
18. Section 14 of the OER Act, 1995 provides that no person other than those authorised to do so by the licence or by virtue of exemption under the Act or authorised or exempted by any other authority under the Electricity (Supply) Act, 1948, shall engage in the State in the business of transmitting or supplying electricity. Section 16 of the Act provides that the Commission may make regulations to grant exemptions from the requirement to have a licence, but subject to compliance with such conditions, if any, as may be specified in the Regulations.
19. Proviso to the Section 16(1) provides that the Commission shall not under any such regulation grant any exemption except with the consent of the licensee operating in the area of supply. In the instant case, no such consent has been asked for/obtained by the applicant from CESCO.
20. In view of the facts stated above, CESCO submits that the application filed by M/s NALCO for supply of power to M/s Nava Bharat Ferro Alloys Ltd. is not maintainable and is liable to be rejected.
21. M/s Nava Bharat Ferro Alloys Ltd., who has also been impleaded as a party has submitted that it has set up a Ferro Alloys Plant to produce 50,000 tonnes of Ferro Chrome per annum predominantly for exports and has commenced operation from 1997. The manufacturing process for Ferro Alloys is highly power-intensive. Recognising the necessity of low cost power for the Ferro Alloy Industry for competition in International markets, the Central Govt. has allowed direct supply of power from NTPC, wheeled by GRIDCO. Despite the NTPC power meeting a

- part of the total need, the high cost of grid power has affected the operation and capacity utilisation of the Ferro Alloys Plant. The Commission has granted permission to it for establishment of a 1X30 MW Coal based Captive Power Plant. Govt. in the policy direction dated March, 1998, has decided that GRIDCO should allow sale of surplus power by the Industries in the State to the extent permitted by the State Govt., to be wheeled over its Transmission system. The applicant and the respondent have reached an understanding that NALCO will sell their surplus power to the extent of 26 MVA on mutually agreed terms. As such the Commission may direct GRIDCO to wheel excess power of NALCO to Nava Bharat Ferro Alloys Ltd. on payment of wheeling charges.
22. Subsequently, NALCO has filed an application before the Commission u/s 16 of the OER Act, 1995 seeking exemption from licence for supply of its power to Nava Bharat Ferro Alloys Ltd.
 23. We have heard the counsel for NALCO and CESCO and perused the written submission made by GRIDCO.
 - 23.1 As per the provisions of OER Act, 1995, the following categories can be engaged in the business of supplying electricity.
 - i) Any one authorised by license issued by OERC u/s 15(1) of OER Act, 1995.
 - ii) Those who are exempted u/s 16 of the OER Act, 1995.
 - iii) Those who have been authorised or exempted by any other authority under the Electricity (Supply) Act, 1948.
 24. NALCO has not been authorised or exempted by any authority under Indian Electricity Act, 1910 or Electricity (Supply) Act, 1948 to supply electricity except with regard to sanction for sale of surplus power to M/s IAPL only (formerly M/s Mukund Steels Ltd.) vide Energy Deptt. order No.1374 dt.23.4.92 and subsequent approval by OERC vide its order dated 28.5.98 in Case No.25/97.
 25. OERC vide their order dated 31.3.99 had issued amended Transmission and Bulk Supply License, 1997(2/1997) in favour of GRIDCO w.e.f. 1.4.99 and by such amendment, the EHT consumers are being treated as the consumers of Distribution Companies, even though, they are connected to the Transmission system. Thus amendment has become necessary in view of restructuring of Retail Supply business.
 26. Besides that, by order dated 31.3.99 in Case No.22/98, the Commission has granted license u/s 15 of the OER Act, 1995 to CESCO for distribution and retail supply of electricity. On the said license, the areas of supply within which CESCO is authorised to carry out the business of distribution and retail supply has been clearly defined which includes the geographical area within which M/s Nava Bharat Ferro Alloys Ltd is situated.

27. Section 16 of the Act provides that the Commission may make regulations to grant exemption from the requirement to have a licence, but subject to compliance with such conditions, if any, as may be specified in the regulations. Proviso to Sec.16(1) stipulates that even the Commission shall not grant any exemption except with the consent of licensee operating in the area of supply. Both the licensee, GRIDCO for Bulk Supply and CESCO for Retail Supply, have objected to the grant of exemption to NALCO, for supply of electricity to Ferro Alloys Industries. GRIDCO in its written submission has indicated that if CPPs are allowed to trade their surplus power, then the interest of both GRIDCO and CESCO will be affected and only CPP and the third party may stand to gain benefit. But the general public will be deprived of the same. CESCO in its written submission has also pointed out that, if NALCO is allowed to sell power to any industry within its area of supply, then CESCO, which is operating with difficult financial conditions shall suffer further financial hardships and shall not be able to discharge its duties and functions in the licensed areas.
28. As indicated above, exemption from the requirement of a license to engage in the business of supply, can be granted to any agency only with the consent of licensee operating in the area. Both GRIDCO and CESCO have objected to grant of such exemption to NALCO for supply of its excess power to Nava Bharat Ferro Alloys Ltd. As such exemption from the requirement of licence can not be granted to NALCO without consent from the licensee.
29. In case No.25/97, while considering an application of M/s NALCO for sale of power to IAPL, we have observed as follows which is relevant in this regard.
"17. We also note the averment made by M/s GRIDCO that they are the sole licensee in the State of Orissa and if NALCO is allowed third party sale of surplus power to industries inside and outside the State, GRIDCO as a licensee working in a regulatory regime will face severe financial crisis and may face liquidation. We are not going into the details of this at the moment. For reasons stated earlier we have to uphold Gridco's objection that NALCO has no right for sale of power to any one within Gridco's licensed area by using Gridco's transmission and distribution system or in other manner except with specific sanction or exemption.

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20. In the above facts and circumstances before us and the position of law as indicated by us we order that while the sanction order of Govt. of Orissa during July' 1992 permitting Nalco for sale of power to M/s IAPL has to be honoured, M/a Nalco cannot be permitted to sell power to any one else within Gridco's area of licence."
30. It has been submitted by NALCO that the entire energy transaction between NALCO and GRIDCO is governed by Minutes of the meeting dt.25.1.91 and 1.6.94. Although power is exported to the State Grid, there is poor track record on the part of GRIDCO when payment to NALCO is concerned. Besides that, there is poor off take of power by GRIDCO, as a result, NALCO CPP is not able to run

in its full rated capacity and the cost of generation is going up, In reply to this, GRIDCO has submitted that the CPP power is cheaper only if it costs less than the variable cost of other generators connected to the State Grid system (Fixed cost has to be paid anyway). The variable cost of power from NALCO even at the rate of 77 paisa/unit is much higher than that of OPGC, TSTPS, TTPS etc. From May'99 onwards, NALCO did not supply the scheduled quantum of power to GRIDCO. Hence, reliance on CPP for meeting the power needs of the State for present as well as that of future is neither technically feasible nor economically viable. GRIDCO has firm Agreements with other generating stations and is expected to procure power economically. It would draw power from NALCO to the extent it is not available from other stations. For the year 1999-2000, GRIDCO's power requirement from CPPs was 516.05 MU against which the Commission has approved 457.36 MU. During 1999-2000, the net export of power to the State Grid after adjustment of Damanjodi drawl has been 567.11 MU. Therefore, GRIDCO has helped in improving the PLF and generation of NALCO during 1999-2000 like that of previous years. Moreover, non-payment of dues by GRIDCO to NALCO may be raised in the appropriate forum as per the contractual arrangements between them, but this cannot be ground for granting permission for supply of power to others.

31. As regards the applicability of the minutes of the meeting dated 25.1.91 and 1.6.94, we have made our observation in Commission's order dt.13.5.99 in Case No.4/99 which is quoted below:

"6.2 xxx xxx xxx. Some minutes of the decision of a meeting taken by the Chief Minister of Orissa on 25.01.91 had been filed. It has to be noted that no formal directive, policy, order or enforceable contract had been cited or brought before us. Further, the meeting that took place in January, 1991 was much before the passing of the Orissa Electricity Reform Act, 1995. Entire legal and structural framework as well as the regulation of the electricity industry has undergone a metamorphosis with effect from 1st April, 1996 when the OER Act, 1995 came into being. Except with regard to legally enforceable contracts and the legal provisions and decisions saved in the OER Act, 1995, the entire regulation of electricity industry has been brought under the ambit of the Orissa Electricity Regulatory Commission. We have noted elsewhere that the OER Act, 1995 is a watershed in electricity regulation in Orissa. It is quite clear that it is neither sustainable in law nor in logic to claim legitimacy for every formal and informal bilateral arrangement between the erstwhile OSEB and a private power producer-cum-consumer after the operation of OER Act, 1995 when the entire regulatory environment has different legal structure and provisions and the licensee's system has to be consonant with the purposes and provisions of the Reform Act."

Therefore the energy transactions between NALCO and GRIDCO is to be governed by orders issued by OERC from time to time since 1.4.96 and not as per MoM dt.25.1.91 and 1.6.94.

32. We have taken into account the policy guidelines issued by Govt. with regard to setting up CPP for Aluminium & Alumina Plant in the State. Nalco in its application has submitted that as per policy guidelines issued by Govt. of Orissa, GRIDCO shall permit wheeling of power over its transmission system. It will also allow sale of surplus power by the Industries in the State or outside the State to the extent permitted by the State Govt. subject to carrying capacity of the transmission system and subject to payment of wheeling charges. However, Govt. in its letter dt.14.8.2000 has clarified that the policy guidelines are applicable for new Captive Power Plants to be established after March, 1998 for new Aluminium Industries. Besides that, State Govt. is of the view that Captive power stations are to meet the specific power requirement of the Industry to which they are captive and surplus power, if any, is to be sold only to Bulk Power Licensee. Captive Power Stations are not expected to sell surplus power to any other consumer.
33. It is also argued by the petitioner that promotion of Captive Power Plants has been a policy of the Central Govt. The policy encourages Captive/Co-generation Power Plants by industry and also suggests, inter-alia, sale of excess power to the grid as per mutually agreed rates. In this regard, it may be stated that such a policy had been formulated by the Central Govt., to meet the deficit situation in several states of India. As the gestation period of setting up large power projects is long, and there would be shortage of power in near future, Captive/Co-generation Power Plants are being encouraged. However, Govt. policy to encourage setting up Captive/Co-generation Plants does not give a blank cheque to set up such plants even where they are not needed. The Policy is in the nature of a guideline to be kept in mind while granting permission to set up new generating stations. It cannot be construed as a directive of the Central Govt. for automatic permission for setting up CPPs even where power is surplus and the Transmission and Supply Licensees are paying fixed charges for the power not needed in the State. The policy does not and cannot override Section 44 of the Supply Act read with Sec. 21(3) of the Reform Act conferring power on the Regulatory authority to consider justification of each case while granting permission. Eastern region of the Country, more particularly the State of Orissa is facing surplus situation. The Eastern Grid is experiencing the problem of over frequency most of the time due to excess power in the grid. As such, injection of any excess power to the grid from C.P.P. or Co-generation Plant in excess of commitments made under existing contractual arrangements is undesirable at this stage. Permission to a CPP to sell power to Grid or to a third party - even if third party is a sister concern, is not in the interests of the State of Orissa at this juncture.
34. Before concluding we must put in perspective the rights and limitations of NALCO in regulatory environment of electricity sector in Orissa. There is no legal standing of a captive power plant and no right accrues to it in the electricity sector for sale, purchase, distribution and trading of power except what is specifically and explicitly permitted in the consent granted under Section 44A of the Electricity Supply Act to a generating station. None but a licensee or authorised entity can transmit, distribute or supply electricity. Licensee and those

who are authorised are regulated entities. The license/authorisation granted to them have corresponding obligations in addition to rights. A generating company though not a licensee also is regulated to some extent. NALCO is not in any of these categories, but a general industrial unit permitted to set up a generating station. The Govt. of Orissa and the Regulatory Authority have granted some addl. benefit of sale of power to GRIDCO and IAPL. The State obliged NALCO because at that point of time it was in the interests of the State in a power-scarcity situation. This does not confer a recurring right as claimed by NALCO. Besides, when the State is surplus in power and fixed costs of costly power are being paid to NTPC even though power is not being fully utilised, to allow NALCO third party sale inside the State would adversely affect the interest of CESCO, GRIDCO and of the State. Hence we find no case for permitting NALCO.

35. In view of the facts stated above, the application of M/s NALCO for granting permission for direct sale of power to Ferro Alloys Industries and initially to M/s Nava Bharat Ferro Alloys Ltd., Khadgaprasad is not admitted.

(H.S. SAHU)
MEMBER

(D.K. ROY)
CHAIRMAN