

ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012

Present: Shri B.K. Das, Chairperson
Shri K.C. Badu, Member
Shri B.K. Misra, Member

Case No.139/2009

In the matter of: For adjudication of dispute under Section 86(1)(f) of the Electricity Act, 2003 relating to supply of surplus power from the CGP of the petitioner to GRIDCO Ltd. at 11 KV through the 11 KV bus of OCL India Ltd., Rajgangpur.

AND

In the matter of:

M/s. OCL Iron & Steel Ltd., Rajgangpur

....Petitioner

Vrs.

WESCO & Others

..... Respondents

For the petitioner : Shri N.C. Panigrahi, Sr. Advocate, Shri S.R. Panigrahi, Advocate & Shri R. P. Mahapatra, Authorised Representative

For the respondents: Shri Debasish Das, GM (Corp. Reg. Affairs), CSO, WESCO, NESCO & SOUTHCO
Shri G.C. Mohanty, DGM (Com), WESCO
Ms. Niharika Pattanayak, DM (Legal), WESCO, NESCO & SOUTHCO
Shri Jitendra Kumar Dash, Sr. GM (PP), GRIDCO

Date of Hearing: 21.6.2010

Date of Order: 26.8.2010

ORDER

1. M/s. OCL Iron and Steel Ltd. (in short OISL) has a CGP having installed capacity of 14 MW which generates power utilizing WHRB and AFBC boilers. There is a surplus power of 4 MW (average) which was being supplied through open access to OCL India Ltd. through a dedicated 11 KV line constructed, operated and maintained by OISL. At the same time OCL Ltd., Rajgangpur is a consumer of WESCO having a CD of 43.5 MVA availing power supply at 132 KV and categorized as a heavy

industry. Therefore, OCL is a open access consumer and sources a portion of its power requirement from M/s. OISL paying cross subsidy surcharge and wheeling charges to WESCO as per order dtd.01.12.2008 in Case No.10 of 2008 of OERC which was upheld by ATE in their order dtd.03.09.2009 in Appeal No.20 of 2008. In that case OERC had rejected the plea of OCL Ltd. for not paying cross-subsidy surcharge while availing Open Access. This open access transaction was stopped on 07.09.2009 by OCL. In the meantime, OERC in Case No.6-20 of 2009 dtd.30.06.2009 while allowing remunerative price for procurement of power from CGPs by GRIDCO and to evacuate bottled up CGP power observed that '*GRIDCO should leave no stone unturned to mop up as much power as possible from all sources including CGPs*'. Similarly, OERC further in the same order observed that *individual CGP may sign agreement with GRIDCO or the DISCOMs covering the volume and duration of supply of firm power as may be mutually agreed upon.*

In pursuance to this observation of OERC, GRIDCO signed a PPA with OISL on 14.10.2009 allowing them remunerative price as per OERC order. It was proposed in the agreement that CGP of M/s OISL can supply power at 11 KV voltage level, which can be utilized by M/s OCL Ltd. and that the meter installed at premises of M/s OISL can be considered as billing meter by GRIDCO if the dumped data of the same meter is supplied to GRIDCO by WESCO, and that, GRIDCO shall raise the monthly bill to WESCO through BST bills for accounting the quantum of power exported by CGP of M/s OISL at 11 KV for WESCO. Accordingly, it was sought that necessary arrangement be made to send the dumped data of the energy meter installed at the premises of M/s. OISL every month in a CD form to GRIDCO through the representative of M/s OISL for verification at the Energy Billing Centre (EBC) of GRIDCO and processing the same for payment.

2. OCL India Ltd. through the petitioner submitted a 'No Objection Certificate' confirming that OCL does not have any objection for evacuation of power to GRIDCO by OISL through existing electrical system or network.
3. In response to GRIDCO's letter dtd. 14.10.2009 WESCO informed GRIDCO on 30.10.2009 that WESCO was examining the matter from legal, technical and regulatory framework, since M/s. OCL is a consumer of WESCO and earlier, was receiving supply from CGP of M/s. OISL through Open Access.
4. On 30.10.2009 GRIDCO intimated WESCO that it would raise bulk supply bills on WESCO after deducting 0.5% from 11 KV metering data towards wheeling loss to

equate the supplies at 33 KV to WESCO. The payment of Open Access charges, and other charges and transmission charges was not leviable as the supply was to WESCO only. When the matter stood thus, GRIDCO intimated WESCO on 13.11.2009 calling for starting of transaction at once and that WESCO should co-operate with supplying dumped metering data to M/s OISL and should not insist on payment of cross-subsidy and wheeling charges. GRIDCO further stated that WESCO stands to gain out of transaction by getting power at BSP rate and selling to M/s OCL at higher rate which includes some elements of subsidy.

5. Now, on 01.12.2009 M/s. OISL filed a petition before this Commission calling for adjudication of disputes under Section 86 (1) (f) of the Electricity Act, 2003 relating to supply of surplus power from CGP of OISL to GRIDCO Ltd. at 11 KV through the 11 KV bus of OCL India. The Commission on its Order dtd. 16.12.2009 stated that the present case arises out of lack of proper communication between the parties and in the present power deficit situation in the State, it should be the endeavour of all the parties to procure the available surplus power of CGPs. GRIDCO should take immediate step for drawal of surplus power of CGPs to the State Grid and WESCO has to provide necessary co-operation in this regard and power should not be bottled up on technical reasons which can be sorted out latter on. The Commission decided to adopt an approach of conciliation and further directed all the parties in the issue to settle the matter through mutual discussion and pending a final decision regarding commercial arrangement, the injection of surplus power of CGP of OISL to the State Grid will continue and any commercial arrangement will be given effect from the date of injection of surplus power. Several rounds of discussions among the parties were held but they could not reach a consensus. Basing on their meeting held on 04.02.2010 and considering the prayer of petitioner, the Commission further directed on 27.5.2010 that pending final settlement of issues, GRIDCO should make payment provisionally 50% of the outstanding amount payable to M/s. OISL ltd. on or before 15.06.2010. The said payment shall be adjusted in the final settlement.
6. The matter came up before us again on 21.6.2010 for final hearing and disposal.
7. The Senior Counsel for the petitioner submitted that on the day of execution of PPA i.e. 14.10.2009, GRIDCO intimated WESCO about the same and also requested that necessary arrangement be made to send the dump data of the energy meter installed in the premises of OISL every month to GRIDCO in a CD. In spite of their best efforts GRIDCO and petitioner, WESCO did not communicate acceptance or objections to

the arrangement for taking the meter reading at the premises of OISL. In spite of direction of OERC on 27.5.2010 regarding provisional payment of 50% of the outstanding amount of OISL towards power injection, WESCO had not taken any action.

8. Representative of GRIDCO submitted that GRIDCO has been procuring power from the petitioner w.e.f. 22.12.2009 as per the order of the OERC on 16.12.2009 and as per the terms and conditions of the PPA dtd. 14.10.2009. The power is being supplied at BSP tariff to WESCO like other similar cases of CGP like M/s. SMC Power Generation Ltd. under WESCO area who are supplying at 33 KV. The payment of energy bills of CGPs supplying power through shared feeders of DISCOMs is effected by dump MRI data supplied by DISCOMs each month as agreed in the PPA. The respondent WESCO had never disputed such transaction of power by GRIDCO and have furnished the dump MRI data. The representative of GRIDCO further submitted that GRIDCO would raise a bill on WESCO for the power received from OISL Ltd. and injected to OCL Ltd. at the BSP rate approved by the OERC and WESCO in turn may raise a bill for such power on OCL Ltd. at applicable Retail Supply Tariff. The representative of OCL Ltd. was also present in the meeting of the all the stakeholders of the dispute on 18.6.2010 and had not objected to this arrangement. The representative of GRIDCO described this arrangement as a Win-Win situation for GRIDCO and WESCO.
9. The learned Counsel for WESCO opposed the proposal of the petitioner and GRIDCO with vehemence. He submitted that the sole intent of the agreement between GRIDCO and OISL is to frustrate the judgment of Hon'ble ATE passed in Appeal No. 20 of 2009. In terms of the said judgment, OCL a consumer of WESCO was declared as Open Access customer and has been sourcing its power requirement from the petitioner by paying cross-subsidy surcharge and wheeling charges. The present agreement in question was entered into without taking WESCO into confidence. WESCO is neither a party to the said agreement nor is interested to become a party. Agreement that is contingent upon another agreeing to perform certain act and the said another does not agree to perform its act as sought for is a contingent contract and in view of the above the agreement in question (PPA) is void. He brought to the notice of the Commission the judgment of Hon'ble Supreme Court in Re: M V Shankar Bhat Vs Claude Pinto 2003-04 SCC 86 in which Hon'ble Supreme Court held that when an agreement is entered into is subject to ratification by others a concluded contract is not arrived at. Whenever, ratification by some other persons,

who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.

10. The learned Counsel for WESCO brought to the notice of the Commission that the agreement in question does not specify the quantum of power sought to be exported. As per orders of this Commission in Case No. 06-20 of 2009 in the matter of sale of surplus power to CGP, it is imperative to specify the exact quantum of power sought to be exported. He submitted that WESCO would be seriously prejudiced in as much the power i.e. to be sought from the petitioner for exclusive use by OCL will deprive WESCO the EHT sale that it would have done in the normal course of business. In view of the fact that the same agreement is vague and uncertain, it must be said to be attracting provision of Section 29 of the Contract Act and, therefore, the agreement in question is void.
11. He further submitted that there was not a single correspondence with WESCO either by petitioner or by GRIDCO prior to the execution of the agreement. Nothing was demanded from WESCO so as to be either repudiated or maintaining silence for bringing the petition at hand as a 'dispute'. Since there is no dispute, there is no occasion to determine. If at all there is a dispute, it is between petitioner and GRIDCO to which WESCO can't be dragged. The learned Counsel stated that the agreement in question is otherwise bad in law in view of violating provisions of Section 43 of Electricity Act, 2003 and Clause 28 of the OERC (Condition of Supply) Code, 2004. Section 43 of the Electricity Act emphasizes duty of licensee to supply electricity on request by the consumer. Since there is no request from OCL there can't be any supply of power to it. Similarly, Clause 28 of OERC (Condition of Supply) Code, 2004 stipulates that supply shall be at a single point at the outgoing terminals of the licensee. Therefore, supply of power is to be effected at a single point and in absence of an application from OCL to receive supply at 11 KV and WESCO agreeing to same the proposed agreement requesting supply at 11 KV is plainly violative of the provisions of Section 43 and Clause 28 stated above. Again he stated that NOC submitted by OCL is general in nature irrelevant to the issue on hand. That NOC does not make any mention of the proposed billing arrangement of GRIDCO to WESCO and WESCO to OCL.
12. Senior Counsel for WESCO called the attention of the Commission to the Para 4.1 (a) of Bulk Supply Agreement between GRIDCO and the DISCOMs. In the prevailing single buyer model, GRIDCO acted as an intermediary and procures power for

onward sale to DISCOMs by virtue of a bulk supply agreement. In this agreement GRIDCO can also procure power from generators and other sources for supplying power to 'other parties' other than Retail Supply Licensees. Therefore, GRIDCO could have supplied power to OCL directly (subject to completion of other formalities) but refrained for doing so as such supply would have been possible through open access with payment of cross-subsidy surcharge payable by OCL. Hence, the learned Counsel for WESCO described the current proposal to route such supply through WESCO to OCL is collusive in nature primarily aimed at circumventing existing Regulation and deprive WESCO of its legitimate right of revenues from cross-subsidy surcharge and unduly benefiting M/s. OISL and M/s. OCL. Further, representative of WESCO intimated that M/s.OCL, till date has not settled its wheeling charge bill of previous Open Access transaction between OISL and OCL and disputing its bill in the forum of GRF, Ombudsman and also in the Hon'ble High Court.

13. The representative of OISL in their rejoinder submitted that the PPA of 14.10.2009 was between GRIDCO and OISL. WESCO is not a necessary party to the PPA and normally all PPAs are executed between the buyer and the seller. WESCO can't feign ignorance of PPA at this stage because WESCO was intimated about the signing of PPA on 15.10.2009 by the Petitioner and WESCO directed SE (MRT) to test the meter of OISL with a indication that every month dump meter reading is to be taken for assessment and billing purposes. There is no uncertainty in the PPA regarding the quantum of power to be supplied to GRIDCO as it is clearly mentioned in the PPA that 4 MW of power can be exported. Therefore, the PPA can't be hit under Section 29 of the Contract Act as there is no uncertainty. Moreover, under the Electricity Act, 2003 OERC is not empowered to set aside a contract which is under the jurisdiction of a civil court. This being a dispute between CGP and licensee, there is definitely disputes between WESCO and the petitioner which is justiceable under Section 86 (1) (f) of Electricity Act, 2003. The order of Hon'ble ATE on 03.09.2009 is not binding on the petitioner i.e. M/s. OISL since the petitioner was not a party to that dispute. However, the main dispute before ATE in that case was as to whether OCL India Ltd. is liable to pay the cross-subsidy charges to WESCO and after final hearing ATE rejected the contention of OCL and dismissed the appeal.
14. After hearing all the parties the following questions arises which needs to be resolved.

- (a) Whether there is a dispute between the licensee and the generating company which can be adjudicated under Section 86 (1) (f) of the Electricity Act, 2003?
 - (b) Whether the PPA between GRIDCO and OISL is binding on WESCO?
 - (c) Whether OCL India Ltd. is agreeable to this proposal of GRIDCO?
 - (d) Whether the transaction between OCL and OISL shall always be through Open Access?
 - (e) What is the status of the 11Kv line between OCL (a consumer of DISCOM) and OISL a separate industrial unit, having its own generating company but not a consumer of DISCOM .Whether wheeling charge to DISCOM is payable or not?
 - (f) Whether there can be supply to a consumer at two voltage levels i.e. @ 132 KV and @ 11 KV levels?
15. (a) Let us examine all the above questions one by one. The Proviso to Section 9 of Electricity Act, 2003 holds that supply of electricity from a captive generating plant to the Grid shall be regulated in the same manner as the generating station of a generating company. Therefore, in the instant case, the injection of power from OISL to the State Grid through 11 KV, can be similarly viewed and it can be treated as injection of a generating company and amenable to the Regulation by OERC. When a licensee and in this case WESCO objects to the manner of injection of power by a CGP i.e. OISL, then definitely it must be seen dispute between a generating company and a licensee. **Therefore, OERC is certainly empowered to adjudicate this dispute and to refer any dispute for arbitration as per Section 86 (1) (f) of Electricity Act, 2003.** Again as per Para 5.2.26 of National Electricity Policy *“Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariff when a licensee is the off-taker of power from captive plant.”* Therefore, the transaction between OISL and the State Grid through the distribution system i.e. (11KV line) must be under regulatory over sight of OERC. It is pertinent to state here that supply of power by various small hydro stations (Generators) to the State Grid through the 11 KV Distribution system of DISCOMs is quite prevalent in the State. The arrangement of purchase of such power by GRIDCO

at generation tariff and sale to DISCOM at BST rate is not being objected to by any DISCOM.

(b) PPA is a contract between a buyer and a seller of power. It envisages certain obligations to be discharged or acted upon by both the parties as signatories to the contract. WESCO is not a signatory to the PPA and also repudiates the agreement between GRIDCO and OISL. Both WESCO and the petitioner submit that amenability of WESCO to the impugned PPA is a subject matter of a contract under the Contract Act, therefore, beyond the scope of adjudication under Electricity Act, 2003 by OERC. We also hold that nothing should be done contrary to the procedure as law establishes. **Therefore, we do not want at all to enter into the question of sustainability of present PPA under the Indian Contract Act, 1872. But we have every authority to provide for a viable commercial arrangement as per the National Electricity Policy as stated in the foregoing paragraph to evacuate surplus power of CGP into the grid. We hold that the view that the purchase of power by GRIDCO from CGP of OISL as per PPA is an agreement between the seller (generating company) and the buyer GRIDCO as sole power procurer of the State and re-sale to DISCOM at BST rate at the same point.**

(c) From the submission of the petitioner we come to understand that OCL has given consent for evacuation of power to GRIDCO through the existing electrical system but they have not given any affirmation of billing procedure to be adopted in case that power is availed by them. **Therefore, the billing procedure mentioned in PPA can't be construed as acceptance of OCL of the same.**

(d) OERC in their order in Case No. 10/2008 held that if OCL avails power from OISL it will be by open access and it has to pay the open access charges including cross-subsidy surcharge and other charges which has been upheld by Hon'ble ATE. But Open Access can be effected only through the application of the consumer as provided in OERC (Terms and Conditions of Open Access) Regulation, 2005. From the perusal of the Case record we are convinced that neither OCL is interested to avail open access nor OISL is ready to supply power through open access to OCL. Therefore, the contention of WESCO that previous transaction of power through open access shall continue in perpetuity is unacceptable to us. **Neither OERC nor Hon'ble ATE has ever held that the past transaction shall be the only way available to OCL and OISL for transfer of power. Therefore, they are free to accept any**

mode of transaction within the ambit of law. Furthermore, OCL have a valid Contract Demand with WESCO for drawl of power at 132 KV as per the approved Retail Supply Tariff (RST) of OERC. They are not interested to draw any additional power over and above their Contract Demand with WESCO under OA. They, however, have no objection if the drawl at 11 KV and also at 132 KV is considered together as total drawl for billing purposes by WESCO.

(e) Now, let us examine the basic crux of the issue i.e. the status of the 11 KV line between M/s OCL (a consumer of DISCOM) and CGP of OISL. For a proper appreciation of the issue involved, it is required to look into the history of the case. Initially the OCL, OSIL and CGP were a single entity called M/s OCL having 132 KV connectivity with the State Grid. The 11 KV interconnection between its Cement Unit with Steel Unit having a CGP was constructed, maintained and operated by them. Due to a de-merger at the company level the Cement Unit (M/s OCL) having connectivity at 132 KV with State Grid remained as consumer of DISCOM and the Steel Unit with CGP remained as a separate independent entity. The 11 KV interconnection continued to remain in service mostly in floating condition so that CGP could run in a synchronism state with the Grid as well as to draw occasional emergency supply from the Grid.

In the case No.20 of 2008, the Commission, while adjudicating the case of surplus power transfer between CGP of OISL to OCL, has observed that the 11 KV dedicated line between the two companies for the purpose of power transaction should be treated as a deemed distribution system of the DISCOM and, therefore, the transaction will fall under Open Access power transfer category. Hence, the DISCOM is entitled for cross-subsidy charges and other charges, as applicable for open access. The order of the Commission is upheld by M/s ATE.

We, therefore, reiterate our view that even though the 11 KV line is constructed, maintained by the OISL, for the subject transaction as narrated above the 11 kV line shall be treated as deemed distribution system of the DISCOM.

We have noted the argument of the learned counsel that as per Section 9(1) of the Electricity Act, 2003, that any person may construct, maintain or operate Generating Plant including CGP and dedicated transmission line. The 11 KV line between OISL and OCL should, therefore, be treated as a dedicated transmission line of CGP of OISL and, therefore, transmission/wheeling of power through this 11 kV line shall not attract any transmission or wheeling charges as are applicable for the DISCOM's

distribution system. We agree with the contention of the learned Counsel that a Generating Company may construct, maintain and operate a transmission line as per the law but we hold the view that such a Generating Company should terminate its line with due permission at the Sub-station of either a Transmission Utility or a Distribution Utility for evacuation of power either to a State or Central Grid. It can not terminate its line at the internal 11 KV supply system of a consumer of DISCOM (having CD with DISCOM at 132KV). And, therefore, for the sole purpose of evacuation of its power to the State Grid it cannot claim the right to evacuation without consent of DISCOM and without paying legitimate charge of DISCOM. The subject 11KV line is remaining in service due to past legacy and keeping the line in a charged condition is necessary mainly in the interest of the CGP of M/s. OISL to run the CGP unit duly synchronised with the Grid. M/s.OCL has no objection to continue the 11KV line in a floating condition, even though it has no intention to draw power from the CGP through Open Access. However, if the CGP wants to evacuate its surplus power to the State Grid through the above line, it need to first evacuate the power through the DISCOM at 11KV and DISCOM in turn is deemed to have drawn equivalent power from State Grid at 132 KV level for supplying to its consumer i.e. M/s. OCL . Therefore, the subject 11KV line along with associated system shall be deemed to be a part of the distribution system of WESCO. **The DISCOM - WESCO is entitled for wheeling charge, and 0.5% agreed transmission/transformation loss for the purpose of surplus power evacuation by the CGP of OISL to the State Grid- GRIDCO.** We do not find any justification to deviate from our stated stand that wheeling charge is payable to the DISCOM.

(f) The next question that arises is whether OCL can avail supply through both 132 KV and 11 KV as a consumer. Regulation 28 of OERC Distribution (Condition of Supply) Code, 2004 provides that *“Unless otherwise agreed to, the supply shall be at a single point at the out-going terminals of the licensee.”* We observe that the injection at OCL end by 11 KV, in this case, can be treated as the outgoing terminal of WESCO and also as second point of injection provided both the parties agree to it. We have already stated earlier that this is a special case and injection of power of CGP to the grid and related commercial arrangement shall be under regulatory oversight of OERC as per the mandate of the National Electricity Policy. Now while discharging its statutory obligation the Commission has to devise a suitable commercial arrangement for the purpose. We, therefore, resort to Regulation 112 of OERC Distribution (Condition of Supply) Code, 2004 **and direct that in the present**

case power to OCL can be injected at both the voltage i.e. 132 KV and 11 KV so that residual power of CGP can be evacuated.

16. Orissa is undergoing a severe power shortfall in the current year. There should not be any impediment for maximization of all available resources and all effort should be made for evacuation of surplus power of CGP to the grid. The Commission will fail in discharging its statutory function if a viable commercial arrangement for power evacuation is not imposed on all the parties forthwith. Therefore, we direct that GRIDCO, WESCO, OISL and OCL must sign a Quadripartite Agreement mentioning all technical and commercial details in such a way that surplus power of OISL shall be procured by GRIDCO and shall be sold to WESCO at the BSP rate. WESCO shall sell it to OCL at the Retail Supply Tariff of EHT category. **The metering shall be at OCL end and dumped meter reading shall be provided by WESCO every month to GRIDCO for preparation of energy bill. WESCO is entitled to wheeling charges to be paid by M/s. OISL or GRIDCO as the case may be as per quadripartite agreement at applicable rate notified by the Commission for power transfer at 11 KV.** The sale to OCL at 11 KV shall be treated as EHT sales of WESCO and load factor for billing shall be calculated accordingly. The present contract demand of OCL shall continue unless OCL requests for a change. As maximum demand of 4 MW at 11 KV side shall have negligible impact in comparison to 43.5 MVA contract demand of OCL, **we direct that simultaneous maximum demand shall be calculated by arithmetic sum of 132 KV and 11 KV maximum demand indicator through time synchronization of both the apex meters. The transformation loss at OCL end, shall be computed as 0.5% of the energy input. The Reverse power flow relay shall be provided by OCL so that there shall not be back flow of power from OCL end to OISL in case of shut down /break down of CGP of OISL.**
17. OCL stated to receive power through 11 KV from DISCOM and therefore pay to DISCOM at the aggregated Dump data of 11 KV and 132 KV meters. The power evacuation of CGP to GRIDCO shall be deemed to have been effective from the date i.e. 22.12.2009 irrespective of the date on which the agreement is signed.
18. Accordingly, the matter is disposed of.

**Sd/-
(B.K. Misra)
Member**

**Sd/-
(K.C. Badu)
Member**

**Sd/-
(B.K. Das)
Chairperson**