

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

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

Case No. 21/2011

WESCO Petitioner
Vrs.
OCL India Ltd. Respondent

In the matter of: **Application u/s 142 of the Electricity Act, 2003.**

For the petitioner : Shri Debasish Das, GM(Corp.Reg.Affairs),CSO,
WESCO,NESCO&SOUTHCO.

For the Respondent : Shri P.P.Mohanty, Advocate.

Date of Hearing: 03.06.2011

Date of Order: 08.06 .2011

ORDER

This is a case regarding non-implementation of order dated 01.12.2008 of the OERC passed in Case no.10 of 2008 by M/s. OCL India Ltd. The fact of the Case in nutshell is as follows:-

OCL India Ltd. is a large industrial organization and its units are located in an around Rajgangpur town in the district of Sundargarh for manufacturing cements, refractory and sponge iron etc. The OCL India Ltd. had executed an agreement on 31.03.2005 with WESCO for drawal of power at 132 kV with a contract demand of 24.9 MVA which was subsequently amended for 29.9 MVA on 01.04.2006 for use of all the units including sponge iron and mini steel plant. There was a power plant of capacity 14 MW attached to the iron and steel unit which was captive to OCL India Ltd. A dedicated 11 KV line had been drawn by OCL at its own cost from the 11 KV bus bar of their captive power plant upto the 7.5 MVA, 11/3.3

KV transformer which is connected to the 3.3 bus bar of the main 132/3.3 KV substation of OCL. This sub station serves as drawal point of OCL from OPTCL system for its power requirement. The power generated by the Captive Power Plant was being utilized by Iron and Steel units and surplus power was being utilized in the other manufacturing activities of the OCL India Ltd.

2. The Iron and Steel unit was de-merged from OCL India Ltd. and named as OCL Iron & Steel Ltd. (hereinafter referred as OISL) through a Scheme, which was approved by the Hon'ble High Court of Orissa on 27.11.2007 in COPET No. 27 of 2007 under S.394 of the Companies Act, 1956. That consequent upon the above de-merger the shareholding of OCL India Ltd. in OISL would be less than 26% on or after 06.03.2008. The OISL is also consuming more than 51% of the power generated by that Power Plant. As a result the 14 MW Power plant of OISL remained no longer captive to OCL India Ltd; instead it has become Captive to OISL in accordance with the Electricity Rule, 2005 notified by GoI dtd. 8th June 2005. Let it be noted that OCL India Ltd. and OISL became two independent legal entities and by virtue of the Hon'ble High Court order dtd.27.11.2007 in Form No.42 of the companies Court Rules 1959, para 2 and of the approved scheme of Arrangement Part-II, Cl.(1)(i) and Part III, Cls.4.1 and 4.4, the aforesaid CGP, the dedicated 11 KV line and 7.5 MVA, 11/3.3 KV transformer stood transferred to and became vested in OISL. OISL is now the owner of the said CGP, the dedicated 11 KV line and the transformer, and OISL is not a party before us. OCL is now in the position of a consumer seeking supply of power from OISL through open access.
3. M/s. OCL intends, to avail the surplus power of CPP of OISL for use in its units after de-merger through short-term open access in accordance with Clause 4 (2) and 11(2) of the OERC (Terms and Conditions for Open Access) Regulations, 2005. The Open Access is required for a power of more than 5MW. The power supply from the CPP of OISL will be availed of by OCL India Ltd. through the existing dedicated 11KV line between OISL and OCL, which belongs to OISL. Accordingly M/s. OCL India Ltd. filed a petition before the Commission for Open Access and the said petition was registered as Case No.10 of 2008. The Commission had disposed of the said case on 01.12.2008 with the following observations :-

“ Section 42(2) of the Electricity Act, 2003 xxxxxx ‘provides that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission’. The plain reading of this sub-section would show that a consumer is liable to pay the cross subsidy surcharge in addition to other charges determined by the State Commission if he avails open access. Hon’ble ATE in Appeal No. 28 of 2005 dtd. 29.03.2006 in paragraph 43 stated as under:

“xxxx As regards fifth point, liability to pay cross subsidy, which cross subsidy is part of the tariff as notified by the Commission to all consumers within the area of distribution of second respondent distribution licensee so long as the appellant seeking for stand by supply of power, it is liable to pay cross subsidy surcharge and there is no escape. The cross subsidy surcharge, which is an element which has gone into the fixation of tariff, would be compulsory in terms of statutory provision.”

Since OCL is treated as open access customer it has to pay surcharge as per Clause 4(2) of OERC (Determination of Open Access Charges) Regulations, 2006 which states that ‘surcharge to be levied on open access customers under S. 42(2) of the Act, shall be determined by the Commission keeping in view the loss of cross-subsidy from these customers opting to take supply from a person other than the incumbent distribution licensee”.

4. Being aggrieved by the order dated 01.12.2008 passed in case No.10/2008, M/s.OCL India Ltd. had preferred an appeal before the Appellate Tribunal for Electricity (ATE), New Delhi which was registered as Appeal No.20 of 2009. The Hon’ble ATE dismissed the said appeal on 03.09.2009 as devoid of merits and upheld the order of the Commission passed in case No.10/2008. This order of dismissal of the ATE has been challenged by M/s.OCL India Ltd. before the Hon’ble Supreme Court in SLP No.D- 138701 of 2009, which is subjudice. However during pendency of Appeal No.20 of 2009 before the ATE, M/s.OCL India Ltd. has made payments of the wheeling charges for some period with protest and challenged the claim of wheeling charge before the GRF, Rourkela in Consumer complaint Case No.172 of 2009 and the GRF disposed of said case on 24.09.2009 with the following observations:-

“x xx xx xx xx we find from the order dated 01.12.2008 passed by OERC in Case No.10/2008 that the same issue and the payment of surcharge have been dealt with by the Hon’ble Commission by holding that M/s.OCL is liable to make payment on both i.e. transmission charges and cross subsidy charges.

Judgment dated 03.09.2009 passed by the Hon’ble ATE in Appeal No.20/2009 reveals that the appeal filed by M/s.OCL is dismissed.

In view of the aforesaid , I feel the present petition is not maintainable .

However, the counsel of M/s.OCL had made the grievance that the notice of disconnection ought to have been 15 days instead of 7 days. Counsel for WESCO had accordingly agreed on the last date of hearing i.e.11.09.2009 that a fresh disconnection notice was to be issued immediately.

Accordingly this petition is disposed of with a direction to M/s. OCL to make payment of transmission charges and cross subsidy charges within the date stipulated in the fresh disconnection notice.”

5. Again being aggrieved by the order dated 24.09.2009 of the GRF, Rourkela passed in case No.172/2009 M/s.OCL India Ltd. had filed C.R.Case No.23 of 2009 before the Ombudsman-II with a prayer to quash the illegal demand in respect of levy of wheeling charges by WESCO. The Ombudsman-II vide its order dated 27.11.2009 had disposed of the said CR Case No.23/2009 with the following directions:-

“ x x x x x x x . In the result, it is hold that the petitioner is not liable to pay wheeling charges or additional surcharge on the charges of wheeling. Simultaneously the earlier interim order dated 29.09.2009 and 31.10.2009 stands vacated.

The Case is disposed of and closed.”

6. As the above order of the Ombudsman-II was not complied by the petitioner-WESCO, M/s. OCL Ltd. had filed a petition under S.142 of the Electricity Act,2003 before the Commission on 24.02.2010. The said petition under S.142 of the Act,2003 was registered as case No.39 of 2010. During pendency of Case No.39/2010 before the OERC ,WESCO filed a writ petition bearing W.P.(C) No.6923 of 2010 before the Hon'ble High Court of Orissa challenging the order of the Ombudsman-II passed in CR Case No.23 of 2009, which is still pending for adjudication. For the above reasons the Commission after hearing the parties on 31.05.2010 question of admission had dismissed the said case No.39/2010 being premature and devoid of merit.
7. M/s. OCL India Ltd. being aggrieved by the aforesaid order of the Commission dated 31.05.2010 passed in Case No.39 of 2010, has filed W.P.(C) No.12451 of 2010 before the Hon'ble High Court seeking directions of the Hon'ble Court to WESCO for implementation of the order dated 27.11.2009 of the Ombudsman-II passed in CR Case No.23/2009 and to refund the wheeling charges already paid by it, which is subjudice till now and there is no stay of operation of the impugned order passed by the Ombudsman-II.
8. M/s. OCL India Ltd. has not paid the wheeling charges as per order of the Commission in Case No.10 of 2008. In the instant case WESCO has imposed the wheeling Charges upon the respondent –M/s. OCL India Ltd. as per S.42(2) of the Electricity Act,2003, which is also in conformity with the order of the Commission in the above noted case. But M/s. OCL India Ltd. instead of complying the said order has been trying to avoid the same by adopting improper and unsustainable legal courses in the guise of getting justice, which has resulted in severe financial implication on the part of WESCO. So WESCO has filed this petition before the Commission under S.142 of the Electricity Act,2003, which is registered as case no.21 of 2011 wherein it has been prayed for compliance of the order of the Commission passed in Case No.10 of 2008 and for payment of wheeling charges for the period from Aug, 2009 to Sept., 2009 and also for imposition of penalty.

9. The Commission vide its interim order dated 06.05.2011 admitting the case has directed as follows:

“4-Heard the petitioner. Though the Respondent has filed an appeal before the Hon’ble Supreme Court, but the order of ATE has not been stayed. Hence the order passed by the Commission on 01.12.2008 in Case No. 10/2008 still holds good and operative for all practical purpose. Since the order of the Commission is alleged to have been violated, the present petition filed u/S. 142 is admitted. The prayer of the Respondent allowing time to file its objection is allowed.

5-The respondent is directed to file the objection on or before 25.05.2011. Further the Respondent is directed to pay the up to date balance wheeling charges before 25.05.2011”.

10. The respondent-M/s OCL India Ltd. has filed its reply today during hearing, which is taken into record. The learned counsel for the respondent submitted that the wheeling charges pursuant to the interim order dated 06.05.2011 of the Commission, the respondent has paid the same with protest. Shri Das, GM (CRA), WESCO also admitted that the respondent has paid the wheeling charge with protest in consonance with the order above order of the Commission.
11. In view of the above submission made by the parties and as two writ applications are pending before the Hon’ble High Court of Orissa and one SLP No. D-138701 of 2009 against the order of the ATE In Appeal No. 20/2009 pending before the Hon’ble Supreme Court for adjudication on the same cause of action regarding wheeling charge and levy of surcharge thereon and as the interim order passed in the present case of the Commission has been complied with by the respondent, as such there is no violation on the part of the respondent. Accordingly there is no need for the Commission to proceed further in this case.
12. Accordingly this matter is disposed of.

Sd/-
(B.K. Misra)
Member

Sd/-
(K. C. Badu)
Member

Sd/-
(B.K. Das)
Chairperson