ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012
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Present: Shri S. P. Nanda, Chairperson
Shri S. P. Swain, Member
Shri A. K. Das, Member

Case No. 43/2014

CEO, CESU & another …… Petitioners

Vrs.

M/s. Nava Bharat Ventures Limited & another **…....** Respondents

In the matter of: **An application under Section .86 (1) (f) of the Electricity Act, 2003 regarding the dispute for non-payment of Cross-Subsidy Surcharge of Rs.82,86,02,773.00/- for loosing of its CGP status during the Financial Year 2010-11,2011-12 & 2012-13 by M/s Nava Bharat Ventures Limited**

Case No. 44/2014

CEO, CESU & another …… Petitioners

Vrs.

M/s. Nava Bharat Ventures Limited-IPP & Others …..... Respondents

In the matter of: **An application under Section S .86 (1) (f) of the Electricity Act, 2003 to resolve the dispute of Cross-Subsidy Surcharge of Rs.1,14,64,274.00/- for availing construction power from the CGP of Respondent No-2 for construction of M/s Nava Bharat Ventures Limited-IPP from CESU.**

For Petitioner: Shri N. C.Panigrahi, Sr. Advocate,
Shri S. R. Panigrahi, Advocate on behalf of CESU,
Shri S. K. Harichandan, AGM (Law), CESU

For Respondent: Shri Ashok Kumar Parida, Chief Resident Manager,
Shri K. Gopal Choudhury, Advocate on behalf of M/s Navabharat Ventures Limited,
Shri U. N. Mishra, CGM (PP), GRIDCO Ltd.
Shri T. Pattnaik, GRIDCO Ltd.

Order

Date of hearing: 13.10.2015 **Date of order:29.01.2016**

The Petitioner CESU has filed two petitions, one against M/s. Nava Bharat Ventures Limited (M/s. NBVL) claiming cross subsidy surcharge on account of loss of CGP status by M/s. NBVL which is registered as Case No. 43/2014 and another against M/s. Nava Bharat Ventures Limited-Independent Power Plant (M/s. NBVL-IPP)

claiming cross subsidy surcharge on account of drawal of construction power from the CGP of M/s. NBVL, which is registered as Case No. 44/2014. Since, both the cases are similar in nature; they were clubbed together and heard analogously by the Commission.

2. The learned counsel of CESU submitted that M/s. Nava Bharat Ventures Limited (M/s. NBVL) has got two nos. of Captive Generating Plants (CGPs) of 30 MW and 64 MW respectively and another 64 MW generating unit which is distinct and completely independent of M/s. NBVL and maintained separately under the style of M/s. Nava Bharat Ventures Limited-Independent Power Plant (M/s. NBVL-IPP) as decided in the Board of Directors' meeting of M/s. NBVL held on 03.10.2011. M/s. NBVL-IPP vide its letter dated 29.08.2012 has applied to CESU for availing 5 MVA start-up power for its 64 MW IPP. After getting clearance from GRIDCO/OPTCL, permission was accorded in favour of M/s. NBVL-IPP to avail 5 MVA startup power at 132 KV. But before signing of the agreement it came to the notice of the CESU that M/s. NBVL-IPP has not availed any construction power from CESU for the purpose of construction of its 64 MW IPP. On the contrary the same was availed from its CGPs. Hence CESU declined to provide start-up power unless cross subsidy surcharge was paid by M/s. NBVL-IPP towards drawal of construction power from the CGPs. Thereafter, M/s. NBVL furnished an undertaking that they have not obtained construction power from CESU for construction of the 64 MW IPP. If any amount would be legally due on M/s. NBVL and payable to CESU on account of such construction power, on that event the same would be payable by M/s. NBVL to CESU. After obtaining the said undertaking on 26.02.2013, CESU executed the power supply agreement with M/s. NBVL-IPP for supply of startup power.

3. In order to ascertain quantum of energy availed from the existing CGP of M/s. NBVL for the purpose of construction of said IPP, a committee constituted by CESU visited the said plant site but could not collect the information due to non-cooperation of M/s. NBVL. So CESU concluded that the construction power had been availed from CGP of M/s. NBVL for construction of 64 MW IPP. Hence, the committee verified the information regarding generation, auxiliary consumption, captive consumption and the power injected into the state grid by the CGP of M/s. NBVL for the FY 2010-11, 2011-12 and 2012-13. After analysing the auxiliary consumption data the committee came to a conclusion that a quantum of 4.76 MU had been utilised as construction

power for IPP of M/s. NBVL. Accordingly, CESU demanded a cross subsidy surcharge to the tune of Rs.1,14,64,274/- from M/s. NBVL IPP for availing power from CGP of M/s. NBVL as power for construction activities can be availed from the CGP only through open access mechanism.

4. The learned counsel of CESU further submitted that the bilateral transaction between M/s. NBVL-IPP and M/s. NBVL to avail construction power from the CGP without permission of the licensee is not appropriate. The CGP cannot sale/supply power to any IPP for its construction or start-up power. In the present case M/s. NBVL-IPP should have availed its construction power from the distribution utility CESU. Moreover, M/s. NBVL-IPP had furnished an undertaking to pay any sum due to them on account of availing construction power for its 64 MW IPP. Further, the Commission vide its Order dated 14.12.2012 passed in Case No. 28/2011 (WESCO Utility Vrs. M/s. Sterlite Energy Limited-IPP) have held as follows, which is squarely applicable to the present Case No. 44/2014:-

"x x x x x x x . For construction and start up power for any generating company, its status is like that of a consumer and they should take power from the Distribution Licensee. We also do not agree with the views of GRIDCO that though it is designated as nodal agency and bulk supplier, it should only be empowered to supply emergency/start up power to the generating company or to an industry owning CGP. We therefore, order that such start up power and emergency power drawan by SEL should be quantified and regularised through open access arrangement and the cross subsidy surcharge is to be paid by SEL to the concerned DISCOM."

5. Further, the learned counsel of CESU submitted that as per the Clause-3 of Electricity Rules, 2005, the industries should consume not less than 51% of the aggregate electricity generated in their CGP on an annual basis to retain their CGP status. The above rule further provides that if minimum percentage of captive use is not complied within any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company (Third Party Sale). The industry in order to maintain its CGP status shall have to consume 51% of the generation. If a generating company loses its captive status, then its supply of power to the industrial consumer need to be regularized as a "third party sale" attracting cross subsidy charge payable to the concerned Distribution Licensee.

6. Further, any industry set up in the licensed area of any distribution company, is a naturalised consumer of that DISCOM. It has to source all its power requirements from the concerned DISCOM. In case even if it sources a part of its power requirement from outside it has to pay cross subsidy surcharge to the said DISCOM for such requirement. The Commission while adjudicating the Case No. 129/2010 filed by erstwhile Reliance Managed DISCOMs against the Confederation of Captive Power Plants of Odisha with respect to the captive use status of different CGPs, passed an order dated 03.01.2013. Para-12 of this order held as follows:-

"12. Hence, it is directed that GRIDCO/DISCOMs has to verify the CGP status, the industries supplying power to the State Grid for the FY 2009-10, 2010-11 and 2011-12 in line with the aforesaid Resolution of the State Govt. and on actual basis for the FY 2012-13 i.e. not considering the sale of power by CGPs to the State Grid as self consumption of the parent industry. In case, it is found that any CGP has lost its status in spite of such computation of power transaction, the DISCOMs may approach the Commission on the issue of the Cross-subsidy in case to case basis."

7. In view of the above, CESU from the available records verified the generation, auxiliary consumption, captive consumption and power injected into the State Grid during the FY 2010-11, 2011-12 and 2012-13 of the CGPs of M/s. NBVL. Considering the invocation of the Section 11 of the Electricity Act, 2003 by the State government, it is found that M/s. NBVL has lost its CGP status during these three years, hence is liable to make payment of the cross subsidy surcharge to the petitioner. The Petitioner has calculated the cross subsidy surcharge at Rs.82,86,02,773/- on this account for these three years.

8. Accordingly, the Manager (Elect.), Talcher Electrical Division, Chainpal submitted the bill for an amount of Rs.84,00,67,047/- which includes Rs.82,86,02,773/- towards cross subsidy surcharge for losing CGP status for the FY 2010-11, 2011-12 and 2012-13 by the CGPs of M/s. NBVL (confined to Case No. 43/2014) and Rs.1,14,64,274/- towards cross subsidy surcharge for availing power from sources other than CESU by M/s. NBVL-IPP for construction of its 64 MW IPP (confined to Case No. 44/2014). The Respondents M/s. NBVL and M/s. NBVL-IPP have denied their liabilities to pay the aforesaid claimed amount made by the Petitioner. Hence, the Petitioner CESU prayed the Commission to arbitrate the dispute and direct the Respondents to make payment of the claimed amount to the Petitioner.

9. The learned counsel of the Respondents M/s. NBVL and M/s. NBVL-IPP submitted that M/s. NBVL established a separate 64 MW power plant as an IPP in addition to the previously established CGPs of 30 MW and 64 MW respectively. This separate IPP of 64 MW is nevertheless a project and power plant owned by the same company and legal entity that owns the other two CGPs and the Ferro Alloys manufacturing unit. An application was made for a separate 5 MVA start-up power at 132 KV for this 64 MW IPP and the same has been approved by the Petitioner. He stated that there is no difference between the Respondents M/s. NBVL in Case No. 43/2014 and M/s. NBVL-IPP in Case No. 44/2014. Arraying them as two distinct parties is un-warranted and untenable.

10. He submitted that, the Electricity Act, 2003 does not contemplate any naturalised consumer as indicated by the Petitioner in its application. Under the provisions of the Act, a consumer is defined as one who is supplied with electricity for its own use by the licensee or connected to the works of a licensee for the purpose of receiving electricity. If an industry does not receive electricity from a licensee and/or is not connected with the works of a licensee for the purpose of receiving electricity, it cannot be said to be a consumer. An industry is liable to pay cross subsidy surcharge if it sources any part of its power requirement from a source other than the DISCOM under open access and not otherwise. In the instant case there is no question of any bilateral transaction between the M/s. NBVL-IPP and M/s. NBVL. The energy generated by the Respondent's CGP has been utilised by the Respondent itself as captive use. No permission is required to be taken from the Petitioner for such captive use. There is also no question of any sale as contended/alleged by the Petitioner. The Respondents are entitled to utilise the power generated by its CGP for any purpose as captive use. The contention that the IPP can avail construction power only from the Petitioner's distribution utility alone is erroneous, misconceived and without any basis in law.

11. He further submitted that by reason of the definition of the term "supply" in the Act, there must be a sale of electricity involved. The electricity generated in the two CGPs of the Respondent is consumed by the Respondent itself for the construction of its own IPP. There cannot be sale from self to self and therefore the term "supply" cannot be applied to the consumption of electricity by the Respondent of the electricity generated by the respondent itself. It is beyond the scope of the Act for treating the

self-consumption of electricity self-generated as “supply”. Further, the provision in the rule for deeming the “supply” of electricity as “supply” from a generating company cannot apply in the Respondent’s case. The said provision in the rule must therefore be construed as being restricted to the cases where the electricity is generated by a different legal entity (such as a special purpose vehicle or a cooperative society) and the consumption of electricity is by a different person being a shareholder/member and the term “supply” would accordingly apply by reason of the definition in the Act which would also apply to the Rules made under the Act.

12. The respondent further submitted that Rule-3 of the Electricity Rules, 2005 nowhere provides for payment of cross subsidy surcharge. The inference that the cross subsidy surcharge is payable merely because 51% of the electricity generated is not consumed by the captive users is incorrect. It is amply clear from the provisions of Section 42 which contemplates that the payment of cross subsidy surcharge in addition to wheeling charges is a condition precedent for allowing open access. In relation to the present Case No. 43/2014, the transmission/ conveyance of electricity generated by the respondent for consumption by itself through its own dedicated lines and without any open access being availed through the transmission/distribution lines or systems of the licensees. There can be no question of any cross subsidy surcharge when there is no open access availed and when there is no wheeling charges applicable.

13. The reliance of the Petitioner on the order of the Commission dated 14.12.2012 is misconceived. Clearly the facts of that case are completely different. The decision of the Commission in that case contemplating regularisation through open access is completely inapplicable in the present case and otherwise also the issues in that case were not correctly decided according to law so far as sought to be relied upon by the Petitioner. The question of open access does not at all arise in the present case and not even the Petitioner has said that there was any open access. Hence, the question of payment of cross subsidy surcharge of the Petitioner does not arise in the present case.

14. It is also incorrect to allege that the respondent did not disclose the source of availing construction power for its 64 MW IPP. It was already informed to the officials of the Petitioner that the construction power for the 64 MW IPP has been availed from the existing CGPs as captive use. The respondent is not liable for payment of any cross subsidy surcharge by utilising such construction of power out of the electricity generated from its CGP. The Petitioner unlawfully demanded payment of cross

subsidy surcharge on the electricity consumed as construction power for the IPP from the Respondent's CGP, as a pre-condition for the signing the agreement and releasing start-up power for the IPP. As the commissioning of 64 MW- IPP was threatened with indefinite delay the respondent gave an undertaking to the effect that if any amount would be legally due on the respondent and payable to the Petitioner on account of construction of the 64 MW IPP, the same would be payable by the respondent to the Petitioner. Thereupon, the Petitioner executed the agreement for supply of start-up power. The Respondent has only undertaken to pay the amounts that are legally due and payable and nothing more. Further, the methodology of computation of power used for construction purposes is absurd and irrational. The quantum of such construction power between FY 2010-11 and 2012-13 from the two CGPs which was drawn through the internal electrical lines is 4.408752 MU. The quantum of such power and the rate applied by the Petitioner in its application is erroneous, irrational and contrary to law.

15. The Respondent has submitted that the computation of the Petitioner for determination of captive status of the two CGPs of the respondent is incorrect. The captive status of its two CGPs has to be determined separately, the percentage of consumption has to be considered with reference to the aggregate generation and not the net generation. Considering the auxiliary consumption, consumption by the Ferro Alloys Industry of the respondent and supply to the State under Section 11 as captive consumption, the 30 MW CGP of the respondent has been qualified as a CGP as the total captive consumption is over 51% of the gross generation in all the three years under consideration. Similarly, in respect of 64 MW CGP, total captive consumption is over 51% for the FY 2012-13 and the CGP is qualified as a CGP only for that year.

16. The respondent has submitted that the cross subsidy surcharge claimed by the Petitioner for the FY 2010-11 is on the basis of the Commission's order dated 24.06.2010 and that claimed for the FY 2011-12 & 2012-13 is on the basis of the Commission's order dated 13.07.2012. But these orders of the Commission are not applicable in the present cases, because those orders are expressly applicable only to open access customers. But the respondent is not an open access customer and has never availed power through open access. Further, the rate of Rs.3.42/unit for FY 2010-11 and 2011-12 considering a load factor of 20% is entirely arbitrary, irrational and without any basis. The Petitioner has not given any indication, calculation or

basis for adopting a load factor of 20%. Further, without prejudice to the above, a cross subsidy surcharge rate cannot be retrospectively determined or applied. In the present case, there is no determination of cross subsidy surcharge for FY 2011-12 at or prior to the commencement of that year.

17. In view of the above, the respondent has submitted that the present petition is misconceived and without any merit. The respondent is not liable for any cross subsidy surcharge as claimed by the Petitioner or otherwise. Hence, the respondent has prayed to the Commission to dismiss the present petition without any cost.

18. Heard the parties at length. Taking their written submissions into consideration, the Commission observed that M/s. NBVL has two nos. of CGPs of 30 MW & 64 MW respectively and also set up an IPP of 64 MW capacity in the same premises. For this 64 MW IPP, the Board of Directors of M/s. NBVL in its meeting held on 03.10.2011 have resolved that a distinct division of the company is to be maintained separately under the style of M/s. "Nava Bharat Ventures Limited-Independent Power Plants, Odisha" and the accounts including assets and liabilities, income and expenditure shall be maintained distinctly for the IPP and also distinct bank accounts shall be opened to route through all transactions relating to the IPP. M/s. NBVL-IPP has availed power from the said CGPs for the purpose of construction of the 64 MW IPP. CESU the distribution utility has accorded permission to M/s. NBVL-IPP on 18.02.2013 to avail 5 MVA start-up power at 132 KV for its 64 MW IPP after receiving an undertaking from M/s. NBVL that they will pay any amount to CESU on account of construction of 64 MW IPP, if it would be legally due.

19. The contention of the CESU, in Case No. 44/2014, is that M/s. NBVL and M/s. NBVL-IPP are two separate entities and the latter has availed construction power from the CGPs of M/s. NBVL without the knowledge and permission of CESU. A CGP cannot sale power to any IPP for its construction or start-up power. The IPP should avail its construction/start-up power from the distribution licensee of that area. Hence, this bilateral transaction between M/s. NBVL and M/s. NBVL-IPP is not appropriate. Hence, the M/s. NBVL-IPP should pay cross subsidy surcharge to CESU. In Case No. 43/2014 the contention of CESU is that by supplying such construction power from its CGP to M/s. NBVL-IPP and/or otherwise, M/s. NBVL has lost its captive status and its CGP became generating company. Hence, it has to pay cross subsidy surcharge to CESU, from which it should have availed power for its use.

20. In contrary, the contention of M/s. NBVL and M/s. NBVL-IPP is that M/s. NBVL-IPP is owned by M/s. NBVL and the power transaction from the CGP of M/s. NBVL to M/s. NBVL-IPP for construction of its 64 MW IPP should be treated as its own consumption. No cross subsidy surcharge should be claimed by the distribution licensee CESU for such transaction as no open access is involved. Hence, the claim of CESU for an amount of Rs.1,14,64,274/- towards cross subsidy surcharge on account of such transaction of power is illegal and not justified.

21. The Commission observed that the 64 MW- IPP should be a separate entity and it has been separated from M/s. NBVL as per the aforesaid Board resolution of M/s. NBVL dated 03.10.2011 and its assets, liability, income and expenditure has also maintained separately. For construction, start-up and emergency power requirement, the IPP should avail power form the concerned DISCOM (CESU in present case). But the M/s. NBVL-IPP has admittedly availed power from the existing CGP for construction of its 64 MW IPP. A CGP should supply power to cater the load of the parent industry or its sister concern, not to an Independent Power Producer. Hence, it is concluded that the power transaction between M/s. NBVL-CGP and M/s. NBVL-IPP for construction of the subject 64 MW IPP should be regularised through open access transaction on payment of cross subsidy surcharge to CESU, the concerned DISCOM.

22. The Commission further observed that as per computation of CESU the quantum of power transaction from M/s. NBVL-CGP to M/s. NBVL-IPP for construction of 64 MW IPP is 4.763119 MU during the FY 2010-11, 2011-12 & 2012-13, whereas M/s. NBVL has submitted that the said quantum of power is 4.408752 MU as per the power transmitted through their internal electrical lines. The Commission directs M/s. NBVL-IPP to furnished necessary documents to CESU in this regard and directs CESU to verify the same and revise the bills accordingly.

23. In Case No. 43/2014, CESU has submitted that the CGP of M/s. NBVL has lost its captive status during the FY 2010-11, 2011-12 & 2012-13 by not consuming 51% or more of the net generation (excluding auxiliary consumption) of its CGP and claimed an amount of Rs.82,86,02,773/- on M/s. NBVL considering the consumption of the parent industry as open access transaction. In other hand M/s. NBVL has submitted the calculation for determination of captive status of its CGP units of 30 MW and 64 MW separately and also based on the gross generation (including auxiliary consumption). As per the calculation of M/s. NBVL the generating unit of 30 MW is

qualified for CGP during the aforesaid three years and the generating unit of 64 MW is qualified for CGP during the FY 2012-13 only. In its calculation M/s. NBVL has considered the auxiliary consumption as its own consumption which includes the aforesaid construction power supplied to M/s. NBVL-IPP. M/s. NBVL has further submitted that Clause-3 of the Electricity Rules, 2005 nowhere provides for payment of cross subsidy surcharge. Cross subsidy surcharge in addition to wheeling charges is applicable only in case of open access transaction. Since there is no open access transaction in the present case, cross subsidy surcharge is not payable merely because 51% electricity generated is not consumed by the captive users.

24. The Commission observed that Rule-3 of the Electricity Rules, 2005 stipulates that no power plant shall qualify as a captive generating plant unless not less than 51% of the aggregate electricity generate in such plant, determined in annual basis, is consumed for the captive use. In case 51% of the captive use is not complied within any year, then entire electricity generated shall be treated, as if it is a supply of electricity by a generating company. In the present case both the 30 MW & 64 MW CGP units of M/s. NBVL is identified for captive use. Hence, the aggregate generation of both the units should be considered for computation of captive status. Further, M/s. NBVL, in its computation for determination of captive status, has considered the auxiliary consumption as its own use which includes the construction power supplied to the 64 MW IPP of M/s. NBVL-IPP, which is not correct. The Commission vide its Interim Order dated 29.08.2011 passed in Case Nos. 49, 50, 52 & 54 of 2011, Order dated 29.08.2011 passed in Case No. 22/2011 and Order dated 03.01.2013 passed in Case No. 129/2010 has given a format for computation of CGP status and asked all the CGPs to furnish data/information to the licensees in that format. Moreover, the Commission vide its Order dated 03.01.2013 passed in Case No. 129/2010 read with Order dated 23.12.2014 passed in Case No. 26/2013 has clarified for the calculation of CGP status during the period of imposition of Section 11 by the State Government. In view of the above, the Commission directs M/s. NBVL to furnish the required data to CESU/GRIDCO Ltd. in the prescribed format for computation of its CGP status. After computation of CGP status, if it is found that the CGP of M/s. NBVL has lost its CGP status, then drawal of power from the CGP to the parent industry shall be treated as the drawal from a generating company. In that case M/s. NBVL shall pay cross

subsidy surcharge to the concerned DISCOM (CESU) at the rate fixed by the Commission in its cross subsidy surcharge Orders issued for different years.

25. With the above observations and directions, both the cases are disposed of.

Sd/-	Sd/-	Sd/-
(A. K. Das)	**(S. P. Swain)**	**(S. P. Nanda)**
Member	**Member**	**Chairperson**