



Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E. Road, Raipur – 492001

Tel: 0771-4048788, Fax-4073553

Website: www.cserc.gov.in, E-mail: cserc.sec.cg@nic.in

Petition No. 31 of 2009(OA)

In the matter of issue of concurrence for short-term open access for inter-State sale

M/s Vandana Vidhyut Ltd.
Raipur

.... Petitioner

V/s

Chhattisgarh State Power Distribution Company Ltd.
(Successor company of Chhattisgarh State Electricity
Board, CSEB for short), Raipur

.... Respondent

Present: Manoj Dey, Chairman
B.K. Sharma, Member

ORDER **(Passed on 25.11.09)**

M/s Vandana Vidhut Ltd. (VVL, for short) a generating company having 6 MW biomass-based power plant at Industrial Area, Sirgitti, Bilaspur filed a petition to this Commission against Chhattisgarh State Power Distribution Company Ltd. (successor company of CSEB and CSPDCL, for short). The history of the case is that M/s VVL entered into a power purchase agreement (PPA, for short) on 2nd September 2000 with Madhya Pradesh Electricity Board (MPEB, for short) for supply of power from its biomass plant for captive consumption/ sale to third party only to the HT consumers of MPEB through the MPEB's network system. As per provision in clause 7 of the said PPA for sale of power by company to third party the company shall identify the third party, obtain NOC from MPEB in advance. The third party shall necessarily be HT consumer of MPEB and should not be defaulter of MPEB. MPEB may give consent in writing to sell power subject to technical feasibility and permission of State Government under section 28 of Indian Electricity Act, 1910. Subsequently, after creation of new State of Chhattisgarh and formation of CSEB the installed capacity of the plant was increased from 6 MW to 8 MW and a supplementary PPA dated

24th April 2003 was entered into between the petitioner and CSEB (the successor of MPEB). At the time when the PPA and supplementary PPA were entered into, the Electricity Act, 1910 and the Electricity (Supply) Act, 1948 were in force under which there was no provision for open access and sale of power by the generating company to third parties without permission of the State Government. The Electricity Act, 2003 (the Act, for short) which came subsequently has a provision of non-discriminatory intra-State and inter-State open access for sale of power by the generator and purchase of power by any person or licensee. The petitioner filed this petition stating that the restriction in PPA on petitioner to sell power only to the HT consumers of CSPDCL is not consistent with the provisions of the Act as all the generators and all the customers (electricity users) in India should be treated at par. M/s VVL has mentioned that they had approached CSPDCL to allow them to sell their energy outside the state but no such approval was accorded hence this petition. The petitioner has requested that the limitations to sell the energy from petitioner's plant only to the consumers of CSPDCL may be relaxed and may be allowed to sell their energy to out side the state also. It is also prayed in the petition to instruct the CSPDCL or the SLDC for issue of concurrence of inter-State short-term open access for export of power out side the State. The petitioner further in its additional submission has stated that the PPA executed by the petitioner with MPEB on 2nd September 2000 and supplementary PPA with CSEB on 24th April 2003 were entered into in accordance with the provision in the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Subsequently, enactment of new Electricity Act, 2003 (the Act, for short) by the parliament repealed the provisions of above two Acts. Section 185 (2) in the Act provides that licence, permission, authorization etc. done as per the repealed Acts be deemed to have been done or taken under the corresponding provisions of the new Act provided it is not inconsistent with the provisions of the new Act. Section 10 (2) of the Act entitles the generating companies to supply electricity to any licensee or to any consumer subject to the regulations made under sub-section (2) of section 42 of the Act through open access and thus, provision in PPA to supply only to the HT consumers of CSPDCL is against the spirit of the Act being inconsistent with the provisions of the Act. It is further prayed by the petitioner in additional submission to allow supply of power to other licensee/consumers through intra-State and inter-State open access within the provisions of the Act.

2. The respondent CSPDCL raised objection that the petitioner has not invoked the jurisdiction of Commission under any appropriate provision of the Act or Rules and Regulations made thereunder and therefore the petition is not maintainable before this commission due to lack of jurisdiction. However, during arguments the representative of the respondent accepted that the commission has jurisdiction to decide the case under section 86 (1) (e) of the Act. Subsequently, the respondent in its submission submitted that the PPA executed between the petitioner and the MPEB which is subsequently applicable to CSEB and now CSPDCL have operating period of 10 years from the date of its commencement. Since the date of commencement of the PPA is 09.10.01, i.e. the date on feeding of electricity into the Board's grid by the petitioner commenced hence as per the provision in clause 21 of the PPA the date of termination of the agreement will be 31.10.2011. It is further stated that upon enactment of the Act the Chhattisgarh State Electricity Regulatory Commission (CSERC, for short) passed an order under petition No. 20(M) of 2005 on dated 02.08.05 and under petition No. 14(M) of 2006 on dated 05.06.06 both related to M/s VVL i.e. this petitioner that any subsequent change in the third parties shall be under the open access provision of the Act and all the applicable charges shall be levied accordingly, and the provisions of the PPA shall stand modified to that extent. Aggrieved with the order of CSERC dated 05.06.06 in petition No. 14(M) of 2006 this petitioner filed appeals Nos. 112 of 2006 and 210 of 2006 before the Hon'ble Appellate Tribunal for Electricity (ATE, for short) stating that their PPA was saved under section 185 (2) of the Act. Hon'ble ATE decided the appeal on 16.10.06 in favour of this petitioner and held that the PPA is saved for its period of validity. The CSEB aggrieved with this order of Hon'ble ATE filed an appeal before the Hon'ble Supreme Court of India, which was admitted and is under adjudication. It has been further stated in the submission that when the petitioner noticed large appreciation in the price of power in open market, it wants the inclusion of provisions of the Act into his saved agreement. Once the agreement is not open to incorporate the provisions of open access for the sale to consumers under the Act then how it is open to include the facility to sale power even out side the State available in the same Act? It is further stated in the submission that the Hon'ble ATE has decided on 02.06.06 under the appeals No.1 to 80 of 2005 at para 114 that the concluded agreements prior to enactment of the Act are saved and not open to change till the

expiry of agreement period and Regulatory Commission has no authority to alter or change the PPAs entered between NCE Developers (generators) and Electricity Board (Distribution Company). Thus the respondent has pleaded that in the light of the above factual position and provisions of various effective orders on the subject matter, the desired modification under the concluded and saved agreement is not permissible till the tenure of validity of the existing agreement and the CSERC ought to reject such request of the petitioner which is not acceptable under accepted position of law.

3. The petitioner in their rejoinder submitted that an appeal before the Hon'ble ATE was filed stating that the PPA dated 2nd September 2000 and 24th April 2003 were saved as per provisions under section 185 (2) (a) of the Act in so far as it was not inconsistent with the provisions of this Act. It is further pleaded that in view of the provisions of the Electricity (Removal of difficulties) Second order 2005 the petitioner is exempted from payment of surcharge on the sale of electricity but at the same time, it cannot be denied its right to sell electricity to any consumer under the provisions of section 10(2) of the Act. To this extent, clause 7 of the PPA is not consistent to the provisions of the Act as this clause stipulates that the company will sell its power to third party only after obtaining NOC from the Board and also it should be an HT consumer of the Board who should not be defaulter as well. It has been further pleaded that apparently this provision is against the spirit of the provisions of the Act and needs to be modified suitably in accordance with the provisions of section 10 (2) of the Act. It is also pleaded that legally the provisions of the Act will over-ride the provisions of the PPA. A generating company under section 10 (2) of the Act is free to sell its electricity to any consumer subject to the regulations made under sub section (2) of section 42 of the Act. The CSERC while disposing the petition No. 14 of 2006 (M) on 05.06.06 has also observed the same in para 6 and 9. It is also accepted in the rejoinder by the petitioner that the observation of Hon'ble ATE that Regulatory Commission has no authority to alter or change the PPA but the petitioner wishes to submit that the Commission has definite power to alter it if any stipulation in the PPA is inconsistent to the provisions of the Act.

4. We had gone through the contents of petition, reply and rejoinder and pleadings in length and closed the case on 10.09.09 for order but before passing the

order the petitioner submitted an application on 17.09.09 with request to place certain new facts as well as legal points (in form of judgement of Hon'ble ATE) which has now come to light to them. In order to provide natural justice the permission was granted and the petitioner filed subsequent submission giving reference of ATE's order dated 16.10.2006 on appeal No.210 and 112 of 2006 and IA 86 of 2006 and IA 87 of 2006 and judgement related to Tata Power Vs KPTCL (petition No. 108/2007) and Davanagere Sugar Company Ltd. Vs KPTCL (petition No. 114/2009) stating that these are relevant for adjudication of present dispute. It is also stated that the petitioner has not taken any benefit under PPA and the PPA therefore is only relevant to the extent of wheeling of power to third party identified by the petitioner.

5. In reply to the additional submission of the petitioner, the respondent has submitted that the additional submission of the petitioner even after the reserving of matter for final order does not contain any such new thing due to which this submission deserves for consideration. Most of the issues are repeated and have already been replied earlier. The prayer of the petitioner under subsequent submission has been limited to the modification of existing PPA which was not the main issue as per prayer under the original petition. The prayer of petitioner has now been completely changed and hence no amendment can be considered on the basis of additional submission. It is further stated that the referred order of Hon'ble ATE under appeal No. 112 of 2006 and 210 of 2006 were already annexed by the respondent along with the submission dated 26.08.09. Para 25 of which enables to the appellant (this petitioner) to continue the sale of power in terms of PPA for a period of 10 years to reckon from the date found in PPA to sell power to third parties without payment of surcharge under section 42 (2) of the Act. With the above order the Hon'ble ATE confined the PPA of the petitioner herewith within the ambit and scope of provisions of the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. The efforts of CSERC to bring the PPA within the purview of the Electricity Act, 2003 were rejected and set aside on the request of the petitioner here and allowed to continue the PPA on the same terms and conditions till the expiry of currency of agreement up to 10 years. Therefore it is not open now either to the petitioner or to the CSERC to bring again the old PPA in the purview of the Act. Besides above, the finding of the CSERC at para 5 of the order dated 05.06.06 in the petitioner No.

14(M) of 2008 that "Agreement dated 2nd September 2000 with the erstwhile MPEB and the supplementary agreement dated 24th April 2003 with CSEB being saved under the provision of sub-section 2(a) of section 185 of the Electricity Act, 2003" are not rejected by the Hon'ble ATE and therefore these findings are still surviving. It is further pleaded by the respondent that the claim of the petitioner that it has not availed any benefit under the PPA is completely misleading and contrary to the own submission of the petitioner. The benefit of change of party has been allowed and availed of by the petitioner only on account of the provision under the same PPA and not otherwise. On the point of suffering by petitioner on account of non-relishing of the case for further hearing the respondent has stated that the petitioner is not suffering from any injury but wants to avail the opportunity of sale of power in the open market where lucrative rates are available to the generators. An agreement executed with open eyes and sound mind cannot be forfeited merely for above consideration and thus the petition is not maintainable on any ground and is liable to be rejected.

6. We have further gone through the additional submission by the petitioner after closing of the case for order and reply of the respondent thereon and observed that nothing new has been submitted by the petitioner which may require further hearing of the case. Accordingly we decided not to further hear the case and pass necessary order in the matter. Further, before the order is passed in this case the petitioner submitted an application on 18.11.09, to withdraw the petition. Considering and accepting the request of petitioner, we decide not to take further action in the case. We, therefore, dispose the petition without any decision in this case.

**Sd/-
Member**

**Sd/-
Chairman**

True Copy

**(N.K. Rupwani)
Secretary**