

**JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
RANCHI**

Case No. **01** of **2011**

Shri **Mukhtiar Singh**, Chairperson
Shri **T. Munikrishnaiah**, Member (Tech)

Dated: **25th March 2011**

ORDER

IN THE MATTER OF

M/s Kohinoor Steel Private Limited Petitioner

Versus

Jharkhand State Electricity Board & others Respondents

For the Petitioner : Shri M.S. Mittal, Sr. Advocate
Shri N.K. Pasari, Advocate with
Shri A. Sen Gupta, Corp.Executive &
Shri P. Ghosh

For the Respondent : Shri Rajesh Shankar, Advocate
Shri Abhay Prakash, Advocate with
Shri Ramautar Choudhary, CEE, JSEB

1. The petitioner-M/s Kohinoor Steel Private Limited (KSPL) has filed the petition under consideration challenging levying the supervision charges @ 21.5% on the entire cost of the estimates prepared by the respondent-licensee-JSEB for construction/erection of 132 KV D/C transmission line from 220/132 KV Chandil-I Grid Sub-station to the petitioner-KSPL's unit.

2. The respondent-licensee-JSEB appeared and filed the Counter Affidavit.

3. The petitioner-KSPL has stated in the petition that they have set up their factory at village Bulandih (Kuchidih), Chandil Road in the district of Saraikela-Kharsawan and for the purpose of running the same

have taken electrical connection from the respondent-licensee-JSEB in June 2006 and the contract demand of the petitioner-KSPL has been enhanced subsequently. The petitioner-KSPL has further stated in the petition that they have already established a synchronized power plant of 17 MW capacity which is being utilized by them for their captive purpose. Now the petitioner-KSPL wants to sale, as and when it has surplus power, to the respondent-licensee-JSEB through a Power Purchase Agreement and for that purpose, they have approached the respondent-licensee-JSEB for synchronization of its Captive Power Plant at 132 KVA. The respondent-licensee-JSEB for this purpose prepared the estimate which has been technically sanctioned. This estimate shows supervision charge @ 21.5% on the entire estimated amount. The petitioner-KSPL has challenged the rate of the supervision charge on the ground that under clause 3.2.3 (first proviso) to the JSERC (Electricity Supply Code) Regulations, 2005, the supervision charges is restricted to 15% of the labour cost and, as such, prayed that the respondent-licensee-JSEB be directed to charge the supervision charges accordingly

4. On the other hand, the respondent-licensee-JSEB has mentioned in their Counter Affidavit that 21.5% supervision charges is relevant and genuine as they have to supervise the construction work, prepare the estimate and incur administrative expenditure on the staff for supervision, commissioning, operation and maintenance till the existence of the transmission line. The respondent-licensee-JSEB also states that JSERC (Electricity Supply Code) Regulations, 2005 does not apply in the present case.

5. Heard the two sides and perused the pleadings of the parties and considered the materials available on record.

6. From the petition of the petitioner-KSPL and the Counter Affidavit of the respondent-licensee-JSEB it is evident that, admittedly, it is a dispute between the licensee-JSEB who is the respondent and the generator-CPP, who is the petitioner in this case. Here paragraph 4 of the petitioner-KSPL's petition is relevant and reproduced below:

“Para-4 : That it is stated that the petitioner has already established a synchronized power plant of 17 MW capacity, which is being utilized by it for its captive purpose. However, at times when such captive utilization or usage of the power is not required or less required by the petitioner, the said energy generated through the captive power plant of the petitioner is wasted or under utilized and as such the said wastage can even be utilized by the Jharkhand State Electricity Board, in order to reduce its burden and sales of the said Energy to any other consumer under power exchange agreement.”

7. Similarly, paragraph 9 of the Counter Affidavit of the respondent-licensee-JSEB is also relevant and reproduced below:

“Para-9 : That it is pertinent to mention here that the petitioner is being asked to deposit sanctioned estimate amount. However, the estimate has been prepared including supervision charge at the rate of 21.5% ‘Supervision charge’ which is relevant and genuine as the JSEB has to supervise the construction work, preparation of estimate, administrative expenditure of the staffs supervision of commissioning and operation and maintenance till the existence of transmission line. It is also relevant to mention that the petitioner is a C.P.P. As such the provisions of clause 3.2.3 of the Electricity Supply Code Regulations 2005 is not attracted. Hence the aforesaid rate is genuine and logical.”

10. From the aforesaid two paragraphs it is apparent that, admittedly, the petitioner-KSPL has a Captive Power Plant and the dispute is only over the supervision charges.

11. Under Section 86(1)(f) of the Electricity Act, 2003, this Commission, besides other, has the function to adjudicate upon the

disputes between the licensees and the generating companies. The relevant portion of the said section is reproduced below:

“Section 86(1)(f) : adjudicate upon the disputes between the licensees and generating companies and refer any dispute for arbitration.”

12. Since it is a dispute between the generating company and the licensee, this Commission has jurisdiction to adjudicate upon the issue raised by the petitioner-KSPL and accordingly, it proceeds to adjudicate the dispute.

13. Now the next question arises about the rate of supervision charges, which is the bone of contention.

14. The petitioner-KSPL relies on clause 3.2.3 of the JSERC (Electricity Supply Code) Regulations, 2005, which provides for recovery of charges which includes supervision charges.

15. The learned lawyer for the petitioner-KSPL further argued that the Regulations made under Section 181(2)(h)&(i) read with Sections 36 and 39 of the Electricity Act, 2003 can provide alternative remedy if the Commission comes to the conclusion that the JSERC (Electricity Supply Code) Regulations, 2005 does not apply in this case.

16. Section 36 of the Electricity Act, 2003 speaks about the charges for intervening transmission facilities. To our mind, this section applies only after the synchronization process is over. Presently, the matter under consideration is for synchronization with the network of the respondent-licensee-JSEB. Section 39 of the Electricity Act, 2003 speaks about the functions of the State Transmission Utility. This section will be attracted when the synchronization is complete and the network is used for transmission of electricity. In view of this the Commission feels that

Sections 36 and 39 read with Section 181(2)(h)&(i) of the Electricity Act, 2003 are not applicable here.

17. On the other hand, the respondent-licensee-JSEB relies on Bihar State Electricity Board-Financial and Account Code (Financial Rules and Procedures) , 1980 (hereinafter referred to as “the Code”). The relevant clause of the said Code is reproduced below:

“Clause 8-144 : The following will be the percentage of establishment charges or supervision charges to be added to works outlay in such estimates –

- (1) Works to be done under the Electricity Act, 15 percent of works outlay;*
- (2) Deposit works, 21.50 percent of works outlay.”*

18. The learned lawyer for the respondent-licensee-JSEB says that since it is a case of generating company (Captive Power Plant), therefore, JSERC (Electricity Supply Code) Regulations, 2005 does not apply. He adds that “the Code” would apply and hence they are charging 21.5% as provided in the said Code. The respondent-licensee-JSEB has also filed documents to show that they have taken supervision charge @ 21.5% from two other entities i.e. M/s Usha Martin Limited and Road Construction Department of Government of Jharkhand.

19. The learned lawyer for the respondent-licensee-JSEB argued that “the Code” is saved by virtue of the provisions of Section 185(2) of the Electricity Act, 2003. The learned lawyer for the petitioner-KSPL negated this argument by saying that the said section does not save the said Code. In this situation, it is better to go through Section 185 of the Electricity Act, 2003, which is reproduced below:

“Section 185-Repeal and saving- (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the

- Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.*
- (2) *Notwithstanding such repeal-*
- (a) *anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;*
- (b) *the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made thereunder shall have effect until the rules under sections 67 to 69 of this Act are made;*
- (c) *the Indian Electricity Rules 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;*
- (d) *all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;*
- (e) *all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.*
- (3) *The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.*
- (4) *The Central Government may, as and when considered necessary, by notification, amend the Schedule.*
- (5) *Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.”*

20. It is pertinent to refer to the preface of “the Code” relied on by the respondent-licensee-JSEB. The preface of the said Code reads as under:

PREFACE

1. *In Resolution No. 2957-Elec., dated the 27th March 1958 the Government of Bihar decided to constitute a State Electricity Board for Bihar with effect from 1st April, 1958 from which date all the functions of the Electricity Department of Government of Bihar, except those of the Electrical Inspectorate and Works Divisions, would rest with the Board.*
2. *In Resolution nos. 4 and 8 of 1958-59 dated the 1st April, 1958 the Board decided that pending the framing of regulations under*

section 79 of the Electricity (Supply) Act, 1948, all procedural rules of the State Government, including the rules in the Public Works Department Code and the Public Works Account Code would be made applicable to all financial and other transactions of the Board and that all the officers of the Board would continue to exercise the same powers as were exercised by them till the 31st March, 1958.

3. The Board had since decided that they should frame their own regulations as required under section 79 of the Electricity (Supply) Act, 1948. Accordingly, this Code has been prepared so as to cover all the relevant rules applicable to the Board in the Bihar Financial Rules, Bihar Treasury Code, Bihar Public Works Department Code, Bihar Public Works Account Code and Bihar Budget Manual. The rules have been framed so as to conform to the provisions in the Electricity (Supply) Act, 1948 and the Indian Electricity Act, 1910. With the issue of these regulations, the rules in the State Government Codes referred to above will no longer be applicable to the Board.
4. Important delegations have been incorporated in the Code. A comprehensive compendium of delegations of financial powers will be issued separately.
5. **The provisions in this Code should be deemed to be Regulations under section 79(1) of the Electricity (Supply) Act, 1948.** (emphasis added).
6. Correction slips containing amendments to the code will be issued in convenient batches by the Financial Controller to the Board.
7. Suggestions for any amendment to these rules are welcome.

PATNA

The 6th October, 1956

S. SETHURAMAN

Financial Controller

21. The preface of the BSEB-Financial and Account Code shows that “the Code”, in question, is deemed to be a regulation under section 79(1) of the Electricity (Supply) Act, 1948.

22. Section 185 of the Electricity Act, 2003, which has been reproduced hereinabove, does not speak about the saving of regulations framed under section 79 (1) of the Electricity (Supply) Act, 1948. From this, we come to the conclusion that the said Code, under which the respondent-licensee-JSEB is claiming supervision charges is not saved by the Electricity Act, 2003 and, as such, the respondent-licensee-JSEB is devoid of any authority to include in the estimate the supervision charges under “the Code”. True the respondent-licensee-JSEB has charged supervision charges @ 21.5% on the entire estimated cost from two other

entities viz. M/s Usha Martin Limited and Road Construction Department of Government of Jharkhand. But “the Code” under which the respondent-licensee-JSEB have charged the supervision charges itself has not survived after the Electricity Act, 2003 has come into force and as such, respondent-licensee-JSEB’s action in the case of these two entities would not validate their actions in this behalf. Therefore, this plea is not tenable.

23. It will be relevant here to refer to Sections 45, 46 and 47 of the Electricity Act, 2003 which provides for power to recover charges, power to recover expenditure and power to require security respectively. Under Section 45 of the Act, which provides for how to recover charges, section 62 is also mentioned which speaks about determination of tariff. Broadly, these are the legal provisions under which a licensee can levy various charges and recover the same. Sub-Section 45(5) of the Act says that the charges fixed by the distribution licensee shall be in accordance with the provisions of the Electricity Act, 2003 and the Regulations made thereunder. Obviously, “the Code” is not a Regulation made under the Electricity Act, 2003 and to us, after coming into force the Electricity Act 2003, that Code does not have any legal sanctity.

24. On the other hand, this Commission has framed the JSERC (Electricity Supply Code) Regulations, 2005, which came into operation with effect from 28.7.2005, is a Regulation made under the Act. These Regulations provide for levying of various charges including cost of service connection/extension/upgradation, charges of electricity supplied, security deposit and the schedule of charges.

25. The learned lawyer for the respondent-licensee-JSEB also argued that the petition is premature and the petitioner should agitate the matter before the respondent-licensee-JSEB instead of coming to the Commission. A perusal of the papers filed by the petitioner-KSPL with its petition shows that the estimates were prepared by the officials of the respondent-licensee-JSEB incorporating 21.5% supervision charges on the entire cost. The estimates have been technically sanctioned by the competent authority. Now only the administrative sanction is left and once the supervision charges @ 21.5% of the entire cost have been included by the concerned officials and technical sanction has also been accorded, the Commission feels that it will not serve any purpose if the matter is agitated before the respondent-licensee-JSEB.

26. At this stage, it is relevant to refer to the JSERC (Utilization of Surplus Capacity of Captive Power Plants based on conventional fuel) Regulations, 2010, which speaks about the Grid interconnection/parallel operation, seems to be relevant here. Clause 4.5, 4.6 and 4.7 of the said Regulations are relevant and are reproduced below:

Clause 4.5: The CPP shall provide the infrastructure for connecting the generating plant (if not existing earlier) to the network of the Transmission Licensee/Distribution Licensee as the case may be.

Clause 4.6: In case the CPP requires the Transmission Licensee/Distribution Licensee to build the infrastructure to connect the CPP with the Licensee's network then the CPP shall have to bear the cost as per the applicable rates for extending network facility, for the HT consumers at the corresponding voltage level.

Clause 4.7: The scheme of synchronizing the CPP with the concerned Licensee's network shall have to be approved by the Transmission Licensee/Distribution Licensee as the case may be.

27. From a reading of clause of 4.6 above, it seems that for Grid interconnection and parallel operation, networking facility of a CPP has

been equated with that of HT consumers at the corresponding voltage level. But these Regulations do not provide for supervision charges. This takes us to the JSERC (Electricity Supply Code) Regulations, 2005 because the Electricity Supply Code defines H.T. consumers and provides for supervision charges when the works are supervised by the licensee. The relevant clause of the JSERC (Electricity Supply Code) Regulations, 2005 is reproduced below:

“Clause 3.2.3: Where the licensee permits the applicant to carry out works of laying service line and/or dedicated distribution facilities for the power supply requisitioned by him, the licensee shall not be entitled to recover expenses relating to such portion of work so carried out by the applicant.

Provided, however, that the licensee shall be entitled to recover from the applicant, supervision charges as per schedule of charges approved by the Commission in accordance with Clause 17 of these Regulations, not exceeding 15 percent of the labor cost that would have been incurred by licensee in carrying out such work.”

28. The aforesaid clause refers to Clause 17 of JSERC (Electricity Supply Code) Regulations, 2005 which is reproduced below:

Clause 17 – Schedule of Charges:-

17.1: Every Distribution licensee including the deemed licensee shall within three (3) months from the date of notification of these Regulations or within three (3) months of the grant of license, whichever is later, file with the Commission for approval, a Schedule of Charges for matters contained in these Regulations and for such other matters required by the Distribution Licensee to fulfill his obligations to supply electricity to the consumers under the Act or Rules and Regulations there under.

Provided that the Distribution licensee shall file the Schedule of Charges along with every application for determination of tariff under Section 64 of the Act together with such particulars as Commission may required.

17.2: The Commission shall after examining the schedule of charges filed by the licensee and after considering the views of all interested parties issue an order granting its approval thereon with such modifications, alterations or such conditions as may be specified in that order.

Provided that the schedule of charges approved by the Commission shall unless and otherwise amended or revoked, continue to be in force.

17.3: The existing Schedule of Charges of the Distribution Licensee shall continue to be in force until such time as the schedule of charges submitted by the Distribution Licensee under Clause 17.1 of these Regulations is approved by the Commission.”

29. Under Clause 17 of the said Regulations, it is mandatory upon the licensees to submit the Schedule of Charges to the Commission for its approval but this has not been done by the respondent-licensee-JSEB so far. Since the action on the part of the respondent-licensee-JSEB to charge the supervision charges @ 21.5% on the entire estimated cost is not legally permissible, the Commission directs the respondent-licensee-JSEB to charge the supervision charges not exceeding 15% of the labour cost from the petitioner-KSPL as prescribed in the JSERC (Electricity Supply Code) Regulations, 2005.

30. With the above observations, the petition of the petitioner-KSPL is allowed.

31. Let a copy of this order be sent to both the parties.

Sd/-
(T. Munikrishnaiah)
Member (E)

Sd/-
(Mukhtiar Singh)
Chairperson