

**JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
RANCHI**

Case No. 17 of 2009

MUKHTIAR SINGH, Chairperson

IN THE MATTER OF

An application for right to Open Access as provided under Section 9 (2) of the Electricity Act, 2003.

AND

IN THE MATTER OF

M/s Usha Martin Limited Petitioner

Vrs.

Jharkhand State Electricity Board & another Respondents

For the Petitioner : Shri Biren Poddar, Advocate
Shri Piyush Poddar, Advocate

For the Respondents : Shri Rajesh Shankar, Advocate
Shri Abhay Prakash, Advocate

**ORDER
(25.02.2010)**

M/s Usha Martin Limited, hereinafter referred to “the UML” filed a petition before this Commission stating therein that the petitioner-UML is a public limited Company registered under the Companies Act, 1956 having its registered office at 2A, Shakespeare Sarani, Kolkata. The petitioner is having its Alloys & Steel plant at Gamharia, Adityapur in the State of Jharkhand. The petitioner has installed Captive Power Plants (CPPs) of 25 MW, 15 MW and 30 MW capacity, which is synchronized with Jharkhand State Electricity Board, the respondent hereinafter called “JSEB” system and are running on a bi-lateral agreement. It has also been stated that the first CPP of 25MW capacity was installed in 1999 and subsequently the second CPP of 15MW in 2004 and lastly, the third CPP of 30 MW capacity was installed in 2009. All these CPPs are synchronized with 132/33

KV JSEB Grid at Gamaharia through double circuit (DC) 132 KV tie line constructed, owned and maintained by the petitioner as provided in the bi-lateral agreement for exchange of power. It has further been stated that the petitioner has been granted the status of power Generating Company by this Commission vide its order dated 23.5.2006. The petitioner intends to export/ import upto 25 MW power and has prayed for right to Open Access as provided under Section 9(1) of the Electricity Act, 2003.

It is important to point out here that the JSEB has been designated as State Transmission Utility (STU) also in the State of Jharkhand. The petitioner-UML approached the Chief Engineer of STU for clearance for "Right to Open Access" as provided in the State Grid Code read with Section 9(1) of the Electricity Act 2003. The petitioner pointed out that no response was received from the STU so far and hence this petition.

Notice was issued to the Respondents-Jharkhand State Electricity Board (hereinafter referred to as "Respondent-JSEB), who have appeared and filed their Counter Affidavit.

Both the parties are heard at length. They have filed their written submissions as well.

The basic question for consideration in this case is –

"Whether in the facts and circumstances of the case, the petition of the petitioner-Usha Martin Limited for Open Access for Import/Export of power through power exchange is permissible under law?"

The learned counsel for the petitioner-UML has argued that they are a CPP under Section 9(1) of the Electricity Act 2003 and have a right to Open Access. The learned counsel has specifically referred to the provisions of Clause 2(1) of the CERC (Open Access in Inter-State Transmission) Regulations 2008

framed by the Central Electricity Regulatory Commission wherein Open Access customer has been defined as a “person” who has availed or intends to avail of open access under the said regulations and includes a short-term transmission customer as defined in any other regulations, specified by the Commission or a generating company (**including captive generating plant**) or a licensee or a customer permitted by the State Commission to receive supply of electricity from a person other than distribution licensee of his area of supply, or a State Government entity authorized to sell or purchase electricity. The learned counsel has also referred to Section 42(2) of the Electricity Act 2003 which provides that the State Commission shall introduce open access subject to certain terms and conditions. The learned counsel has also heavily relied upon the judgment of the Hon’ble Supreme Court in Tata Power Company Limited Vrs. Maharashtra Electricity Regulatory Commission & others. Besides the status of a CPP, the learned counsel contends that the petitioner fits in the definition of consumer and as such entitled for Open Access as provided for in Section 42 of the said Act. Another argument is that the agreement between the petitioner-UML and the Respondent-JSEB is not an agreement for sale of power; rather it is an agreement for transmission of the power from their generating station to their industrial units through the transmission lines of the Respondent-JSEB. Referring to para 2(v) of the agreement, the learned counsel laid emphasis on the word “the surplus power, if any, shall be fed to JSEB Grid” to support his argument that there is no agreement of sale of power between the petitioner-UML and the respondent-JSEB. The learned counsel further argued that the State Transmission Utility (JSEB) by not granting the open access is violating the legal right of the petitioner-UML. The learned counsel prays that the Respondents-JSEB be directed to grant open access to the petitioner-UML.

The learned counsel for the Respondents-JSEB argued that there is an agreement between the Respondents-JSEB and the petitioner-UML and in that agreement there are clear cut provisions for sale of surplus power, if any, with the petitioner-UML to the Respondents-JSEB. The learned counsel refers to various paragraphs of the agreement to derive home the point that the said agreement contains two elements (i) transmission of power from CPP to the industrial units of the petitioner for its own use and (ii) sale of surplus power, if any, to the respondent. The learned counsel points out that it is a long term agreement for 10 years and in view of the agreement, the petitioner is not entitled to the open access. The learned counsel also contends that the CPP's rights are governed by Section 9 (2) of the Electricity Act 2003 and not by any other section of the said Act. He points out that Section 9 of the Act is *non obstante* section and over-rides the provisions of section 42 of the Act. The learned counsel for the respondents points out that the judgement of the Hon'ble Supreme Court in Tata Power Company Limited Vs. Maharashtra Electricity Regulatory Commission and Others pertains to Section 23 of the Act and does not deal with the right of open access of a CPP and hence not very relevant to the facts and circumstances of the case. The learned counsel further pointed out that the petitioner is not a consumer and as such they cannot take the benefits of the consumer provided in the Act. The learned counsel prays that the petition of the petitioner-UML does not have any merit and hence should be rejected.

Admittedly, the petitioner-UML has three Captive Power Plants. The petitioner themselves have stated so in their petition. That being the situation, Section 9 of the Electricity Act 2003 which speaks about the captive generation is more relevant in the present case. Section 9(1) of the Electricity Act 2003 starts with "Notwithstanding anything contained in this Act" means that the provision of

Section 9 over-rides the provisions of other sections of the Act. In other words, as far as CPPs are concerned, the right of open access is specifically provided in Section 9(2) of the Act, which speaks about the right to open access for the purpose of carrying electricity from his captive generating plant to the destination of **his use**. Admittedly, there is no dispute as far as transmission of electricity from the petitioner's generating plant to their other industrial units is concerned. To me, it seems, the agreement has provided the open access as enshrined in Section 9(2) of the Act.

I do not agree with the learned counsel for the petitioner that the agreement, in question, does not contain provisions regarding sale of surplus power to the respondents-JSEB. Here the paragraphs 2(v), 7(i) and 8 (ii) of the said agreement reproduced below are relevant :-

Para 2(v): *“The energy generated by the UML shall be used for meeting the power requirement of Usha Alloys and Steel Division. UML may wheel power to its other units/Divisions at Gamharia, Adityapur, Jamshedpur and Ranchi on the terms as stipulated in the agreement and surplus power, if any shall be fed to JSEB Grid.”*

Para 7(i): *“During the month if any surplus energy is found to have been received by JSEB, after the adjustment of power/energy (KWH) wheeled from the UML, JSEB shall pay the cost of energy (KWH) to UML. The cost of such energy will be decided by the JSERC. Pending decision from JSERC the application cost of energy shall be at 20% less than the average rate of purchase of power by JSEB from NTPC during the month.”*

Para 8(ii): *“In case, in any month, the NET ENERGY (KWH), after adjustment of power/energy (KWH) wheeled, becomes payable to UML by JSEB fails to make payment of the bill, the NET ENERGY (KWH) shall be adjusted during the subsequent months and any amount becomes payable to UML after final adjustment at the end of financial year, shall be made at the end of the financial year. No surcharge shall be payable by the JSEB for non-payment of energy bill.”*

The aforesaid paragraph 2(v) of the agreement clearly states that the surplus power, if any, shall be fed to JSEB Grid. Likewise, paragraph 7(i) of the agreement speaks about the supply of power by CPP to JSEB. This paragraph also speaks about the payment of cost of energy to the respondents-JSEB. Paragraph 8(ii) of the agreement speaks about the billing and payment.

I agree that the word 'sale' is not used in the agreement, but the instrument has to be read as a whole. Law is well settled in this regard. The Hon'ble Supreme Court in the case of F.M. Devaru Ganapathi Bhat Vs. Prabhakar Ganapathi Bhat (2004 2 SCC 504) has stated that –

“The rule of construction is well settled that the intention of the executor of a document is to be ascertained after considering all the words in the ordinary natural sense. The document is required to be read as a whole to ascertain the intention of the executant. It is also necessary to take into account the circumstances under which any particular words may have been used.”

From the above judgement of the Hon'ble Supreme Court, it is clear that the instrument has to be read as a whole.

In view of the above, I have no doubt, in my mind that the petitioner-UML through the said agreement has agreed to sale the surplus power, if any, to the respondents-JSEB. This agreement is for 10 years.

I agree that in Clause 2(i) of the CERC (Open Access in Inter State Transmission) Regulations 2008, the right of open access has been included for a CPP as well. To my understanding, the petitioner-UML has exercised its right of open access by agreeing to sale the surplus power to JSEB.

During the course of argument, it was also contended on behalf of the petitioner-UML that the agreement was signed under coercion. But there is

nothing on record to suggest that the agreement was not voluntary and hence this plea is not tenable.

I agree with the learned counsel for the respondents-JSEB that the judgement of the Hon'ble Supreme Court in TPCL Vs. MERC pertains to the scope of Section 23 of the Act and does not have a direct bearing on the facts and circumstances of the present case. But I do agree with the learned counsel for the petitioner-UML that the objectives and philosophy of the Act have been well brought out in the said judgement. To my mind, there is no conflict between the objectives of the Act and the agreement, in question. Rather, to me, the Hon'ble Supreme Court in the said judgement have welcomed the concept of long term PPAs because of huge investments involved in setting up of generating plants. Rightly the agreement, in question, is also for 10 years.

In the facts and circumstances of the case discussed hereinabove, the question under consideration is answered in the negative. The petition of the petitioner is rejected as the right of Open Access of the petitioner-UML is not infringed or violated by the said agreement. There is no necessity for issuing any direction to State Transmission Utility/State Load Despatch Centre.

Sd/-
(Mukhtiar Singh)
Chairperson