

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

Dated: 9<sup>th</sup> February, 2010.

**Present :Hon'ble Mr. Justice M. KARPAGA VINAYAGAM, Chairperson  
Hon'ble Mr. H.L. BAJAJ, Technical Member**

**In the matter of:**

**APPEAL NO. 119 Of 2009**

Chhattisgarh State Power Distribution Co. Ltd. ...Appellant  
Daganiya, Raipur.

*Versus*

1. Aryan Coal Benefications Pvt. Ltd.  
7<sup>th</sup> Floor, Ambience Office Book,  
Ambience Hall, Ambience Island,  
NH-8, Gurgaon-122010.
2. Chhattisgarh State Electricity Regulatory Commission,  
Civil Lines, G.E. Road,  
Raipur-492 001. ... Respondents

Counsel for the Appellant(s) : Mr. K. Gopal Choudhary with  
Mr. A. Bhatnagar, SE/CSPDCL

Counsel for the Respondent (s):Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Mr. Swapna Seshadri for  
CERC  
Mr. Atul Sharma,  
Mr. Milanka Choudhary,  
Mr. Ashwarya Sinha,  
Mr. Ajay Sawheny,

Mr. Rajat Arora for Aryan Coal  
Benefications.

**APPEAL NO.125 Of 2009**

Aryan Coal Benefications Pvt. Ltd.  
7<sup>th</sup> Floor, Ambience Office Book,  
Ambience Hall, Ambience Island,  
NH-8, Gurgaon-122010.

...Appellant

Versus

1. Chhattisgarh State Electricity Regulatory Commission,  
Civil Lines, G.E. Road,  
Raipur-492 001.
2. Chhattisgarh State Electricity Board,  
Dagan iya, P.O. Sundernagar,  
Raipur-492 103., Chhattisgarh

Counsel for the Appellant(s) : Mr. Atul Sharma,  
Mr. Milanka Choudhary  
Mr. Ashwarya Sinha  
Mr. Ajay Sawheny  
Mr. Rajat Arora

Counsel for the Respondent (s):Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Mr. Swapna Seshadri  
Mr. K. Gopal Choudhary  
Mr. A Bhatnagar

## **JUDGMENT**

**Per Hon'ble Mr. Justice M. KARPAGA VINAYAGAM, Chairperson**

The common judgment is being rendered in these two Appeals, as these appeals would arise out of the common order passed by the Chhattisgarh State Electricity Regulatory Commission disposing of the two Petitions No. 10 & 11 of 2008 and giving directions to both the parties, namely Chhattisgarh State Power Distribution Co. Ltd and Aryan Benefication Limited.

2. The Chhattisgarh State Power Distribution Company has filed an Appeal No. 119 of 2009 as against the Aryan Benefication Limited (ABL). Similarly the Aryan Benefication Limited has filed Appeal No. 125 of 2009 as against the Chhattisgarh Power Distribution Company Limited, on being

aggrieved over the respective findings made in the impugned order dated 23.1.2009.

3. The short facts are as follows:-

- i) Ms Aryan Coal Benefication is the coal based generating station. This generating station entered into a Power Purchase Agreement (PPA) with the Chhattisgarh State Electricity Board for supply of 25 MW firm power with effect from 22.2.2007. There upon the Aryan Plant constructed its own 33 KV dedicated transmission line and started supplying power to its coal washeries, as a captive power plant.
- ii) On receipt of the information from the Chief Electrical Inspector of Chhattisgarh Government, the State Commission came to know that M/s Aryan Coal Benefication Limited did not qualify to be captive generating plant. Therefore, the State

Commission issued a notice dated 12.08.2008 to the Aryan plant by giving a Suo Moto direction that it should not supply power to its coal washeries except through open access, since the said plant did not fall in the category of captive plant. On receipt of the said notice M/s Aryan Plant filed a reply before the State Commission on 31.07.2008. The Aryan Plant filed further a reply on 4.8.2008 stating that it would file a separate petition to the State Commission for grant of open access for supply of power to its coal washeries within a period of three months and requesting the State Commission to withhold further action in this regard.

- iii) However, the State Commission was not satisfied with the reply and it initiated suo moto proceeding in Appeal No. 10/08 and sent a show cause notice dated 12.08.2008 under Section 142 of the

Electricity Act 2003 to the Aryan Plant as to why the penalty be not imposed on it for violation of the provisions of the Electricity Act. The Aryan Plant there upon submitted its reply stating that the transfer of power from the generating plant, to its own coal washeries does not amount to supply of electricity to consumers and therefore, there was no violation. Besides the reply, the Aryan Plant company by way of abundant caution filed a petition No. 11 of 2008 praying that they may be allowed to supply power to its own coal washeries on payment of cross subsidy charges. On receipt of the said petition, the State Commission thought it fit to implead the Chhattisgarh State Electricity Board as a necessary party in Petition No. 11 of 2008. Accordingly impleaded.

- iv) Both the Petitions were heard together by the State Commission. Ultimately, the State

Commission disposed of both the Petitions, after hearing both the parties, through a common order dated 23.1.2009. In the said impugned order, the State Commission accepted the portion of the plea of the Aryan Plant thereby allowed the plant to pay the cross subsidy surcharge to the Electricity Board in regard to the past use. It however directed that the Aryan Plant being a non captive generation plant either to apply for the license or to avail open access from the Distribution Company for future use. It is also directed that since the plant has been declared as non-captive generating plant, the parallel operation charges (POC) which were earlier paid by the Aryan Plant to the Electricity Board, shall be adjusted towards the cross subsidy charges payable by the Aryan Plant to the Electricity Board for the past period

and consequently dropped proceedings under Section 142 of the Electricity Act.

- v) Aggrieved over the portion of the said order directing the Aryan Plant to obtain license or obtain the open access from the Distribution Company, the Aryan Plant filed a Review Petition. This Review petition was, however, dismissed on 25.5.2009. Hence the Aryan Plant has filed this appeal before this Tribunal in Appeal No. 125 of 2009 both against the Main order and the Review order.
- vi) Similarly the Chhattisgarh State Power Distribution Company, which is the successor of the Chhattisgarh State Electricity Board, challenging the other portion of the common order, namely dropping of the 142 proceedings against the Aryan Plant as well as against the order directing them for the adjustment of parallel operation charges

towards the cross subsidy charges, has filed Appeal No. 119 of 2009 before this Tribunal.

4. Both these Appeals are taken together and heard.
  - i) The main contention urged by the learned counsel for the Aryan Plant in Appeal No. 125 of 2009 are as follows:-
    - a) The Aryan Plant Company being a generator which has not been qualified as a captive generating plant can transfer power generated by it for its own use to its own coal washeries through its own dedicated transmission line without license or open access, as there is no prohibition in the Electricity Act, 2003 for such a transfer. The State Commission is wrong in holding that the dedicated transmission line for self use of power is applicable only in the case of

captive generating plant and not in the case of any other generator.

- b) If the dedicated transmission line can be laid from a generating company to a load centre, the supply can be made through dedicated transmission line. The Aryan Plant Company transferring power to its own coal washeries through its own dedicated transmission line can not be treated as “supply” as envisaged under Section 2 (70) of the Electricity Act. Therefore, the Aryan Plant Company is not bound either to avail open access or to obtain a license under the Electricity Act.
- c) The Company can avail exemption under Clause 6 (b)(ii) of open access regulations and continue to use its power in its coal washeries on payment of cross subsidy charges. The State Commission has

correctly accepted this plea and held that parallel operation charges earlier paid to the Distribution Licensee shall be adjusted towards the cross subsidy charges for the past use. Having recognized and regularized the past use of electricity on payment of cross subsidy charges, the State Commission ought to have applied the same principle for the future use as well by directing for the continued payment of cross subsidy charges to the distribution company instead of directing the Aryan Plant either to obtain the license or to get the open access.

- d) The cross subsidy charges are payable not only for availing of the open access but also could be made applicable to the transfer of electricity by the generating plant to its own

coal washeries namely the load centre by way of dedicated transmission line.

5. The arguments advanced by the learned counsel for the State Power Distribution Company in Appeal No. 119 of 2009 are as follows:-

- i) The State Commission, having initiated the proceeding under Section 142 of the Electricity Act through a show cause notice to Aryan Plant to show cause as to why penalty be not imposed, ought to have decided upon whether or not was there any violation of the Electricity Act and consequently whether the penalty to be imposed in terms of Section 142 of the Act. In this case the State Commission, having concluded that there was a violation, it unfortunately dropped the penalty proceedings by accepting the prayer for

payment of cross subsidy charges to the Distribution Licensee for the past use. This finding is illegal.

- ii) The cross subsidy surcharge is a surcharge in addition to wheeling charges and not compensation in lieu of the parallel operation charges. It is applicable only where open access had been availed of in pursuance of the phased introduction of open access and as a part of the consideration for availing of open access. There can be no cross subsidy surcharge when no open access had been availed.
- iii) When the State Commission held that the means for the past supply of the electricity was unlawful, the prayer to supply power to its own coal washeries by paying cross subsidy charges should have been totally rejected. Having rightly held that for the future use the plant should apply for open

access or to obtain license, the State Commission ought to have applied the same principle for the past use as well.

- iv) The State Commission without considering the scope of Section 142 has gone to the extent of directing the Distribution Company for the adjustment of parallel operation charges towards the cross subsidy surcharge for the past use. This is beyond the scope of the proceedings and this relief has been granted by the State Commission even without the prayer to this effect.
- v) Prior to the passing of the impugned order, the Aryan Plant in fact had availed of parallel operation facilities extended by the distribution licensee while supplying its own load. The subsequent determination that it is not a captive plant, by reason of not consuming 51% of the energy generated cannot alter the effect as it had

already availed parallel operation facilities from the Distribution Company in a manner in the capacity of captive generation plant. Therefore, the order directing for the adjustment of parallel operation charges is not legal.

6. The learned counsel for the State Commission also has elaborately made his submissions in justification of the findings rendered by the State Commission in the impugned order. Two questions that may arise for consideration in these Appeals are as follows:

- i) Whether the State Commission is correct in holding that the Aryan Plant is liable to pay cross subsidy charges for past use of the electricity generated by it for supply to its own coal washeries to the distribution licensee and consequently the parallel operation charges which

were paid earlier by the Aryan Plant to the distribution licensee shall be adjusted towards the said cross subsidy charges for the past use.

- ii) Having regularized the past use by directing to pay cross subsidy charges, whether the State Commission is correct in holding that the Aryan Plant is liable to apply for open access or to obtain the license for supply of power to its own coal washeries for the future use through its own dedicated line?

7. Let us now deal with these questions one by one. In regard to the first question, the State Commission has rendered the following findings:-

- i) Aryan Plant is not a captive generation plant.

- ii) Therefore Aryan Plant is liable to pay cross subsidy charges to the Distribution Company for the past use.
  - iii) Since the Aryan Plant was found to be not a captive generation plant, there is no liability for the plant to make the payment of parallel operation charges to the Distribution Company and the said amount of parallel operation charges paid earlier shall be directed to be adjusted towards the demand of cross subsidy charges for the past use.
8. We shall now see as to whether these findings are proper.
9. It is noticed that the section 142 proceedings were initiated against Aryan Plant by issue of a show cause notice on two aspects.

- i) The Aryan plant can not be considered to be a captive generation plant, as it does not fulfill the requirements of the captive power plant.
- ii) When it is not a captive power plant, Aryan Plant can not supply power to its own coal washeries unless the license is obtained under Section 12 of the Electricity Act, 2003.

9. The main contention urged by the learned counsel for the Distribution Company, the Appellant in Appeal No. 119 of 2009 is that the State Commission having initiated the proceedings under Section 142 and having found that there was a violation, it ought to have imposed some punishment on the Aryan Plant and as this was not done, the impugned order is illegal. This contention in our view does not merit acceptance for the following reasons:-

It is the judicial discretion of the State Commission whether to impose such punishment as it considers

appropriate against Aryan Plant Company, even when there was any violation. In other words, it is up to the State Commission to decide whether at all to impose any punishment even when it is found that there was such violation. If the State Commission considers that the same was not required in the circumstances and facts of the case, it may not impose punishment. As a matter of fact, the expression used in Section 142 is only 'May' and not 'shall'. So it is not mandatory on the part of the State Commission to impose any punishment, even though there was violation.

10. The main prayer made by the Aryan Plant Company in Petition No. 11 of 2008 before the State Commission is for seeking permission to Aryan Plant to continue to supply power to its own coal washeries against payment of cross subsidy charges to the Distribution Company. Therefore, the question arises as to whether the Aryan Plant Company is entitled to supply power to its own coal washeries through its

own dedicated transmission line on payment of cross subsidy charges even without obtaining open access.

11. Under the Electricity Act, 2003 both the generating company and captive power plant are entitled to supply electricity to others. The sale of electricity by captive power plant and the generating company to the end users is also permitted. This is specifically provided under Section 9 and 10 of the Electricity Act, 2003, which are reproduced below:-

**“9. Captive Generation** - (1) *Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines;*

*Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*

(2) *Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use;*

*Provided that such open access shall be subject to availability of transmission facility shall be the Central Transmission Utility or the State Transmission Utility, as the case may be;*

*Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”.*

**“10. Duties of generating companies:-** (1) *Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with a the provisions of this Act or the rules or regulations made thereunder.*

(2) *A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of Section 42., supply electricity to any consumer.*

(3) *Every generating company shall-*

(a) *submit technical details regarding its generating stations to the Appropriate Commission and the Authority.*

(b) *co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.*

12. The perusal of these Sections would make it clear that the first and 2<sup>nd</sup> proviso to Section 9 when it is read together would clearly envisage for the supply of electricity generated to any consumer subject to regulations made under sub-section 2 of Section 42. Similarly, sub-section 2 of Section 10 also would envisage for the supply of electricity by a generating company to a consumer by a generating company to any licensee in accordance with this Act and the rules and regulations made thereunder and subject to the regulations made under sub-section (2) of Section 42. While the proviso to section 9 uses the expression “the supply of electricity by generating plant through the grid”, there is no such qualification provided for in sub-section 2 of section 10. Thus, these sections would make it evident that it is open to the generating company as well as captive plant to supply electricity to end users.

13. Further the consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the Act. Similarly, the transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It is well settled in law that what is not barred or what is not prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. The following is the relevant portion of observations made by the Hon'ble Supreme Court in the case of Suresh Jindal Vs BSES Rajdhani Power Ltd. – (2008) Vol-1 SCC 341.

*“Section 20 operates one filed namely, conferring a power of entry on the licensee. The said provision empowers the licensee inter-alia to alter a meter which would include replacement of a meter. It is an independent general provision. In the absence of any statutory provision, we do not see any reason to put a restrictive meaning*

*thereto. Even under the General Clauses Act, a statutory authority while exercising the statutory power may do all things which are necessary for giving effect thereto. There does not exist any provision in any of statutes referred to hereinbefore which precludes or prohibits the licensee to replace one set of meter by another.”*

14. It can not be disputed that when the power plant from which electricity is made available is a captive power plant, no cross subsidy charge is payable. In the same way, if it is not a captive power plant then the cross subsidy is payable. Since Aryan Plant was not paying cross subsidy surcharge, on the finding that it is not a captive power plant, the Aryan Plant had been asked to pay the cross subsidy surcharge for the past use, especially when the plant itself filed an application before the State Commission in Petition No. 11 of 2008 stating that it was prepared to pay the cross subsidy surcharge.

15. The Distribution licensee can not have any grievance in regard to the order directing the Aryan Plant to pay the cross subsidy charge towards the past use, since the Distribution Licensee in fact is actually benefited, since it is getting cross subsidy surcharge which is higher than the parallel operation charges which was being paid earlier. Once it is held that the generating plant was not operating as a captive generating plant then there was no liability to pay parallel operation charges.

16. Section 42 (2) deals with two aspects; (i) open access (ii) cross subsidy. Insofar as the open access is concerned, Section 42 (2) has not restricted it to open access on the lines of the distribution licensee. In other words, Section 42 (2) can not be read as a confusing with open access to the distribution licensee.

17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. On this principle it has to be held that the cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not.

18. In this context, the next question that would arise for consideration is whether the generation plant can use its own dedicated transmission line to supply power to its own

coal washeries without obtaining open access. This point has been held in favour of the generating plant by this Tribunal in Nalwa Steel & Power Ltd. Vs CSPDCL & Anr. [Appeal No. 139 & batch – 2009 ELR (APTEL) 609] dated 25.5.2009. In this decision it has been held that the dedicated transmission line can be laid by generating company to the place of consumption of the consumer when a place of consumption is a load centre. This is also held valid in another decision in Appeal No. 10 of 2008 on 22.2.2009 in the case of Dakshin Gujarat Vidyut Vitran Nigam Ltd. Vs. Gujarat Electricity Regulatory Commission.

19 The relevant portion of the observations of the Tribunal dated 20.5.2009 in Nalwa Steel & Power Ltd. Vs CSPDCL & Anr. in Appeal No. 139 of 2009 ELR (APTEL) 609 is as follows:-

*“11) The new Act envisages grant of transmission license. The new Act also envisages supply by the generating company and the captive generating company to a consumer. When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of, if no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term ‘subject to’ is interpreted to mean ‘only under’ it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance*

*of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on complying with the relevant rules and on payment of the required charges and not that even if the existing lines are too far away, the generating company cannot directly supply to a consumer.*

*12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16). It means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of*

*load and not an individual industry/factory as consumer. According to Mr. Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr. Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed as "dedicated transmission line" when we treat the point of consumption as a 'load centre'. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a*

*generating station under Section 10 of the Act. In this view one may say that a generating company may need license to ‘supply’ to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it.”*

20. Now the same question has been raised as to whether non-captive generating company can lay the dedicated transmission line for self consumption without obtaining a license or availing the open access. This question has been considered in detail by this Tribunal and a finding had been given in Jindal Steel and Power Ltd. V CSERC & Ors 2008 ELR (APTEL) 628 in Para 51,52,60 & 61 reproduced below:-

*51) The generating company can reach the consumer for “supplying” electricity through dedicated transmission lines as defined in section 2(16). Section 10(1) says that the duties of a generating company shall be to establish, operate and maintain generating*

*stations, tie lines, sub-stations and dedicated transmission lines connected therewith. The “dedicated transmission lines” as defined in 2(16) is as under:*

*“2(16). “dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;”*

*52) Thus dedicated transmission lines which the generating station can establish can go up to the load*

*centre. Therefore, a generating station can supply electricity to a consumer through dedicated transmission lines up to the load centre. However, if the generating company, instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers in a particular area, then what he requires is not a dedicated transmission line but a distribution system for he is certainly not contemplating to have dedicated transmission line for each consumer. If this is the situation i.e. a generating company intends to supply to a group of consumers but not through a dedicated transmission line, then the intended activity become distribution. In that case section 12 of the Electricity Act 2003 makes no exception for him and he would need a license.*

*60) The next question that arises for consideration is the effect of sub-section 2 of section 42. It has been submitted by senior counsel Mr. Ravi Shankar Prasad*

*appearing for the Chhattisgarh State Electricity Board that the supply from a CPP or even under section 10(2) is permissible only when the same is made by use of the grid or the transmission lines of the distribution licensee or a transmission licensee by use of open access. According to him unless open access is availed of the supply cannot be made. When open access is availed of, the CSEB is able to recover the cross subsidy surcharge. In case the open access is not availed of, the CSEB has to lose the cross subsidy surcharge which may affect the income of the CSEB and also the section of consumers who are subsidized by using the money recovered through the cross subsidy surcharge.*

*61) The question really is what the meaning of is “subject to”. In our opinion, open access is an enabling provision. This is a provision to help expansion of the*

*electricity sector and not to limit its development. In case the supply is made through the grid then, certainly the supply will be subject to regulations made for using open access. However, it will not be correct to say that even if electricity generated by a CPP or a generating company can be supplied to a consumer without the use of the grid, such a supply will not be permissible. If the dedicated transmission line can be laid from a generating plant up to a load centre, supply can be made through dedicated transmission line. No provision of the Electricity Act 2003 restricts the supply through a dedicated line because such supply is not going through the grid and does not avail of the facility of open access. If the intention of the Act was that no sale is possible except by availing open access it could say so. Instead of saying “subject to regulations made under sub-section (2) of section 42” it could say “by availing access through the grid or a distribution system of the licensee of the concerned area”. The provision of Section 42(2) would be attracted only*

*when the access through the existing distribution system is sought. When no such access is sought the question of application of section 42(2) will naturally not arise.*

21. The finding given above in this decision is that if the dedicated transmission line is laid from the generating company up to the load centre, then the supply can be made through dedicated line. As discussed above, no provision of the Electricity Act, 2003 restricted the supply through the dedicated line because such supply is not going through the grid and does not avail the facility of open access. The proviso of Section 42 (2) would be attracted only when the open access through distribution system is sought. When the open access is not sought the question of application for 42 (2) will not arise.

22. As stated above, the transfer of power by Aryan Plant to its own coal washeries does not amount to supply of

electricity as defined in the Act. Under Section 2 (70) of the Act, the supply is defined; *“supply in relation to electricity means the sale of electricity to a licensee or a consumer”*. The term consumer is defined under Section 2(15) of the Act. From this definition it is clear that the consumer is a person who gets supply of the electricity for his own use. The coal washeries and the generating plant are owned by the same entity, Aryan Coal Benefication Ltd. and no price is paid for such use of electricity by coal washeries to it. Therefore, it is clear that to constitute ‘supply’ to a consumer there should be a sale. In the absence of any price being paid, there can not be any sale of electricity from generating plant to coal washeries.

23. The State Commission has framed Chhattisgarh State Electricity Regulatory Commission (Intra-State Open Access in Chhattisgarh) Regulations, 2005 in exercise of powers under section 181 of the Act. Clause 11 (6)(b)(ii) of

Regulations provides that a cross subsidy surcharge is payable by such consumers which receives supply of electricity from a person other than a distribution licensee in whose area of supply is located, irrespective of whether he avails such supply through transmission/distribution network of the Distribution licensee or not. In this case the Aryan Plant's coal washeries received supply of electricity from its own generating plant which is not a distribution licensee.

24. Let us quote the said provision of 11 (6) (b) as under:-

“The principle and procedure for determining the cross subsidy surcharge shall be as under:-

- i) Every open access customer requiring supply of electricity through open access in case that these regulations shall be liable to pay the cross subsidy surcharge as may be specified.
- ii) Cross subsidy surcharge shall also be liable by such consumer who receive supply of electricity

from a person other than the distribution licensee in whose area the supply is located, irrespective of whether he avails such supply through transmission/distribution network licensee or not.

25. Thus it is clear that the Act read with Regulations as referred to above contemplated consumer receiving the supply of electricity from the source other than the licensee, thus making a proviso to compensate the licensee for the loss in the area thereof. The perusal of the above Regulation would show that there is provision for the payment of cross subsidy charges and by that process it safeguards the interest of the distribution licensee in whose area the consumer is located.

26. At the risk of repetition, it is to be stated that the Clause 11 (6) (b) (ii) of such Regulations recognizes two categories. The first is the case of open access customer

receiving the supply of electricity from the Distribution licensee whereas the 2<sup>nd</sup> is the consumer who receive supply of electricity from a person other than the distribution licensee. The case of Aryan Plant falls in the 2<sup>nd</sup> category. Thus the scheme of the Act states a balance between the interest of entities and the interest of the distribution licensee. These categories are recognized under the Act and the Regulations. Naturally, Aryan Plant is entitled to use its own power in coal washeries by payment of cross subsidy as per Clause 6 (b) (ii) of the Regulations.

27. The energy can be generated and same can be supplied to the consumer within the premises. Similarly where the electricity is generated at one place it may be transmitted to a place of consumption other than the place of generation. In the former case, it can be consumed through internal wiring. In the later case, there is necessity to lay down electricity line from the place of generation to place of

use by using the existing line of the licensee through the open access.

28. In the case of Malwa Steel & Power Ltd. V CSPDCL & Anr. (Appeal 139/2007 & batch- 2009 ELR (APTEL) 609 at para 12 it has been held that the term load centre can be interpreted to mean that even the place of single consumer can be a load centre.

29. If the said finding which is a ratio is followed, then it has to be held that the dedicated transmission line which is laid for supply from the place of generation to the place of consumption can be used on payment of cross subsidy charges.

30. There is one more angle to be noticed. There is no dispute in the fact that the dedicated transmission line does not require license as per Section 12 of the Act. The

conveyance of electricity over a dedicated transmission line as defined separately in Section 2 (16) will not amount to transmission of electricity requiring the transmission license. The Central Government has issued an order under Section 183 of the Act namely the Electricity (Removal of difficulties) Fifth Order, 2005. As per this order, no license is required for dedicated transmission line. The relevant portion of the said notification is as follows:-

*“Now, therefore, the Central Government in exercise of its powers conferred by section 183 of the Act hereby makes the order in respect of establishing, operating or maintaining a dedicated transmission line, not inconsistent with the provisions of the Act, to remove the difficulties, namely:-*

1. **Short title and commencement:-** (1) *This order may be called the Electricity (Removal of Difficulty Fifth Order, 2005.*  
(2) *It shall come into force on the date of publication in the Official Gazette.*
2. **Establishment, operation or maintenance of dedicated transmission lines.** – *A generating company or a person setting up a captive generating plant shall not be required to obtain license under the Act for establishing, operating or maintaining a dedicated transmission line if such company or person complies with the following:-*

- (a) Grid code and standards of grid connectivity;*
- (b) Technical standards for construction of electrical lines;*
- (c) System of operation of such a dedicated transmission line as per the norms of system operation the concerned State Load Despatch Centre (SLDC) or Regional Load Despatch Centre (RLDC).*
- (d) Directions of concerned SLDC or RLDC regarding operation of the dedicated transmission line.*

31. These clarifications would make it clear that no license is required for dedicated transmission line. However, a distinction has been made between the requirements of taking license under Section 12 read with Section 14 of the Act for the dedicated transmission line under the 2<sup>nd</sup> proviso of the Section 9 of the Act which deals with the captive generation. The 2<sup>nd</sup> proviso in Section 9 was inserted by the amendment effective from 15.6.2007. As per 2<sup>nd</sup> proviso no license shall be required for supply of electricity generated from the captive generating plant. This proviso does not

deal with the issue of license for dedicated transmission line. This proviso clarifies that no license is required for supply of electricity through dedicated transmission line. When a doubt was created as to whether a captive generating company which is established primarily for the generation and self use of electricity can supply electricity to others without getting into the distribution system, the same was clarified by this proviso. Thus, similar proviso has been provided under Section 10. There can not be any distinction between a mere generating company and a captive generation plant in regard to the supply of electricity. A generating company can equally undertake supply of electricity to any licensee or to the consumer under Section 10 (2) of the Electricity Act. Further Section 49 of the Electricity Act also clarifies the sale of electricity by a generating company to a consumer. Therefore, the 2<sup>nd</sup> proviso of Section 9 does not place the captive generating company at a higher position than the generating company

in regard to the supply of electricity through a dedicated transmission line. Thus it is clear that both, the generating company as well as the captive generating station are similarly placed.

32. If the load centre is the installation of the consumer then both the captive generating station and the generating company can install the dedicated transmission line up to the place of the consumer without the need to obtain any license. Load centre can not be incorporated as not including the installation of the consumer, if such an interpretation is given, both captive generation plant and generating company cannot lay down the dedicated transmission line up to the place of the consumer. So it has to be held that under the regulation no license is required to undertake supply of electricity through a dedicated transmission line without using the distribution line of the transmission company or the distribution system of the licensee.

33. It has been argued by the learned counsel for the Appellant in Appeal No. 119 of 2009 that the parallel operation charges can not be directed to be adjusted towards cross subsidy charges since the Aryan Plant had already paid parallel operation charges after having availed of the parallel operation facilities, the subsequent finding that it is not a captive generating plant can not alter the fact that it had used the parallel operation facilities provided by the Distribution Licensee after payment of parallel operation charges and therefore the order ordering for adjustment of parallel operation charges toward cross subsidy charges is wrong. This contention in our view is misconceived. Once it is found out that the generating plant who claimed as a captive generating plant did not consume 51% of the energy generated by it, it was never a captive generating plant, then the Appellant namely Power Distribution Company Limited can not claim that they are entitled to collect parallel

operation charges. Therefore, the order impugned had been correctly passed by the State Commission holding that the Aryan Plant could never be a captive power plant and therefore, there was no liability to pay parallel operation charges. Consequently, the State Commission held that the charges which were paid earlier as parallel operation charges have to be adjusted as cross subsidy charges for the past use. There is no illegality in this order. Further, no prejudice can be attributed to the Power distribution licensee especially when the amount of cross subsidy surcharge which the power distribution company is entitled to claim is much higher than the parallel operation charges which were paid earlier.

34. The learned counsel for the Distribution Licensee submits that his client does not want cross subsidy charges, merely because it is higher than the parallel operation charges. This submission is quite strange. It is not open to

the distribution licensee to contend that it does not want cross subsidy charges even though it is higher than the parallel operation charges. This stand of the distribution licensee is not only against the interest of the consumers, but also contrary to the provisions of the Electricity Act, 2003.

35. Now we may come to the next question. Having regularized the supply of electricity by the Aryan Plant to its own coal washeries on payment of cross subsidy surcharge for the past use, whether Central Commission could direct the Aryan Plant to obtain license or to seek for open access for the future use? As we held above the reasoning given in the impugned order by the Central Commission for ordering payment of cross subsidy charges on finding that the generating plant was never be a captive generating plant for the past use is perfectly valid in law. In our view, the said analogy would apply to the future use also on payment of

cross subsidy charges. If the Central Commission had decided that Aryan Plant is liable to get license for open access for supply to its own coal washeries through its own dedicated line, then it ought to have held that the Aryan Plant being the mere generating plant can not supply to its own coal washeries without obtaining the license or open access for the past use as well. In this case it can not be debated that the Aryan Plant has used its dedicated transmission line for supplying its power to its own coal washeries both in the past as well as in the future also. Admittedly, they have not used any line of the distribution system. If that is so, then there is no necessity for directing the Aryan Plant to go for license or go for open access. The direction for payment of cross subsidy surcharge for the past to the Distribution Company would certainly apply to the future also as the compensatory cost.

36. In the light of the discussion made above, we hold that the order impugned giving the direction to the Aryan Plant to apply for license or to get open access for the future use alone would suffer from infirmity and consequently that portion of the order is liable to be set aside and accordingly set aside. Consequently, the Appellant, Aryan Plant is entitled to use its own dedicated transmission line to supply electricity to its own coal washeries on payment of cross subsidy surcharge to the Distribution Company as a compensatory charge to the distribution company for the future period as well. In other respects, the impugned order is confirmed.

36. In the light of the above discussions, we make the following conclusions:-

- i) The Aryan Plant Company being a generator which is found to be not qualified as a captive generating plant can transfer power generated by it for its own use to

- its own coal washeries through its own dedicated line without license or open access.
- ii) The Aryan Plant Company transferring power to its own coal washeries through its own dedicated transmission line can not be treated as '**supply**' as envisaged under Section 2 (70) of the Electricity Act. Therefore, the Aryan Plant Company is not bound either to avail open access or to obtain a license under the Act.
  - iii) Under the Act and the Regulations framed under the said Act a consumer is entitled to receive the supply of electricity from the source other than the licensee thereby making a proviso to compensate the licensee therefore, show that there are provisions for the payment of cross subsidy surcharge and by that process, it safeguards the interest of the distribution licensee in whose area the consumer is located.
  - iv) If the load centre is the installation of the consumer, then both the captive generating station and the

generating company can install the dedicated transmission line up to the place of the consumer without the need to obtain any license. In other words, under the Regulations no license is required to undertake supply of electricity through a dedicated transmission line without using the distribution line of the transmission company or the distribution system of the licensee.

- v) The State Commission is correct in directing the Distribution Company to adjust the parallel operation charges which were earlier paid by the Aryan Plant Company, towards the cross subsidy surcharge for the past use. Once it is found out that the generating plant whose claim as a captive generating plant was never qualified, as it does not consume 51% of the energy generated by it, then the distribution company can not collect the charges from the Aryan Plant Company as parallel operation charges. As there is no liability to pay

parallel operation charges, the State Commission has correctly held that the charges which were paid earlier as parallel operation charges have to be adjusted as cross subsidy charges. There is no illegality in this order.

vi) Though the State Commission is right in holding that the Aryan Plant Company was liable to pay the cross subsidy surcharge for the past use, it is not correct to hold that for the future use it must obtain license or apply for open access. Having regularized the transfer of power by the Aryan Plant Company to its own coal washeries on payment of cross subsidy surcharge, the State Commission ought to have adopted the same analogy for the future use also on payment of cross subsidy surcharge.

vii) As such the order impugned giving direction to the Aryan Plant Company to apply for license or to get open access for the future use alone would suffer from illegality.

Therefore, that portion of the order is set aside. Consequently, the Aryan Plant Company is entitled to use its own dedicated transmission line to transfer power to its own coal washeries on payment of cross subsidy surcharge to the Distribution Company as compensatory charge to the Distribution Company for the future period as well. In other respects, the impugned order is confirmed.

37. In the result, the Appeal No. 119 of 2009 filed by the Distribution Company is dismissed and Appeal No. 125 of 2009 filed by Aryan Plant is allowed. No order as to the costs.

**(H.L. Bajaj)**  
**Technical Member**

**(Justice M.Karpaga Vinayagam)**  
**Chairperson**

**Dated: 9<sup>th</sup> February, 2010.**

INDEX: Reportable/Non-Reportable.