

**HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134113, HARYANA**

CASE NO. HERC/PRO – 9 of 2010

DATE OF HEARING: 10.08.2010

DATE OF ORDER : 25.08.2010

IN THE MATTER OF:

Indian Oil Corporation Limited (IOCL) Panipat, seeking clarification whether IOCL needs to apply to the Haryana Electricity Regulatory Commission (the Commission) for a license to supply up to 21 MW of power from its Captive Power Plant to Air Liquide North India Private Limited (BOO Plant) for Panipat Naphtha Cracker Complex).

Parties:

1. M/s Indian Oil Corporation Limited, Panipat Refinery, Panipat - 132140

Petitioner/Applicant

2. Uttar Haryana Bijili Vitran Nigam, Shakti Bhawan, Sector – 6, Panchkula

Respondent

Present:

- | | |
|----------------------------|----------|
| 1. Shri Bhaskar Chatterjee | Chairman |
| 2. Shri Rohtash Dahiya | Member |

On behalf of the Applicant/ Petitioner

1. Shri Abhinav Vashist, Advocate
2. Ms Mona Aneja, Advocate
3. Shri S.Z.H. Rizvi, Chief Project Manager
4. Shri Anit Kumar, CLE

On behalf of Respondents:

1. Shri Ajmer Singh Gill, GM / Commercial
2. Shri S. K. Bansal, SE / RA

ORDER

Brief background of the case:

The petitioner, M/S Indian Oil Corporation Limited (IOCL), Panipat had vide their letter No. PR / PNCP / N 202 dated 30th July, 2009 informed the Commission that they are constructing Panipat Naphtha Cracker Complex (Complex) comprising of various units to produce different grades of Polymers / Plastics etc at Panipat. Hence to meet the power requirement of the complex they are installing a Captive Power Plant of 238.5 MW capacity in their own premises. As an intermediate input to the Naphtha Cracker process they would require Nitrogen & Oxygen gases. The cryogenic Oxygen and Nitrogen Plant which will feed Oxygen and Nitrogen gases in the Complex is being set up by Air Liquide Industries, Belgium, SA (“ALB”) on a Build – Own-Operate (“BOO”) basis and will require a maximum of 21 MW of power. The power to Oxygen and Nitrogen Plant will be provided by IOCL from their CPP at 33 KV voltage level through two dedicated feeders put within the battery limit of the Complex. IOCL will not use any grid or other infrastructure of any distribution licensee of the area for the purpose.

In the above background the IOCL requested the Commission to clarify whether they need to apply to the Commission for a license to supply up to 21 MW of Power from its Captive Power Plant to the BOO Plant.

The Commission vide letter No. 1974 / HERC / T – 120 (Misc.) dated 29th October, 2009 afforded an opportunity of hearing to IOCL on 6th November, 2009. In the hearing the learned counsel for IOCL submitted that under amended section 9 of the electricity Act, 2003 and interpretations of the Hon’ble Supreme Court for the purpose of second proviso, section 9 (2) of the Electricity Act, 2003 (reported as 2009 (III) Bom LR 2996), they do not require any license. He also submitted that any statutory duty including Electricity Duty or fees / surcharge determined by the Commission, if applicable, shall be paid.

The Commission considered the oral submissions of IOCL and examined the application in light of the provisions of section 9 read with section 2 (15) and observed vide letter No. 2699 / HERC / T – 120 (IOCL) dated 15th December, 2009 that ALB (BOO Plant) fall under the definition of “consumer” as per the Act and IOCL does not require license to supply power from its Captive Power Plant to ALB subject to regulations made under section 42 (2) of the Act. Consequently till the status of ALB as a “consumer” is established beyond doubt, it is unable to express any view in the matter as sought by IOCL.

In response to above observation of the Commission IOCL vide letter No. PR / PNCP / N202 dated 11th January, 2010 submitted that ALB has a 300 KVA electricity connection in its name at Dharuhera from Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) since 11th September, 2009. IOCL also submitted photo copies of electricity consumption bills of M/s ALB.

The Commission vide its letter No. 3577 / HERC / T – 120 (Misc.) dated 27th January, 2010 obtained information from Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Superintending Engineer (OP) Circle, Panipat as to whether ALB has an electricity connection from UHBVNL in respect of the electricity consumption at the Complex. Additionally, the commission vide its letter No. 3578 / HERC / T – 120 (Misc.) dated 27th January, 2010 sought an affidavit / documentary proof from IOCL that ALB has an electricity connection from UHBVNL in the premises in which IOCL wants to supply of electricity from their Captive Power Plant.

In response to above letter of the Commission IOCL vide their letter No. PR / PNCP / N202 dated 8th February, 2010 submitted that section 2 (15) of the Act defines ‘Consumer’ inter alia as a person who is already being supplied electricity, for its own use by a licensee or the Government or by any person engaged in the business of supplying electricity to public. M/s ALB is being supplied electricity by DHBVNL. However, the Commission was not satisfied with the reply of IOCL and directed them vide letter No. 3022 / HERC / T – 120 (Misc.) dated 10th March, 2010 to refer to the definition of the consumer in section 2 (15) of the Act and as M/s ALB is not connected to the works of a licensee (UHBVNL) it should proceed further accordingly.

IOCL vide their letter No. PR / PNCP / N202 dated 29th March, 2010 contested that the definition under section 2 (15) defines consumer as a person and not as a premises. They further submitted that the definition of consumer has also been analyzed by the Supreme Court of India in the case of Isha Marbles vs. Bihar State Electricity Board (reported as (1995) 2 SCC 648) wherein the Hon’ble Court inter-alia has held that a ‘Consumer’ means any person who is supplied with energy. As per this analysis of the Supreme Court, ALB is a consumer.

However, the Commission not being satisfied vide its letter No. 217 / HERC / T-120 (Misc.) dated 26th April, 2010 observed that definition of consumer as per section 2 (15) of the Act provides that consumer is a person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee. The word “premises” would obviously mean the premises, where connection is required and not any other premises.

IOCL vide letter No. PR / PNCP / N202 / 004 dated 21st May, 2010 reiterated their earlier stand and submitted that ALB is a consumer for the purpose of the Act irrespective of the fact whether he is receiving supply from DHBVNL or UHBVNL. They further submitted that if a person is already being supplied power by a licensee, there is no reason why he should seek an additional power connection and pay demand, consumption and other charges to the licensee for the power he does not draw or consume in addition to paying charges to the Captive Power Plant for electricity drawn by it. This defeats the very purpose sought to be achieved by the introduction in 2007 of the second proviso to section 9 (1) of the Act, which intended to liberalize power supply and to encourage larger generation of electricity by enabling Captive Power Plants to supply up to 49% of the power generated directly to consumers of electricity without requiring a license to do so. IOCL requested the Commission to re-examine the interpretation of the word “Consumer” as used in the second proviso to section 9 (1) of the Act read with Rule 3 (a) (ii) of the Electricity Rules, 2005 and Section 2 (15) of the Act. They also sought a hearing in this regard.

The Commission acceding to the request of IOCL fixed 30th June, 2010 as the date of hearing and conveyed the same to IOCL as well as UHBVNL vide letter no. 997-98/HERC/T-120 (Misc.) dated 29th June, 2010. After a few adjournments on the request of the parties including the petitioner the case was finally heard on 10th August, 2010 in the Commission’s office.

IOCL’s Submissions:

Shri Abhinav Vashist, the Ld. Counsel appearing on behalf of IOCL submitted as under

1. The issue in the present proceeding is whether or not IOCL, the petitioner is required to take a distribution license from the Commission for distribution of electricity wholly within the premises of the petitioner.
2. The supply of electricity is from the Captive Power Plant of the petitioner to the M/s ALB is within the premises of the petitioner. The premises are at Panipat and within the area of supply of UHBVNL, the respondent.
3. The issue has already been settled by the APTEL in case of:
 - (a) Chhattisgarh State Power Distribution Company Limited V Aryan Coal Benefactions Pvt. Ltd & Ors, 2010 ELR (APTEL) 0476;
 - (b) Kadodara Power Pvt. Ltd. Gujarat v Gujarat Electricity Regulatory Commission, 2009 ELR (APTEL) 1037;
 - (c) Malwa Steel and Power Limited v Chhattisgarh State Power Distribution Company Limited, 2009 (APTEL) 609.

4. The Commission vide its order dated 2nd August, 2010 has already decided in a similar case of Maruti Suzuki India Limited that they do not require any license to supply electricity through its dedicated lines to its ancillary units within its premises. The case of IOCL is similar to M/s Maruti Suzuki India Ltd. as such they may also be allowed to supply power to ALB through their dedicated lines within their premises without any requirement of obtaining license.
5. **IOCL is willing to pay charges like electricity duty and cross subsidy surcharge as may be determined from time to time.**

UHBVNL's Submissions:

The representatives of UHBVNL submitted that they do not have any objection if IOCL supplies electricity to M/s ALB through its dedicated lines within its premises subject to payment of electricity duty and cross subsidy charge and any other charges as may be determined from time to time.

Commission's Observations / Order:

After going into details of the protracted correspondence / clarifications sought by the Commission from the applicant as well as the distribution licensee, oral and written submissions of the parties, the following issues have been framed for clarification, namely:-

1. Whether M/s ALB (BOO Plant) to which IOCL proposes to supply up to 21 MW of Power from its CPP falls under the definition of a "consumer" as defined under Section 2(15) of the Electricity Act, 2003.
2. Whether IOCL come under the purview of regulations/charges determined by the Commission under section 42(2) of the Act.

The Commission has carefully considered various provisions of the Electricity Act, 2003 including policies / rules framed by the Central Government under the enabling provisions of the said Act as well as the relevant judgments of Hon'ble Supreme Court and Ld. Tribunal cited by the Ld. Counsel for IOCL.

Section 2(15) of the Electricity Act, 2003 defines a consumer as under:

“Consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be”.

It is evident from the above definition that consumer can either be a person who is supplied electricity for his own use irrespective of the premises to which power is supplied to or a person whose premises is connected for the purpose of receiving power. **Thus it can be inferred that in both the circumstances it is the person or owner of the premises and not the premises per.se. who is the consumer.**

The Commission has perused the observations and judgment of the Hon’ble Supreme Court of India IN CWP Nos 3510 – 3511 & 3593 of 2008 in the matter of Tata Power Company Ltd. Vs Maharashtra Electricity Regulatory Commission and Others and Municipal Corporation of Greater Mumbai BEST Undertaking Vs Reliance Energy Ltd. and Others. The relevant observation / judgments are extracted below:-

“The legal principle is that all statutory definitions have to be read subject to qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive in as much as the word defined is said to mean a certain thing, it is possible for the word to have somewhat different meaning in different sections of the Act depending upon the subject or context”

Thus it is evident from the findings of the Hon’ble Supreme Court that the words defined in the statute (in this case the Electricity Act, 2003) have to be seen in the backdrop of the relevant context / subject. Hence, the word ‘consumer’ in the instant case has to be seen beyond the narrow confines of the definition provided in the Act itself. **Consequently, in the light of the fact that M/s ALB has 300 KVA electricity connection in its name from Dakshin Haryana Bijli Vitran Nigam Ltd (DHBVNL) at Dharuhera, the Commission agrees with the arguments of the Ld. Counsel of the petitioner and is of the considered**

view that M/s ALB is covered within the definition of “Consumer” as defined under Section 2(15) of the Act.

Further, the Hon’ble Supreme Court in the judgment cited above held as under:-

“A generating company has to make a huge investment and assurances given to it that subject to the provisions of the Act he would be free to generate electricity and supply the same to those who intend to enter into an agreement with it. Only in terms of the said statutory policy, he makes huge investments. If all his activities are subject to regulatory regime, he may not be interested in making investment. The business in regard to allocation of electricity at the hands of the generating company was the subject matter of the licensing regime. While interpreting the statute it must be borne in mind that such a mechanism should not come back”.

In the instant case the only difference is that supply of electricity to M/s ALB a generating company has been substituted with a CPP. While for all intent and purpose a CPP is also a generating company except for the fact that a major part of the power generated is consumed by the owner of the Captive Power Plant itself. The Commission further observes from the submissions of M/s ALB and IOCL that almost the entire output (if not 100%) of M/s ALB will be utilized by IOCL in their Naphtha Cracker complex; hence product of M/s ALB is part and parcel of production process of the Naphtha Cracker Unit of M/s IOCL.

In the above context the Commission has closely examined Section 9 of the Electricity Act, 2003 which deals with Captive Generation and supply thereto and the decisions of the Hon’ble Appellate Tribunal for electricity in the Kadodara Power Pvt. Ltd., Gujarat Vs Gujarat Electricity Regulatory Commission, 2009 ELR (APTEL) 1037 wherein it was held that M/s Gayatri Shakti Paper & Boards Ltd. does not need any license for supplying power to M/s Kherani Paper Mills Ltd.

As per these judgments it is quite clear:-

- A dedicated line can be constructed from the captive generating plant to the destination of its use. Such destination i.e. 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 the same at the point of consumption is treated as a ‘load centre’. Hence a single consumer could also be a load centre. A dedicated transmission line can go from the captive generating station to a load centre and such load centre can also be a consumer. 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. The Act, thus, does envisage transmission and supply of electricity from a captive generating plant to a consumer – although subject to the provisions of the Act and Rules and Regulations made there under.

- In an earlier judgment in appeal no. 139 of 2007 titled M/s Nalwa Steel and Power Limited V Chhattisgarh State Power Distribution Company Limited, decided on 20th May, 2009 Hon’ble Appellate Tribunal expressed the view that the open access Regulations are required to be followed when open access is availed of and that if no open access is availed or it is not necessary or because no existing network is available the **captive generating company cannot be prevented from supplying to consumer by laying its own dedicated line.**
- In 2010 ELR (APTEL) 0476 decided on 9/02/2010 it was held that 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 cannot 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.**

In the light of the above the Commission clarifies that the petitioner M/s IOCL who proposes to supply power to M/s ALB located in their own premises at 33 KV voltage level through two dedicated feeders put within the battery limit of the Complex without using any grid or any other infrastructure of any distribution licensee /

transmission licensee of the area for the purpose, do not require any license under Section 14 of the Act for supply of power from its CPP.

Finally, the issue of whether IOCL come under the purview of regulations/charges determined by the Commission under section 42(2) or not remains to be addressed. On the basis of the submission of the parties before the Commission it is an admitted fact that:-

- 1) The petitioner is not required to use any part of the licensee's grid to effect supply of such electricity.
- 2) With regard to payment of cross-subsidy surcharge, the petitioner is willing and has undertaken to pay such charges as applicable and determined by the Commission.

On the basis of aforesaid facts and to cushion erosion of revenue prospects thereby adversely affecting the financial viability of distribution licensee of the area who supplies electricity not only to the better paying industrial customers but also to consumers in rural and domestic segment where costs due to social & capacity to pay considerations are not fully recovered, the Commission's clarification, as explained above, is subject to payment of **any charges including cross-subsidy surcharge, additional surcharge determined by the Commission under Section 42(2) of the Electricity Act, 2003 by M/s IOCL in addition to the statutory duties levied by the State Government from time to time.**

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 25th August, 2010.

Date: - 25/08/2010

Place: - Panchkula

(Rohtash Dahiya)
Member

(Bhaskar Chatterjee)
Chairman