

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

Case No. HERC/PRO- 8 of 2011

Date of Hearing: 29.06.2011

Date of order: 11.08.2011

In the matter of

Petition filed by Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL) through superintending Engineer/ RA, DHBVNL, Hisar vide memo dated 05.10.2010, received in the Commission on 20.10.2010, regarding levying of electricity duty, cross subsidy and additional surcharge on the electricity supplied by the generation plant owned by M/s DLF Utilities Ltd. (DLFU) in the DLF cyber city Gurgaon.

Dakshin Haryana Bijli Vitran Nigam, Vidyut Sadan, Vidyut Nagar, Hisar.

Petitioner

VERSUS

M/s DLF Utilities Limited having its office at DLF Gateway Tower, 7th Floor, DLF City, Phase-II, Gurgaon.

Respondent

Present

1. Ms. Poonam Verma, Advocate for the Petitioner.
2. Shri K.G. Raghavan, Sr. Advocate, Shri V.P. Singh, Advocate & Shri A.K. Gupta, GM/DLFU for the Respondent

Quorum

Shri Bhaskar Chatterjee, Chairman

Shri Rohtash Dahiya, Member

Shri Ram Pal, Member

Order

1. This petition has been filed by Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL), the distribution Licensee for southern circles of Haryana, seeking levy of electricity duty, cross subsidy and additional surcharge on the electricity supplied by the Generation Plant owned by M/s DLF Utilities Ltd. (DLFU) at DLF cyber city Gurgaon to certain Buildings owned by DLF group companies in the cyber city which fall in the area of jurisdiction of the distribution license of DHBVNL.

2. The short facts of the case are as follows:

2.1 DLFU is a company incorporated under Companies Act, 1956 engaged in the business of setting up of energy centers comprising gas / dual fuel based co-generation power plants and vapour absorption machines (VAM) on the surface / basements of commercial / residential complexes for supplying electricity and chilled water for air conditioning. There are seven commercial buildings in which the electricity is being supplied by the generation plant of DLFU. These seven buildings are owned by DLF group companies; hereinafter refer to as "building owners". Four of the seven buildings are owned by DLF Cyber City Developers Limited and the other three buildings are owned by Revkon Partners, Atria Partners and Caraf Builders & Construction Pvt. Ltd. which are all DLF group companies.

The building owners are in the business of letting out space in the buildings to various tenants / companies to operate their business and in terms of lease are required to provide air conditioning, electric supply, water supply, security, horticulture, operation of common facilities etc. to the occupants. For supply of electricity & chilled water (for air conditioning), building owners have entered into an energy purchase agreement with DLFU to set up a captive power plant for them in the basement of the building or near the buildings and supply them electricity and chilled water on payment of tariff / charges as per the agreement. DLFU have accordingly set up 40 MW co-generation plant and a chilling unit at building no. 10 (one out of the seven buildings), energy center, phase –II, Gurgaon. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables upto the main electricity receiving panel (HT/LT) of each building.

The building owners, as stated by DLFU are co-share owners of the generating plant of DLFU having a share holding of around 98.11% of DLFU and together utilize around 80% of the electricity generated by the DLFU's generating plant.

2.2 DHBVNL has taken objection to the supply of electricity from the generation plant of DLFU to the seven building owners through dedicated distribution lines & further to the companies occupying these buildings without obtaining a license stating that the generation plant does not qualify as a captive power plant on account of the reason that 51% of the power produced is not being used by the building owners, the co-share owners of the generation plant, but is being used by the companies occupying these buildings as tenants which is not in line with Rule 3(1) of the Electricity Rules, 2005. DHBVNL accordingly issued a notice dated 17.09.2010 to DLFU directing them to submit an affidavit within seven days along with supporting documents to prove that bonafide consumption of 51% is for its own use.

Not satisfied with the reply of DLFU, DHBVNL filed petition dated 05.10.2010 before the Commission.

3. The petitioner has submitted as under:-

i) The DLF utilities Ltd. (Petitioner has erroneously mentioned DLF limited as owner of the Plant as clarified by the Respondent in the reply) owns and operate a power generation plant of capacity 40MW and has installed 4x5440 KW Gas Turbine, 5x 5225 KW Gas Generation and 7x2000 KVA DG set at Building No. 10, Energy center in Phase-II Gurgaon. The Electricity generated by the plant is being supplied at one point to seven co-share owners of the generation plant viz DLF group companies, which own different commercial buildings, through dedicated distribution lines without using licensee's system. These seven buildings are.

Sr. No.	Buildings	Building Owning Company
1	DLF Building No. 10	DLF Cyber City Developers Limited.
2	DLF Building No. 9A	DLF Cyber City Developers Limited
3	DLF Building No. 9B	DLF Cyber City Developers Limited
4	DLF Square	Revkon Partners (DLF Group Company)
5	DLF Building No. 8	DLF Cyber City Developers Limited
6	DLF Atria	Atria Partners (DLF Group Company)
7	DLF Cyber Greens Building	Caraf Builders & Constructions Pvt. Ltd. (DLF Group Company)

ii) DHBVNL holds distribution licensee in the southern circles of Haryana including the area in which above buildings are located. These buildings are occupied by commercial consumers which in normal course of power being supplied by the licensee would be cross-subsiding other categories of consumers. Illegal supply to these commercial consumers is adversely affecting the revenue flow of the Govt. (in the form of electricity duty) and DHBVNL (in the form of revenue from sale of power).

iii) End users of electricity generated by DLFU's generation plant are the companies occupying the buildings and not the DLF group companies (building owners) who are co-share owners in the generation plant. The building owners have rented / leased out these buildings to various companies. Hence, the supply from the plant does not qualify as captive use and is a case of sale of electricity for which a license is required. Accordingly, a show cause notice has already been issued to M/s DLF on 17.09.2010 (copy attached with the petition).

iv) Since the supply of power from M/s DLFU to the seven commercial buildings does not qualify for captive use, the charges like ED, cross subsidy and additional surcharge should be levied on M/s DLFU as an interim relief to DHBVNL till the time the issue of legalities of supply is settled by the appropriate authority.

v) It is pertinent to refer to HERC order dated 02.08.2010 regarding supply of power from captive plant of Maruti Suzuki Limited to their ancillary units and HERC order dated 25.08.2010 regarding supply from IOCL's captive plant to Cryogenic Oxygen and Nitrogen Plant, built , owned & operated by a Belgian Company located

within the premises of IOCL's Naphtha Cracker Complex. In both the cases, HERC had ordered levy of cross subsidy surcharge and additional surcharge to compensate the licensee for revenue loss on account of consumers in licensed area getting supply from a third party (not from the licensee or own captive plant).

vi) Because of DLFU supplying power from its plants to various independent commercial establishments in DLF group companies' owned buildings, the licensee is losing a large number of key consumers located in its licensed area of supply thereby losing revenue generated through cross-subsidy from such consumers. The cross-subsidy helps the licensee to fulfill its social obligation of supplying power to all consumers at a reasonable tariff based on their capacity to pay.

The Petitioner in view of above submissions has prayed as under:-

a) Levy cross- subsidy and additional surcharge to M/s DLF Limited on the electricity supplied from the plant from its date of commissioning as determined by the Commission under section 42 (2) of the Act.

b) Levy electricity duty to M/s DLF Limited, as determined by the State Govt.

4. In their reply, filed on 16.12.2010, DLFU submitted as under:-

i) To enable the Commission to decide the present dispute in a fair manner, the factual position has been set out herein below:-

a) DLFU has a generation plant which supplies electricity to certain buildings owned by DLF group companies through dedicated transmission lines. For the supply of electricity, DLFU has entered into Power Purchase Agreements with each of these DLF group companies, in terms whereof electricity is supplied by DLFU to these companies who alone are responsible for the payment to be made to DLFU for such supply. In other words, the risk and title of the electricity supplied is passed to the DLF group companies (Building Owners) and the PPAs of DLFU had nothing further to do with supply by such companies to their tenants.

b) The said DLF owned companies or buildings owners, are co-owners of the generation plant of DLFU having a shareholding of around 98.11% of DLFU

and they utilize around 80% of the electricity generated by the DLFU generation plant.

c) The building owners are engaged in the business of leasing out space to various tenants to operate their businesses and in terms of lease, are required to provide fully serviced space with electricity, air conditioning, lifts, fire fighting, water supply, horticulture, security etc to the tenants. The building owners are thus utilizing the electricity supplied from the generation plant of DLFU for their business (of providing world standard office space with 24 hours electricity) i.e. “for own use”.

d) The building owners are co-owners of the generation plant to the tune of more than 26% and consume more than 51% of electricity.

Therefore, the generation plant of DLFU is clearly a captive generation plant, within the meaning of rules/ regulations framed under Electricity Act, 2003, which uses its own dedicated transmission lines for supply of electricity.

ii) Question of paying cross subsidy surcharge or additional surcharge as determined under section 42 (2) of EA, 2003 would arise only in the event open access is sought and in the event no open access is sought, as in the present case, section 42 (2) is not applicable. This position has also been upheld by APTEL in the case of Jindal Steel & Power Ltd. V/s CERC, ELR (APTEL) 628 wherein it was held as under:-

“....The provisions 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”.

iii) Generation plant being a captive plant is exempted from payment of electricity duty.

iv) Reliance of DHBVNL on HERC orders in case of IOCL and Maruti Suzuki Ltd.(MSL) is not valid, as the said orders of Commission rely on admission / willingness of the parties and hence cannot be considered as precedent, a fact also upheld by the Supreme Court (AIR- 2007 SC- 2640).

5. The petitioner, DHBVNL, thereafter, filed a detailed rejoinder vide letter dated 26.04.2010 rebutting the claims / arguments of the respondent made in their reply to the petition which further stated that:-

i) Recently, it has come to the notice of the Nigam that DLFU have also started supplying to M/s Ambience Developers & Infrastructure Ltd. (Ambience Mall), Gurgaon without obtaining any permission/ clearance from Chief Electricity Inspector (CEI), Haryana or from the distribution licensee and in doing so has contravened Regulation no. 43 of CEA Regulations (Measures relating to safety and electric supply)'2010. As such, a penalty of Rupees One Lakh has been imposed on them by Electrical Inspectorate, Haryana. Further, another consumer M/s Microtek Forgings (Unit of Bajaj Motors Ltd.), Gurgaon has submitted an open access application for supply of electricity from DLFU. These cases further substantiate that M/s DLFU is involved in selling of supply of electricity.

ii) In parawise reply, DHBVNL have rebutted DLFU's submissions / arguments and have reiterated that

- DLFU's generation plant is not a captive power plant
- Both cross subsidy and additional surcharge are applicable even if the distribution system of DHBVNL is not used by DLFU under open access.
- Decisions of the Commission in case of Maruti Suzuki Ltd. and IOCL are not based on any concession given by MSL/ IOCL. Besides, in both the cases, the generation plants are captive power plants and supplying surplus power to other consumers.

6. DLFU thereafter filed an additional affidavit on 21.06.2011 and submitted point wise reply/ response to the issues raised by DHBVNL in its rejoinder.

7. **Public Proceedings**

i) Before proceeding further the Commission thought it appropriate to give a hearing to both the parties to further elicit their views for coming to any decision in the case. Accordingly, the Commission heard the parties in the hearings held on 17.02.2011 and 29.06.2011. In the hearing held on 17.02.2011, Shri P.C. Gupta,

CGM/ Commercial, DHBVNL appeared for the petitioner. He, by and large, reiterated the submissions made in the petition. Shri K.G. Raghavan, Sr. Advocate appeared on behalf of the respondent. He advanced arguments in line with the reply already submitted on 16.12.2010 as discussed in para 4 above. The learned counsel for the respondent also filed an additional affidavit of Shri R.C. Gupta, General Manager of DLFU stating that the respondent wishes to place on record the following documents to corroborate the contentions set out in DLFU's reply :-

a) DLFU supplies power to its captive users pursuant to an energy Purchase Agreement/ Power Purchase Agreement. A sample copy of such an agreement is annexed herewith as Annexure.

b) The captive users of the plant established by DLFU have a shareholding (with voting rights) of around 98.11% of DLFU. A certified copy of the shareholding pattern of DLFU is annexed herewith as Annexure.

c) The consumption pattern of the captive users of the captive generation plant owned and established by DLFU indicates that the captive users consume 89% (approximately) of the net electricity generated by the DLFU captive generation plant of 40 MW. A copy of a chart reflecting the consumption pattern is annexed herewith as Annexure.

A copy of the affidavit was also supplied to the petitioner. Shri P.C. Gupta appearing for the petitioner sought adjournment for filing reply to the additional affidavit before advancing arguments which was granted by the Commission. The case was posted for final argument on 29.06.2011.

ii) In the hearing held on 29.06.2011, Ms Poonam Verma, Advocate appeared on behalf of the petitioner. She elaborated the points mentioned in the petition and argued at length in support of the claims put forward by the petitioner, which have been discussed while deliberating on different issues involved in this case in the following paragraphs.

8. Commission's Order

8.1 The Commission has carefully considered the submissions made in the instant petition and in the rejoinder filed by the petitioner, DHBVNL, the counter

submissions made by the respondent, DLFU, in their replies to the petition and the rejoinder, oral submissions made by the parties during the hearing, the information / additional information furnished at various stages and the various judgments / orders, copies of which were submitted by the petitioner as also by the respondent during the course of hearing.

The various issues which, arise in this case as per the Commission & require adjudication are:-

- (1) Whether the generation plant of DLFU qualifies to be a Captive Power Plant as per the provisions of the Electricity Act, 2003?
- (2) Whether any illegality or violation of any provisions of the Electricity Act, 2003 is involved in the supply of electricity from the generation plant of DLFU to the DLF group companies i.e. Building owners, who are co- share owners of the Generation Plant, and further to the tenants / companies occupying these buildings?
- (3) Whether DLFU/ Building Owners require a transmission/ distribution license as per section 14 or exemption under section 13 of the Electricity Act, 2003?
- (4) Whether the Charges like cross-subsidy surcharge, additional surcharge as per Section 42 (2), 42 (4) of the Act, and Electricity duty as per the Punjab Electricity Duty Act, are payable on the supply of electricity from the generation plant of DLFU?
- (5) Whether DLFU can supply electricity from its generation plant to the Ambience Mall in the Cyber City, Gurgaon and whether any charge like cross subsidy/ additional surcharge are recoverable on the same.

Now we proceed to deal these issues one by one in the light of arguments/ counter arguments advanced, the statutory provisions and the various judgments / orders quoted by the petitioner/ respondent.

8.2 Whether the generation plant of DLFU qualifies to be a Captive Generation Plant as per the provisions of the Electricity Act, 2003?

i) Statutory provisions

As per Section 2(8) of the Electricity Act, 2003, "Captive Generation Plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co- operative society or association of persons for generating electricity primarily for use of members of such co- operative society or association;

Section 9 of Electricity Act, 2003 which deal with the captive generation is 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:

Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made there under and to any consumer subject to the regulations made under sub- section (2) of section 42.

(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 adequate transmission facility and such availability of transmission facility shall be determined by 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.

The 'Requirements of Captive Generation Plant' as laid down in Rule 3 of The Electricity Rules, 2005 are as under:

" Requirements of Captive Generation Plant- (1) No power plant shall qualify as a 'Captive Generating Plant' under section 9 read with clause (8) of section 2 of the Act unless-

- (a) in case of power plant-
 - (i) not less than twenty six per cent. of the ownership is held by the captive user(s), and
 - (ii) not less than fifty one per cent. of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co- operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co- operative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent. of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent. of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent.”

- (b) Not relevant

In the illustration given below Rule 3 of Electricity Rules, 2005, it has been mentioned under explanation (i) (b) that for purpose of this rule, “captive user” shall mean the end user of the electricity generated in a Captive Generation Plant and the term “captive use” shall be construed accordingly.

ii) It has been contended by the petitioner that ‘the generation plant of DLFU does not meet the requirements as set out in section 2 (8) and section 9(1) of The Electricity Act, 2003 (EA) to qualify as a Captive Generation Plant (CGP). The BOs may have the requisite share holding of above 26% in the generation plant of DLFU but they are not the end users of the electricity generated at Plant. The end users of electricity are the tenants/ companies occupying these buildings and operating their businesses’. It has further been contended that ‘on one side DLFU claims that BOs are co- owners of the generation plant but on the other hand, M/s DLFU have signed energy purchase / sale agreement with the BOs. If the supply had been for own use of DLFU, there would not be any need for the EPA.

The learned counsel for the petitioner, Ms. Poonam Verma, also referred to Rule 3 of The Electricity Rules, 2005 during the hearing wherein, she said, it has been very clearly laid down that “captive user” shall mean the end user of the

electricity generated in a captive generation plant and accordingly generation plant of DLFU does not qualify to be a CGP.

iii) Shri R.K. Raghavan, learned counsel for the respondents advanced arguments as under:-

- As per the definition of “Captive Generating Plant” in the Electricity Act, 2003, the captive generating plant means power plant set up by any person to generate electricity primarily for his own use.

In this context, following points needs to be noted.

i) As per legal dictionary, the meaning of “own” and “use” are as follows:

“Own” – to have rightfully or possess as property.

“Use”- the application or employment of something especially, a long continued possession and employment of a thing as distinguished from a possession or employment that is merely temporary. In the context of the above, it is to be noted that (a) the building owners carry on long continued employment of electricity from their captive plant (b) the tenants are on temporary basis.

ii) BO is the only entity which is “using” electricity because it is the entity which has long and continued possession and is consuming electricity on a long term basis.

iii) Only the BO has the right to the electricity generated in its captive power plant.

iv) Electricity is an amenity for the buildings and the BO shall consume electricity irrespective of the fact whether the buildings are occupied by the tenants or not.

From the above, it is clear that the tenants are not in the “own use” category and only the BO meet the “own use” criteria. This fact, coupled with the fact that the BO have more than 26% of the equity in DLFU and consume more than 51% of the power generated in the subject power plant, makes it clear that power plant is a captive power plant.

He further stated that it was pertinent to note that BOs only recover the cost of electricity incurred by them from the tenants of the buildings and there is no commercial gain for the BOs on such expenses incurred by them.

iv) The Commission has examined this issue in detail. It is an admitted fact that no meaning can be assigned to the term ‘own use’ and ‘captive use’ other than what has been assigned in The Electricity Act, 2003 or The Electricity Rules, 2005. Hence, the Commission is of the view that the tenants/ companies occupying the

said buildings, do not fit into “own use” category. The building owners also do not qualify as captive users in terms of Rule 3 of The Electricity Rules, 2005 wherein it has been provided that ‘a “captive user” shall the mean end user of the electricity generated at the captive power plant’. In this case, the end users of the electricity generated at the DLFU’s generation plant are admittedly the tenants/ companies occupying these buildings and not the building owners.

Further, the contention of the respondent, that BOs are in the business of leasing out space to the various tenants to operate their business and in terms of the lease agreement entered into with the tenants are required to provide a package of services to the tenants which interalia also include providing electricity and thus are using electricity supplied by the generation plant for their business i.e. for their ‘own use’, is also not tenable in the eyes of the Law. Business of the BOs cannot include supply of electricity to the tenants as the same is a licensed activity and has to be subject to the provisions of EA, 2003 and rules and regulations made there under. The DLFU cannot justify supply of electricity by the BOs to the tenants based on the plea that BOs are obliged to supply electricity to the tenants as per the lease agreement signed with the tenants. Moreover, it cannot be considered as part of the package services like security, gardening etc. since the supply of power is through meters and end users are expected to pay as per the consumption recorded by the meter. Hence supply of power stands distinctly separate from other package of services contrary to the arguments so elaborately put up by the learned counsel of the respondent.

v) Besides, from the details furnished by DLFU in respect of total generation at the plant and the energy utilized by each of the building owners during the year 2010-11, it is evident the rule of proportionality of consumption as set out in 2nd proviso of Rule 3 (1) of The Electricity Rules, 2005 is also not being met. For example, Caraf Builders and Developers Ltd. owner of the building DLF Cyber Green, has utilized over 25% of the total electricity generated at the plant in 2010-11 whereas its share holding is only 0.05% as per the detail furnished. So on this ground also, the generation plant of DLFU does not qualify as a captive power plant.

vi) In view of the foregoing discussion we hold that generation plant of DLFU does not qualify to be a captive generation plant but only a generation plant' supply from which is subject to relevant provisions of The Electricity Act, 2003.

8.3 (a) Whether any illegality or violation of any provisions of the Electricity Act, 2003 is involved in the supply of electricity from the generation plant of DLFU to the DLF group companies i.e. Building owners, who are co- share owners of the Generation Plant, and further to the tenants / companies occupying these buildings?

(b) Whether DLFU/ Building Owners require a transmission/ distribution license as per section 14 or exemption under section 13 of the Electricity Act, 2003?

Having held that generation plant of DLFU is not a captive generation plant but only a generation plant which fits into the definition of generation company as per Electricity Act, 2003, we now take up the above two issues together.

i) The arguments advanced by the learned counsel for the petitioner on these two issues are as under:-

a) DLFU / Building owners are operating & maintaining a distribution system for supplying power to the consumers (i.e the tenants in different buildings) which amounts to sale of power and requires a distribution license. The business of building owners should be limited to providing space under lease and other common facilities such as air-conditioning lifts etc. but not supply of electricity which is a licensed activity. As such the supply of electricity by DLFU / building owners to the tenants occupying the buildings is illegal.

b) The terms & conditions of the EPA, entered into between DLFU and building owners, like 'tariff and charges' (Article 6), 'Billing & payment' (Article 7), 'Security Deposit' (Article 8), etc are similar to the terms and conditions of an agreement between a distribution licensee and a consumer which also shows that they are involved in distribution of electricity which requires a license as per Section 12 or an exemption under Section 13.

ii) The arguments advanced by the learned counsel for the respondent are primarily based on the contention that DLFU's generation plant is a captive generation plant, co-owned by building owners & they are bonafide captive users of 80% of the electricity generated at the plant and hence there is nothing illegal in it. But once it has been held that DLFU's generation plant is a non-captive generation plant, the arguments advanced by the learned counsel for the respondents cease to be relevant and supply from the DLFU's generation plant has to be looked at as supply of power by a generating company in the light of relevant statutory provisions of the Electricity Act.

iii) As per Section 7 of the Electricity Act, 2003, a generation company can establish, operate and maintain a generation plant without obtaining a license under the Act. Section 9(1) and 10(1) of the Act respectively provide that a captive generation company as also a generation company can establish, operate and maintain 'dedicated transmission lines'. The definition of 'dedicated transmission lines' is given in Section 2(16) of the Act. Further Section 10(2) of the Electricity Act, 2003 provides that a generation company may supply electricity to any consumer subject to the regulations made under sub-section (2) of section 42 of the Act. The relevant sections of the Act, except for section 9, already reproduced in para 10.2, are reproduced below for ease of reference.

“7. Generating company and requirement for setting up of generating station.- Any generating company may establish, operate and maintain a generating station without obtaining a license under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73.

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 the provisions of this Act or the rules or regulations made there under.

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

2 Definitions

(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;”.

There is no dispute in the fact that operation and maintenance of dedicated transmission lines does not require a license as per section 14 of the Act. The Govt. of India has issued an Order under Section 183 of the Act, namely, The Electricity (Removal of Difficulty) fifth Order, 2005 wherein it has been provided that ‘a generating company or a person setting up a captive generation plant shall not be required to obtain a license under the Act for operating or maintaining dedicated transmission lines’. The definition of ‘dedicated transmission line as per section 2(16) of the Act, as is evident, includes any electric supply lines for point to point transmission required for the purpose of connecting a captive generation plant referred to in section 9 or a generation plant referred to in section 10 of the Act to the ‘load centre’.

From the above it is clear that both, a captive generation company or a generation company can supply electricity over a dedicated transmission line to a consumer / load centre without obtaining a license as per section 14 of the Act. For interpretation of the term ‘load centre’, it would be appropriate to refer to para 12 of the Order of the Appellate Tribunal of the Electricity (APTEL) in case of Nalwa Steel & Power Ltd. v. CSPDCL and Anr. {Appeal No. 139 of 2009 ELR (APTEL)} dated 25.05.2009 which is reproduced below.

(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). 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 centre”. *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.”

The term ‘load centre’ as it appears in the definition of ‘dedicated transmission line’ has been described by APTEL in the above order as conglomeration of load which implies that a ‘load centre’ can comprise of a cluster or a group of consumers.

iv) Thus both, captive generation company or a generation company can supply electricity over dedicated electric lines to a cluster of consumers subject, of course, to regulations made under section 42 (2) of the Electricity Act. Whereas in case of captive generation company it has been specifically provided by second proviso to section 9, which was inserted w.e.f. 15.06.2007 vide amendment of 2007, that for supply of electricity to a consumer, a captive generation plant shall not need a license, no such exemption is there in case of a generation company and it need to be delved with whether a generation company would need a license for ‘supply’ to a consumer.

This issue has also been dealt by APTEL and findings given in its order dated 09.02.2010 in case of Aryan Coal Benefications Pvt. Ltd. v/s Chhattisgarh State Electricity Regulatory Commission and Chhattisgarh State Electricity Board, wherein it has been held that for supply of electricity to a licensee or to a consumer both, generation company as well as captive generating station, are similarly placed and second proviso of Section 9 does not place the captive generating company at a higher position than the generating company. Relevant part of para 31 & 32 of the order are reproduced below:-

“(31) There cannot 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 second 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 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.

v) In the light of the position brought out above it would be safe to conclude that a generation company is permitted to supply electricity to a cluster of consumers (load centre) by establishing, operating and maintaining dedicated electric lines without the need of obtaining any license.

In this context it would also be relevant to refer to paras 11 & 12, reproduced below, of the APTEL Order dated 09.02.2010 referred to above, wherein it has been held by APTEL that sale of electricity by a captive generation plant and a generation company to the end users is permitted.

‘(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.....

‘(12) The perusal of these sections would make it clear that the first and second 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 there under, 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.*

In the present case tenants / companies occupying the said buildings are the end users of electricity supplied from the generation plant of DLFU & together they can be said to constitute a ‘load centre’. They are being supplied electricity over dedicated transmission lines from generation plant of DLFU, in which the DLF groups companies owing the said buildings hold the majority share. Thus it is a clear case of a generation company supplying electricity over dedicated transmission lines to the end users which is in line with the provision of Electricity

Act, 2003 and no license under the Act is required for the same as has been held by the APTEL in the above refereed Order dated 09.02.2010.

The Commission, therefore, holds that no illegality is involved in the supply of electricity from the generation plant of DLFU/building owners to the tenants / companies occupying these buildings through dedicated electric lines and there is no need of any license for the same under the Electricity Act, 2003.

8.4 Whether Charges like cross-subsidy surcharge, additional surcharge as per Section 42 (2), 42 (4) of the Act, and Electricity duty as per the Punjab Electricity Duty Act, are payable on the supply of electricity from the generation plant of DLFU?

i) As already stated, supply of electricity by a generation company to a consumer under the provision of section 10 (2) of the Electricity Act, 2003 is subject to the regulations made under sub- section (2) of section 42 of the Act. The Commission has notified open access regulations under sub-sections (2,3,4) of section 42 of the Act. These regulations provide for levy of cross subsidy surcharge & additional surcharge, in addition to the transmission charges and wheeling charges, on the consumers availing open access to the transmission system / distribution system of the licensee. The additional surcharge is leviable in terms of sub section (4) of section 42 of the Act. It provides that where a consumer or a class of consumers receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. Sub-section (2) to (4) of section 42 are reproduced below:-

“ 42. Duties of distribution Licensee and open access

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

ii) Apparently supply of electricity by a generation company to a consumer as per section 10(2) of the Act attracts levy of cross subsidy surcharge and additional surcharge if the supply is made by availing open access to the transmission/ distribution system of the licensee. In the present case, the electricity from the generation plant of DLFU/ building owners is being supplied to the consumers i.e. tenants/ companies occupying the buildings through dedicated transmission lines without availing open access and without using the system of the licensee. These consumers, however, are located in the area of the licensee i.e. DHBVNL. This is also a fact that but for the supply from DLFU’s generation plant these consumers would have taken the power supply from the licensee and in the result, would have paid tariff applicable for such supply which would have also included an element of cross-subsidy and thus, would have contributed their share of cross subsidy to meet the overall requirement of cross subsidy in the area of supply of the licensee. The

question, therefore, is whether cross subsidy surcharge and additional surcharge would be leviable on supply of electricity by a generation company to a consumer or consumers under the provisions of section 10 (2) of The Electricity Act, 2003 irrespective of whether open access is availed or not i.e. irrespective of whether the system of licensee is used or not.

iii) The arguments advanced by the petitioner / their learned counsel in this regard are as under:-

- a) Generation Plant of DLFU is not a captive power plant and hence cross subsidy surcharge is payable.
- b) Cross subsidy surcharge as per section 42 (2) of the Act 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 as a 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.
- c) APTEL in its order dated 9.02.2010 in Appeal No. 119 of 2009 in case of Aryan Coal Beneficiation Pvt. Ltd. has held that
 - i) Cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensees are used or not (para17)
 - ii) Dedicated transmission lines from the generation plant to place of consumption can be used on payment of cross subsidy surcharge (Para 29).
- d) The Commission in its orders in case of Maruti Suzuki Ltd. and IOCL has held that cross subsidy surcharge, additional surcharge and electricity duty are leviable.

iv) The main arguments of the respondent are that:

- a) Levy of cross subsidy or additional surcharge would arise only in the event open access is sought and in case no open access is sought, as in the present case, section 42 (2) will not be applicable.
- b) Reliance placed by the DHBVNL on the finding in para 17 (reproduced later in the order) of the APTEL's order dated 09.02.2010 is misplaced as the said finding is in the context of open access which is not the present case.

- c) The above contention of the respondent is further reinforced from the findings of APTEL at para 21 of the said order, wherein it has been held that” *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 of 42 (2) will not arise.*”
 - d) The decision of APTEL in the order dated 09.02.2010 relies on Regulation 11(6) (b) ii of the open access regulations of Chhattisgarh State Electricity Regulatory Commission which provide that “*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 of the licensee or not.*” The decision has misquoted the Regulation. In any event, even if a state regulatory commission has made such a regulation it would be ultra vires of Section 42 (2) of the Act.
 - e) APTEL in case of Jindal Steel and Power Ltd v. CSERC and Ors. 2008 ELR (APTEL) 628 has, at para 61, held that “*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.*”
 - f) Utility cannot ask for any compensation if it is not supported by law.
- v)** In this context it is seen that both, the petitioner as well as the respondent have mainly relied on the findings / observations of the APTEL as given in the order dated 09.02.2010 in case of Aryan Coal in support of their respective contentions. We have closely examined the said order of the APTEL in the light of arguments/ counter arguments advanced by the parties and observe as under:
- a) This issue has been examined in depth by the APTEL in this order in the light of various statutory provisions and APTEL’s earlier judgments in similar cases.
 - b) The findings of the APTEL quoted at iv) (c) and (iv)(e) above by the learned counsel of the respondent have been supposedly kept in view by

the APTEL while arriving at the final decision on this issue as these judgments have been referred to in the order dated 09.02.2010.

- c) The APTEL has given a very well reasoned decision on this issue in the said order. The relevance paragraphs of the order dated 09.02.2010 are reproduced below:

“(16) Section 42 (2) deals with two aspects; (i) open access and (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) cannot 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.”

“(28) In the case of Malwa Steel & Power Ltd. v. CSPDCL and Anr. (Appeal 139/2007 and 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 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.”

“(36) in the light of the above discussions, we make the following conclusions:

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”.

We are not in agreement with the argument of the learned counsel of the respondent that finding of APTEL in para (17) above is in the context of open access (to the distribution system of the licensee) which is not the present case. In this context, it needs to be noted that the term ‘open access’ used in para 17 above in the line ‘*but for the open access the consumer would have taken power*

from the licensee...' apparently refer to open access (to receive power from other than the licensee) without using distribution lines of the licensee. The argument advanced by the learned counsel, therefore, is not tenable

We also do not agree with the argument that decision of the APTEL in this order relies on the regulation 11 (6) (b) (ii) of the open access regulations of Chhattisgarh State Electricity Regulatory Commission. It is an admitted fact that what is not permitted under the Act cannot be part of any regulation. The APTEL has upheld regulation 11 (6) (b) (ii) of the CSERC as the same has been found by the APTEL in line with the provisions of the Electricity Act, 2003.

We are fully in agreement with the decision of the APTEL on this issue as given in para (16), (17) & (29) above as the same, in our opinion, is in line with the spirit behind the second proviso of sub section (2) of section 42.

In view of the above we hold that cross subsidy surcharge is payable on the supply of electricity from the generation plant of DLFU/ building owners to the tenants/ companies occupying the buildings from the date of commencement of supply to each of the buildings.

vi) Regarding levy of additional surcharge we note that DHBVNL have themselves admitted in the rejoinder that 'a plain reading of the Sub section 42 (4) would show that a consumer is liable to pay, additional surcharge only if he is liable to pay wheeling charges and not otherwise'. It has been contended that 'DLFU is not utilizing licensee's system for supply of electricity to avoid payment of wheeling charges; Once it is held that DLFU should supply electricity through licensee's system, they would be liable to pay additional surcharge on the wheeling charges.' We do not find any justification in the above request of the DHBVNL as the same is not supported by the provisions of the Electricity Act, 2003. Supply of electricity from the generation plant of DLFU through dedicated lines without using system of the licensee is permitted under the Electricity Act, 2003. There is, therefore, no ambiguity that levy of additional surcharge shall be attracted only when an existing consumer opts to get supply of electricity from a person other than the licensee.

In view of the above, we hold that additional surcharge is not payable on the supply of electricity from the generation plant of DLFU/ Building owners to the tenants / companies occupying the said buildings.

vii) As far as issue of levy of electricity duty is concerned, the Commission observes that it relates to Govt. of Haryana. The issue of electricity duty is neither covered under the provision of the Haryana Electricity Reform Act, 1997 (No. 10 of 1998) nor The Electricity Act, 2003 (36 of 2003) and hence falls outside the purview of the Commission. The petitioner is free to take up with the State Govt. in this regard.

8.5 Whether DLFU can supply electricity from its generation plant to the Ambience Mall in the cyber city, Gurgaon and whether any charge like cross subsidy/ additional surcharge are recoverable on the same.

i) In view of findings given in paras 8.2 to 8.4 of this order, it is evident that supply of electricity by DLFU from its generation plant to Ambience Mall amounts to supply of electricity by a generation company to a consumer through dedicated transmission line which is permitted under The Electricity Act, 2003 but it will be subject to levy of cross subsidy surcharge. The additional surcharge, however, will not be applicable as the supply is over dedicated line without using licensees system

ii) We, therefore, hold that DLFU can supply electricity from its generation plant to the Ambience Mall in the cyber city, Gurgaon but it is subject to levy of cross subsidy surcharge as determined by the Commission from time to time

8.6 Summing up, the Commission's views on the basis of examination of the documents in the case and after hearing the arguments of the parties are that the generation plan being run by DLFU is not a captive power plant as the end users have no share in the ownership of the plant. The energy purchase agreement between the DLFU and the building owners does not cover the tenants or the occupiers of the commercial areas. Supply of electricity cannot be termed as providing services since it is paid as quantified through the electric meters and amounts to sale. It is not a case of open access either since no distribution/transmission lines of the licensees are used by the respondent. It is a case of maintaining a generating unit and supplying power to its consumers through

dedicated lines as envisaged under section 10(2) of the Electricity Act, 2003. In such eventuality the plant owner has to pay cross subsidy since by supplying power to a group of consumers the generating company is depriving the licensee of some of its valued customers who are contributing cross subsidy for other consumers. There is no case of payment of additional surcharge since no system redundancy has been found. Regarding payment of electricity duty it is beyond the purview of the Commission and the parties can take up the issue with the Govt. for appropriate action.

The Commission disposes of the matter accordingly.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 11th August, 2011.

Dated: - 11.08.2011

Place: - Panchkula

Sd/-
(Ram Pal)
Member

Sd/-
(Rohtash Dahiya)
Member

Sd/-
(Bhaskar Chatterjee)
Chairman

