



# Madhya Pradesh Electricity Regulatory Commission

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**Petition No. 02/2007**

In the matter of validation and approval of scheme for constructing a Group Captive Power Plant and removal of difficulties in its implementation under MPERC (Power Purchase and other matters with respect to conventional fuel based Captive Power Plants) Regulation 2006

-  
M/s Malanpur Captive Power Limited, Mumbai - Petitioner  
**V/s**  
MP Madhya Kshetra Vidyut Vitaran Co. Ltd. Bhopal - Respondent  
(Central Discom)

**ORDER**  
**(Passed on this day 22nd May 2007)**

Having heard both the parties in the last hearing held on dated 04.05.2007, the Commission decided to reserve the case for order. In continuation of above, the Commission passes the final order as under:-

2. The Petitioner has filed this Petition on 12.01.2007 in the matter of validation and approval of scheme for constructing a Group Captive Power Plant and removal of difficulties in its implementation under MPERC (Power Purchase and other matters with respect to conventional fuel based Captive Power Plants) Regulation 2006. The Petitioner is a Special Purpose Vehicle, (SPV) constructing a Group Captive Power Plant at Malanpur Distt. Bhand. The said CPP is being set up under section 9 and section 2(8) of the Electricity Act 2003 (hereinafter referred to as Act) and rule 3(1) (a) and 3(1)(b) of the Electricity Rules 2005(hereinafter referred to as Rules).

3. It has been mentioned in the Petition that the Petitioner's Project is for captive generation of power, for its current captive user shareholders namely SRF, Montage and Supreme. The other sponsor shareholders are Wartsila India Ltd. and Compton Greaves Ltd. The installed capacity of the project is 26.19 MW but fuel tie up has been granted for 20 MW only. Out of this available capacity, the Captive Power Plant, (CPP) users are expected to consume a minimum of 13.90 MW, which translates to 69.5% of the available capacity. SRF site being contiguous to the Petitioner's site, it is supplied power through a 6.6 KV cable connection, while supply to other CPP Users shall require 33 kV dedicated transmission line to be constructed. The Petitioner has submitted that the Captive users of the petitioner company have contributed requisite equity throughout the development of the project and shall always maintain the minimum of 26% of shareholding; thus satisfying all the relevant statutory requirements.

4. It is also submitted that the petitioner Company is a Special Purpose Vehicle owning, operating and maintaining a generating station and has no other business or activity. Neither distribution license under section 14 of the Act is required by the Petitioner nor cross subsidy surcharge or additional surcharges under section 42(2) and 42(4) of the Act are payable by the petitioner to the respondents.

5. The respondent in its submission has stated that the petitioner company is not using power for itself but is distributing electricity under the cover of captive generation. Therefore, the provision of section 42(2) of the Act is applicable. It is also submitted by the respondent that section 42(4) deals with requirement of consumer and has nothing to do with the CPP. It is further stated by the respondent that as per the Electricity Rules 2005 no captive generation plant shall qualify as captive generation plant unless not less than 26% of ownership is held by captive users and not less than 51% of aggregate electricity generated in such plant is consumed for captive use annually. The Petitioner does not satisfy the conditions prescribed under the Rules. Thus Petitioner is not a Special Purpose Vehicle under Rule 3.

6. The petitioner in its rejoinder dated 16-04-2007 submitted that Section 7 of the Act, permits a generating company to establish, operate and maintain a generating station without obtaining the license under the Act, if it complies with the required technical standards. In view of this, it is submitted by the petitioner that the Commission may be pleased to pass necessary directions in favour of the petitioner. The main purpose of the present petition is to seek directions against the respondent to perform its statutory duties in accordance with law and to desist from abusing its dominant/monopoly position. The petitioner has also submitted to quash the notices, letter and demand issued by the respondent.

7. Having gone through the pleadings of both the parties, the main issues for consideration before the Commission are as follow:-

- (i) Whether the petitioner's power plant is a CPP and a Special purpose vehicle within the meaning of Section 2(8) and section 9 of Electricity Act, 2003 read with Explanation 1 (d) of rule 3 of Rules.
- (ii) Whether minimum 26% of the ownership of the CPP is held by its captive users.
- (iii) Whether the respondent is entitled to recover cross subsidy surcharge, additional charges or other surcharges from the captive users?

8. The Commission heard both the parties. During the hearing the petitioner reiterated that the respondent MPMKVCL enjoys monopoly power in the state and is thus abusing its position for the sake of its revenues and is unnecessarily trying to frustrate and delay the implementation of the Petitioner's said project. The petitioner

company has a captive generating plant at Malanpur in MP within the meaning of Section 2(8) of the Act. The present estimated cost of the project is around Rs. 89 crores of which Rs. 17.80 crores is being contributed through equity and the balance through borrowings. It is submitted that the Petitioner Company, as on 11th April, 2007 has allotted more than 30% to its present CPP users collectively. Thus, the petitioner company satisfies the requirement of Rule 3(1)(a)(i) of the Electricity Rules, 2005. The petitioner thus has a prima facie case in its favour

9. During the course of hearing on 04th May 2007, it was submitted by the respondent that various companies have become shareholders in the petitioner company and wanted to avail power supply. The petitioner company is a different entity and is not using the power for itself but is supplying/selling power to other companies for their use in their respective plants. It was submitted that Rules cannot supersede the Act. The petitioner company is nothing but a distribution company and wants to do business of sale of power under the mask of captive generation to save itself from the clutches of obtaining a license and to deprive the respondents of payment of charges.

10. During the last date of hearing on 4<sup>th</sup> May 2007 the Commission directed the petitioners to submit the equity status as on the date of commissioning the first unit of the captive power plant. The petitioner submitted the required information on 08.05.2007. Going through the information submitted by the petitioner it is observed that more than 26% of the ownership is held by the captive power plant (CPP) users on the date of Commissioning of the first unit viz. 4<sup>th</sup> February 2007. It is also observed from the affidavit that supply of power from the first unit was only to SRF and as of 31st March, 2007, the paid-up equity remained the same i.e. 26%. As per Annexure-1 of the submission, the subscribed equity share capital of Malanpur CPP as on 04.02.2007 was as follows :-

<b>Name of the Company</b>	<b>Number of shares held</b>	<b>% of shares held</b>
<b>SRF Limited</b>	<b>3991650</b>	<b>26.00%</b>
<b>Montage Enterprises Pvt. Limited</b>	<b>102350</b>	<b>0.67%</b>
Total CPP Users	4094000	26.67%
<b>Crompton Greaves Limited</b>	<b>9358500</b>	<b>60.96%</b>
<b>Wartsila India Limited</b>	<b>1900000</b>	<b>12.38%</b>
Grand Total	15352500	100.00%

11. The Commission analyses the case as under:

- a. As per Sec. 7 of the Electricity Act, 2003 any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid as specified by the Central Electricity Authority
- b. As per Section 9 of the 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.
- c. As per Section 2(49) of the Act, "person" shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person.
- d. As per Section 2(8) of the Act, "Captive generating 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 cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association.

12. A question arose as to what level of consumption should be considered to be labelled "primarily for his own use". A second question arose as to consumption with reference to a captive generating plant set up by a company or body corporate which is incorporated under the Companies Act. The issue that cropped up was whether the Company itself should be consuming the power generated in its plant or whether the shareholders could also be consuming the electricity generated and if so what should be the proportion of consumption of electricity which will constitute "primarily for his own use".

13. The Ministry of Power, Government of India came out with a notification on 8<sup>th</sup> June 2005 (as amended on 26<sup>th</sup> October, 2006) specifying rules under Section 176 of the Act (which empowers it to make rules for carrying out the provisions of the Act.). These rules were called the Electricity Rules, 2005.

14. Rule 3 of the said rules specifies the requirements of Captive Generating Plant as under:

*'(1) No power plant shall qualify as 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless -*

*(a) in case of a power plant -*

*(i) not less than twenty six percent of the ownership is held by the captive user(s), and*

*(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:*

*Provided .....ten percent;*

- (b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

Explanation :-

- (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and
- (2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six percent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

*Illustration:* In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

- (2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

Explanation – (1) For the purpose of this rule,-

- a. "Annual Basis" shall be determined based on a financial year.
- b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;
- c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;
- d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

15. Thus the Ministry of Power, Government of India through this notification of rules had made it abundantly clear that a Special Purpose Vehicle could be formed for owning, operating and maintaining a generating station and if twenty six percent of the equity shares are held by some users and these users consume fifty one percent of the electricity generated, then the station can be considered as captive generating plant.

16. As mentioned above, the petitioner company is in process of implementing a scheme, which envisages the setting up of captive generating plant of 26.19 MW capacity for identified Captive Users. However, the petitioners have the fuel tie up for generation of only 20 MW. The captive users shall consume in aggregate not less than 51% of the total generated electricity of the plant and shall hold not less than 26% of the equity capital of the petitioner company related to such generating unit in compliance of the stipulations of Rule 3(1)(b) of the Electricity Rules, 2005. At present the said captive power plant has been partly commissioned to the extent of 8.73 MW on 4<sup>th</sup> February 2007 and commissioning of the further two units are scheduled in the month of May 2007. Going through the records submitted by the petitioner, the Commission is in agreement with the petitioner company that it is a captive generating plant within the meaning of Section 2(8) and section 9 of the Act. Also the petitioner's company is a "Special Purpose Vehicle" within the meaning of rule 3(1) (b) of the Electricity Rules 2005. As submitted by the petitioner, it is engaged only in the generation of power and in no other business. The petitioner has denied the allegation of the respondent that under cover of captive power plant the petitioner is selling power to other consumers. It is worth-mentioning here that the respondent has not advanced specific evidence to substantiate the allegation that the petitioner is indulging in sale of power to consumers other than CPP users. The petitioner has also confirmed that if the Commission is of the view that besides the main object of establishing the captive power plant, the Ancillary and other objects may be deleted from the Petitioner's Memorandum of Association, the petitioner undertakes to immediately carry out the necessary amendment to its Ancillary and other objects.

17. The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4<sup>th</sup> proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above. Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users. The Commission agrees with the respondent that as per Section 42(4) of the Act, 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. However, the Commission would like to point out that clause 8.5.4 of the National Tariff Policy notified by the Central Government on 6<sup>th</sup> January 2006 (in terms of Section 3 of the Act) states as under:-

*"The additional surcharge for obligation to supply as per Section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related network assets would be recovered through wheeling charges."*

While the Commission would consider levying additional surcharge on wheeling charges, yet it is the responsibility of the licensee to demonstrate that they have an obligation in terms of existing power purchase commitments or they bear fixed costs consequent to such a contract. Hence, the Commission directs the licensee to demonstrate such commitments in order to levy additional surcharge on wheeling charges in terms of Section 42(4) of the Act.

18. Therefore, the Commission concludes from the combined reading of Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules, that captive generating plant and dedicated transmission line can be constructed, maintained and operated by a person for generation of power and supply to its captive users. However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.

19. In view of the above, the Commission decides to approve the scheme of the petitioner for captive generation and supply to its captive users through the dedicated transmission line to be constructed as mentioned above subject to the following conditions:

- (1) The petitioner shall strictly abide by the provisions of the Electricity Act 2003 and the Rules made there under and the regulations framed by the Commission along with the necessary amendments to be notified in the Act, rules and regulations from time to time.
- (2) The petitioner shall always adhere to the following:
  - (a) not less than 26% of its ownership shall be held by its CPP users holding voting rights
  - (b) not less than 51% of the aggregate electricity generated in its plant, determined on annual basis shall be consumed by its CPP Users.The respondent may bring to the notice of the Commission if any violation is noticed by them in this regard for appropriate action by the Commission.
- (3) The petitioner shall give an undertaking to the respondent that the Petitioner Company is not engaged and shall not be engaged in other business or activity except the captive generation of power and supply as per explanation 1 (d) of rule 3 of the Electricity Rules, 2005. The respondent may bring to the notice of the Commission if any violation in this regard is noticed by them for taking appropriate action by the Commission.
- (4) The petitioner shall submit to the respondent and the Commission the annual information of the status of ownership and of consumption by the captive users in the above CPP. The petitioner shall also be informing the respondent and the Commission of any changes occurring in the shareholdings and /or consumption by the shareholders within a period of one week of occurrence of such change. The petitioner has to inform the respondent immediately after commissioning of the remaining 2 units and status of equity pattern at the time of commissioning.
- (5) Supply of electricity from the captive generating plant to anyone other than the shareholders shall be treated as distribution and thus requires a license from the Commission. However, sale of surplus electricity generated (over and above the quantity supplied to the captive users) to the licensee will not be considered as distribution.
- (6) According to the rule 3(2) of Electricity Act, 2005, it shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentage mentioned in sub-clause (a) and (b) of sub-rule (1) above is maintained and in case percentage of captive use is not complied within any financial year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.
- (7) The CPP shall be established, operated and maintained as per technical safety and grid standards specified by the Authority or State Transmission Utility (STU) or the Commission and shall also comply with the provisions of MPERC (Power purchase and other matters with respect to conventional fuel based Captive Power Plants) Regulation 2006.
- (8) The above approval is subject to the condition that the petitioner shall obtain the written permission from GoMP for "Right of the way" for erection of own dedicated H.T. line and permission from Chief Electrical Inspector, GoMP for erection, charging and observing safety rules.

With the directions above, the Commission decides to close the case

Ordered accordingly.

Sd/-  
**(R.Natarajan)**  
Member (Econ.)

Sd/-  
**(D.Roybardhan)**  
Member (Engg.)

Sd/-  
**(J.L. Bose)**  
Chairman