CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Coram

1. Dr. Pramod Deo, Chairperson
2. Shri S.Jayaraman, Member
3. Shri V.S. Verma, Member

Petition No. 114/2009

In the matter of

Petition under Section 79 of the Electricity Act, 2003.

And in the matter of

Davanagere Sugar Company Ltd., Davanagere .. **Petitioner**

Vs.

1. Karnataka Power Transmission Corpn. Ltd., Bangalore
2. Bangalore Electricity Supply Co. Ltd., Bangalore
3. State Load Despatch Centre, KPTCL, Bangalore
4. Reliance Energy Trading Co. Ltd., Mumbai ….**Respondents**

The following were present:

1. Shri Prabhuling K. Navadgi, Advocate for the Petitioner
2. Shri Mukesh Kumar, Davanagere Sugar Co. Ltd.

ORDER
(Date of Hearing: 14.7.2009)

The applicant seeks directions to the third respondent, the State Load Despatch Centre, Karnataka, to consider the application made for open access in accordance with law, under the provisions of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (hereafter "the open access regulations"), for supply of energy from its plant, and for setting aside of the third respondent's letter No.CEE/EE/AEE-3/SLDC/194-195 dated 10.6.2009, after declaring it illegal and contrary to the open access regulations.

2. The applicant is a company registered under the Companies Act. It owns a sugar mill, with co-generation facility and is stated to have 24 MW of the exportable surplus capacity.

3. The applicant entered into an agreement dated 17.1.2002 with the first respondent, Karnataka Power Transmission Corporation Ltd., for sale of its surplus power @ Rs.2.25/kWh, with escalation of 5% per annum. Subsequently, on 9.6.2005, the parties signed a supplemental agreement, under which the rates of sale of electricity by the applicant to the first respondent were revised. The agreement has since been assigned to the second respondent Bangalore Electricity Supply Company Ltd., after restructuring of electricity sector in the State. The applicant has claimed that the agreement dated 17.1.2002 read with supplemental agreement dated 9.6.2005, though styled as 'Power Purchase Agreement' is in fact a tariff agreement. The applicant has further claimed that the agreement did not obligate it to sell power to the first respondent. Therefore, the applicant planned to export power, as, according to it, the rates for supply of power agreed upon between the parties were uneconomical in view of rise in cost of generation.

4. The fourth respondent, Reliance Energy Trading Co. Ltd., reportedly with the consent of the applicant, submitted an application dated 6.6.2009 before the third respondent for standing clearance/No Objection Certificate under the open access regulations for open access from 8.6.2009 to 31.8.2009 for sale of power outside the State of Karnataka, through the power exchange. However, the third respondent by the impugned letter dated 10.6.2009 turned down the application relying on the State Governments G.O. No.328 NCE 2009 dated 6.6.2009 on the ground that the applicant was having valid PPA with the second respondent.

5. Feeling aggrieved, the applicant has made the present application before the Commission.

6. The first respondent in its written statement has stated that the applicant has a subsisting PPA for sale of its surplus power to the second respondent. It has been stated that the State Government, in exercise of powers under Section 11 of the Electricity Act, 2003 (the Act), issued an order dated 17.12.2008, directing all generating companies situated in the State to sell electricity to the State Grid and not to export electricity outside the State. Therefore, according to the first respondent, the applicant was obligated to sell all exportable capacity to the State Grid in terms of the State Government's order dated 17.12.2008. It has been pointed out that by a subsequent order dated 1.6.2009, also stated to have been issued under Section 11 of the Act, all private generating companies in the State were directed to sell 50 % of their exportable capacity to the State Grid. The power situation in the State is said to have been reviewed by the Cabinet Sub-Committee in its meeting held on 5.6.2009 whereat it was resolved that the private generators not bound by PPA need not supply power to the State Grid as specified in the order dated 1.6.2009. Thus, it has been stated, the generating companies in the State having a binding PPA for sale of electricity to the distribution companies in the State have a legal obligation to sell electricity to such distribution companies. The first respondent has contended that the applicant is bound by the statutory order of the State Government as it has a valid PPA with the second respondent. The first respondent has urged that the applicant was denied open access by the third respondent, being operated by the first respondent, in compliance with the statutory order passed by the State Government. It has been further stated that the second respondent has filed a petition before the Karnataka Electricity Regulatory Commission (KERC) for enforcement of the PPA and the matter is pending there.

7. The second respondent in its reply-affidavit has supported the decision of the third respondent, since, according to it, in view of the statutory order dated 6.6.2009, made by the State Government, the generators having binding and valid PPA are bound to sell electricity generated at their generating stations to the distribution companies in the State.

8. We heard learned counsel for the parties. We have given our thoughtful consideration to the rival submissions and perused the records.

9. Earlier, in 2007, certain co-generation power plants in the State of Karnataka were refused open access for conveyance of power outside the State through the electricity traders. The concerned entities filed petitions before the Commission, being Petitions No.108/2007, 114/2007 and 116/2007. In those matters, it was *inter alia*, argued that the concerned co-generation generating companies could not be permitted to export their surplus capacity as they had valid PPAs for sale of power to the distribution companies in the State and grant of open access to such generating companies would amount to facilitating breach of obligations under the PPAs. Those petitions were disposed of by a common order dated 3.12.2007. The Commission rejected the contention of the first respondent, holding that the argument was extraneous to the statutory provisions of the Act and the open access regulations. The relevant portion of the Commission's said order dated 3.12.2007 is extracted hereunder:

> "13. On consideration of the facts on record and catalogued in the preceding para, it may be possible to take a view that the PPA between VSL and HESCOM has lost its enforceability. However, we are not going any further into the question of subsistence or otherwise of the PPA in the present proceedings and restrain ourselves from taking a definite view in the matter. The issues before us is denial of open access of Tata and the validity of the reasons therefore, which can be considered in the light of statutory provisions as contained in the Electricity Act, 2003 and open access regulations specified by the Commission, and without adjudicating upon the question of continued existence of the PPA, since in our view, the PPA cannot override the provisions of law. Also, the question raised by HESCOM cannot be looked into in the collateral proceedings. In any case, the contesting respondents do not want us to go into the question of subsistence of the PPA since, according to them, the matter falls within the

domain of KERC. The parties may approach KERC for adjudication of the matter. Further, even if it is to be presumed that the PPA subsists and any of the parties has committed breach of the terms of the PPA, the aggrieved party have the remedy to invoke the jurisdiction of the appropriate judicial forum for enforcement of its rights under the PPA or to claim damages, in accordance with law."

10. The respondents filed appeal before the Appellate Tribunal against the Commission's order dated 3.12.2007. The appeal was disposed of through a consent order dated 1.4.2008, without interfering with the Commission's order dated 3.12.2007.

11. The applicant who was also denied open access in December, 2007, and was similarly situated like the petitioners in the petitions disposed of vide the Commission's order dated 3.12.2007, filed a Petition (No.18/2008) before the Commission. This petition was disposed of by order dated 10.4.2008, in terms of the order dated 3.12.2007 read with the Appellate Tribunal's order dated 1.4.2008. In this manner, the Commission's findings extracted at para 9 above have acquired finality. It has been averred that the applicant was granted open access for the period up to December, 2008 based on the Commission's order dated 10.4.2008 in Petition No.18/2008.

12. For the purpose of the present case, certain other developments need to be taken note of. The State Government of Karnataka passed an order dated 17.12.2008, in purported exercise of power under Section 11 of the Act, valid up to May 2009, directing all the generating companies in the State to supply electricity to the State Grid. The validity of the said order dated 17.12.2008 is the subject matter of proceedings presently pending before the Karnataka High Court. In compliance with the directions of the State Government in the order dated 17.12.2008, the applicant is stated to have continued supply to the State Grid.

13. As we have noted above, the State Government by its order dated 1.6.2009, issued also in purported exercise of power under Section 11 of the Act, *inter alia,* directed that all private

generators in the State, including co-generation units would supply 50% of their exportable capacity from June 2009 to September 2009 to the State Grid. However, the said order dated 1.6.2009 was withdrawn by the subsequent order dated 6.6.2009. In the order dated 6.6.2009 it was observed that the private generators including the co-generation units not bound by PPA, need not supply 50% of power to the State Grid. However, operative part, and intent and purpose of the order dated 6.6.2009 was to withdraw the previous order dated 1.6.2009.

14. It is thus observed that the order dated 17.12.2008, which was valid up to May 2009, has lapsed by efflux of time. The subsequent order dated 1.6.2009 of the State Government stands withdrawn. Both these orders were passed in the purported exercise of power under Section 11 of the Act. We are not expressing any opinion on the competence of the State Government to make such orders, as the Hon'ble High Court is already in seisin of the matter. It is, however, sufficient for the purpose of present proceedings to observe that on 6.6.2009, when the application for standing clearance/No Objection Certificate was made before the third respondent, there was no statutory order of the State Government in operation to interdict open access to the applicant or Reliance Energy Trading Company Ltd., through whom the applicant was exporting power. Therefore, we reject the contention of the respondents that the applicant was bound by the statutory order of the State Government as, in fact, we have already found, there was no such order in force at the relevant time.

15. The reason for rejection of the applicant for standing clearance/No Objection Certificate was existence of PPA. This, we have concluded, could not be a valid ground for denial of open access.

16. The Commission in its order dated 3.12.2007, ibid had observed that the ground for rejection of open access application could be the absence of surplus transmission capacity and no other reason. Those observations of the Commission are reproduced below:

> 15. From the above provisions of the open access regulations, it is seen that the primary criteria for grant of short-term open access is availability of surplus transmission capacity. The nodal Regional Load Despatch Centre is enjoined to grant short-term open access in case it does not anticipate congestion on any of the transmission corridors involved in transmission of power. Any other consideration for denial of the short-term open access will be extraneous to the criteria specified under the open access regulations. The criteria laid down under the open access regulations is in sync with Section 35 of the Electricity Act, 2003 which also emphasizes the availability of surplus transmission capacity as the ground for allowing the intervening transmission facilities by the Appropriate Commission. Section 35 of the Electricity Act, 2003 is reproduced below:
>
> "**Intervening transmission facilities.**
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> 35.
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> The Appropriate Commission may, on an application by any licensee, by order require any other licensee owning or operating intervening transmission facilities to provide the use of such facilities to the extent of surplus capacity available with such licensee.
>
> Provided that any dispute regarding the extent of surplus capacity available with the licensee, shall be adjudicated upon by the Appropriate Commission.
>
> 36. ……
>
> Explanation: For the purposes of section 35 and 36, the expression "intervening transmission facilities" means the electric lines owned or operated by a licensee where such electric lines can be utilized for transmitting electricity for and on behalf of another licensee at his request and on payment of tariff or charge."
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> 16. Tata has been granted licence by the Commission for inter-State trading in electricity and is therefore, a licensee with the meaning of the term defined under sub-section (39) of Section 2 of the Electricity Act. Tata sought open access for transfer of electricity from the State of Karnataka to the State of Gujarat through the Intervening transmission system of KPTCL. Therefore, in keeping with the provisions of Section 35 of the Electricity Act and the criteria specified under the open access regulations, the application made by Tata needed to be examined by SLDC based on yardstick laid therein. In the pleadings filed on behalf of HESCOM there is no whisper that open access was denied to Tata because of unavailability of surplus capacity on the transmission lines owned and operated by KPTCL. Neither was anything urged at the hearing before us. For deciding the question it was not necessary for SLDC to ask for comments of HESCOM or any other person who does not own or operate the intervening transmission lines, that is, the transmission lines proposed to be used for transfer of electricity outside the State of Karnataka. The process adopted by SLDC was clearly *de hors* the express provisions of law and denial of open access of Tata was for extraneous reasons.

17. It is already on record in the proceedings before the Member-Secretary that HESCOM had objected to grant of open access to Tata on the ground that it had a valid PPA and VSL and that the State of Karnataka was facing acute shortage of power. Such objections are not valid, particularly after the Electricity Act, 2003, and its amendment of May 2007, have come into force. These objections cannot be used for blocking open access. Neither KPTCL (in its role as the State Transmission Utility) nor SLDC should have been influenced by such objections when the request for their consent to open access applied for by Tata was received from WRLDC. KPTCL and SLDC while considering the matter should have been guided by the provisions of the Electricity Act, 2003 and the open access regulations.

17. At the hearing, learned counsel for the first respondent produced a copy of State Government letter dated 13.7.2009, which clarifies that the generating companies having valid PPA will supply power to the State network. The said clarification does not in any manner support the case of the first respondent. Neither does it affect the conclusions already arrived at by us, since the said clarification has no statutory force. This is more so, when we have held that no statutory order has been in force since 6.6.2009.

18. In the case on hand, there is no averment on behalf of the respondents that open access was denied on the ground of unavailability of surplus transmission capacity. Therefore, rejection, in our considered view, was for reasons extraneous to the statutory mandate. Therefore, we allow the application and set aside the impugned order dated 10.6.2009. After setting aside of the order dated 10.6.2009, no other consequential relief can be provided to the applicant. The applicant, if so advised, may make a fresh application for grant of standing clearance/no objection for open access which, when made, shall be considered by the respondents, in particular the first and third respondents, in accordance with law and the above observations.

19. The application stands disposed of in above terms.

Sd/-	**sd/-**	**sd/-**
(V.S. VERMA)	**(S. JAYARAMAN)**	**(Dr. PRAMOD DEO)**
MEMBER	**MEMBER**	**CHAIRPERSON**

New Delhi dated the 17th August, 2009