

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Coram

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri R.Krishnamoorthy, Member**
- 3. Shri S.Jayaraman, Member**
- 4. Shri V.S. Verma, Member**

**Petition No.135/2009
With I.A.No. 26/2009**

In the matter of

Petition under Section 79 of the Electricity Act, 2003.

And in the matter of

Vishwanath Sugars Ltd., Belgaum

.. Petitioner

Vs

1. Karnataka Power Transmission Corpn. Ltd., Bangalore
2. Hubli Electricity Supply Company Ltd., Hubli, District Dharwad
3. Karnataka State Load Despatch Centre, Bangalore
4. Tata Power Trading Company. Ltd., Mumbai

....Respondents

**Petition No. 136/2007
With I.A.No. 27/2009**

In the matter of

Petition under Section 79 of the Electricity Act, 2003.

And in the matter of

Doodhanga Krishna Sahakari Sakkare Karkhane Niyamit, Belgaum **..Petitioner**

Vs

1. Karnataka Power Transmission Corpn. Ltd., Bangalore
2. Hubli Electricity Supply Company Ltd., Hubli, District Dharwad
3. Karnataka State Load Despatch Centre, Bangalore
4. Tata Power Trading Company. Ltd., Mumbai

....Respondents

The following were present:

1. Shri Prabhuling K. Navadgi, Advocate for the Petitioners
2. Shri Mukesh Kumar, VSL
3. Shri Anand K. Ganesan, Advocate, KPTCL
4. Shri S.M.Chandra Shekar,KPTCL

ORDER
(Date of Hearing: 28.7.2009)

These applications have been made under similar facts, and raise similar questions. Therefore, we dispose of these petitions through this common order. For this purpose, we propose to deal the issues raised with reference to the facts stated in Petition No. 135/2009.

Petition No. 135/2009

2. The prayers made in the application are extracted hereunder:

“Wherefore, for the reasons aforesaid, the petitioner humbly prays that this Hon`ble Commission may be pleased to :

(i) be pleased to hold and declare the communication dated 19.6.2009 in No. CEE/EE/AEE-3/SLDC/229-230 vide Annexure Y issued by Chief Engineer (Electricity) (Respondent No.3) is illegal and contrary to open access regulations framed by this Hon`ble Commission, as amended from time to time.

(ii) set aside the impugned communication dated 19.6.2009 in No. CEE/EE/AEE-3/SLDC/229-230 vide Annexure Y issued by Chief Engineer (Electricity, 3rd respondent herein and;

(iii) issue suitable and appropriate directions to the jurisdictional Load Despatch Centre (3rd respondent herein) to consider the open access application filed by the petitioner, strictly in accordance with law under the provisions of Central Electricity Regulatory Commission (Open Access in inter-State transmission) Regulations, 2008 as amended from time to time, for supply of energy from the petitioner's plant.

(iv) may be pleased to initiate contempt proceedings against the respondents herein for their willful disobedience of the order dated 3.12.2007 passed by this Hon`ble Commission in Petition No.108/2007, as contemplated under Section 142 of the Electricity Act, 2003, in the ends of justice.

(v) Grant such other and further relief as this Hon1ble Commission deems fit in the facts and circumstances of this case.”

3. The applicant, in substance, seeks directions to the third respondent, the State Load Despatch Centre, Karnataka, to consider the application made by it 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 in the State of Karnataka, and for setting aside

of the third respondent's letter No.CEE/EE/AEE-3/SLDC/229-230 dated 19.6.2009, after declaring it illegal and contrary to the open access regulations.

4. The applicant is a company registered under the Companies Act. It owns a sugar mill, with co-generation facility which is stated to have 7.5 MW of exportable capacity.

5. The applicant entered into an agreement dated 26.7.2001 with the first respondent, Karnataka Power Transmission Corporation Ltd., for sale of power. 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, Hubli Electricity Supply Company Ltd., after restructuring of electricity sector in the State. The applicant has claimed that the first and second respondents during the first quarter of 2006 defaulted in making payments for the electricity purchased. Therefore, the applicant filed a petition before the Karnataka Electricity Regulatory Commission, *inter alia* praying that the applicant be permitted to export power to third party, to which the first and second respondents are said to have consented. Therefore, the applicant planned to export power. Accordingly, the respondent entered into an agreement dated 22.7.2006 with the fourth respondent, Tata Power Trading Company Ltd.

6. Pursuant to agreement dated 22.7.2006, the fourth respondent applied for inter-State open access. The fourth respondent was denied open access for the month of October 2006. Subsequently, the application for open access for the month of November 2006 was also rejected. Thereafter, the applicant as also the fourth respondent, jointly filed a Petition No. 108/2007, before the Commission for setting aside the order of rejection of request for grant of

open access by the third respondent. The said petition was allowed by this Commission vide order dated 3.12.2007.

7. In Petition No. 108/2007, 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. The Commission in its order dated 3.12.2007 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.

8. Second respondent filed an Appeal No. 6 of 2008 before the Appellate Tribunal for Electricity 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. The Appellate Tribunal vide its said order dated 1.4.2008 directed the second respondent to file such petition before the Karnataka Electricity Regulatory Commission (KERC) relating to the alleged rights under the power purchase agreement and directed that the existing open access arrangement between the parties would continue in the meanwhile.

9. The second respondent filed a petition before the Karnataka Electricity Regulatory Commission claiming that the petitioner was bound to fulfill its obligations of selling power under the power purchase agreement. The second respondent sought to restrain petitioner from selling electricity to third parties and also claimed damages. KERC vide its order dated 4.9.2008 passed an interim order denying the open access to the petitioner.

10. Feeling aggrieved by the order of KERC, the petitioner filed an Appeal No. 112/2008 before the Appellate Tribunal against the order of KERC dated 4.9.2008. Appellate Tribunal vide its judgment dated 24.10.2008 set aside the said order dated 4.9.2008. Subsequently, the petition filed before the KERC was withdrawn by the second respondent.

11. The petitioner has stated that thereafter, it made an application before the State Load Despatch Centre on 1.11.2008 for grant of open access and same was granted and continued up to December 2008.

12. 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.

13. The fourth respondent, Tata Power Trading Co. Ltd., reportedly with the consent of the petitioner, submitted an application dated 19.6.2009 before the third respondent for grant of standing clearance/No Objection Certificate under the open access regulations for open access up to 13.9.2009 for sale of power outside the State of Karnataka. However, the third respondent

by it impugned letter No. CEE/EE/AEE-3/SLDC/229-230 dated 16.6.2009 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, namely HESCOM.

14. Feeling aggrieved, the petitioner has filed the present petition before the Commission. The applicant has also filed IA No. 26/2009 for grant an *ex parte ad interim* stay of the said letter dated 19.6.2009 issued by the third respondent.

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

16. It was contended on behalf of the first respondent that the generating companies in the State having a binding PPA for sale of electricity to the distribution companies in the State were under a legal obligation to sell electricity to such distribution companies. The learned counsel for 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. Accordingly, it has been argued on behalf of the first respondent 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.

17. For the purpose of the present case, the developments which are relevant 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.

18. 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.

19. 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. Thus 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 Tata Power Trading Company Ltd., through whom the applicant was to export 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.

20. The reason for rejection of the applicant for standing clearance/No Objection Certificate was existence of PPA. The Commission in its order dated 31.12.2007 *ibid* held that the

existence of the power purchase agreement was not a valid reason for denial of open access.

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.”

21. It is to be observed that the second respondent filed a petition before KERC for enforcement of the power purchase agreement signed with the petitioner. This petition was subsequently withdrawn as noticed at para 10 above. Thereafter, the petitioner was allowed open access during November and December 2008. These actions of second respondent only show that it was satisfied that existence of the power purchase agreement was not the valid ground to stop the petitioner from export of power.

22. The Commission in its order dated 3.12.2007 *ibid* had further 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.

35.

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.”

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.

23. In the case on hand, it is not the case of the respondents that the application was rejected by the third respondent on the ground of unavailability of surplus transmission capacity. In our considered view, denial of open access was for reasons extraneous to the statutory mandate. Therefore, we allow the application and set aside the impugned order dated 19.6.2009. Learned counsel for the first respondent brought to out notice the State Government's letter dated 13.7.2009, according to which the generating companies having valid PPA supply power to the State network. The said letter dated 13.7.2009 does not in any manner support the first respondent's contention. The said letter dated 13.7.2009 lacks any statutory force after the expiry of the order dated 17.12.2008 and withdrawal of the order dated 1.6.2009 on 6.6.2009. Thus, no statutory order had been in force since 6.6.2009.

24. After setting aside of the order dated 19.6.2009, no other consequential relief can be granted to the petitioner. The petitioner, 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.

Petition No. 136/2009

25. Petition No. 136/2009, as we have noted above, also raised the similar issues. Therefore, our findings and directions in Petition No. 135/2009 shall *mutatis mutandis* be applicable to also this case.

26. The Petition Nos. 135/2009 and 136/2009 along with I.As stands disposed of in above terms.

Sd/- (V.S. VERMA) MEMBER	sd/- (S. JAYARAMAN) MEMBER	sd/- (R.KRISHNAMOORTHY) MEMBER	sd/- (Dr. PRAMOD DEO) CHAIRPERSON
New Delhi dated the 7th September 2009			