

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 83/MP/2013

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri M. Deena Dayalan, Member

Shri A.K. Singhal, Member

Date of Hearing: 27.2.2014

Date of Order : 31.3.2014

In the matter of:

Illegal denial of open access by the respondents in violation of Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008.

And

In the matter of:

Sagar Power (Neekukatte) Private Limited,
2nd Floor, Venkatadri Complex, Bangalore-560 025

...Petitioner

Vs

1. State Load Despatch Centre, Karnataka,
Kaveri Bhawan, K.G.Road, Bangalore-560 009

2. PTC India Limited, 2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi-110 066

.. Respondents

Following were present:

Shri Shridhar Prabhu, Senior Advocate for petitioner
Shri Anantha Narayana, Advocate for petitioner
Ms. Swapna Seshadri, Advocate, KPTCL
Shri Varun Pathak, Advocate, PTC

ORDER

The petitioner, Sagar Power (Neekukatte) Private Limited has filed this petition seeking direction to the first respondent, SLDC, Karnataka to grant no objection/prior standing clearance under Regulation 8 (2) of the Central Electricity Regulatory

Commission (Open Access in inter-State Transmission) Regulations, 2008 (Open Access Regulations) and to set aside the letter dated 30.3.2013 issued by SLDC, Karnataka denying Open Access to the petitioner.

2. The facts of the case in brief are that the petitioner is a generating company and is operating a 15 MW mini hydro based power project across Nethravathi River, near Neerukatte village in Karnataka. The petitioner entered into a Power Purchase Agreement (PPA) dated 6.12.2006 with Mangalore Electricity Supply Company Limited (MESCOM) for supply of power from its project for a period of 20 years from the date of commercial operation. The COD of the generating station was 17.9.2009 and accordingly, the PPA is valid till 16.9.2029.

3. The petitioner filed OP No. 24/2009 before the Karnataka Electricity Regulatory Commission (KERC) seeking a declaration that there is no valid or subsisting agreement between the petitioner and MESCOM and the PPA dated 6.12.2006 is null and void. The petitioner further sought a direction to SLDC Karnataka and MESCOM to grant Open Access or in the alternative to fix revise tariff @ ₹5/kWh. KERC in its letter dated 23.12.2010 upheld the validity of the PPA and rejected the prayer for re-fixation of tariff while granting liberty to the petitioner to submit its claim for revision of tariff to MESCOM along with supported documents for its consideration. The petitioner filed Review Petition No.3 of 2011 seeking the review of KERC order dated 23.12.2010 which was rejected vide order dated 22.12.2011.

4. In the present petition, the petitioner has submitted that it suffered due to continuous payment defaults by MESCOM in violation of the terms and conditions of the

PPA and failure of MESCOM to open the Letter of Credit as required under the PPA. The petitioner issued a default notice dated 7.9.2011 to MESCOM to make payment of interest for delayed payment and arrange for opening of LC within the 30 days from the date of receipt of letter. MESCOM in its letter dated 22.9.2011, intimated the petitioner that the power sector was in financial crisis and the opening of LC in terms of the PPA was in progress. The petitioner vide its letter dated 22.10.2011 issued a notice of termination to MESCOM in terms of Article 9.3.2 of the PPA. MESCOM in its letter dated 16.11.2011 contested the notice of termination and reiterated that the PPA 6.12.2006 was subsisting for 20 years as per Article 9.1.1 of the PPA.

5. The petitioner executed a Member Client Agreement with PTC India Ltd for supply of power through Power Exchange. Based on the Member Client Agreement, PTC made an application dated 6.8.2012 to SLDC, Karnataka for no objection/standing clearance for grant of Short Term Open Access (STOA). In response to SLDC letter dated 8.8.2012, MESCOM vide its letter dated 10.8.2012 stated that the petitioner was having valid PPA with MESCOM for a period of 20 years from COD i.e. upto 16.9.2029. MESCOM further intimated that the petitioner was submitting monthly invoices for the delivered energy and the payments were being made by MESCOM with LC arrangement as per the PPA. SLDC, Karnataka in its letter dated 10.8.2012, intimated the petitioner that as per G O No. EN 540 NCE 2008 dated 1.9.2009 issued by Government of Karnataka, all private generators having valid PPAs with State utilities are bound to supply to respective power utilities in the State and accordingly, PTC was denied Open Access for off-taking power from the petitioner's plant for sale in the Power Exchange. The petitioner is stated to have made similar applications through PTC for

no objection/ standing clearance for the months of April, May and June, 2013 which were rejected by SLDC, Karnataka.

6. In the above background, the petitioner has filed the present petition seeking directions to SLDC Karnataka for grant of open access to the petitioner under Regulation 8 (2) of the Open Access Regulations. The petitioner has submitted that its case is squarely covered by the Commission's order dated 8.9.2009 in Petition No. 158/2009 (GMR Industries Vs. KPTCL & Ors.) wherein the Commission has held that SLDC has no power to decide the dispute between the generator and discom regarding the termination of the PPA and therefore, SLDC Karnataka cannot deny open access to the petitioner.

7. The petition was heard for admission on 23.7.2013. The Commission admitted the petition and directed issue of notice to the respondents. The Commission also observed the following in the Record of Proceedings:-

"After hearing learned counsel for the petitioner, the Commission observed that the petitioner should take up the matter with the State Government and make it clear to the Government that since there is no valid PPA, the power would not be supplied. The Commission further observed that since the petitioner is continuing to supply the power, which means the petitioner is indirectly accepting the existence of PPA. In response, learned counsel for the petitioner submitted that though the petitioner is not bound to supply the power under the PPA after terminating of the PPA, it is constrained to supply the power into the grid."

8. Similar observation was also made by the Commission during the hearing on 24.9.2013 which is quoted as under:-

"The Commission observed that the disputes regarding the validity of the PPAs should be taken up before the State Commission. The Commission further observed that since the petitioner is continuing to supply the power, it follows that the petitioner has accepted the validity of the PPA."

9. The petitioner has not filed any document on record to the effect that the petitioner had taken up the matter with the State Government in the light of the observation of the Commission.

10. Replies to the petition have been filed by the first and second respondents vide affidavit dated 3.12.2013 and 22.2.2014. The first respondent has submitted that there exists a valid and subsisting PPA between the petitioner and MESCOM. It has been alleged that the petitioner unilaterally decided to discontinue supply of electricity to MESCOM for sale to third parties. As the PPA is subsisting, there is no scope for third party sale of electricity by the petitioner and therefore, it cannot be granted open access for sale of electricity outside the State. The first respondent has submitted that the issue of termination of the PPA cannot be raised in the present proceedings since the proper forum to seek appropriate relief on the issues under the PPA is the State Commission. Therefore, unless and until the validity of termination is decided by the State Commission, the petitioner owes a duty to supply electricity to the consumers in the State. The first respondent has submitted that the petitioner had earlier filed a petition, being petition No. 24 of 2009 before the State Commission for declaration of the PPA dated 6.12.2006 as null and void. The said petition was dismissed by the State Commission vide order dated 23.12.2010. The first respondent has further submitted that the power of the State Government of Karnataka to issue statutory orders in terms of Section 11 of the Electricity Act, 2003 has been upheld by the Hon'ble High Court of Karnataka in which it has been relied that the open access is not an absolute right and is subject to the other rights and obligations of the parties. The first respondent has submitted that the Commission in its order dated 20.5.2013 in Petition No. 227/MP/2013

has already held that the question of the reasonableness of denial of open access will arise only after the adjudication of the rights and obligations of the parties under the PPA. According to the first respondent, until the issue of validity of the PPA is decided, the question of open access cannot arise. The first respondent has requested the Commission to direct the petitioner to approach the State Commission on the aspect of validity of the PPA.

11. The second respondent in its reply dated 22.2.2014 has submitted that PTC signed the PPA on 11.7.2012 for selling 15 MW hydro power from the petitioner, through IEX. As per the PPA, arranging NOC and necessary approval from KPTCL/SLDC is the responsibility of the petitioner. On the request of the petitioner, PTC applied for NOC to KPTCL/SLDC on 6.8.2012, 28.12.2012 and 23.3.2013 which were rejected by SLDC citing the reason that the PPA between the petitioner and MESCOM was valid upto 16.9.2009 and hence the petitioner was not entitled for open access. PTC has submitted that it has no role to play in the dispute between the petitioner and Karnataka SLDC on the issue of non-grant of open access.

12. During the course of hearing, learned senior counsel for the petitioner submitted that in terms of the order of the Commission in GMR case, SLDC is not required to consult the distribution company but is only required to be guided by the Open Access Regulations of the Commission which mandate two requirements-availability of surplus transmission capacity and availability of metering facilities-to be fulfilled for grant of open access. Therefore, the action of SLDC is in violation of the Open Access Regulations and the order of the Commission in GMR case. Learned Counsel for SLDC

Karnataka submitted that the PPA between the petitioner and MESCOM has been upheld by the KERC and in accordance with the State of Karnataka order dated 1.9.2009, open access shall be issued to the generating companies which do not have a valid and subsisting PPA with the distribution companies. Since the petitioner has a valid PPA with MESCOM under which it is obliged to supply power to MESCOM, no open access can be granted to the petitioner. Learned Counsel for PTC submitted that it is not a necessary party to the dispute.

13. During the hearing of the petition, we enquired from the learned senior counsel for the petitioner whether the petitioner is supplying power to MESCOM. Learned senior counsel submitted that in the absence of open access, the petitioner is supplying power to the grid.

14. We have heard the learned counsels for the parties. We have carefully considered the submissions made on behalf of the parties and perused the records of the case.

15. The petitioner's case for termination of PPA has been rejected by KERC. Even the Review Petition filed against the rejection of the petition has been dismissed. The petitioner has subsequently given a notice dated 7.9.2011 to MESCOM to arrange for payment and opening of the LC. MESCOM in its letter dated 22.9.2011 has disputed the claim of the petitioner regarding default in payment and has stated that payments are being made within due dates in terms of the PPA. Subsequently, the petitioner vide its letter dated 22.10.2011 has given a notice under Article 9.3.2 of the PPA for termination of PPA. MESCOM in its letter dated 16.1.2011 has disputed the claim of

the petitioner and has assured that LC has been opened and would be sent to the petitioner shortly. MESCOM has categorically stated that *“there is no cause for termination of PPA. Hence PPA dated 6.12.2006 is subsisting and continues to be in force for 20 years as per Article 9.1.1 of the PPA”*. The petitioner has not taken any further action on the letter of MESCOM dated 16.11.2011 and appears to have accepted that the PPA is subsisting. The learned senior counsel for the petitioner has also confirmed during the hearing that the petitioner has been supplying power to MESCOM.

16. It appears to us that the whole case of the petitioner is based on the premise that after its termination notice dated 21.10.2011 to MESCOM, PPA stood terminated and the petitioner is under no obligation to supply power to MESCOM and is entitled to third party sale by availing of open access under Open Access Regulations. In our view, the petitioner sent a notice to MESCOM for termination of the PPA, which was rejected by MESCOM. If the petitioner had any grievances, it was open to the petitioner to approach KERC for adjudication of the dispute with MESCOM. This Commission while dealing with the inter State open access cannot adjudicate the dispute pertaining to the validity of the PPA between the petitioner and MESCOM.

17. The Commission in the order dated 9.5.2013 in Petition No. 228/MP/2013-Rithwik Energy Generation Private Limited and SLDC, Karnataka has issued the following directions:-

"In view of the foregoing, the petitioner has to approach the State Commission for adjudication of the dispute regarding subsistence or otherwise of the PPA after service of notice dated 11.5.2012 on the third respondent. The question of reasonableness of denial of open access will arise only if the termination of the PPA is found to be valid by the appropriate forum under the law."

18. The Commission in the order dated 20.5.2013 in Petition No. 227/MP/2013-
Ravikiran Power Projects Pvt. Limited and SLDC, Karnataka had further observed as
under:-

"The question of unreasonableness in denial of concurrence/ 'no objection'/ prior standing clearance for inter-State open access shall be gone into by this Commission only after the termination of the PPA has been found to be valid by the State Commission on the petition filed by the petitioner and presently pending. Accordingly, the petition is not maintainable at this stage and stands dismissed. There shall be no order as to costs."

19. In the light of our decision in the orders quoted above, the prayers of the petitioner cannot be granted. The petitioner is at liberty to approach the State Commission for adjudication of dispute regarding the subsistence or other issue of the PPA.

20. The petition is disposed of in terms of the above.

sd/-
(A.K. Singhal)
Member

sd/-
(M. Deena Dayalan)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson