

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 228/MP/2016

Subject : Petition under Section 79 (1) (c) of the Electricity Act, 2003 read with Regulations 8 and 26 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008.

Date of hearing : 27.4.2017

Coram : ShriGireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : OCL India Limited.

Respondents : WBSETCL& Others.

Parties present : Shri Manu Seshadri, Advocate, OCL
ShriM.G. Ramachandran, Advocate, WBSETCL
Ms. AnushreeBardhan, Advocate, WBSETCL
ShriHemantSetia, Advocate, WBSEDCL
Ms. ShrutiDass, Advocate, WBSEDCL
ShriSurajitChakraborty, WBSEDCL
Shri S.S. Barpanda, ERLDC

Record of Proceedings

Learned counsel for the petitioner submitted that the present petition has been filed against the denial of Short Term Open Access by WBSEDCL on the ground of constraint in the inter-State network for the period 1.3.2016 to 31.5.2016 which is in violation of Central Electricity Regulatory Commission (Open Access in inter-State transmission) Regulations, 2008 (2008 Open Access Regulations) and further submitted as under:

a). The first principle of law is that jurisdiction cannot be conferred or claimed by framing Regulations. Jurisdiction needs to be found in the Statute, namely the Electricity Act, 2003 (the Act). Otherwise, any Commission will simply frame Regulations to exercise jurisdiction which it otherwise cannot exercise.

b). The transaction sought to be done by the petitioner is purchase of power by a bilateral transaction through a specified buyer and amounts to an inter-State transaction. The usage of the State network is only incidental and will not give the jurisdiction to the State Commission to decide the issue. In so far as any bilateral

inter-State transaction is concerned, it is deemed to be an inter-State transaction and governed by the 2008 Open Access Regulations only.

c). Moreover, the State Commission cannot exercise jurisdiction in the present case since the denial has been of inter-State open access permission. The merits of such a denial can only be questioned before the Commission and not before the State Commission. It is a settled principle that any inter-State transaction is governed by the Commission in terms of Section 79(1)(c) of the Act read with Regulation 26 of the 2008 Open Access Regulations.

d). There was no constraint in the inter-State network and SLDC and WBSEDCL has wrongly denied the No Objection to open access to the petitioner.

e). In support of his contentions, learned counsel relied upon the judgments of the APTEL in Bharat Aluminum Company Limited Vs. Chhattisgarh State Power Transmission Company Limited, Appeal No. 210 of 2012 and VVL and Others Vs. CSERC & Anr., Appeal No. 89 of 2015.

2. In its rebuttal, learned counsel for WBSETCL submitted as under:

a). The Commission does not exercise jurisdiction over matters relating to Intra State Transmission System. The transmission system owned, operated and maintained by WBSETCL is primarily for conveyance of the electricity within the State of West Bengal and therefore, is a part of the Intra -State Transmission system within the meaning of Section 2 (37) of the Act.

b). The terms and conditions of tariff in regard to use of such system by others are decided by West Bengal State Electricity Regulatory Commission under Section 86 read with Sections 61, 62 and 64 of the Act.No part of such system owned, operated and maintained by WBSETCL falls within the scope of Inter-State Transmission System as defined in Section 2(36) of the Act. Accordingly, the petition is not maintainable before the Commission.

c). The petitioner had sought STOA for use of CTU/STU Corridor for conveyance of power through the Open Access to its unit in West Bengal. The said open access could not be agreed to for the reason of non-availability of room in the CTU/STU Corridor/insufficient transmission capacity of WBSETCL.

d). The open access could not be agreed in view of the system constraint that is existing in the intra-State network at the 220/132 KV Midnapur sub-station through which the petitioner is drawing power. The said sub-station is already close to its peak capacity and will not have the ability to meet requirements of STOA after meeting the existing and projected load growth. This aspect has been raised by WBSEDCL by its letter dated 4.4.2016.

e). In support of his contentions, learned counsel relied upon the judgment of the APTEL dated in Appeals No. 231 of 2015 and 251 of 2015 (UPPCL Vs. UPERC and Others) where considering the transmission system of Uttar Pradesh Power

Transmission Company Limited, the APTEL has decided that the State Commission has jurisdiction and not the Central Commission.

3. Learned counsel for WBSEDCL adopted the submissions made by learned counsel for WBSETCL and submitted as under:

a). The present petition is not maintainable before the Commission since the consent to inter-State short term open access has been rejected for reasons of intra-State network constraints. Therefore, it is for the concerned State Commission i.e. West Bengal Electricity Regulatory Commission to consider and adjudicate on such aspects of network constraints.

b). Regulation 11 of the WBERC OA Regulation, 2007 provides that for adjudication of any dispute regarding availability of transmission capacity the aggrieved party may file a petition before WBERC for adjudication of the dispute within 60 days from cause of action. The petitioner has failed to approach the WBERC within the period of limitation. Therefore, it is barred from raising such dispute at such a late stage. The present petition has been filed before the Commission to circumvent and avoid such bar under the WBERC OA Regulations, 2007. Therefore, the present petition is a perfect case of forum shopping.

c). The petitioner has tried to prejudice the Commission by referring to earlier instances of rejection of open access by SLDC. It is, however, clear from the contents of the petition and the documents that such rejection was made on grounds of technical constraints similar to those that have been WBSEDCL in the present case. The petitioner has not approached WBERC against such rejection.

e). In accordance with Regulation 10.1 (a) of the WBERC (OA) Regulations, 2007, the petitioner made an application to SLDC for grant of open access in the Format-I mentioning the point of drawal as WBSEDCL (132 KV LILO line connected between Dharma and Bishnupur sub-stations at Midnapore, West Bengal.

f). As per Regulation 10.4 (a) and (c) of WBERC OA Regulations, 2007, the nodal agency is required to analyse all the applications made for STOA on the basis that there are no technical constraints in the State transmission and distribution system. Accordingly, the petitioner's application for grant of concurrence for short term open access was rejected.

g). The applicability of WBERC OA Regulations, 2007 can be pointed out from Regulation 3 of the WBERC OA Regulations, 2007 that provides that WBERC OA Regulations, 2007 shall apply to open access for use of intra-State transmission lines and/or distribution systems and associated facilities with such lines or systems of the licensees.

h). It is a settled principle of law that jurisdiction cannot be assumed where there exists none. In support of this contention, learned counsel relied upon the judgment of the Supreme Court in Jagmittar Sain Bhagat and Others Vs. Director, Health Services, Harayna and Others, [(2013) 10 SCC 136].

3. The representative of ERLDC submitted that during the period from 1.3.2016 to 31.5.2016, no real time congestion was experienced in any of the Intra Regional links within the Eastern Region and ERLDC has not refused any bilateral STOA application due to transmission constraint during the said period. The representative of ERLDC further submitted that ERLDC has placed on record the monthly TTC/ATC figure for the months of March to May, 2016 wherein the limiting constraint for arriving at Inter/Intra regional TTC/ATC values is mentioned.

4. After hearing the learned counsels for the parties, the Commission directed the parties to file their written submissions with an advance copy to each other by 17.5.2017 failing which the order shall be passed based on the documents available on record.

5. Subject to the above, the Commission reserved the order in the petition.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Legal)**