

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 517/MP/2014
With I.A. No. 63/2014**

**Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K Singhal, Member
Shri A.S. Bakshi, Member**

**Date of Hearing: 10.2.2015
Date of Order : 5.10.2015**

In the matter of
Petition under Section 79 (1) (c) of the Electricity Act, 2003

**And
In the matter of**

Udupi Power Corporation Limited
II Floor, Le Parch Richmonde,
51, Richmond Road,
Bangalore-560 025

....Petitioner

Vs

1. Karnataka Power Transmission Corporation Ltd.
Kaveri Bhawan, Bangalore-560 009
2. State Load Despatch Centre
No. 28, Load Despatch Centre,
Race Course Road, Bangalore -560 009
3. Power System Operation Corporation Ltd.
Southern Regional Load Despatch Centre
29, Race Course Cross Road
Bangalore-560 009
4. Power Company of Karnataka Limited
KPTCL Building, Kaveri Bhawan,
K.G. Road, Bangalore-560 009
5. Kerala State Electricity Board Ltd.



Following were present:

Shri Sakya Singh Chaudhuri, Advocate, UPCL
Shri Shubhranshu Padhi, Advocate, UPCL
Ms. Swapna Seshadri, Advocate, SLDC, Karnataka
Ms. Anushree Bardhan, Advocate, PCKL
Ms. Ranjitha Ramachandran, PCKL
Ms. Stuti Venkat, PCKL
Shri G. Sreenivasan, KSEB
Ms. Jayantika Singh, SRLDC
Shri V. Suresh, SRLDC

ORDER

The petitioner, Udupi Power Corporation Limited, has set up a 1200 MW (2X600 MW) Mega Power Project (hereinafter “project”) based on the imported coal in Udupi District in the State of Karnataka. The capacity of the generating station was originally envisaged as 1015 MW which was subsequently enhanced to 1200 MW having two units of 600 MW each. Generation of power from the first unit and second unit started on 11.11.2010 and on 19.8.2012 respectively.

2. The petitioner entered into PPA on 26.12.2005 with the distribution companies in the State of Karnataka namely, Bangalore Electricity Supply Company Limited, Mangalore Electricity Supply Company Limited, Gulbarga Electricity Supply Company Limited, Hubli Electricity Supply Company Limited and Chamundeshwari Electricity Supply Corporation Limited (herein after referred to as ‘Karnataka ESCOMs’) for supply of 90% of 1015 MW capacity. The petitioner also entered into PPA dated 29.9.2006 with PSPCL for supply of 10% of 1015 MW capacity.

3. After augmentation of capacity from 1015 MW to 1200 MW, 90% of the augmented capacity of 185 MW was tied up with Karnataka ESCOM. The petitioner offered 10% of augmented capacity i.e. 18.5 MW to PSPCL vide its letter dated 25.3.2010. The petitioner vide its letter dated 19.5.2014 informed PSPCL that the petitioner has made other arrangements for the sale of the untied capacity of 18.5 MW to PSPCL. The petitioner has submitted that pursuant to the augmentation of the capacity of the plant to 1200 MW and after considering the existing PPAs for 1015 MW and Government of Karnataka's condition to supply 90% of the enhanced capacity to the ESCOMs, the petitioner is left with 18.5 MW at its disposal. However, the petitioner is presently supplying the entire capacity of 1200 MW to the ESCOMs of Karnataka.

4. The petitioner has submitted that Kerala State Electricity Board Limited (KSEBL), Respondent No. 5, invited tenders on 31.1.2014 for supply of short term power for one year to the grid. Since, the petitioner was having untied power of 18.5 MW, the petitioner participated in the tendering process. The petitioner was declared as the successful bidder and was issued LoI on 20.3.2014. In terms of the LoI, the petitioner furnished the Contract Performance Guarantee of ₹6.66 crore and entered into a PPA with KSEBL on 9.4.2014 for supply of 18.5 MW power.

5. The petitioner has submitted that in accordance with the provisions of the PPA entered into by the petitioner with KSEBL, the petitioner is required to deliver power at the switchyard of its project and therefore, KSEBL was required to obtain the requisite open access permission from the concerned agencies and bear all cost/charges thereof. KSEBL approached SLDC Karnataka and SRLDC by filing application every

month from June, 2014 to November, 2014 seeking open access permission. KSEBL also filed application dated 29.2.2014 seeking MTOA permission for the period 1.10.2014 to 31.5.2015. The petitioner has submitted that SLDC Karnataka and SRLDC have refused to grant permission for open access on the ground that as per the decision taken by the Power Company of Karnataka Limited (PCKL), the entire 100% power generated by the project has to be made available to the ESCOMs of Karnataka.

6. The petitioner has submitted that KSEBL vide its letters dated 27.5.2014 and 29.5.2014 sent communications to the petitioner seeking clarification with regard to the contracted capacity of power i.e. 18.5 MW. The petitioner vide its letter dated 27.5.2014 is stated to have clarified that there is no PPA between the petitioner and the ESCOMs of Karnataka for supply of 18.5 MW power. KSEBL in its letter dated 13.11.2014 requested for a confirmation from the petitioner that 18.5 MW RTC Power which had been contracted with KSEBL was free power as on the date of the PPA. The petitioner in its letter dated 21.11.2014 has replied that the petitioner from time to time has communicated about the availability of the contracted power to KSEBL and accordingly the petitioner is also ready and willing to perform its part of contractual obligation, and in terms of the provisions of the PPA, it is for KSEBL to take necessary action for wrongful denial of open access application in accordance with law.

7. Aggrieved by the denial of open access, the petitioner has filed the present petition on the ground that such denial by SLDC Karnataka and SRLDC are illegal, arbitrary and violates the mandate of law. The petitioner has submitted that as per Regulation 8 (3) (c) of the Central Electricity Regulatory Commission (Open Access in

inter-State Transmission) Regulations, 2008 as amended from time to time (Open Access Regulations), SLDC on verifying the three conditions mentioned in sub-clause (3) (b) of the said regulation i.e. existence of infrastructure necessary for time block-wise energy metering and accounting in accordance with the provisions of the Grid Code, availability of surplus transmission capacity in the State Network, and submission of affidavit regarding existence of valid contract with respect to bilateral transaction for which open access has been sought, has to mandatorily convey its concurrence or no objection to the open access applicant. The petitioner has submitted that SLDC is not permitted to consider any criteria other than the statutorily recognized conditions, and any other conditions considered by SLDC would be extraneous to the statutory requirements. Moreover, SLDC Karnataka and SRLDC have cited the decision taken by PCKL for supply of entire 100% power generated by the petitioner company to the ESCOMs of Karnataka as the reason for denial of concurrence or no objection on the application for open access. The petitioner has submitted that SLDC Karnataka and SRLDC by relying on the decision of PCKL have abdicated their statutory duties. The petitioner has further submitted that the impugned communication states that open access cannot be granted since 100% of the power generated by the petitioner company is to be made available to the State Grid and for any power refused by PSPCL, the first and primary options rest with the ESCOMs of Karnataka being the principal buyers. The petitioner has submitted that the PPAs between the petitioner and the Karnataka ESCOMs show that only 90% of the power generated by the petitioner was contracted with Karnataka ESCOMs, and therefore, Karnataka SLDC and SRLDC could not have rejected the applications of KSEBL for no objection or concurrence.



8. The petitioner has prayed for a declaration that the communications dated 23.5.2014, 23.6.2014, 16.7.2014, 6.9.2014, and 29.9.2014 issued by Respondent No. 2 & 3 are illegal and for setting aside the said communications. The petitioner has sought a direction to SLDC Karnataka and SRLDC to consider the applications filed by the Respondent No. 5 in accordance with the Power Purchase Agreement dated 9.4.2014 and Open Access Regulations.

9. The petitioner has filed IA No. 63/2014 in which the petitioner has stated that during the pendency of the petition, KSEBL issued a communication dated 3.12.2014 informing the petitioner that in the event of the petitioner failing to resolve the issue on or before 19.12.2014, KSEBL would encash the Performance Bank Guarantee. The petitioner has submitted that the action of KSEBL is arbitrary, illegal and contrary to the principle of law relating to fairness, administrative and contractual actions. The petitioner has sought a direction to stay the impugned communication dated 3.12.2014 and direct KSEBL not to encash bank guarantee and to maintain status quo. After hearing the petitioner, the Commission directed the petitioner to extend the validity of the Bank Guarantee and further directed KSEBL not to take any coercive measures with regard to encashment of Contract Performance Guarantee till further order. The petitioner vide its affidavit dated 30.1.2015 (filed on 25.2.2015) has submitted that the validity of the Contract Performance Guarantee has been extended till 30.11.2015 with a claim period upto 31.12.2015.

Replies of the Respondents

10. PCKL in its reply dated 22.1.2015 has submitted that the sale of power from the power project of the petitioner is under the composite scheme whereby the petitioner had agreed to supply 90% of the contracted capacity to the distribution companies of Karnataka and 10% of the contracted capacity to the Punjab State Power Corporation Limited (PSPCL). The distribution companies of Karnataka have entered into a Power Purchase Agreement dated 26.12.2005 with the petitioner for purchasing 90% of the capacity and have also the pre-emptive right/right of first refusal in regard to the quantum of 10% of electricity allocated to PSPCL. In the event of refusal on the part of PSPCL or any un-requisitioned quantum of power in regard to 10% of capacity of the project, the petitioner is bound to offer such power to the ESCOMs of Karnataka as per the PSPCL's PPA dated 29.9.2006. In this connection, PCKL has relied upon the provisions of Clause 3.10 of Karnataka's PPA dated 26.12.2005 and Clause 3.10 and Annexure 5 of PSPCL's PPA dated 29.9.2006. Relying on the PSPCL's letter dated 16.9.2013 to KPTCL for finalisation and signing of the TSA between PSPCL and KPTCL, PCKL has submitted that the letter clearly implies that PSPCL is interested to off-take the 10% of the 1200 MW capacity of the project. PCKL has further submitted that the petitioner has been continuously supplying 10% of the quantum of power (related to 1015 MW) earmarked for PSPCL to the ESCOMs of Karnataka since PSPCL has failed to sign the BPTA to avail the said power. The basis of availing of the power of PSPCL by ESCOMs of Karnataka is that the entire contracted capacity of the project is being funded through the capacity charges and variable charges by the two beneficiaries viz. Karnataka and Punjab and accordingly, as and when either of the



beneficiaries is unwilling to procure the power, the right of first refusal should be given to the other party. The benefit of additional capacity of 185 MW should also be given to the two beneficiaries in the same manner as in case of 1015 MW. In the circumstances, the ESCOMs of Karnataka have a valid claim to the quantum of 18.5 MW of power from the project. PCKL has further submitted that since the tariff for the petitioner's 1200 MW project has been determined by the Commission under section 62 of the Electricity Act, 2003 (hereinafter referred to the 'Act'), the same capacity/partial capacity cannot be entitled for sale under section 63 of the Act.

11. Karnataka Power Transmission Corporation Limited and State Load Despatch Centre, Karnataka (Respondent Nos. 1 & 2) in their joint reply dated 27.1.2015 have submitted that scheduling and dispatch of the petitioner's project is being done by the SLDC, Karnataka. Moreover, the Respondent Nos. 1 & 2 are required to act in terms of the Act and the regulations framed thereunder for scheduling and dispatch of electricity. When KSEBL applied for open access, PCKL acting on behalf of the ESCOMs represented that in terms of contractual obligations, the petitioner is required to first supply 90% of the electricity to the ESCOMs of Karnataka and 10% to Punjab. Since for any power refused by PSPCL, the first and primary option rests with ESCOMs of Karnataka being principal buyers of the petitioner's power, the ESCOMs of Karnataka are entitled to the electricity generated from 18.5 MW capacity and accordingly, consent for open access for supply of power from the said capacity was not granted to KSEBL.

12. SRLDC in its reply dated 30.12.2014 has submitted that the petitioner has clubbed the averments against SRLDC alongwith its averments against SLDC

Karnataka in all its allegations. According to SRLDC, it is not a party to the decision by SLDC, Karnataka and it has no say whatsoever for the reasons taken either by SLDC Karnataka or PCKL. SRLDC has further submitted that since SLDC Karnataka refused to accord concurrence to KSEBL, SRLDC could not grant the open access in question as per the applicable laws. Therefore, it was not proper for the petitioner to hold SRLDC responsible for refusal of open access by SLDC Karnataka. SRLDC has further submitted that the petitioner is an embedded generator in the State of Karnataka and SLDC is its despatching authority as per the provisions of the Grid Code and therefore, SRLDC had gone by the averment of SLDC Karnataka in regard to the ownership of the surplus power arising out of the enhancement of installed capacity.

Submissions during hearing

13. During the hearing, learned counsel for the petitioner submitted that it has been settled by the Commission vide order dated 7.9.2009 in Petition No.135/2009 that SLDC while granting NoC shall be guided by the provisions of Open Access Regulations, and not any extraneous factors. As per the provisions of Open Access Regulations, only relevant factors for the purpose of grant of NoC for short term open access is the availability of transmission capacity and metering arrangement. Since no transmission constraint has been shown, refusal of NoC by SLDC Karnataka is illegal. Learned counsel for the petitioner further submitted that as per the PPA dated 26.12.2005, the contracted capacity with Karnataka ESCOM was for 90% of gross capacity and not for 100% as claimed and therefore, SLDC and SRLDC should have been guided by the express terms of the contract, and not on the basis of the claim of PCKL. The reliance

placed on clause 3.10 of the PPA to claim right over 100% capacity by PCKL is misplaced since the said clause relates to (i) any generation above the target availability of 80% of the contracted capacity of 90%, and not to any generation beyond 90% capacity, and (ii) the un-requisitioned capacity referred to in the clause pertains to the portion of the contracted capacity that has not been scheduled by the Karnataka ESCOMs and therefore, is not part of the balance 10% capacity. In response to our query regarding nature of the agreement entered into between the petitioner and the Karnataka ESCOMs for off-taking PSPCL's share of power, learned counsel for the petitioner submitted that the supply is being made on ad-hoc basis without any formal agreement between the parties.

14. Learned counsel for SLDC Karnataka submitted that in terms of the judgment of Appellate Tribunal for Electricity dated 5.9.2014 in Appeal No. 171/2013 (Ravikaran Power Projects Private Ltd Vs State Load Despatch Centre & Others), "when the Distribution Licensee is claiming that it has a valid PPA with the generating company and power from the generating station has to be dispatched within the State for consumption by the Distribution Licensee, then the SLDC cannot give "No Objection" for Inter-State open access for the same power sought by the generating company on the ground of termination of PPA, ignoring the claim of the Distribution Licensee." Learned counsel submitted that it is the duty of SLDC to examine any contesting claims relating to any capacity raised by any party while deciding on the grant of NoC. PCKL which acts on behalf of the distribution companies of Karnataka represented to SLDC that in terms of contractual obligations, the petitioner is required to first supply 90% of the

power to the ESCOMs of Karnataka and 10% to PSPCL. In case of refusal of power by PSPCL, the first and primary option rests with Karnataka ESCOMs as they are the principal buyers of the petitioner's generating station. Learned counsel submitted that since the Karnataka ESCOMs have exercised their first and primary option, Karnataka SLDC has denied concurrence to the applications of KSEBL.

15. The representative of SRLDC submitted that SRLDC is not a party to the decision taken by Karnataka SLDC and as per the Open Access Regulations, SRLDC has to go by the decision of Karnataka SLDC.

16. Learned counsel for PCKL submitted that ESCOMs of Karnataka have a valid claim on the quantum of 18.5 MW of power from the petitioner's generating station. The petitioner has no right to divert the above power to third party and is required to give the option of first refusal to the ESCOMs of Karnataka. Learned counsel further submitted that since the tariff for the entire 1200 MW capacity was determined by this Commission under Section 62 of the Act, there was no occasion for the petitioner to sell any part of the power under Section 63 of the Act.

17. The petitioner and KSEBL were directed to clarify whether affidavit as per Regulation 8 of the Open Access Regulations was furnished in the prescribed format to SLDC, Karnataka and submit a copy of the same. The petitioner and PCKL were directed to submit the arrangement between the petitioner and PCKL for taking 10% share of PSPCL in the petitioner's project.

18. The petitioner has filed an affidavit dated 17.2.2015 setting out the details of the arrangement with PCKL for supply of 10% share of PSPCL in the project to the Karnataka ESCOMs. The crux of the submissions of the petitioner is as under:

- (a) As per the provisions of Power Purchase Agreement entered into between petitioner and ESCOMs of Karnataka as well as between petitioner and PSPCL, power is sold ex-bus UPCL Switchyard and transmission is the responsibility of the buyers. However, PSPCL has been unable to schedule the contracted power from the generating station on account of certain issues related to the grant of open access to PSPCL, which is presently the subject matter of a different proceeding before this Commission.
- (b) The scheduling and energy accounting of petitioner's power station is under the control of SLDC Karnataka. Accordingly, the petitioner has been furnishing the capacity declaration to SLDC every day. Currently, the entire power generated by the petitioner is being scheduled by SLDC to Karnataka ESCOMs since (i) Punjab is not scheduling its share of 101.5 MW from petitioner as its power evacuation arrangement with PGCIL is yet to be concluded, and (ii) open access has not been granted for the 18.5 MW power (10% of augmented capacity of 185 MW) tied up by petitioner with KSEBL.
- (c) The supply of power by the petitioner to Karnataka ESCOMs beyond the contracted capacity of 90% of 1200 MW is being done on an ad hoc basis on the basis of scheduling by the Karnataka SLDC, and that there is no

agreement/arrangement between petitioner and Karnataka ESCOMs for diverting 10% share of Punjab (101.5 MW) as well as the 18.5 MW to the Karnataka ESCOMs.

(d) The petitioner has no intention of supplying 18.5 MW to the Karnataka ESCOMs.

However, it is constrained to declare and schedule this power through Karnataka SLDC since KSEBL has been denied open access at the instance of the PCKL.

(e) Since the entire power is being currently scheduled to Karnataka ESCOMs, monthly bills are being raised by the petitioner on Karnataka ESCOMs for the entire power scheduled to them by SLDC in accordance with the monthly energy account issued by the SLDC, and Karnataka ESCOMs are paying the capacity charges and energy charges accordingly. The payment of capacity charges for 120 MW is on ad hoc basis on account of the incapability/hurdle to supply such power to their rightful beneficiaries under the relevant contracts. The capacity charges for the 18.5 MW will be charged from KSEBL as part of single part tariff once supply to KSEBL commences.

19. PCKL vide its additional affidavit dated 23.2.2015 has submitted that in terms of the agreement, right from the COD of the Units, power generated relating to 1200 MW capacity have been supplied to Karnataka ESCOMs including the 10% capacity allocated to PSPCL. Accordingly, there has been a consistent course of action on the part of the petitioner in supplying the entire quantum of electricity to Karnataka ESCOMs who have been servicing the capital cost and paying for the entire electricity

generated and supplied. Since the petitioner has been injecting the power both in regard to the shares of PSPCL in relation to 1015 MW as well as 185 MW, the petitioner is bound to continue with such arrangement till PSPCL schedules any power from its 10% allocated capacity. PCKL has further submitted that since the tariff of UPCL project is determined on cost plus basis, the entire project cost including the associated amenities are being reimbursed by ESCOMs of Karnataka and PSPCL in terms of the PPA, the benefits also needs to be shared by the two utilities in proportion to their contracted capacity and not by any other utility/3rd party like KSEBL. PCKL has also submitted that the petitioner should not be allowed to make profit at the cost of the consumers of Karnataka at large and consumers of PSPCL by allowing sale of 18.5 MW to KSEBL at a different tariff through open access.

20. KSEBL vide its affidavit dated 23.2.2015 has placed on record the documents furnished by KSEBL to Karnataka SLDC as per Regulation 8 of the Open Access Regulations along with STOA applications and letter dated 2.5.2014 stating that KSEBL has valid agreement with M/s UPCL for purchase of power from 18.5 MW capacity. KSEBL has requested to issue necessary directions to Karnataka SLDC to issue concurrence/no-objection certificate for drawing 18.5 MW RTC power from the petitioner's project to the State of Kerala as per the provisions of the PPA dated 9.4.2014. KSEBL has sought a direction to SRLDC to consider the STOA applications of KSEBL for drawing 18.5 MW of power from the petitioner's project even if NoC is not granted by SLDC Karnataka. KSEBL has further requested to allow it to invoke the Contract Performance Guarantee deposited by the petitioner in the event SRLDC

denies open access for drawal of contracted power to Kerala, citing that the entire power from the petitioner's project is earmarked for the ESCOMs of Karnataka.

Analysis and Decision

21. We have considered the submissions of the petitioner and the respondents. The petitioner's project was initially developed for 1015 MW. The petitioner executed a PPA dated 26.12.2005 for 90% of the capacity i.e. 913.5 MW with Karnataka ESCOMs and PPA dated 29.9.2006 with PSEB (predecessor of PSPCL) for 10% i.e. 101.15 MW. Subsequently, the capacity was augmented to 1200 MW with an addition of 185 MW. Government of Karnataka vide its letter dated 3.2.2009 while according in principle no objection for expansion of the project made a condition that 90% of power generated in the entire project would be made available to Government of Karnataka as per the PPA dated 26.12.2005. Though formal amendment to the PPA dated 26.12.2005 regarding supply of 90% of augmented power has not been placed on record, there is no dispute between PCKL and the petitioner that 90% of the total capacity (i.e. 1080 MW) would be supplied to Karnataka ESCOMs. Therefore, we accept that both petitioner and PCKL have agreed for supply of 1080 MW from the petitioner's project to Karnataka ESCOMs. The petitioner vide its letter dated 25.3.2010 addressed to PSPCL stated that consequent to the environment clearance by Government of India, Ministry of Environment and Forests, the petitioner had installed all the systems and equipment to generate 1200 MW from the project and in line with the current arrangement, 10% of the electricity generated from the augmented capacity of the project would be made available to PSEB. There is no formal communication from PSEB/PSPCL accepting the



supply of 10% of the augmented capacity (18.5 MW) nor there is any agreement between the petitioner and PSEB/PSPCL to that effect. The petitioner proposed to sell this 18.5 MW power outside the State and consequently submitted the bid in response to the NIT of KSEBL and was selected as the successful bidder. The petitioner has entered into a PPA for supply of 18.5 MW to KSEBL and as per the terms of the PPA, the KSEBL applied for STOA to SRLDC for the period from June 2014 to May 2015. The petitioner applied for NOC to SLDC which is a necessary condition for applying for STOA where the transmission system of STU is involved. STU denied no objection or concurrence on the ground that the entire capacity is being scheduled by Karnataka ESCOMs. Therefore, the main bone of contention between the petitioner and the respondents is with regard to the 18.5 MW of capacity. While the petitioner claims that this capacity is untied and is available at the disposal of the petitioner for sale to any party, PCKL claims that the said power can be utilized by PSPCL and the ESCOMs of Karnataka and cannot be sold to third party like KSEBL. PCKL has also raised the issue whether the power from the generating station whose tariff has been determined by the Commission under section 62 of the Act can be sold through competitive bidding under section 63 of the Act. Considering the submissions of the parties, the following issues arise for our consideration:

- (a) Whether the 18.5 MW capacity for which PPA has been made by the petitioner with KSEBL is covered under any of the provisions of the PPAs of the Petitioner with ESCOMs of Karnataka and PSPCL?

- (b) Whether SRLDC and SLDC Karnataka have acted in accordance with the Act and Open Access Regulations by denying open access to KSEBL/Petitioner?
- (c) Whether the petitioner is permitted to sell part of the capacity to third parties through competitive bidding under section 63 of the Act?
- (d) Whether KSEBL is entitled to encash the Contract Performance Guarantee?

Issue No.1: Whether the 18.5 MW capacity for which PPA was made with KSEBL is covered under any of the provisions of the PPAs of the Petitioner with ESCOMs of Karnataka and PSPCL?

22. The petitioner's project is a Mega Power Project. As per the Policy Guidelines of Government of India (Ministry of Power), inter-State thermal generation projects of more than 1000 MW to be located in the States (other than J&K, Sikkim and seven States of North-East) shall be eligible for mega project benefits. Accordingly, the petitioner decided to supply power from 90% of the capacity to Karnataka where the petitioner's project is located and 10% of capacity to the distribution company outside the State. According to the petitioner, arrangements for supply of power from the petitioner's project was made in two stages e.g. first from the originally decided capacity of 1015 MW and subsequently from the augmented capacity of 185 MW. PPA between the petitioner and ESCOMs of Karnataka was signed on 26.12.2005 for sale of 90% of 1015 capacity i.e. 913.5 MW. Another PPA between the petitioner and PSEB (predecessor of PSPCL) was signed on 29.9.2006 for supply of balance of 10% of 1015 MW i.e. 101.5 MW. The capacity of the petitioner's project was augmented to 1200 MW in 2009. Vide letter dated 3.2.2009, Government of Karnataka conveyed its in-principle no-objection

for the expansion of the project subject to the condition that 90% of the power generated in the entire project would be made available to Government of Karnataka as per the original PPA. Vide its letter dated 25.3.2010, the petitioner intimated to PSEB to supply 10% of the augmented capacity as under:

“Currently, UPCL is required to sell 10% of the capacity generated from the project to PSEB. In line with the current arrangement, 10% of the electricity generated from the augmented capacity of the project shall be made available to PSEB.”

There was no response from PSPCL confirming acceptance of the above offer of the petitioner. In the absence of acceptance by PSPCL, it cannot be said there is an agreement between the petitioner and PSPCL for supply of 18.5 MW power. In any case, PSPCL is not scheduling the power covered under the PPA due to open access problem. The petitioner vide its letter dated 19.5.2014 informed its intention to PSPCL to sell 18.5 MW of power to third party as under:

“UPCL had entered into a Power Purchase Agreement (PPA) with Punjab State Power Corporation Limited (PSPCL) (earlier known as Punjab State Electricity Board) on 29.9.2006 for supply of 10% of 1015 MW (2x507.50 MW) from its Udupi Thermal Power Plant. UPCL consequently proposed to augment its capacity from 1015 MW to 1200 MW and offered 10% of the augmented capacity (18.5 MW) also to PSPCL vide its letter dated 25.3.2010. Since initial allocated power of 101.5 MW itself is not scheduled, and PSPCL have not indicated their willingness to accept the augmented capacity, UPCL had already made other arrangements for sale of the augmented capacity of 18.5 MW. We request PSPCL to take note of the same. This is without prejudice to any of the rights under the PPA referred above.”

There was no response from PSPCL to the above letter. In the absence of any response from PSPCL, it cannot be said that PSPCL has contracted 10% of the augmented capacity of the project. Since there is neither a PPA with PSPCL nor there is

acceptance of PSPCL for 18.5 MW capacity, we are of the view that 18.5 MW capacity is available at the disposal of the petitioner as untied capacity.

23. PCKL has taken the position that the ESCOMs of Karnataka are entitled to 100% of the petitioner's capacity as the principal buyer and that for any power refused by PSPCL, the first and primary option rests with ESCOMs of Karnataka. In this connection, PCKL has relied upon the provisions of Article 3.10 of the Power Purchase Agreement dated 26.12.2005 with Karnataka ESCOM and Article 3.10 and Annexure-5 of the PPA dated 29.9.2006 with PSPCL. The said provisions are extracted as under:

"Clause 3.10 of the PPA dated 26.12.2005

3.10 Third Party Sale:

(a) The Seller shall be allowed to sell electricity from the units beyond the target availability, subject to first right of refusal resting with the Principal Buyers;

The seller shall have right to trade the un-requisitioned capacity until the schedule is revised by the Principal Buyers with notice as per the scheduling provision in the regulation and IEGC.

Provided further that if the Commission and Principal Buyers allows the seller to sell electricity to a third party, the seller shall pay the principal buyers such charges, as applicable from time to time, for such sale as per prevailing norms and such regulations. There shall be a pro-rata reduction in the Recoverable Capacity (Fixed) Charges borne by the Principal Buyers in case the total energy dispatched is less than 90% of the Target Availability as decided by the Commission.

(b) For supply of electricity to third party, above target availability, the profit net of all costs including transmission charges, wheeling charges etc paid to various power utilities and extra charges incurred by the Company towards O&M charges shall be shared in the ratio of 50:50.

Clause 3.10 of the PPA dated 29.9.2006

3.10 Third Party Sale:

The seller shall have right to trade the un-requisitioned capacity until the schedule is revised by the buyer with notice as per the scheduling provision as per the regulation and IEGC. There will be a pro-rata reduction in the recoverable fixed charges borne by the buyer.

Annexure 5 of the PPA dated 29.9.2006

Supply of Power on Short Term Basis

In case of surplus power available with seller, after the first right of refusal by five ESCOM's of Karnataka, the seller will offer this power to buyer, who will have the right to either accept or reject such available power. Seller shall arrange to supply such power to buyer at negotiated rate to buyer subject to availability of transmission corridor. LEUL shall assist in arranging the short-term transmission corridor."

24. Clause 3.10 of the PPA dated 26.12.2005 permits the petitioner to sell electricity from the units of the project beyond the target availability subject to first right of refusal resting with the principal buyers. Further, the petitioner has the right to trade the un-requisitioned capacity until the schedule is revised by the principal buyers with notice as per the scheduling provision of the Grid Code. The term "principal buyers" has been defined in the PPA dated 26.12.2005 as BESCO, MESCOM, GESCOM, HESCO and CESCO and their authorized representatives. Target Availability has been defined "in relation to the Unit for recovery of full capacity (fixed) charges for any period means the availability value of 80% or as enhanced by the Commission from time to time". Therefore, as per Clause 3.10, the petitioner can sell power to third parties beyond the target availability of 80% of the contracted capacity of 1080 MW subject to first right of refusal of the Karnataka ESCOMs or the un-requisitioned power within the contracted capacity till the schedule is revised by ESCOMs of Karnataka. Clearly, Clause 3.10 does not authorize ESCOMs of Karnataka to avail the un-requisitioned power from the 10% capacity tied up with PSPCL. In case of the PPA dated 29.9.2006 with PSPCL,

the petitioner has the right to trade un-requisitioned capacity until the schedule is revised by PSPCL with notice as per the scheduling provision of the Grid Code. Further, Annexure-5 of the said PPA provides that in case of surplus power available with the petitioner after the first right of refusal by ESCOMs of Karnataka, the petitioner shall offer this power to PSPCL who shall have the right to either accept or reject such power. The petitioner is also required to arrange to supply such power to PSPCL at negotiated rates subject to availability of transmission corridor. The surplus power refers to the power which remains un-requisitioned by the Karnataka ESCOMs out of their contracted capacity of 90%. This provision does not cover the scheduling of 10% of power of PSPCL on the ground that the same power has not been requisitioned by PSPCL. Therefore, while there is first right of refusal vested in Karnataka ESCOMs in the PPA dated 26.12.2005 relating to their contracted capacity, there is no corresponding provision in the PPA dated 29.9.2006 under which the Karnataka ESCOMs can claim first right of refusal over the power which has been tied up through PPA with PSPCL. In our view, Karnataka ESCOMs do not have first right of refusal over the capacity tied up with PSPCL or the capacity which is available exclusively at the disposal of the petitioner. Subject to the permission of PSPCL, the petitioner can sell 10% of the contracted capacity to the Karnataka ESCOMs or third parties. In so far as the untied capacity of 18.5 MW is concerned, there is no contractual obligation on the part of the petitioner to sell this power either to ESCOMs of Karnataka or to PSPCL. PCKL has submitted that there has been a consistent course of action on part of the petitioner in supplying the entire quantum of electricity to the ESCOMs of Karnataka who have been servicing the capital cost and paying the tariff for the entire electricity

generated from the project. PCKL has submitted that this consistent course constitutes a contractual arrangement between the two parties for sale and purchase of electricity and a procurement process within the meaning of Section 86 (1) (b) of the Act. We are not in agreement with the views of PCKL. The fact that the petitioner has been scheduling the entire capacity of the project to Karnataka ESCOMs pending finalization of the long term arrangement for delivery of power to PSPCL does not vest power on the Karnataka ESCOMs to claim first right of refusal on 10% capacity of the original capacity contracted by PSPCL or 10% of the augmented capacity which is at the disposal of the petitioner.

Issue No. 2: Whether SRLDC and SLDC Karnataka have acted in accordance with the Act and Open Access Regulations by denying open access to KSEBL/Petitioner?

25. The petitioner based on the competitive bidding carried out by KSEBL under section 63 of the Act was selected as the successful bidder for supply of 18.5 MW power to KSEBL from 1.6.2014 to 31.5.2015. As per the PPA dated 9.4.2014 between the petitioner and KSEBL, the delivery point is the Udupi Thermal Power Station Switchyard. Further, the PPA provides that KSEBL shall be responsible to seek open access approval from the competent authority upto Kerala periphery and shall be responsible to pay all open access charges beyond the delivery point including intra-State open access charges, transmission charges and losses alongwith SLDC charges, CTU injection and withdrawal charges and losses and RLDC scheduling charges etc. KSEBL has placed on record the applications for Short Term Open Access for bilateral transactions made to RLDC and for concurrence made to SLDC in accordance with the

Open Access Regulations for the periods from 1.6.2014 to 30.6.2014, 1.7.2014 to 31.7.2014, 1.8.2014 to 31.8.2014, 1.9.2014 to 30.9.2014, 1.10.2014 to 31.10.2014, 1.11.2014 to 30.11.2014, 1.12.2014 to 31.12.2014, 1.1.2015 to 31.1.2015 and 1.2.2015 to 28.2.2015. As per Regulation 8(1) of the Open Access Regulations, “wherever, the proposed bilateral transaction has a State Utility or an intra-State entity as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted alongwith the applications.” According to SRLDC, since no communication was received by KSEBL from SLDC Karnataka, KSEBL submitted an affidavit alongwith STOA applications for the months of June, July and August 2014. Proviso under Regulation 8(4) (c) provides that “the concerned Regional Load Despatch Centre in case of bilateral transactions and concerned power exchange in case of collective transactions for day ahead or for bilateral intra-day transaction/contingency transaction through power exchange shall forward the affidavit alongwith the documents to the concerned SLDC on the same day it is received.” Accordingly, SRLDC forwarded the documents submitted by KSEBL to Karnataka SLDC the same day it was received. Karnataka SLDC in its communication dated 23.5.2014 conveyed its non-concurrence. SRLDC conveyed to KSEBL vide its letter dated 23.6.2014 that as concurrence was refused by Karnataka SLDC, SRLDC was not in a position to process the application and rejected the request of KSEBL for short term open access. Similarly, applications for the months of August, September, October and November 2014 were rejected vide letters dated 23.6.2014, 16.7.2014, 6.9.2014 and 29.9.2014 respectively.

26. In our view, SRLDC has acted in accordance with the Open Access Regulations while dealing with the applications for short term open access by KSEBL. SRLDC is not required to scrutinize whether the no-concurrence received from SLDC is correct or not. Since SLDC has conveyed no-concurrence, SRLDC has no other option but to reject the applications indicating the reasons for rejection. Therefore, the prayers made by the petitioner against SRLDC (Respondent No.3) are rejected.

27. The petitioner has submitted that KSEBL had also filed an application dated 29.4.2014 for medium term open access for the period from 1.10.2014 to 31.5.2015. Since State transmission system is involved, NoC was required from SLDC. Karnataka SLDC has denied concurrence for MTOA vide its letter dated 23.6.2014. Central Transmission Utility which is responsible for grant of MTOA in its letter dated 10.6.2014 has intimated that though there were margins in Available Transfer Capability for import of power to Kerala, MTOA cannot be granted due to limitation in ATC for import between S1 & S2 areas and has accordingly closed the application. Since PGCIL (CTU) has not been made a party to the petition, we consider it appropriate not to deal with the issue of MTOA.

28. SLDC Karnataka has conveyed no-concurrence on the ground that as per the decision of PCKL, the entire 100% power generated by M/s UPCL shall be made available to ESCOMs of Karnataka State who are the principal buyers of UPCL power. It is to be noted that SLDC is required to schedule the power under open access in accordance with provisions of the Act and Open Access Regulations. Section 32(2)(a) of the Act provides that SLDC “shall be responsible for optimum scheduling and

dispatch of electricity within a State, in accordance with the contracts entered into with the licensees or generating companies within the State.” Though UPCL is an inter-State generating station, it is connected to the grid through the system of the STU and accordingly, the scheduling and dispatch functions have been vested with the Karnataka SLDC. While discharging the functions under the Act, the Karnataka SLDC is required to go by the plain language of the PPA and not on the basis of the decision of an interested party with regard to the PPA. Further Regulation 8(3) (b) of the Open Access Regulations requires the SLDC to verify only three conditions while considering the application for grant of short term open access. Regulation 8(3) (b) of Open Access Regulations is extracted as under:

“(b) While processing the application for concurrence or ‘no objection’ or prior standing clearance, as the case may be, the State Load Despatch Centre shall verify the following, namely-

(i) existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force,

(ii) availability of surplus transmission capacity in the State network.

(iii) submission of affidavit regarding existence of valid contract according to the second proviso to sub-clause (a) of clause (3) of this regulation with respect to bilateral transactions and according to the last proviso with respect to collective transactions.

(c) Where the existence of necessary infrastructure, availability of surplus transmission capacity in the State network and submission of affidavit as required under provisos to sub-clause (a) of clause (3) of this regulation have been established, the State Load Despatch Centre shall convey its concurrence or no objection or prior standing clearance, as the case may be, to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, within three (3) working days of receipt of the application.”

29. Proviso to sub-clause (a) of clause (3) of Regulation 8 of the Open Access Regulations provides as under:

“Provided further that while making application to the SLDC for obtaining Concurrence for bilateral transactions (except for intra-day transaction/contingency transactions), an affidavit in the format prescribed in the Detailed Procedure, duly notarized, shall be submitted, along with the application, declaring that:

- (i) There is a valid contract with the concerned persons for the sale of the power under the proposed transaction for which concurrence is applied and;
- (ii) There is no other contract for sale of the same power as mentioned in (i) above.”

According to the above provisions, three requirements are to be fulfilled, namely, existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the Grid Code, availability of surplus transmission capability in the State network, and submission of affidavit regarding existence of valid contract. Existence of valid contract has two elements, namely, valid contract with the concerned persons for sale of power under the proposed transaction for which concurrence has been applied for, and there is no other contract for sale of such power. Once these conditions are fulfilled, SLDC is bound to convey its concurrence or no objection. It is noted that Karnataka SLDC did not respond to the applications of KSEBL within a period of three days as required under the Open Access Regulations. It only acted after SRLDC forwarded the affidavit of KSEBL in terms of Regulation 8(4) (c) of Open Access Regulations. Karnataka SLDC did not grant concurrence citing the following reasons:

“As per the decision taken by PCKL, KSEB’s STOA application for export of 18.5 MW power from M/s UPCL to KSEB for the month of June 2014 and July 2014 is not considered, since the entire 100% power generated by M/s UPCL shall be made available to ESCOMs of Karnataka State, who are the principal buyers of UPCL power.”

The sole ground taken by Karnataka SLDC for not granting the concurrence is the decision taken by PCKL that 100% power generated by the petitioner shall be made

available to Karnataka ESCOMs being the principal buyers. It appears that SLDC Karnataka was guided by the decision of PCKL and has not independently satisfied itself whether there is a PPA for the same capacity for which open access was sought. If there was a pre-existing PPA for the certain capacity and the open access applicant produces another PPA for the said capacity, then the SLDC is within its power to refuse concurrence or no-objection as the SLDC is not the forum to decide which PPA is valid and adjudicate the conflicting claims of the parties. In its reply before the Commission, Karnataka SLDC has stated the following reasons for denial of open access:

“I say that when the petitioner sought to supply electricity to the Respondent No.5 and applied for open access, Respondent No.4 which acts on behalf of the distribution licensees in the State of Karnataka represented that in terms of contractual obligations of the petitioner, the petitioner is first required to supply 90% of the electricity to the electricity distribution licensees in Karnataka and 10% to Punjab. Since any power refused by PSPCL/PSEB, the first and primary option rests with ESCOMs of Karnataka, as the ESCOMs of Karnataka are the principal buyers of UPCL power. Therefore, distribution licensees are entitled to the said electricity of 18.5 MW and therefore, open access consent to Kerala was not granted.”

30. From the above submissions of Karnataka SLDC, it emerges that Karnataka SLDC was solely guided by the representation of PCKL and has not satisfied itself on the basis of the PPAs whether Karnataka ESCOMs enjoy the first and primary option over the power of PSPCL in case the latter do not schedule power. After considering the claim of PCKL, Karnataka SLDC denied concurrence to KSEBL. As per the Open Access Regulations, Karnataka SLDC was required to check whether three requirements are satisfied, namely, whether there was transmission margin to accommodate the requirement, whether there was necessary infrastructure for scheduling and energy metering as per the Grid Code and whether there no other PPA

for the same capacity. Karnataka SLDC has not denied the concurrence on any of these counts but has been guided by the claims of PCKL without verifying such claims on the basis of the PPAs. In our view, Karnataka SLDC has not complied with the Open Access Regulations while denying concurrence for short term open access to KSEBL for 18.5 MW.

31. Karnataka SLDC has relied on the judgment of the Appellate Tribunal for Electricity in Appeal No.171 of 2013 (Ravikaran Power Projects Private Ltd. Vs State Load Despatch Centre, Karnataka & Others) in support of its action to deny open access on the representation of PCKL. The Appellate Tribunal in the said judgment observed as under:

“15. It is correct that as per the Inter-State Open Access Regulations, the SLDC has to verify the availability of metering and energy accounting infrastructure and surplus transmission capacity before granting “No Objection” to an Applicant for inter-state open access. However, the SLDC has to also consider the responsibility entrusted upon it under the Electricity Act, 2003 to schedule and dispatch electricity within the State in accordance with the contracts entered into between the Distribution Licensee and the generating company. When the Distribution Licensee is claiming that it has a valid PPA with the generating company and power from the generating station has to be dispatched within the State for consumption by the Distribution Licensee, then the SLDC cannot give “No Objection” for inter-State open access for the same power, ignoring the claim of the Distribution Licensee. The SLDC cannot decide whether the Termination Notice served by the Appellant was valid or not or whether the default of non-payment of dues has been remedied by GESCOM. Only the State Commission is empowered to adjudicate upon the dispute regarding termination of the PPA between the Appellant and GESCOM under Section 86(1) (f) of the Electricity Act, 2003.

16. The Central Commission has correctly held that they would deal with the issue only after the termination of the PPA has been found to be valid by the State Commission as the adjudication of dispute between the Appellant and GESCOMs is within the jurisdiction of the State Commission u/s 86(1)(f) of the Act.”

32. In Ravikiran's case, there was a PPA between the generator and GESCOM which Ravikaran terminated by giving a notice under the PPA. Against the said termination, GESCOM filed a petition before the State Commission. In the meantime, Ravikiran entered into another PPA to sell that power and sought short term open access which was denied by SLDC. In that context, Ravikaran filed the petition before this Commission and the Commission after considering the facts came to the conclusion that SLDC could not be expected to adjudicate the dispute regarding validity of PPA which fell within the jurisdiction of the State Commission. The decision of the Commission was upheld as per the judgement quoted above in which the Appellate Tribunal has held that when the distribution licensee was claiming that "it has a valid PPA with the generating company and power from the generating station has to be dispatched within the State for consumption by the Distribution Licensee, then the SLDC cannot give "No Objection" for inter-State open access for the same power, ignoring the claim of the Distribution Licensee". In the present case, though PCKL on behalf of ESCOMs was claiming that it had the right to get 100% power from the petitioner's project, Karnataka SLDC did not appear to have satisfied itself on the basis of the PPA whether the claim of PCKL was correct or not. Without verifying the factual position, Karnataka SLDC did not honour the PPA between the petitioner and KSEBL and rejected the application for concurrence for open access. In our view, Ravikiran's case is factually different from the present case and denial of concurrence by Karnataka SLDC cannot be sustained. We direct Karnataka SLDC to grant no objection or concurrence for 18.5 MW if the petitioner or the buyer produces a valid PPA for sale of such power.

Issue No. 3: Whether the petitioner is permitted to sell part of the capacity to third parties through competitive bidding under Section 63 of the Act?

33. PCKL has raised the point that since the tariff of the petitioner's generating station is determined in accordance with the Tariff Regulations of the Commission under Section 62 of the Act, part of the capacity of the generating station cannot be sold through competitive bidding under Section 63 of the Act. PCKL has submitted that once the tariff for the entire capacity of the project has been determined under Section 62 of the Act, it is not upto the project developer to sell any part of such capacity under any other tariff. The petitioner has submitted that the tariff regulations of the Commission for the period 2014-19 allows for such sale of power from a generating station at price other than the tariff determined under Section 62 of the Act. The petitioner has further submitted that there are number of instances where the tariff of the generating station has been determined under Section 62 of the Act and part capacity of the generating station is available as merchant capacity. The petitioner has further submitted that para 5.7.1 of the National Electricity Policy which allows 15% of capacity to be sold outside the long term PPA contemplates part of the capacity of the plant being tied up with distribution companies on long term basis and the rest being available as merchant capacity and such a structure necessarily requires a separation in terms of capacity for which tariff is regulated under Section 62 while the other being priced through negotiation or bidding.

34. We have considered the submission of the petitioner and PCKL. The petitioner has relied upon para 5.7.1 and Regulation 6 (5) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff

Regulations) in support of its contention that part capacity of the project whose tariff is determined under section 62 of the Act can be sold under section 63 of the Act. Regulation 6(5) of 2014 Tariff Regulations is extracted as under:-

“(5) Where only a part of the generation capacity of a generating station is tied up for supplying power to the beneficiaries through long term power purchase agreement and the balance part of the generation capacity have not been tied up for supplying power to the beneficiaries, the tariff of the generating station shall be determined with reference to the capital cost of the entire project, but the tariff so determined shall be applicable corresponding to the capacity contracted as per supply to the beneficiaries.”

The above provision clearly recognizes that if part of the capacity is tied up through long term power purchase agreement, the tariff of the generating station determined on the basis of the Tariff Regulations shall be applicable to the corresponding capacity only. The said regulation is silent as to how the tariff of the balance capacity shall be determined. The petitioner has submitted that in terms of para 5.7.1 of the National Electricity Policy, it is permissible to sell part of the capacity outside long term PPA. Para 5.7.1 of the National Electricity Policy provides as under:

“5.7.1 To promote market development, a part of new generation capacities, say 15% may be sold outside long term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long term power purchase agreement framework. In the coming years, a significant portion of the installed capacity of the new generating stations could participate in competitive power markets. This will increase the depth of the power market and provide alternatives for both generators and licensees/consumers and in the long run would lead to reduction in tariff.”

It clearly emerges that a generating company which has long term PPAs for part of its capacity can sell the power from the remaining part of capacity outside long term PPAs. Therefore, we are not in agreement with PCKL that a generating company whose tariff is determined under section 62 of the Act has to necessarily sell power from its

entire capacity at the determined tariff. There is another reason as to why a generating company will be required to sell its future capacity or untied capacity under section 63 of the Act. In terms of para 5.1 of the Tariff Policy, power procurement by the distribution companies from the generating companies other than State controlled companies shall be on competitive bidding basis on or after 6.1.2006 (extended in cases of PPAs entered prior to 30.9.2006) and with effect from 6.1.2011, procurement of power by distribution companies through competitive bidding has been made mandatory. As per the above provision, the petitioner can only find the beneficiary for 18.5 MW capacity through participating in the competitive bidding under section 63 of the Act since all procurements by the distribution companies will be through competitive bidding only.

35. The question whether para 5.1 of the Tariff Policy will supersede section 62 of the Act was considered by the Appellate Tribunal in Appeal Nos. 106 & 107 of 2009 in which it was held as under:

“18. Thus these Sections provide for 2 alternatives to the concerned parties to procure power with the approval of tariff by the Appropriate Commission. These 2 alternatives are as follows:

(i) Under Section 62 (1) (a), the Appropriate Commission shall determine the tariff for the supply of electricity by a generating company to a distribution licensee.

(ii) Under Section 63, when the tariff has been determined by the Competitive Bidding Process, the Appropriate Commission shall adopt such tariff. The wording contained in Sections 62 and 63 of the Act would make it clear that Section 63 is not couched as a non-obstante clause being an exception carved out from Section 62. Section 62 is a substantive provision. Section 63 is an exception. So the exception contained in Section 63 cannot override the scope of the substantive namely Section 62. In other words, Section 62 provides substantive power to the Appropriate Commission for determination of tariff with the sole exception of price discovery through the Competitive Bidding Process under Section 63.

19. Clause 5.1 of NTP provides that the power procurement for future should be through a transparent Competitive Bidding Process using the guidelines issued by the Central Government on 19.01.2005.

.....

22. In the light of the above rationale laid down by the Supreme Court, clause 5.1 of the NTP which is a subordinate legislation would not restrict or whittle down the scope of the statutory powers conferred to a State Commission under Section 62 (1) (a) especially when it is noticed that clause 5.1 of NTP would apply to Section 63 only and not to Section 62 which is a substantive provision. As stated above, Section 63 is an exception to Section 62 and the same cannot be taken away by way of a policy document like guidelines – clause 5.1 of NTP.

23. Secondly it has been held that clause 5.1 of the NTP which is a policy direction cannot be held to control or override Section 62 of the Act and when these two provisions cannot be reconciled, Section 62 alone must prevail.”

36. Thus the above judgment clearly provides that even though Para 5.1 of Tariff Policy mandates procurement of power through competitive bidding, it cannot take away the power of the Commission to determine tariff under section 62 of the Act. Though this decision has been challenged in the Supreme Court, there is no stay on the said judgment. Therefore, the present position is that tariff determination under both section 62 and section 63 is possible and distribution companies can buy power at the tariff determined under section 62 of the Act or at the tariff discovered through competitive bidding and adopted under section 63 of the Act. Considering the above legal position, we are of the view that the petitioner may find a buyer outside the State for purchase of power from 18.5 MW capacity at the tariff determined by the Commission or through competitive bidding under section 63 of the Act. In case, the buyer is selected for supply of power at the tariff determined by the Commission, then the said tariff will apply and in case the buyer is selected through competitive bidding, the tariff discovered and adopted under section 63 will apply. It is however made clear that in case the tariff

discovered through competitive bidding is more than the tariff determined by the Commission, the excess tariff shall be shared with the original beneficiaries of project in proportion to their shares.

37. It is pertinent to mention that the project was accorded mega power status on account of its inter-State character and was eligible for various concessions/benefits offered by Central Government. The petitioner was required to sell at least 10% of the power outside the State in which the project is located. Mere identifying a buyer outside the State and entering into long term PPA but without scheduling of power corresponding to contracted capacity defeats the very purpose of mega power policy of the Central Government. It is further noted that the petitioner has not explained as to why the power cannot be scheduled to PSPCL. As per the PPA, it is the UPCL's responsibility to arrange long term access. In this connection, relevant portion of Annexure 5 to the PPA is extracted as under:

"Long Term Open Access shall be arranged by Seller from Power Grid Corporation of India (PGCIL). Lanco Electric Utility Limited (LEUL) will assist and facilitate Seller and Buyer in obtaining necessary approval for getting Long Term Open Access arrangement. Buyer shall provide all support and assistance in terms of documentation, date, etc in obtaining the required permission/ approval. Necessary approval, if required of the Commission on Long Term Open Access arrangement shall be obtained."

Further, Article 4.9 of the PPA with PSPCL provides as under:

"The Buyer shall enter into appropriate agreements with KPTCL and PGCIL for evacuation and transmission of Power for which Seller will provide all necessary assistance. Buyer shall pay the Transmission and Long Term Open Access charges to KPTCL/ PGCIL as approved by the Commission."

Since the responsibility to arrange and facilitate long term access for evacuation and transmission of power towards the share of PSPCL rests with the petitioner, it is

expected that the petitioner should have taken pro-active steps to ensure that power is scheduled to PSPCL at the earliest.

38. It is an admitted fact that presently entire power is scheduled to Karnataka ESCOMs. If the generating station is going to cater to the requirement of a single State, it acquires a character of intra-State entity which in normal course would not have been eligible for benefits under mega power policy. In our view, the petitioner should take effective steps to facilitate scheduling of power to PSPCL or in the event of PSPCL expressing unwillingness or inability to off-take the power corresponding to its contracted capacity, the petitioner should find a new beneficiary in order to retain the mega power status and inter-State character of its project. If the petitioner does not take steps to schedule power to a beneficiary outside the State of Karnataka, the Commission directs the Ministry of Power to review the mega power status of the petitioner's project and take necessary action as may be considered appropriate.

Issue No. 4: Whether KSEBL is entitled to encash the Contract Performance Guarantee?

39. KSEBL has requested the Commission to issue directions to SLDC Karnataka to issue concurrence and no objection certificate and to SRLDC to consider the STOA application of KSEBL. KSEBL has further submitted that in the event SLDC Karnataka and SRLDC deny open access for drawal of contracted power to Kerala, KSEBL be permitted to invoke Contract Performance Guarantee deputed by the petitioner. In the light of our decision on Issue Nos.1 & 2 above, we vacate the stay on the encashment

of Contact Performance Guarantee. KSEBL is at liberty to take action as may be considered necessary in terms of the PPA with petitioner.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

