

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Bhanu Bhushan, Member**
2. **Shri R. Krishnamoorthy, Member**

Petition No. 108/2007

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with regulation 35 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004.

And in the matter of

1. Tata Power Co. Ltd., Mumbai
 2. Viswanath Sugar Ltd., Mumbai
- ... **Petitioners**

Vs

1. Western Regional Load Despatch Centre, Mumbai
 2. State Load Despatch Centre, Bangalore
 3. Karnataka Power Transmission Corp. Ltd., Bangalore
 4. Hubli Electric Supply Co. Ltd., Hubli
- **Respondents**

Petition No. 114/2007

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with regulation 35 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004.

And in the matter of

1. Ugar Sugar Works Ltd., Sangli
 2. Tata Power Co. Ltd., Mumbai
- ... **Petitioners**

Vs

1. Karnataka Power Transmission Corp. Ltd., Bangalore
 2. Hubli Electric Supply Co. Ltd., Hubli
 3. Western Regional Load Despatch Centre, Mumbai
 4. State Load Despatch Centre, Bangalore
- **Respondents**

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with regulation 35 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004.

And in the matter of

1. Shree Dhoodhaganga Krishna Sahakari Sakkere
Karkhane Niyamit, Chikodi
2. Tata Power Co. Ltd., Mumbai ... **Petitioners**

Vs

1. Karnataka Power Transmission Corp. Ltd., Banglaore
2. Hubli Electric Supply Co. Ltd., Hubli
3. Western Regional Load Despatch Centre, Mumbai
4. State Load Despatch Centre, Bangalore **Respondents**

The following were present:

1. Shri Sunil Agrawal, AGM, TPTCL
2. Shri Sanjay Sen, TPCL, USWL, VSL, & SDKSSKN
3. Prabhuling Navagi, Tata Power Co. Ltd
4. Shri S.S. Sardesai, USWL
5. Shri Mukesh Kumar, Viswanath Sugars Ltd.,
6. Shri M.G. Ramachandra, KPTCL
7. Shri Anand K. Ganesan, KPTCL
8. Shri Hiremath, Director (Law), KPTCL
9. Ms Swapna Seshadri, KPTCL

**ORDER
(DATE OF HEARING: 20.11.2007)**

These applications have been made under similar facts and with almost identical prayers. Therefore, we propose to deal with these applications with reference to the facts stated in Petition No.108/2007. The prayers made in the application are extracted hereunder:

“In the facts and circumstances, it is most respectfully prayed that the Hon’ble Commission may be pleased to:

- (a) Direct the WRLDC to grant open access for the months of October, 2007, in terms requested by the Petitioner No.1 in its application dated _____;

(b) Direct the WRLDC to consider only those technical issues which are provided in the Electricity Act, 2003 and the CERC Regulations, and clarify that WRLDC cannot deny open access on the ground of existence of alleged Power Purchase Agreement etc.;

(c) Set aside the endorsement made by Chief Engineer – SLDC, KPTCL dated 20/21.8.2007 in the “Request For Consent For Short Term Open Access”, being Annexure P-16 of the present petition;

(d) pass such other or further order or orders as this Hon’ble Commission may deem fit and proper in the circumstances of this case.”

2. Viswanath Sugar Ltd., the second petitioner, hereinafter referred to “VSL”, has set up a co-generation plant at Belgaum in the State of Karnataka. It had executed a Power Purchase Agreement dated 26.7.2001 (PPA), initially valid for a period of 20 years, with Karnataka Power Transmission Corporation Limited, the third respondent, hereinafter referred to as “KPTCL”, for sale of power. Consequent to reorganization of KPTCL and creation of the distribution companies in the State of Karnataka, the PPA was assigned to Hubli Electricity Supply Co. Ltd., the fourth respondent, hereinafter referred to as “HESCOM” in terms of an agreement dated 9.6.2005. It is provided in clause 9.1 of the PPA that in the event of any payment default by HESCOM for a continuous period of three months, VSL can sell power to third parties in accordance with clause 5.2 thereof. It has been stated that HESCOM defaulted in making payment of dues from January to April 2006 for the electricity purchased under the PPA. It is further stated that HESCOM has also not provided any payment security mechanism, required under the PPA. In view of these defaults, VSL approached Karnataka Electricity Regulatory Commission (KERC) for recovery of its dues and for a direction to HESCOM to provide payment security mechanism or in the alternative to grant permission to VSL to sell power to the third

parties. The application made before KERC was disposed of by order dated 18.1.2007 with the following directions:

“It is submitted by the counsel for the petitioner that the petitioner has started selling power to the third party in pursuance of the provisions of the PPA and in terms of the observations of the Commission earlier. He has also been paid the amount by the respondent, which was due as on the date of the petition. Nothing remains further to adjudicate. Hence the petition is disposed of with liberty to come up with fresh petition if required in future.”

3. Earlier, KERC through its interim order dated 13.7.2006 is stated to have had permitted VSL to sell power generated by it to third parties pending further hearing on the main issue of opening of letter of credit. The order dated 13.7.2006 is also extracted hereunder:

“Counsel for the petitioner submits that the respondent 2 has defaulted for more than 3 months in payment and because of that all operations of the petitioner have stopped. Mr. Hiremath who represents the respondent has submitted that as per clause 9(1) read with 5.2 of the PPA dated 26-7-2001, as modified by supplemental agreement dated 9-6-2005, the petitioner is at liberty to sell the power to third parties and respondents have no objection to this. In view of this petitioner is permitted to do so namely sell the power generated by it to third parties pending further hearing on the main issue of opening of letter of credit.”

4. VSL has averred that in view of the orders of the KERC, PPA signed by it with HESCOM stands abandoned and accordingly it has entered into a Power Purchase Agreement dated 18.7.2006 with Tata Power Trading Company Limited, the first petitioner, hereinafter referred to as “Tata”, valid for a period of three years, and extendable further by mutual consent, for sale of 7.5 MW of power on round-the-clock basis, starting from 1.9.2006.

5. Pursuant to the PPA, Tata applied for grant of open access to Western Regional Load Despatch Centre, the first respondent, hereinafter referred to as "WRLDC", in terms of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2004 as amended, hereinafter referred to as "the open access regulations", for the months of September, October and November 2006. However, Tata was initially allowed open access for the month of September 2006. Subsequently, based on applications stated to have been made by Tata, open access was allowed for the months of December 2006 to May 2007 by KPTCL. Tata is said to have made an application for grant of open access for the month of June 2007, which was denied. Consequently, it made an application before Member-Secretary, Southern Regional Power Committee, hereinafter referred to as "the Member-Secretary", under Regulation 35 of the open access regulations. In the proceedings before the Member-Secretary, HESCOM is stated to have objected to grant of open access to Tata on the ground that the former had valid PPA with VSL and that the State of Karnataka was facing acute shortage of power. Therefore, it was urged by HESCOM before the Member-Secretary that Tata who purchased power from VSL could not be granted open access. However, before the Member-Secretary could give its decision on the application made by Tata, Chief Engineer, Karnataka State Load Despatch Centre, the second respondent, hereinafter referred to as "SLDC", by its letter dated 23.5.2007 conveyed consent for grant of open access for the month of June 2007. In this manner, Tata was able to get open access for the month of June 2007 and subsequently for the months of July and September 2007 also.

6. As may be noted from the prayers extracted above, the present dispute relates to grant of open access for the month of October 2007. Tata's application for open access for that month for conveyance of power to Gujarat Urja Vikas Nigam Ltd. was not granted by WRLDC on the ground of "No comments from KPTCL". It is alleged by the petitioners that denial of open access is motivated by commercial considerations and is totally in contravention of the provisions of the Electricity Act, 2003 and the open access regulations. It has been pointed out that the reason for 'no comments' by KPTCL is the endorsement dated 20/21.8.2007 made by the Chief Engineer, SLDC, wherein the ground for rejection is stated to be the existence of a PPA between VSL and HESCOM, who intends to avail entire power in terms of PPA.

7. A reply has been filed on behalf of HESCOM. The gravamen of the submissions made by HESCOM is that it is entitled to secure electricity generated by VSL who in terms of the PPA is bound to supply electricity to HESCOM. It is emphasized that VSL cannot be allowed to sell electricity to any third party (Tata in the present case) in violation of its obligations under the PPA. It is stated that the agreement still continues to be valid since it has not been terminated or cancelled in terms of clause 9.3 of the PPA. It is further averred that any dispute or difference between VSL and HESCOM is to be adjudicated by KERC in terms of Section 86 (1) (f) of the Electricity Act, 2003. HESCOM has urged that by granting open access to the petitioners this Commission would be assisting VSL, to breach of its obligations under the PPA, though the public authorities have to ensure that the persons seeking open access are not facilitating breach of the existing valid agreements. HESCOM has argued that sale of power by VSL

to the third parties will cause disruption of supply of electricity in the State of Karnataka. HESCOM has denied that the PPA entered into by it with VSL stands abandoned since, according to it, the process laid under clause 9 of the PPA for termination thereof has not been complied with as VSL has not taken any steps in that direction. Under these circumstances, HESCOM has sought a direction to the petitioners to approach KERC, which is said to be the proper authority for exercise of jurisdiction in the matter, for appropriate decision since, in the reckoning of HESCOM, question of open access will arise only after an appropriate decision on the status of the PPA by the State Commission and not otherwise.

8. We heard Shri Sanjay Sen, Advocate, for the petitioners and Shri M.G. Ramachandran, Advocate, for the contesting respondents, namely, KPTCL, SLDC and HESCOM. At the hearing, Shri Ramachandran, learned counsel repeatedly emphasized that HESCOM was ready to purchase whole of the power generated at the generating station owned by VSL at the rates agreed upon between them and in terms of the PPA and under these circumstances the question of grant of open access to Tata should not arise.

9. In terms of our orders dated 20.11.2007 and 21.11.2007, liberty was granted to the parties to file written submissions. This opportunity has been availed of by the petitioners. The written submissions have not been filed on behalf of the respondents.

10. It is to be noticed here that the petitioners were granted open access from 17.10.2007 to 30.11.2007 after certain interim orders were made by the Commission. Therefore, strictly speaking, the present application has become infructuous since the dispute raised relates to the month of October 2007. However, considering the fact that the dispute is of the recurring nature and the issues are likely to arise in future as well, we are proceeding with the matter.

11. At the hearing learned counsel for the parties made elaborate arguments on the scope of the PPA between VSL and HESCOM and the implications of KERC's orders dated 13.7.2006 and 18.1.2007. Shri Sen, learned counsel argued that the PPA stands abandoned in view of the orders of KERC and consequent agreement for sale of power to Tata. Per contra, Shri Ramachandran, learned counsel argued that since the process under clause 9.3 has not been followed for terminating the PPA, the PPA between HESCOM and VSL continued to be valid and in force. The learned counsel argued that KERC's orders cannot be construed to have resulted in termination of the PPA. Therefore, it was urged, HESCOM had a superior right to buy power from VSL. It was also stated that all the dues of VSL had been settled by HESCOM. In view of this assertion, it was argued that the petitioners could not be allowed open access for conveyance of electricity outside the State of Karnataka. Shri Ramachandran sought to impress upon us that the petitioners in the first instance be relegated to KERC who is competent forum having jurisdiction to adjudicate upon the continuity of the PPA.

12. In the present case, based on available records it has been established without an iota of doubt that:

- (a) There was a payment default on the part of HESCOM in respect of power purchased from VSL under the terms of the PPA.
- (b) As a consequence of the payment default, certain rights accrued in favour of VSL under clause 9.1 of the PPA.
- (c) HESCOM approached KERC for enforcement of its rights under the PPA for appropriate directions to HESCOM.
- (d) In the proceedings before KERC it was stated on behalf of the respondents that as per clause 9.1 read with clause 5.2 of the PPA, VSL was at liberty sell power to the third parties to which respondents had no objection.
- (e) KERC through its interim order dated 13.7.2006 and after taking cognizance of the submission made by Shri Hiremath, KPTCL, (also present at the hearing before this Commission), permitted VSL to sell the power generated by it to the third parties, pending further hearing on the main issue of opening of letter of credit.
- (f) KERC disposed of the petition by its order dated 18.1.2007 after taking note of the submission of VSL that it was paid the amount due on the date of filing of the petition and that it had started selling power to third party in terms of the provisions of the PPA and interim order of KERC.
- (g) VSL signed the PPA with Tata for sale of its power after interim order of KERC (made at the instance of the respondents).

- (h) HESCOM has released the pending payments, and payment default has been cured.
- (i) Right to sell power to third parties in line with clause 9(1) of the PPA has been conferred on VSL by KERC and accepted by the respondents.
- (j) KERC did not go into the issue of letter of credit while disposing of the petition at the subsequent hearing held on 18.1.2007, perhaps because sale of power to HESCOM was no longer contemplated.

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 to 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.

14. We now proceed to consider the validity of the grounds for rejection of open access to Tata. Under sub-section (47) of Section 2 of the Electricity Act, open access has been defined as the non-discriminatory provision for the use of the transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. The Commission in exercise of its powers under the Electricity Act, 2003 has specified the open access regulations. Regulation 6 of these regulations lays down the criteria for allotment and reservation of transmission capacity as under:

“ Criteria for Allotment and Reservation of Transmission Capacity

6. (i) Allotment priority of a long-term customer shall be higher than reservation priority of a short-term customer.
- (ii) Within a category (long-term or short-term), there shall be no discrimination between open access customers and self-use by an integrated utility like the State Electricity Board.
- (iii) In case of inter-regional transactions, reservation of transmission capacity to the short-term customer may be reduced or cancelled by the Regional Load Despatch Centre, if the Central Government allocates power from the Central Generating Station or Stations in a region to a person in another region and such allocation, in the opinion of the Regional Load Despatch Centre, cannot otherwise be implemented due to congestion in the inter-regional link. If the Regional Load Despatch Centre decides to reduce or cancel transmission capacity reserved for a short-term customer under this clause, it shall, as soon as possible, intimate the short-term customer concerned of its decision to reduce or cancel transmission capacity.

- (iv) The applications for grant of short-term access shall be processed only if such short-term access is commencing in the first month to the fourth month and is not ending beyond the fourth month, taking the month in which application is made as the first month.
- (v) The applications for grant of short-term access received in a month for open access commencing in the month in which the application is made or received after the nineteenth day of a month for open access commencing and terminating in the following month shall be treated on first-come-first-served basis, and short-term access shall be granted subject to availability of the transmission capacity.
- (vi) All applications for short-term access, other than the applications for short-term access to be processed on first-come-first-served basis in accordance with clause (v) above, received up to the nineteenth day of a month shall be considered together on the twentieth day of that month for advance reservation and shall be processed in the manner given hereunder, namely:-
 - (a) The applications shall be analysed to check for congestion on any of the transmission corridors to be used for short-term access.
 - (b) In case the nodal Regional Load Despatch Centre does not anticipate congestion on any of the transmission corridors involved, the applicants shall be granted short-term access for the quantum and duration sought, latest by the twenty-fifth day of the month.
 - (c) If in the opinion of the nodal Regional Load Despatch Centre, grant of short-term access to all the applicants is likely to lead to congestion in one or more of the transmission corridors to be used for short-term access for any duration, it shall inform the applicants of its opinion accordingly and the reasons therefor on or before the twenty-third day of the month.
 - (d) On receipt of intimation in accordance with sub-clause (c) above, an applicant may reduce its requirement of transmission capacity during the period of congestion or opt for access only for the duration when no congestion is anticipated and in such a situation, he shall inform the nodal Regional Load Despatch Centre accordingly by the twenty-fifth day of the month.
 - (e) If the nodal Regional Load Despatch Centre still anticipates congestion in one or more of the transmission corridors to be

used for short-term access, it shall invite electronic-bids for reservation of transmission capacity of the congested transmission corridor in accordance with Regulation 14 of these regulations on the twenty-sixth day of the month. Non-participation of an applicant in the bidding process shall be construed that he is no longer interested in open access and his application shall not be processed.

- (vii) In the event of a reserved transmission corridor subsequently becoming fully or partly vacant for certain duration in a month, the Regional Load Despatch Centre shall display this information in public domain on its website.
- (viii) Except as provided in clause (iii), once open access has been granted, the long-term customer or the short-term customer shall not be replaced by any other person on account of a subsequent request received from such other person.
- (ix) The Regional Load Despatch Centres shall lay down a detailed procedure for reservation of transmission capacity to the short-term customers after obtaining prior approval of the Commission, which shall include the detailed procedure for inviting bids, advance reservation, reservation on first-come-first-served basis, usage of alternate route through other regions if direct inter-regional links between two regions are congested or constrained and any other residual matter. Any further revision of the procedure shall be carried out only after obtaining prior approval of the Commission”

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 utilised for transmitting electricity for and on behalf of another licensee at his request and on payment of a 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 subsection (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 to 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 with 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.

18. In its reply in Petition No.114/2007, HESCOM has pointed out that the petitioners have concealed certain material facts while making the application and thereby have misled the Commission. It has been pointed out that the petitioners have stated in the application that there was no agreement between the parties after 5.5.2006 and that there was default on the part of HESCOM in making payments for a continuous period from November 2005 to April 2006. HESCOM in its reply has stated that in fact, a supplementary agreement was executed between HESCOM and the first petitioner on 7.8.2007 wherein the PPA had been extended for the period up to 23.5.2008. It is also

stated that all dues by HESCOM to the first petitioner were fully paid on 16.8.2007. HESCOM has sought dismissal of the application on the ground of non-disclosure of complete facts before the Commission. Since we have not gone into the PPA and Tata does not seem to be involved in the PPA signed on 7.8.2007 and the payments by HESCOM to the first petitioner, we do not consider it proper to dismiss the application merely on this ground.

19. The petitioners have co-generation plants which use renewable (non-fossil) fuel, and are highly efficient in energy conversion. Also, co-generation plants, by their very nature, are non-dispatchable, which means that they cannot curtail the generation to accommodate the changes in requirements of the State utility. Their surplus power has, therefore, to be necessarily absorbed in the grid. Prior to the Electricity Act, 2003, there was no statutory provision for sale elsewhere, and all surplus power had to be necessarily purchased by the State utility.

20. In our order dated 18.10.2007, we had stated that since co-generation is very efficient and renewable form of electricity generation, it must be encouraged, by formalizing and accounting its absorption into the State grid either as an agreed purchase by a State utility, or on scheduled basis under open access. In case neither of these happens, the injected energy should be accounted and paid for as Unscheduled Interchange (UI). We reiterate this once again.

21. Before parting, we consider it appropriate to make a general observation that the question of 'rights' of a party would normally arise only when the other party defaults on

its 'obligations'. It would be grossly unfair for a party to default on its own obligations, and continue to claim 'rights'. HESCOM cannot simply exercise its right to procure power from the petitioner and block the applications for open access by stating that sale to third parties will cause disruption of supply of electricity to the consumers within its area of supply, in the State of Karnataka without meeting its obligations to pay to the seller in terms of the PPA. We have already noticed that the payments by HESCOM were not regular and it had habitually delayed payments for the power supplied. HESCOM cannot on the one hand make irregular/delayed payments and on the other hand insist to exercise its right to procure power from the petitioners. The rights and obligations are two sides of the same coin and have to be completed simultaneously for smooth operation.

22. With these observations the applications stand disposed of. These observations shall be kept in view by the respondents while deciding the applications made for open access in future. At the cost of repetition, we reiterate that as an independent operator and statutory body under the Electricity Act, 2003, SLDC should consider the applications for open access in an impartial manner and in line with provisions of Electricity Act, 2003 and the open access regulations. Any denial of open access on considerations other than those prescribed under the law and taken note of in the above analysis, will attract the penal provisions of the Electricity Act, 2003.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

New Delhi dated the 3rd December 2007

Sd/-
(BHANU BHUSHAN)
MEMBER