

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

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

**Review Petition No.70/2007
in
Petition No.24/2007**

In the matter of

Review of the order dated 7.3.2007 in Petition No. 24/2007.

And in the matter of

Refusal No 131 of 25.1.2007 by the Western Regional Load Despatch Centre of the open access application filed by Tata Power Trading Company Limited for transmission of 27 MW power through Eastern Regional Load Despatch Centre and Orissa State Load Despatch Centre from Nava Bharat Ventures Ltd, on the ground of "No consent from OPTCL".

And in the matter of

Nava Bharat Ventures Ltd, Hyderabad

.....Petitioner

V E R S U S

1. Western Regional Load Despatch Centre, Mumbai
2. Eastern Regional Load Despatch Centre, Kolkata
3. Orissa Power Transmission Corporation Ltd, Bhubaneswar
4. Grid Corporation of Orissa Ltd, Bhubaneswar
5. Eastern Regional Power Committee, Kolkata
6. Tata Power Trading Company Ltd, Mumbai

.....Respondents

Following were present:

1. Shri K.Gopal Choudhary, Advocate, NBL
2. Shri S.S.Barpanda, ERLDC
3. Shri Sunil Agrawal, PGCIL
4. Shri R.B. Sharma, Advocate, GRIDCO
5. Shri Shiba Shankar Nayal, GRIDCO
6. Shri R.K. Mehta, Advocate OPTCL
7. Ms Suman Kukrety, Advocate, OPTCL

8. Shri Santosh Kumar, OPTCL
9. Shri B.N. Mahapatra, OPTCL

ORDER
(DATE OF HEARING: 14.8.2007)

The application has been made for review of order dated 7.3.2007 in Petition No.24/2007 (hereinafter referred to as “the original application”), for which reliance has also been placed on para 11 (c) of the said order, extracted hereunder:

“11. (c) In case an inter-State open access involves buying/selling power from/to an entity embedded in the State grid, the concerned RLDC must obtain the prior consent of the concerned SLDC, since the open access transaction has to be duly accounted for in the net drawal schedule of that State. If prior consent is not on record, there could be intractable disputes regarding scheduling, etc. later on.”

2. In the original application jointly filed by the present applicant and the sixth respondent, (collectively referred to as “the applicants”) it was complained that the Western Regional Load Depatch Centre, the first respondent, had refused open access for transmission of 27 MW of electricity from OPTCL periphery to the inter-connection between Madhya Pradesh and the CTU during the period April-June 2007 on the ground of “No consent from OPTCL”, by its letter dated 25.1.2007. In the original application, the applicants prayed for the following reliefs, namely:

“(a) To declare that the Refusal No 131 dated 25.1.2007 communicated by the 1st Respondent WRLDC in respect of the 2nd Respondent’s application for short-term open access No 1030/NCVL-MPPTC/2006-2007 dated 18.1.2007 was illegal, unjustified, unreasonable and contrary to law; and

(b) To declare that the Nodal RLDCs required to grant open access for inter-state transmission are required to presume that there is no impediment or constraint in transmission of electricity pursuant to an application for open access, unless any intervening RLDC and/or SLDC communicates specifically in writing that there is a specific relevant and justifiable technical reason by way of a constraint in capacity or congestion duly providing sufficient particulars and reasons therefore; and

- (c) To declare that the conduct of the 3rd Respondent SLDC in withholding consent was not valid, unreasonable, unjustified and contrary to law; and
- (d) To declare that the Petitioners are entitled to short-term open access for the inter-State transmission in the facts and circumstances of the case and in like or similar facts and circumstances; and
- (e) To direct the 3rd and 4th Respondents and/or the other respondents to pay the costs of this petition and the legal and other costs and also exemplary costs;
- (f) and/or pass such other or further orders as the Hon'ble Commission considers fit and just in the facts and circumstances of the case."

3. Before the application was taken up for hearing, the applicant had approached Member-Secretary, ERPC in terms of Regulation 35 of the Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2004 (hereinafter referred to as "the open access regulations") for resolution of the dispute. In the application it was alleged that the Member-Secretary had failed to resolve the dispute. However, when the matter was taken up for hearing, a copy of the Member-Secretary's letter dated 5.3.2007 was brought to the Commission's notice, wherein the Member-Secretary had concluded that the applicants were entitled to short-term open access on the transmission system owned by OPTCL. By order dated 7.3.2007 the Commission had endorsed the decision of the Member-Secretary, arrived at in accordance with the procedure prescribed in the open access regulations. The Commission also made certain general observations on the question of grant of open access on the inter-State transmission system for future guidance of the authorities concerned, para 11(c) extracted above being one such observation.

4. In the present application for review, the applicant has brought out that the Commission in its order dated 7.3.2007 had not considered the following specific relief sought in the original application:

“To declare that the Nodal RLDCs required to grant open access for inter-state transmission are required to presume that there is no impediment or constraint in transmission of electricity pursuant to an application for open access, unless any intervening RLDC and/or SLDC communicates specifically in writing that there is a specific relevant and justifiable technical reason by way of a constraint in capacity or congestion duly providing sufficient particulars and reasons therefore.”

5. The applicant has formulated the following issues, which in its view arise out of the prayer made in the original application requiring specific consideration and adjudication by the Commission:

(a) Whether the concerned STU/transmission licensee/SLDC/RLDC are not obliged and required, in processing an application for open access, to specifically and invariably intimate their position with regard to only to availability of capacity and within the very limited time span within which the open access application has to be processed and decided upon?

(b) Whether any STU/transmission licensee/SLDC/RLDC can fail or omit (willfully or otherwise) or neglect to respond to the application communicated by the Nodal RLDC and with what legal or other consequence?

(c) Whether, in view of the right to open access conferred by the Act subject only to availability of capacity, is it not correct and proper for the nodal RLDC to infer no objection and availability of transmission capacity in the event of any failure, omission or neglect of any STU/transmission licensee/SLDC/RLDC to

specifically communicate inadequacy/non-availability; and whether mere silence STU/transmission licensee/SLDC/RLDC may not be construed as denial?

6. The respondents No.3 and 4 have opposed the present application. It has been urged that the order dated 7.3.2007 is the subject matter of a Civil Writ Petition filed before the Hon'ble Orissa High Court. It has also been urged that the applicant does not seem to have pressed the relief during the hearing of the original application and that the Commission is not bound to deal with the issues raised in the original application. It has also been urged that the relief being sought through the application for review can be the subject matter of an independent proceedings and cannot be granted in these proceedings. At the same time, in their written submissions, these respondents have endorsed the Commission's order dated 7.3.2007, particularly in respect of its para 11 (c). We quote the following from the affidavit dated 4.7.2007 filed by the fourth respondent:

"2. That in response to paragraph No.1 of the petition, it is submitted that the Hon'ble Commission has considered all the issues that were material in deciding the petition No.24 of 2007. So there is no question of any revision of the said order dated 7.3.2007."

7. In their written submissions, the first and second respondents too have supported the order dated 7.3.2007 and endorsed para 11 (c) thereof specifically.

8. We heard the learned counsel for the parties. When it was pointed out to the petitioner that para 11 (c) would only ensure that there are no disputes in energy

accounting, he responded that his main concern was that of open access being blocked by an STU/SLDC by not responding to the concerned RLDC.

9. We now consider the question of maintainability of the present application. The applicants' principal grievance as projected in the original application was the denial of open access. This issue was resolved by the Member-Secretary and the decision of the Member-Secretary has been endorsed by the Commission. The Commission had not dealt with the second prayer of the applicant for the reason that it did not directly arise out of the refusal by WRLDC to grant open access to the applicants in the proceedings in Petition No.24/2007, which were of adversarial nature. Therefore, this aspect was not deliberated in the order dated 7.3.2007. The question of lack of response by STU/SLDC appears to be purely hypothetical in the present case since the SLDC has given its response to RLDC. We further take note of the fact that the Commission has laid down the elaborate procedure for allotment and reservation of transmission capacity in the open access regulations. The relevant part of the open access regulations is reproduced below:

“ 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”

10. From the above provisions, it is to be seen that the applications for grant of short-term open access are to be processed by the nodal RLDC who is required to take a decision on grant of open access or otherwise in a time bound manner. In case the nodal RLDC does not anticipate any congestion on the transmission corridor, it has to grant open access by 25th day of the month, otherwise it is required to convey its decision to

the person applying for short-term open access by 23rd day of the month. In this manner, the person applying for open access becomes aware of the decision on its application well in advance, and should be in a position to take further remedial steps in accordance with the specified procedure. After obtaining the Commission's approval, the CTU has laid down the procedural steps required by the nodal RLDC while processing the applications for grant of short-term open access, which envisage consultation with SLDCs, etc. These steps are also to be completed within the laid down time schedule. All this implies that acceptance or rejection of the application by nodal RLDC has to follow the time-schedule. For this reason also, it was not necessary to deliberate on the second prayer made in the original application.

11. Under these circumstances, we have to examine whether non-consideration of the prayer by the Commission can be a subject matter of review. For this purpose, we refer to Explanation V given below Section 11 of Civil Procedure Code (the Code) according to which, any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of that Section, be deemed to have been refused. When we extend the principle laid down in the above statutory provisions to the proceedings before the Commission, we feel that the second relief sought by the applicant and not expressly granted is deemed to have been refused. Therefore, this cannot be the subject matter of review in the proceedings under Section 114 read with Order XLVII of the Code.

12. Accordingly, the present application for review is dismissed with no order as to costs. However, we have made a note of the petitioner's concern (as recorded in para 8 above) for consideration at the time of next review/revision of open access regulations.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 27th August 2007