

**ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri R. Krishnamoorthy, Member**
- 3. Shri V. S. Verma, Member**

Petition No. 157/2009

In the matter of

Petition under Section 79 of the Electricity Act, 2003 filed by NSL Sugars Ltd. Bangalore.

And the in the matter of

M/s NSL Sugars Ltd.

... Petitioner

Vs

1. Karnataka Power Transmission Corporation Limited, Bangalore
2. Bangalore Electricity Supply Company Ltd., Bangalore
3. State Load Despatch Centre, Karnataka Power Transmission Corporation Ltd., Bangalore
4. Tata Power Trading Co. Ltd. Mumbai

... Respondents

Following were present

1. Shri Nishanth Patil, Advocate, M/s NSL Sugars Ltd.
2. Shri Prabhuling K. Navadgi, Advocate, M/s NSL Sugars Ltd.
3. Shri Anand K Ganesan, Advocate, KPTCL

**ORDER
(Date of Hearing 8.9.2009)**

This petition has been filed against the denial, by the first respondent who is also operating the State Load Despatch Centre, of open access sought by the petitioner. Briefly, the submissions of the petitioner are as under:

(a) The petitioner has a co-generation plant of capacity 26 MW in the State of Karnataka. The petitioner had entered into a Power Purchase Agreement (PPA) with the first respondent, initially on 30.3.2001, which was revised through a supplementary PPA on 22.3.2002 for sale of its surplus power.

(b) First respondent terminated the PPA vide its communication dated 5.7.2003. The PPA, however, was restored vide the State Commission's order dated 30.11.2006. Consequently, the petitioner entered into a supplemental agreement with respondents No 1 and 2 on 5.4.2007. In the meantime, the PPA between the petitioner and the first respondent was assigned to the second respondent with effect from 9.6.2005.

(c) As first respondent started restricting the payment to only 13 MW against the drawal of 15-16 MW, the petitioner approached the State Commission vide O P. No. 12/2007. The State Commission, vide its order dated 10.7.2008 directed the respondents to release payment in respect of the excess energy as per the terms of the PPA and to release the arrears within 30 days of the order.

(d) Second respondent filed an appeal against the above order in the Appellate Tribunal for Electricity, which dismissed the appeal vide its order dated 26.5.2009 and imposed cost of Rs. 20,000/= on the second respondent, holding that the appeal was not maintainable

because the order of the State Commission was based on a Joint Memo filed by the parties.

(e) The respondents started making payment for the excess energy received by them only after the petitioner filed a contempt petition before the State Commission. However, the interest on delayed payment has been withheld by the respondents. Further, the second respondent has made payment of the principal amount under protest only. As a result, a sum of more than nine crore and six crore are outstanding against the first and second respondents respectively towards principal and interest.

(f) The petitioner, in the meantime, issued a default notice dated 19.8.2008 under the provisions of the PPA. Even after the lapse of the prescribed period of 30 days, the second respondent neither cured the defaults nor respond to the notice. Thereupon, the petitioner issued notice of termination of PPA vide its letter dated 21.11.2008

(g) Subsequently, the petitioner entered into a PPA with respondent No. 4 namely, Tata Power Trading Company Ltd (TPTCL). The petitioner made an application dated 2.7.2009 for availing open-access. Third respondent, vide its letter dated 2.7.2009 sought certain additional details like power plant location, copy of synchronization approval, position of metering point, copy of PPA with the second respondent or trading company etc. The above

details were furnished vide the fourth respondent letter dated 8.7.2009.

(h) Thereafter, the third respondent vide its letter dated 8.7.2009 denied open-access on the ground that all the power generating plants, including co-gen units having valid PPA with ESCOMs shall continue to supply power to the respective ESCOM and that the petitioner was having a valid PPA with the second respondent.

2. The petitioner has sought the following reliefs through the present petition:

(a) To hold and declare communication dated 8.7.2009 from the third respondent, illegal and contrary to open access regulations framed by this Commission.

(b) To set aside the impugned communication dated 8.7.2009 by the third respondent.

(c) To issue suitable directions to the third respondent to consider the open-access application filed by the petitioner strictly in accordance with the provisions of Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 (hereinafter "the open access regulations") .

3. Replies to the petition have been filed by the first and the second respondents. We have gone through the pleadings and heard the learned

counsels for the parties present. Accordingly, we proceed to dispose of the matter.

4. The first respondent in its reply filed under affidavit dated 5.9.2009 has urged the following to justify denial of open access to the petitioner:

(a) The Petitioner had entered into a PPA with the second respondent on 30.3.2001 and a supplemental agreement dated 22.3.2002 for a period of 20 years and the same was not validly terminated by the petitioner.

(b) Government of Karnataka had, vide its order dated 30.12.2008 under section 11 of the Electricity Act, 2003 (the Act) directed all the generating companies in the State to sell electricity to the State Grid and not to export electricity outside the State of Karnataka.

(c) Subsequently, the State Government vide its order dated 1.6.2009 under section 11 of the Act, directed all the private generating companies in the State to sell 50% of their exportable capacity to the State Grid . This was followed by another order dated 6.6.2009 whereby, the private generators including cogen Units not bound by PPA, were exempt from the requirement of supplying 50% of power to the State Grid as directed vide the order dated 1.6.2009. Subsequently, the State Government vide its order dated 1.9.2009 had clarified that the Private generators having valid Power Purchase

Agreements were bound to the respective power utilities in the State in terms of the PPAs.

(d) The Commission's order in Petition No. 114/2009 directing the KPTCL to grant open access to a generator having a PPA with the distribution company in the State and the same was stayed by the Hon'ble High Court of Karnataka vide order dated 17.8.2009.

5. Second respondent, in its reply affidavit dated 8.9.2009 has stated that its PPA with the petitioner has not been validly terminated. It has also added that the above issue is required to be gone into by the State Commission which has jurisdiction over the matter. Second respondent has also reiterated that denial of open access by KPTCL as SLDC is valid.

6. From the above it is seen that the only ground relied upon by the respondents in support of denial of open access is the existence of a PPA with a Discom of the State. We do not propose to examine the subsistence or otherwise of the PPA between the petitioner and the second respondent. Nor are we inclined to scrutinize whether the termination of the PPA, as claimed by the petitioner is in order. We have no doubt that these are issues completely outside the purview of scrutiny of applications seeking open access for export of power. In case a generator fails to comply with the provisions of a valid PPA, or its termination of the PPA is not sustainable, the aggrieved party is at liberty to seek the remedies available to it under the law by approaching the appropriate forum. In the course of hearing of the present case, we pointedly asked the learned counsel for the respondent as to whether the respondents had challenged the termination of

the PPA before any forum. He sought one week's time to file an affidavit clarifying the matter. No clarification in the matter has been filed till date. In the circumstances, we take it that the respondents have nothing to say on this.

7. Incidentally, it is also significant that Hon'ble High Court of Karnataka has referred a similar issue in another case for examination by the State Commission. If SLDC undertakes examination of the validity or otherwise of PPA and issues relating thereto, it would be tantamount to usurpation by the SLDC of the jurisdiction of SERCs / other applicable forums meant to go into such contractual issues and disputes. The SLDC is required under the provisions of Section 32(2) (a) of the Act to be responsible for optimum scheduling and despatch of electricity within a State, "in accordance with the contracts entered into with the licensees or the generating companies operating in that State". If the words in quotes meant that SLDC has the power to decide the validity or otherwise of termination of the PPA in the present case, then the provisions Section 86(1)(f) is rendered illusory. However, it is not so. Section 86(1) (f) requires the State Commission to "adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration". The Act does not expressly or impliedly empower the SLDC to usurp this function of the State Commission. The words "contracts entered into with the licensees or the generating companies operating in that State" in Section 32(2) (a) are to be read in context of the functions laid down under Section 32(2). Noticeably, there is no such function listed under Section 32(2) empowering the SLDC

to decide the present controversy or dispute between the petitioner and respondents over the termination of the PPA. Accordingly, we do not find any justification in the reliance placed by the respondents over the subsistence of the PPA or invalid termination thereof.

8. In the light of the submissions, the only question before us for determination is whether there is a valid ground for denial of open access. We have jurisdiction to decide this question as the open access is sought for power produced by the petitioner in Karnataka to be exported to Maharashtra State by TPTCL from Karnataka. This therefore is inter-state transmission of electricity where the open access regulations notified by the Commission would apply.

9. The provisions relating to the concurrence of State Load Despatch Centre for bilateral and collective transactions laid down in the open access regulations are extracted hereunder:

“(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, and

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

(c) Where existence of necessary infrastructure and availability of surplus transmission capacity in the State network has 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 recognised mode of communication, within three (3) working days of receipt of the application.

Provided that when short-term open access has been applied for the first time by any person, the buyer or the seller, the State Load Despatch Centre shall convey to the applicant such concurrence or 'no objection' or prior standing clearance, as the case may be, within seven (7) working days of receipt of the application by e-mail or fax, in addition to any other usually recognised mode of communication."

10. From the above extracted statutory provision, it is evident that while examining the request for open access, the SLDCs are required to consider the (i) existence of infrastructure facility for energy metering and accounting and (ii) availability of surplus transmission capacity in the State network. In doing so, the SLDC will need to take into account "the contracts entered into with the licensees or the generating companies operating in that State" because the quantum of power meant for flow in the system would be borne out of such contracts for off-take or injection. Usually, an applicant seeking open access would submit or produce in support of its application for open access a copy of the contract entered into by it with the licensee or generating company, as the case may be. SLDC is only required to verify prima facie, whether there is a contract for sale of power by the utility proposing to inject power for the open access transaction. This does not empower the SLDC to sit on judgment on the validity or otherwise of a

contract or adjudicate upon disputes as in the present case, which otherwise is within the scope of Section 86(1) (f). Any party disputing the contract cited by the party seeking open access or claiming that it has a subsisting PPA with the generating company in question, will have to approach the appropriate forum to get the matter adjudicated. SLDC cannot assume the role of adjudicator to decide as to which of the two contracts is valid.

11. In view of the above, we have no doubt that the denial of open access in the present case is not sustainable and accordingly we set aside the impugned communication. We also direct the first and third respondents to examine the applications seeking open access strictly in accordance with the provisions of open access regulations notified by this Commission as open access sought for pertains to inter-state transmission. We also make it clear that any deviation from the above stated procedure will lead to initiation of penal proceedings as permissible under the provisions of the Act.

12. With the above, the petition stands disposed of.

Sd/=	Sd/=	Sd/=
(V. S. VERMA) MEMBER	(R. KRISHNAMOORTHY) MEMBER	(Dr. PRAMOD DEO) CHARIPERSON

New Delhi, dated the 11th December 2009