

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram:**

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri Bhanu Bhushan, Member**
- 3. Shri R. Krishnamoorthy, Member**
- 4. Shri S. Jayaraman, Member**

**Petition No. 108/2008**

**In the matter of**

Petition under section 79 of the Electricity Act, 2003 read with Regulation 26 of the Central Electricity Regulatory Commission (Open Access in inter-State transmission) Regulations, 2008.

**And in the matter of**

JSL Ltd, Hissar	..	<b>Petitioner</b>
	Vs	
Orissa Power Transmission Corporation Ltd	..	<b>Respondent</b>

**The following were present:**

1. Shri T.R. Andhyarjuna, Senior Advocate, JSL Ltd.
2. Ms. Shally Maheshwari, Advocate, JSL Ltd.
3. Shri R.K. Bharati, Advocate, JSL Ltd.
4. Shri Akhil Anand, Advocate, JSL Ltd.
5. Shri R.K. Jain, JSL Ltd.
6. Ms. Megha Mukerjee, Advocate, JSL Ltd.
7. Shri R.K. Mehta, Advocate, OPTCL
8. Shri Sibo Shanker Mishra, Advocate, Govt. of Orissa., Deptt. Of Energy

**ORDER**  
**(Date of hearing: 27.11.2008)**

The petition seeks direction to the respondent to grant short-term open access to the petitioner to enable it to transfer power from its captive power plant in the State of Orissa to its stainless steel plant at Hissar in the State of Haryana.

2. The petitioner is a company incorporated under the Companies Act, 1956, having stainless steel plants located at Hissar (Haryana), Visakhapatnam (Andhra Pradesh), and also at a place called Duburi in the State of Orissa. The petitioner contemplated to set up captive power plant at Duburi (hereinafter "the captive power plant") with capacity as under:

- (a) Phase 1 125 MW +25 MW (waste heat)
- (b) Phase 2 375 MW +25 MW (waste heat)

3. The petitioner entered into a Memorandum of Understanding (hereinafter "the said MOU.") dated 9.6.2005 with the State Government of Orissa (hereinafter "the State Government."). Sub-clause (D) of clause 5 of the said MOU provides that the captive power plant was being set up by the petitioner to meet the requirement of energy for its stainless steel making process. The said MOU further provides that the surplus power from the captive power plant, if any, shall be first offered to the Grid Corporation of Orissa (hereinafter "GRIDCO") or any other corporation so designated by the State Government of Orissa, at a tariff determined by the Orissa Electricity Regulatory Commission (OERC).

4. Before referring to the controversy raised, it may be appropriate to take note of certain other facts having bearing on the dispute. On 31.5.2005, the petitioner is said to have informed the Power Grid Corporation of India Ltd, which is designated as the Central Transmission Utility, (hereinafter "the Power Grid.") that out of 250 MW power to be generated at the captive power plant during the first phase, 175 MW would be consumed at its Orissa plant, and the remaining 75 MW would be wheeled to its steel plant at Hissar. Accordingly, the petitioner

applied for long-term open access. After the petitioner approached the Power Grid, the latter took up the matter with the Grid Corporation of Orissa to ascertain whether the petitioner could be provided open access for transfer of power at Hissar by using the available network or any system strengthening was required. The petitioner's proposal for grant of long-term open access was said to have been discussed at a meeting held on 22.6.2006. In this meeting, the representative of GRIDCO informed that the petitioner's proposal was examined, and there was no objection to the injection of 75 MW power from the captive power plant for transmission to Hissar. The other constituents of the Eastern Region are also said to have agreed to the proposal. The petitioner has since been granted permission for long-term open access by Power Grid by its letter dated 26.2.2008.

5. The first phase of captive power plant is said to have been commissioned. The petitioner held a meeting on 12.6.2007 with the respondent, GRIDCO and other entities in the State of Orissa whereat the petitioner agreed to sell its surplus power to GRIDCO after meeting the requirement of its own plants in Hissar and Duburi as per the MOU dated 9.6.2005. In the said meeting, GRIDCO informed that open access could be allowed after clearance from the State Government, for the proposed wheeling of power, but agreed to take up the matter with the State Government in case the petitioner offered to sell 25 MW to Orissa. However, on 21.8.2008, the petitioner formally approached the respondent for concurrence for short-term open access for wheeling 75 MW power at Hissar. The respondent refused to grant concurrence to wheel power from the captive power plant to Hissar on the following two grounds, namely.

- (a) in the said MOU there was no provision for taking power to the petitioner's sister unit at Hissar and that surplus power from the captive power plant, if any, is to be first offered to GRIDCO or any other corporation designated by the State Government at a tariff to be determined by the State Commission, and
- (b) SCADA system of the captive power plant was not functioning for the real time monitoring of power injection into the transmission system owned by the respondent.

6. Feeling aggrieved by the decision of the respondent, the petitioner has made the present application. According to the petitioner, the primary criterion for grant of concurrence for short-term open access is the availability of the required transmission capacity in the State network as specified under Regulation 8 of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (hereinafter “ the open access regulations”). The petitioner has urged that its application has not been rejected on the ground of unavailability of sufficient surplus transmission capacity but on erroneous interpretation of sub-clause (D) of clause 5 of the said MOU. The case of the petitioner is that, while considering its application for grant of short-term open access, the respondent ought not to have considered the provisions of the said MOU. The petitioner has further submitted that it was informed of the defects in the SCADA system only at the time of denial of short-term open access and never before, but the system had been set right and was functioning.

7. The respondent in its reply has raised a preliminary objection. According to the respondent, in view of the provisions of Regulation 26 of the open access regulations, the dispute raised by the petitioner falls within the jurisdiction of the State Commission. The respondent therefore, seeks rejection of the present petition. On merits, the respondent has contended that open access has been denied because of sub-clause (D) of clause 5 of the said MOU. The respondent has submitted that the SCADA system was not functional at the time of its making the application for short-term open access. It, has, however, not denied that the system became functional subsequently. Thus, on merits, based on pleadings of the respondent, the only ground that survives for consideration is the applicability of the said MOU as a ground for refusal of short-term open access. The respondent has denied that the open access can be refused only the ground of unavailability of the surplus transmission capacity.

8. The State Government has sought to intervene on the ground that it was a necessary party for adjudication of the dispute in view of the fact that the petitioner has signed the said MOU with it. The State Government has filed written submissions which though titled "Written submissions on behalf of the State of Orissa on the question of intervention ...." contain its submissions on merits in regard to interpretation of sub-clause (D) of clause 5 of the said MOU. In its written submissions, the State Government has stated that in terms of the said MOU the petitioner is obliged to sell its surplus power to GRIDCO or any other corporation designated by the State Government. It has been further submitted that the said MOU does not permit the petitioner to transfer power to any of its units outside the State of Orissa. The State Government has pointed

out that the representations made by the petitioner for permission to transfer power outside the State of Orissa were considered at the highest levels in the State, including at the level of Chief Minister, and was rejected. Therefore it has been argued that the petitioner is not entitled to the relief prayed for in the petition.

9. Having heard the parties and after considering the materials placed on record, we first consider the preliminary objection raised on behalf of the respondent as regards the maintainability of the present petition/application. In this regard, it would be relevant to refer to Regulation 26 of the open access regulations which is extracted hereunder:

**“Redressal Mechanism**

26. Unless the dispute involves the State Load Despatch Centre and the intra-State entities of the concerned State and falls within the jurisdiction of the State Commission, all disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.”

10. The dispute referred to us pertains to grant of short-term open access to the petitioner to enable it to transfer power from its captive power plant in the State of Orissa to its stainless steel plant at Hissar in the State of Haryana. Thus, this would be a dispute involving inter-State transmission of electricity arising under the open access regulations and is to be adjudicated upon by the Central Electricity Regulatory Commission (“Central Commission”). In this regard it is relevant to point out to the term “inter-State transmission system” as defined under sub-section (36) of section 2 of the Act as under :

“(36) “inter-State transmission system” includes -

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.”

11. Under clause (c) of sub-section (1) of section 79 of the Act, the function of regulation of inter-State transmission is assigned by the legislature to the Central Commission. Furthermore, the Central Commission has the power and the function under clause (f) of sub-section (1) of section 79 of the Act to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) of sub-section (1) of section 79 of the Act and to refer any dispute for arbitration. In terms of clause (ii) of sub-section (36) of section 2 of the Act “inter-State transmission system” includes the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity. The petitioner is seeking no objection to the injection of 75 MW power into the State network from the captive power plant for transmission to Hissar would be nothing other than conveyance within the State which is incidental to such inter-State transmission of electricity. Thus, this case is to be decided by the Central Commission. Therefore, the respondent’s contention that the present dispute ought to be heard by the State Commission is dismissed.

12. Learned senior counsel for the petitioner submitted that the petitioner who owns the captive power plant can carry power to its stainless steel plant at Hissar by virtue of section 9 of the Act. On the contrary, learned counsel for the

respondent as also for the State Government submitted that by the reason of sub-clause (D) of clause 5 of the said MOU the petitioner cannot be permitted to take power outside the State of Orissa. Thus, the dispute primarily involves interpretation of section 9 of the Act read with the said MOU. For facility of reference, we reproduce below section 9 of the Act:

**“9. Captive generation**

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made there under and to any consumer subject to the regulations made under subsection (2) of section 42.]

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

13. We have also considered the provisions of the Memorandum of Understanding dated 9.6.2005. In our view, the said MOU records the commitment of the petitioner to establish an integrated steel plant and the commitment of the Government of Orissa to provide assistance, support and incentives to the petitioner by making provision of land, iron ore, chrome ore,



manganese ore mines, coal block and other facilities. One of the terms of the said MOU is that surplus power from the captive power plant, if any, should be first offered to GRIDCO or any other corporation so designated by the State Government, at a tariff determined by OERC. In our view, in case there is surplus power from the said captive power plant and if the same is not offered to GRIDCO or any other corporation so designated by the State Government, the recourse of the State Government would be as envisaged in the said MOU, as provided below:

“In the event of non-implementation of the project or part thereof, or failure to adhere to the milestones or to the provisions of this MOU the corresponding support/commitment of the State Government indicated in the MOU with regard to Iron Ore, Chrome Ore, Manganese Ore Mines/Coal Block, incentives and concessions of the State Government in particular shall be deemed to be withdrawn. The allotment of land, mines and other infrastructural facilities, if any, given to JSL shall also be cancelled and Government of Orissa shall not be liable for the loss, if any, sustained by JSL.”

14. The State Government can only take recourse, if at all, in terms of the said MOU as it states above. In no manner can the State Government oppose the grant of open access to the petitioner which has already been granted permission for long-term open access by Power Grid by its letter dated 26.2.2008 after recording of no objection by GRIDCO and also the respondent. We are, therefore, of the view that the intervention by the State Government on the subject matter of grant of open access to the petitioner, is unjustified and uncalled for. Furthermore, section 9 of the Act, gives a statutory right to the petitioner to open access for the purposes of carrying electricity from its captive generating plant to the destination of its use. This statutory right cannot be taken away by the said MOU. Any contention demanding the whittling down of the said

statutory right to open access by making the said MOU as the basis, would make the provisions of section 9, not only nugatory but also sterile and inoperative, which is impermissible in law. Therefore, all contentions relating to the enforcement of the said MOU on the right of the petitioner to avail open access is hereby dismissed. On the other hand, open access is subject to availability of adequate transmission facility in terms of the proviso to Section 9(2) and such availability of transmission facility is mandatorily required to be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be. In the present case, it is the Central Transmission Utility which had to determine the availability of transmission facility in order to grant open access to the petitioner. Section 38 mandates the CTU to provide open access to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. The same mandatory duties have been specified in Section 39 on the STU and under Section 40 on the transmission licensee. Because open access to the petitioner was already granted by Power Grid by its letter dated 26.2.2008 after consulting the respondent, availability of transmission facility is not an issue in dispute. In light of the above, the first and the only surviving ground of denial of concurrence by the respondent to wheel power from the captive power plant to Hissar, is dismissed. As regards the second ground the respondent has submitted that the SCADA system was not functional at the time of making of the application for short-term open access. It, has, however, not been denied that the system has since become functional. Functionality of SCADA system is not a condition under which open access can be denied. On this basis, we dismiss the second and the final ground.

15. In view of the above, the denial and opposition by the respondent to the grant open access to the petitioner, is wholly unjustified and in contravention of the law. We accordingly direct the respondent to allow the petitioner to inject 75 MW power from the captive power plant to enable it to transfer power from the State of Orissa to its stainless steel plant at Hissar in the State of Haryana.

16. With the above, petition stands disposed of.

Sd/-

Sd/-

Sd/-

Sd/-

**(S. JAYARAMAN) (R. KRISHNAMOORTHY) (BHANU BHUSHAN) (DR. PRAMOD DEO)**  
**MEMBER MEMBER MEMBER CHAIRPERSON**

**New Delhi, dated the 2<sup>nd</sup> February, 2009**