

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram :

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

Petition No. 153/2008

In the matter of

A petition under Section 79 of the Electricity Act, 2003 read with applicable regulation of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 as amended from time to time

And in the matter of

Global Energy Ltd., New Delhi

Petitioner

Vs

1. Karnataka State Load Despatch Centre, Bangalore
2. Karnataka Power Transmission Corporation. Ltd., Bangalore
3. Western Regional Load Despatch Centre, Mumbai
4. Reliance Energy Ltd, Mumbai

Respondents

Following were present:

1. Shri Suresh V. GEL
2. Shri Rajiv Yadav, Advocate, GEL
3. Shri Anand K. Ganesan, Advocate, KPTCL

**ORDER
(Date of Hearing: 22.1.2009)**

The petitioner has sought directions primarily to the first and second respondents (hereinafter collectively referred to as "the respondents") to immediately provide open access to the petitioner for schedule of power in terms of the day ahead schedule submitted to them.

2. The petitioner has established a 5 MW bagasse-based power plant (hereinafter “the generating station”) in the State of Karnataka and reportedly entered into an agreement for sale of power to the second respondent who is said to have terminated the agreement by its letter dated 13.11.2003. However, as stated in the petition, the generating station is connected to the State grid operated by the second respondent since 17.2.2007. The petitioner has made arrangements for sale of power outside the State through the fourth respondent by availing short-term open access. It has been averred that the fourth respondent, by its letter dated 25.10.2008 agreed to buy 5 MW of power from the generating station on a firm/day-ahead basis for the month of November 2008. The period of agreement for supply of power to the fourth respondent now stands extended up to 31.3.2009 to be scheduled on day-ahead basis.

3. The petitioner has alleged that the first respondent, without assigning or communicating any reason, denied concurrence for open access for day-ahead scheduling for the request sent on 12.11.2008. On verbal enquiries, the petitioner is stated to have been informed that concurrence was being denied until further orders based on the decision of the senior management of the second respondent. For the reason of denial of concurrence, the petitioner has alleged, it could not supply power to the fourth respondent and thereby incurred losses. The petitioner states that during discussions with the concerned officials it transpired that the State Government intended to buy power from the generating station for the distribution companies in the State to meet the requirement of electricity (at a price which the petitioner considers to be lower

than the prevailing market price) and, therefore, open access was being denied to prevent outflow of power.

4. The petitioner is said to have made applications for open access and followed up the matter with the concerned officials, but failed to elicit any response. The petitioner has averred that there are no transmission constraints on the second respondent's network and as such denial of open access has been termed as arbitrary and contrary to law. It is alleged that the first respondent has been acting on the instructions of the second respondent which also operates the former in disregard of its statutory responsibility to act independently.

5. No reply has been filed on behalf of the respondents. However, learned counsel appearing on their behalf produced at the hearing a copy of the order whose subject reads "Supply of power by Generators in Karnataka to the State Grid – issue of directions under Section 11 of the Electricity Act, 2003" and is dated 30.12.2008. We have taken this document on record as part of the proceedings. However, we are dismayed to note that the respondents did not consider it appropriate to formally place on record the directions contained in the said order dated 30.12.2008 despite the fact that sufficient time was available to them. We deprecate such a tendency, and hope that a situation like this will be avoided in future.

6. Learned counsel for the respondents submitted that in view of the directions issued by the State Government under sub-section (1) of section 11 of the Electricity Act,

2003, (the Act), the petitioner is required to supply all its exportable power to the State grid for drawal by the distribution companies in the State. Learned counsel submitted that the State Government had passed the said order dated 30.12.2008 in public interest, directing all generators in the State to operate and maintain the generating stations to maximise their exportable power and supply that power to the State grid in view of extreme extraordinary situation prevailing in the State. Therefore, he argued that the question of grant of open excess for export of power outside the State after issue of the directions by the State Government did not arise. He, however, could not explain why the open access was not granted since 12.11.2008 when there was no such direction issued, except for stating that the officials of the second respondent were involved with decision-making and the matter had been under consideration for some time.

7. Learned counsel for the petitioner argued that the State Government by virtue of power under sub-section (1) of section 11 of the Act could not compel the petitioner to sell its power to the distribution companies in the State. He relied upon section 10 of the Act to support his contention. According to him, section 10 grants liberty to the generating company to supply power to a licensee or consumer of its choice.

8. We have considered the matter very carefully. Section 11 of the Act is extracted hereunder:

“11. (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate

and maintain any generating station in accordance with the directions of that Government.

Explanation- For the purposes of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

9. In extraordinary circumstances, the Appropriate Government is empowered under sub-section (1) of Section 11 of the Act to issue directions to the generating company to operate and maintain its generating station and the generating company is to act in accordance with the directions so issued. Explanation below sub-section (1) defines the ‘extraordinary circumstances’ which includes circumstances arising in the public interest. Under sub-section (2), the Appropriate Commission can offset the impact of the direction on the generating company. The order dated 30.12.2008 made by the State Government is to be considered in the light of the above statutory provisions.

10. For facility of reference we reproduce below the operative part of the said order dated 30.12.2008 as under

“GOVERNMENT ORDER NO. EN 391 NCE 2008 (1)
BANGALORE, DATED: 17.12.2008

In the circumstances explained in the preamble, and in exercise of the powers conferred under Section 11 of the Electricity Act, 2003 the State Government is pleased to issue the following directions in the public interest until further orders:

- a] All generators existing and operating in Karnataka State shall operate and maintain the Generating Stations to their maximum exportable capacity and PLF.*
- b] All generators shall supply all exportable electricity generated to the State Grid, in view of the extraordinary circumstances.”*

11. In the order, all generators in the State have been directed to maximize their generation, and to supply all of their exportable electricity to the “State Grid”. We would like to point out that all generating plants in the State have to be connected to the State grid only, and any electricity exported from such generating stations has necessarily to flow into the State grid, whatever may be the ultimate object of sale of power, that is, whether the sale is to be effected to a person within or outside the State. From the said order dated 30.12.2008, it does not at all follow that the State Government has decided that the power generated at all the generating stations in the State was necessarily to be sold to the State distribution companies, as the phrase “supply..... to the State Grid” used in the order cannot be read to imply “supply..... to the State distribution companies”. In that view of the matter, sub-para (b) of the order seems to be redundant. In any case, it does not flow from the said order dated 30.12.2008 that the generating companies operating within the State are required to supply power to the State distribution companies. Therefore, we do not accept the contention of learned counsel for the respondents that after issue of the said order dated 30.12.2008, injection of power in State grid is exclusively for the purpose of drawal by the distribution companies operating in the State or that the question of grant of open access under the circumstances should not arise.

12. This leads to the substantive issue of grant of concurrence for open access on the second respondent’s system. There is no denial of the fact that the applications made by the petitioner have remained unanswered. Under clause (d) of sub-section (2) of Section

39 of the Act, it is the responsibility of the transmission licensee (the second respondent herein) to provide non-discriminatory open access on its transmission system for use by the licensee, generating company and the consumer. Further, considering the spirit of Section 35 of the Act, the transmission licensee is required to provide the use of its (intervening) transmission facilities for use by other licensees to the extent of availability of surplus capacity on the transmission licensee. This has been so provided in the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (hereinafter "the open access regulations") specified by the Commission in exercise of powers under section 178 of the Act. Accordingly, it is the obligation of the second respondent to provide open access on its net work and can be denied only on the ground of non-availability of the surplus capacity. The State Load Despatch Centre (the first respondent herein) is to be guided by this criterion, while considering the applications for concurrence. Therefore, in our considered view the respondents were not justified in not allowing concurrence for open access to the petitioner.

13. The issue similar to that raised in the present petition regarding grant of open access had arisen earlier in a number of petitions wherein the respondents were party. In a recent order dated 22.1.2009 in Petition No. 147/2008 (Reliance Energy Trading Company Ltd Vs Karnataka Power Transmission Corporation Ltd and others) the Commission held as under

"13. Section 11 empowers the Government to give direction to generating companies. Such directions would only bind the generating companies. In no manner can it be said that such directions that the Government could

give to the generating companies would also bind others. In other words, the STU / Transmission Licensee who are statutorily mandated under Sections 39 and 40 to provide non-discriminating open access to the transmission system cannot be bound by the directions given by the Government to the generating companies under Section 11. The duties of generating companies are different from the duties of the STU/Transmission Licensees. Sections 39 and 40 do not subject the mandatory functions of the STU/Transmission Licensee to the directions given by the State Government to generating companies under Section 11. Sections 39 and 40 do not state so. It is well settled that new words cannot be imported into a statutory provision where such words do not exist in the first place. It is also well settled that statutory provisions are required to be given a meaning according to the plain reading.

However, the provision of open access is to be implemented in accordance with the regulations specified by the Commission. In this regard, the Commission has already specified the Open Access Regulations. The statutory source and power to specify and to make these regulations, emanate from Section 178 of the Act. These regulations are part of the legislative functions of the Commission whereas the aforesaid Government's Order is part of the Government's administrative functions. The administrative functions under Section 11 cannot impinge on the legislation made by the Commission which only will decide a course of action in the grant of open access in terms and in accordance with the open access regulations. In that view of the matter and in light of the position under law stated in the foregoing paragraphs, the denial of open access by the Respondents making the aforesaid Government's Order as the basis for such denial, would not be legally sustainable, and is therefore held to be wholly void. In the matter of grant of open access, the Open Access Regulations define and circumscribe the Respondent's sphere of activity. The act of denial of open access making the Government's Order its basis, thus, would be beyond the scope of the powers of the Respondents as defined in the open access regulations and the Electricity Act, 2003."

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"The respondents are duty bound to consider the applications made for concurrence for open access strictly on the criterion of availability of surplus transmission capacity. In the present case, there is no averment that there is any congestion on the transmission corridor on account of which it is not feasible technically to transmit electricity on the first respondent's transmission system. Therefore, we direct the respondents to convey concurrence for open access to the petitioner, on the application dated 6.11.2008, for the period up to 31.3.2009, presently pending. Also, the respondents cannot deny open access to any future applicants citing the orders issued by the State Government."

14. The above directions *ipso facto* apply to the present case. We direct that the applications for concurrence for open access on the State grid for inter-State transmission of electricity made by the petitioner or any other person, whether a generating company or a licensee or a consumer shall be considered by the respondents and decided strictly in accordance with provisions of the open access regulations, in particular regulation 8 thereof.

15. The present petition stands disposed of in above terms.

Sd/-
(S.JAYARAMAN)
MEMBER

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON

New Delhi, dated the 3rd February 2009