

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram :

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

Petition No. 147/2008

With

IAs No. 37/2008 & 42/2008

In the matter of

Reliance Energy Trading Ltd., New Delhi

Petitioner

Vs

1. Karnataka Power Transmission Corporation. Ltd., Bangalore
2. Karnataka State Load Despatch Centre, Bangalore
3. Shree Renuka Sugars Ltd, Belgaum

Respondents

And in the matter of

Violation of (i) Section 39 & 40 of the Electricity Act, 2003 and regulation 8 of the CERC (Open access in inter-State Transmission) Regulations 2008 in unlawful and without any reason delaying the grant of concurrence to the application filed, (ii) Law laid down in the matter of Gujarat Flurochemical Ltd. Vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd and order dated 3.12.2007 in Petition No. 108/2007.

Petition No.156/2008

In the matter of

Reliance Energy Trading Ltd., New Delhi

Petitioner

Vs

1. Karnataka Power Transmission Corporation. Ltd., Bangalore
2. Karnataka State Load Despatch Centre, Bangalore
3. Shree Renuka Sugars Ltd, Belgaum

Respondents

And In the matter of

Willful disobedience of order dated 28.11.2008 in Petition No. 147/2008 by Karnataka Power Transmission Corporation Ltd./Karnataka State Load Despatch Centre, (ii) Violation of regulation 8(3) of the CERC (Open access in inter-State Transmission) Regulations 2008.

Following were present

1. Shri Amit Kapur, Advocate, RETL,
2. Shri D Radha Krishna, RETL,
3. Shri J.S. Jarolia, RETL, Shri Anand Ganesan, Advocate, KPTCL,
4. Shri B.M. Chandrashekar, FA, KPTCL,
5. Shri R.V. Dilip Kumar, KPTCL,
6. Shri Sanjay Sen, Advocate, Shree Renuka Sugar Mills
7. Ms. Ruchika Rathi, Advocate, Shree Renuka Sugar Mills
8. Shri Deepak Biswas, Advocate, Shree Renuka Sugar Mills.

ORDER
(Date of Hearing: 23.12.2008)

The petitioner in the main petition (Petition No. 147/2008) has sought directions upon the first and second respondents (hereinafter “the respondents”) to comply with Regulation 8 of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (hereinafter “the open access regulations”) and to grant concurrence for open access to it and a declaration that the action of the respondents in delaying in the decision or non-grant of open access was erroneous, unjustified and contrary to law and amounted to violation of the open access regulations. The petitioner has further prayed for compensation/damages for the losses suffered by it and the third respondent, a generating company owning cogeneration sugar plants

(hereinafter “the generating company”) on account of delay or non-grant of open access by the respondents and also the costs of the proceedings.

2. It has been alleged that the respondents delayed their decisions on the petitioner’s applications dated 4.10.2008 and 6.11.2008 for concurrence for open access for the periods 1.12.2008 to 31.12.2008 and 1.1.2009 to 31.3.2009 respectively, for the electricity purchased by the petitioner from the generating company for conveyance outside the State of Karnataka. It has been further alleged that in terms of Regulation 8 of the open access regulations the respondents are mandated to convey their decision within three working days after receipt of the applications. However, the respondents did not convey any decision on these applications.

3. The petition was heard on 28.11.2008 when the Commission was informed by learned counsel for the petitioner, that open access was granted up to 30.11.2008. After hearing learned counsel for the petitioner, the Commission by an *ex parte* order directed to maintain status quo till 16.12.2008, the next date of hearing. In the proceedings held on 16.12.2008 learned counsel for the petitioner informed that open access was granted from 11.12.2008 to 16.12.2008. However, in view of the inability of the respondents to be present, hearing was adjourned to 23.12.2008.

4. Meanwhile, the petitioner filed another petition, being Petition No. 156/2008, praying for penal action against the respondents under Sections 142, 146 and 149 of the Electricity Act, 2003 (hereinafter "the Act") alleging, *inter alia*, that they willfully and contemptuously violated the Commission's order dated 28.11.2008 inasmuch as open access was not continued beyond 30.11.2008 despite service of copy of the Commission's order on 29.11.2008.

5. At the hearing on 23.12.2008, learned counsel for the petitioner emphasized on non-compliance of the Commission's order dated 28.11.2008, seeking its enforcement and also penal action under Sections 142, 146 and 149 of the Act. He pointed out that electricity generated by the generating company was perforce being injected into the State grid, without any assurance for payment of charges.

6. Learned counsel for the respondents sought to place on record a reply, copy of which was served on learned counsel for the petitioner and the generating company. Learned counsel for the respondents informed that the State Government of Karnataka had passed an order dated 17.12.2008 under sub-section (1) of Section 11 of the Act, in public interest, directing all cogeneration sugar plants 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 of Karnataka. He further submitted that the State Government by another order of

the same date accorded approval for purchase of electricity by the first respondent round the clock from co-generation sugar plants at Rs. 7.25/kWh from December 2008 to May 2009. The order of the State Government has thus come into force from 1.12.2008, it was stated. For facility of reference, the operative part of the aforesaid two orders are 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 Cogeneration Sugar Plant Units existing and operating in Karnataka State shall operate and maintain the Generating Stations to their maximum exportable capacity and PLF.*
- b] *All Cogeneration Sugar Plant Units shall supply all exportable electricity generated to the State Grid, in view of the extraordinary circumstances.”*

“GOVERNMENT ORDER NO. EN 391 NCE 2008 (2)
BANGALORE, DATED: 17.12.2008

- a} *For the reasons mentioned above and under extraordinary circumstances, approval is accorded to the following:-*
 - i) *To purchase power round the clock from Co-generation Power from Sugar Plants at Rs. 7.25 per Kwh from December 2008 to May 2009 respectively.*
 - ii) *To pay Rs. 7.25 per Kwh to Co-generation Sugar Plant Units who supply power to the Grid.*
- b} *This rate will be applicable to sugar factories which supply power to the State Grid, using Bagasse and Coal in the ratio of 1:2 respectively.*
- c} *Payment of this rate to Co-generation Sugar Plants, which are supplying power under PPA, is subject to approval by Karnataka Electricity Regulatory Commission.*
- d} *Managing Director, Karnataka Power Transmission Corporation Limited is authorized to co-ordinate receipt of power from Cogeneration sugar units on a daily basis and to monitor interest free payment from the*

Government to the Distribution Companies and thereafter to the Cogeneration sugar plants on a fortnightly basis.

- e) *Managing Director, Karnataka Power Transmission Corporation Limited shall intimate to the Government of substantial changes, if any, in the prices of imported coal/bagasse that may subsequently alter the calculations made. In such an event, the matter will be reviewed by the Government.*
- f) *The additional amount required for purchase of power from Co-generation sugar units by ESCOMs shall be released every month by the State Government to the Managing Director, KPTCL as interest free loan, to enable further release of the same to the distribution companies according to the purchases made by them of Co-generation power.*
- g) *MD, KPTCL is authorized to take measures as needed from time to time, to monitor the quantity and quality of imported coal as used by the Sugar Factories. The Sugar Factories shall require to produce necessary documents, whenever required, to support the cost calculations made in respect of power purchased from Co-generation sugar Plants.*
- h) *This order will come into effect from 1st December 2008.*

This order issues with the concurrence of Election Commission of India vide their letter No:100/KT-LA/2008 dated 16.12.2008.”

7. Learned counsel for the petitioner, in the light of above-noted facts, submitted that the scope of Section 11 of the Act called for a detailed examination. He stated that despite the State Government's orders, the respondents were in default and were liable to be punished under Sections 142, 146 and 149 of the Act. According to learned counsel, Section 11 did not empower the State Government to impinge upon or dilute the powers and jurisdiction of the Commission by promulgating the orders, effective retrospectively from 1.12.2008. He relied upon the judgment of the Appellate Tribunal in *Seil Ltd vs Punjab State Electricity Regulatory Commission* to support his contention that the Commission has wide powers to the extent of giving directions binding on the State Government. Learned counsel argued that the

respondents were under an obligation to grant open access by virtue of the provisions of the Act, the open access regulations and the Commission's order dated 28.11.2008. He accordingly urged the Commission to invoke its powers under the Act to punish the respondents on account of their defiance of the statutory provision.

8. Learned counsel for the generating company argued that the order made by the State Government raised a number of questions such as, whether there existed circumstances to invoke Section 11 by the State Government. He submitted that the order of the State Government was directed against the generating company, and needed a thorough examination from all perspectives and in particular its financial implications in accordance with sub-section (2) of Section 11 of the Act. Learned counsel submitted that the generating company might challenge the order at an appropriate forum.

9. Learned counsel for the respondents submitted that the order was made by the State Government in exercise of its statutory power and was a complete answer to the entire proceeding initiated by the petitioner. He stated that no person was likely to be adversely affected financially by retrospective application of the order as the State Government had decided to pay compensation at a very attractive rate of Rs. 7.25/kWh from 1.12.2008 and argued that any person, including the generating company, feeling aggrieved by the orders of the State Government could initiate appropriate proceedings under the law. He informed

that concurrence for open access granted for 17.12.2008 was not availed by the petitioner. Learned counsel maintained that the order of the State Government was in public interest and was made to safeguard the interests of the consumers within the State of Karnataka, in view of the extreme shortage situation being faced by the State.

10. Learned counsel for the respondents clarified that the State Cabinet had considered the issue in its meeting held on 27.11.2008 and decided to promulgate the order under sub-section (1) of Section 11 of the Act. However, the order could not be issued immediately thereafter, without obtaining the approval of the Election Commission of India because the Code of Conduct promulgated by the Election Commission for election to certain seats in the State Assembly had come into operation. He submitted that the Election Commission accorded its approval by letter dated 16.12.2008 and the State Government's orders were made the very next day on 17.12.2008. He further clarified that the respondents were involved in the decision of the State Cabinet and were aware of it and this was apparent from the orders themselves.

11. In response to a specific query from the Commission regarding penalty under Sections 142, 146 and 149 of the Act, learned counsel submitted that there was no deliberate intention to defy the Commission's order and open access was not granted as the State Cabinet on 27.11.2008 had decided to issue orders under Section 11 of the Act, effective from 1.12.2008.

12. Having heard the parties and after considering the materials placed on record, we are of the view that the question before us is as to whether the aforesaid Government's Orders can be the basis to deny open access. Consequently, it will need to be decided whether the denial of open access is justified.. Section 11 of the Act reads as under:

"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."

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.

14. Having laid down the position of law, we would like to point out with reference to the first of the two Orders of the Government, that all cogeneration plants in the State have to be connected to the State grid only, and any electricity exported from such plants would necessarily go 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.

15. As regards, the substantive issue of grant of concurrence for open access on the transmission licensee's system as raised by the petitioner, from various submissions made before us, there is no denial of the fact that the two applications dated 4.10.2008 and 6.11.2008 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 first respondent) to provide non-discriminatory open access to its transmission system for use by the licensee, generating company and the consumer, in the latter case, subject to the conditions laid down therein. 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 provided in the open access regulations as well. Accordingly, open access is a mandatory

function and duty of the transmission licensee, unless it can be denied on the ground of non-availability of the surplus capacity / transmission facility or on account of any transmission constraints, and on no other ground. In the reply-affidavit filed on behalf of the respondents it has been stated that “In view of the decision taken by the State Government, KPTCL was not able to give open access”. We have already considered the decisions of the State Government conveyed through the orders dated 17.12.2008, but we do not find any semblance of the inference drawn by the respondents. Therefore, in our considered view the respondents were not justified in not allowing concurrence for open access to the petitioner.

16. The issue similar to that raised in the present petition regarding grant of open access had arisen in an earlier petition (Petition No. 108/2007) (Tata Power Trading Co Ltd Vs Karnataka Power Transmission Power Corporation Ltd and others) involving the respondents. The said petition was disposed of by the Commission’s order dated 3.12.2007 wherein also it was held that “the primary criteria for grant of short-term open access is availability of surplus transmission capacity”. The Commission had directed the respondents to consider the future applications for open access in the light of the observations made therein as per the extracts of the order placed below:

“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.”

17. We reiterate the above directions. 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.

18. The petitioner has not laid foundation in support of its prayer for grant of compensation/damages for the losses allegedly suffered by it. Neither was any argument made at the hearing. Accordingly, this part of the relief is declined.

19. The present petition stands disposed of in above terms without any order as to costs.

IA No. 37/2008

20. The interlocutory application has been made by the generating company with a prayer to take on record the factum of non-compliance of the Commission's order dated 28.11.2008 by the respondents and for directions to them to grant concurrence for open access in terms of the application dated 4.10.2008 made by the petitioner before the respondents. For the view we have

taken in the main petition above and Petition No. 156/2008, herein below, no separate order is required to be made on the interlocutory application which stands disposed of in terms of the orders being made.

IA No. 42/2008

21. The interlocutory application has been made by M/S Bhagyanagar Solvent Extractions Pvt Ltd (hereinafter “the applicant”) for directions to the second respondent to grant consent for open access to facilitate evacuation of power for the period 17.12.2008 to 31.12.2008 and 1.1.2009 to 31.3.2009 or any other period for sale of power of the applicant and abide by the Act and the notifications issued by the Commission.

22. The applicant is said to have established a 11-MW generating station in the State of Karnataka, out of which it has entered into an agreement to sell 6 MW of power to GESCOM in the State and is supplying the remaining 5 MW to GESCOM, but without an agreement. The applicant is said to have entered into an agreement for sale of 5 MW power to Reliance Energy Trading Company Ltd who advised the applicant to ensure concurrence of the second respondent before commencement of sale. The applicant is apprehensive that the second respondent may deny concurrence or keep the applications pending. Hence the applicant has made the present IA, without applying for concurrence for open access.

23. None appeared on behalf of the applicant, despite intimation for listing of IA.

24. In our opinion, the applicant is not entitled to the reliefs prayed for in IA. Firstly, there is no cause of action for filing the application which is presently based on apprehension. The applicant has not made any application before the respondents for concurrence for open access. It cannot be said that applicant has been denied concurrence or decision on its application has been delayed. In that view, the application is premature. Also, the applicant through the present IA cannot be given any substantive relief in the petition filed by another person. The applicant is required to make an independent application in case it is feels aggrieved by any action or inaction of the respondents. Accordingly, the present application is dismissed as not maintainable.

Petition No 156/2008

25. As already noted, this petition has been filed by the petitioner for action under Sections 142, 146 and 149 of the Act alleging, *inter alia*, non-compliance of the Commission's order dated 28.11.2008. Learned counsel for the respondents prayed for time to make detailed submissions on this issue. The request made by learned counsel for the respondents has been allowed. Issue fresh notice to the respondents directing them to explain why penalty under Section 142 of the Act be not imposed on them for non-compliance of Clause (3) and Clause (4) of Regulation 8 of the open access regulations and the

Commission's order dated 28.11.2008 ibid. Also issue notice under Section 149 of the Act to Ms. G. Latha Krishna Rao, Managing Director of the first respondent and Shri H.S. Kesav Murthy, Chief Engineer, State Load Despatch Centre, as the persons in-charge of and responsible to the respondents for conduct of their business. Detailed replies may be filed by the respondents and the officers in-charge of and responsible to the respondents for conduct of their business, latest by 31.1.2009, with copies to the petitioner and the generating company.

26. Petition No. 156/2008 shall be notified for further hearing on 10.2.2009.

Sd/-
(S.JAYARAMAN)
MEMBER

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON

New Delhi dated the 22nd January, 2009