

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram :

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

Petition No. 21/2009

In the matter of

Application under sections 76 and 79 for open access under section 2(4) of the Electricity Act, 2003

And in the matter of

GMR Energy Trading Ltd., Bangalore

Petitioner

Vs

1. Karnataka Power Transmission Corporation. Ltd., Bangalore

Respondent

Following were present:

1. Shri Gopal Jain, Advocate, GMR
2. Shri Anand K. Ganesan, Advocate, KPTCL

**ORDER
(Date of Hearing: 16.4.2009)**

The petitioner has made this application to challenge denial of open access by the respondent and has accordingly sought directions for setting aside the decision of the respondent refusing open access.

2. The petitioner is a company registered under the Companies Act, 1956 and has been granted licence for inter-State trading in electricity by the Commission. The

respondent is the State Transmission Utility in the State of Karnataka and operates the State Load Despatch Centre.

3. The petitioner made an application dated 12.1.2009 for concurrence for open access for the period 1.2.2009 to 28.2.2009 for export of power from the generating station owned by GMR Energy Ltd, a sister concern of the petitioner to the State of Andhra Pradesh. The application was returned by the respondent with the following observations, namely-

“As per the govt. order no. N540 NCE 2008/Bangalore dated 30.12.2008 all generators of Karnataka State shall supply all exportable electricity generated to the State Grid in view of extraordinary circumstances. In view of the above SLDC, KPTL, being nodal agency for open access has stopped the issue of consent to the STOA transactions in Karnataka. Hence, this application cannot be considered.”

4. The petitioner is said to have made another application for concurrence for open access for the period 1.3.2009 to 31.3.2009 but this application has failed to elicit any response, it has been stated. The petitioner has averred that denial of open access has been arbitrary and illegal. It is alleged that the respondent has refused open access in disregard of its statutory responsibility.

5. The respondent in its reply to the petition has stated that by an order dated 30.12.2008, issued by the State Government under section 11 of the Electricity Act, 2003 (the Act), has directed all the generating companies in the State to operate and maintain the generating stations to their maximum exportable capacity and to supply

all exportable electricity so generated to the State Grid in view of the extraordinary situation of shortage of power supply in the State. The respondent has brought out that elaborate discussions were held with the stakeholders within the State before issue of the order dated 30.12.2008 by the State Government. The respondent has further pointed out that GMR Energy Ltd has filed a writ petition before the Hon'ble High Court of Karnataka against the State Government's order dated 30.12.2008. The Hon'ble High Court has declined stay of the said order dated 30.12.2008. It is further stated that an earlier order of the Commission dated 22.1.2009 in Petition No. 147/2008 directing the respondent to grant open access for export of power outside the State under similar circumstances has been stayed by the Hon'ble High Court on a writ petition filed by the State Government of Karnataka. The respondent has stated that under these circumstances it was unable to grant open access to the petitioner.

6. We heard learned counsel for the parties. Learned counsel for the petitioner stated at the hearing that by another application dated 6.3.2009 the petitioner has sought standing clearance/NOC for availing open access for the power generated at the generating station of GMR Energy Ltd, for the period 1.6.2009 to 31.8.2009 because the generating station had 220 MW of surplus power. However, the respondent has not replied to this application despite the reminders. The supporting documents in this regard have been placed on record by the petitioner through its affidavit dated 20.4.2009 under the Commission's direction.

7. Learned counsel for the petitioner submitted that the order dated 30.12.2008 was a colourable exercise of power by the State Government since section 11 of the Act could be invoked only under extraordinary circumstances and no such circumstances existed when the order was made. He argued that shortage of power in the State could not be a ground falling within the scope of 'extraordinary circumstances' referred to in the explanation below section 11. He further submitted that under section 11 of the Act, a direction could be issued to operate and maintain the generating station, and that section does not authorize the State Government to issue direction for supply of power to the State Grid.

8. Learned counsel for the respondent reiterated that in view of the directions issued by the State Government under sub-section (1) of section 11 of the Act all the exportable power was to be supplied 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. Learned counsel further submitted that under section 37 of the Act the State Government was competent to issue directions to the State Load Despatch Centre for maintaining smooth and stable transmission and supply of electricity in the State. As regards the petitioner's application for open access for the period 1.6.2009 to 31.8.2009, learned counsel stated that he was not aware of any such application and did not have any instructions on that.

9. We have considered the matter very carefully in the light of the submissions made and have also perused the record. 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.”

10. 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. Despite the grievance made by the petitioner that there were no extraordinary circumstance to support the order or that the State Government was not empowered to issue directions for supply of power to the State Grid, we do not consider it appropriate to express any opinion on

the issue since the Hon'ble High Court is already in *seisin* of the issue in writ petitions filed by the State Government and GMR Energy Ltd., and stated to be pending.

11. Learned counsel for the respondent heavily relied upon section 37 of the Act to justify denial of open access. We reproduce hereunder section 37 of the Act:

“Direction by appropriate Government

37. The Appropriate Government may issue directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State.”

12. From the above, it is seen that the State Government can issue directions to the State Load Despatch Centre to take measures necessary for maintaining smooth and stable transmission and supply of electricity to the State. Nothing has been brought on record to show that any direction specifically under section 37 of the Act was issued to the State Load Despatch Centre by the State Government. Learned counsel for the respondent submitted that a copy of the Government order dated 30.12.2008 was endorsed to the respondent and that was considered as direction under section 37 of the Act. We are not convinced. Section 37 empowers the State Government to issue directions to the State Load Despatch Centre to take measures to maintain smooth and stable transmission and supply of electricity in the State. The order dated 30.12.2008 issued under section 11 of the Act cannot be said to encompassing directions to the State Load Despatch Centre under section 37. The order, if any, issued under section 37 is justiciable and unless such an order is made by the State Government, it is not possible to take a view that denial of open access was justified.

13. Next issue to be considered is whether the State Government's order dated 30.12.2008 can have the effect of prohibiting the State Load Despatch Centre to deny concurrence for open access. The similar issue was considered by the Commission In its 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 that

“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. In our considered opinion, the view already taken should squarely apply to the facts of the present case.

15. Learned counsel pointed out that the order dated 22.1.2009 was stayed by the Hon'ble High Court in the writ petition filed by the State Government. However, in reply to a specific question by the Commission whether stay granted by the Hon'ble High court meant stay of all future proceedings before the Commission for open access, learned counsel clarified that the stay granted by the Hon'ble High Court was order-specific, and there was no stay on any other proceedings for open access, meaning thereby that the stay order did not preclude the Commission to pass an

order by relying on the order stayed by the Hon'ble High Court in any subsequent proceedings.

16. The importance of open access need not be over-emphasised. This is an instrument to promote competition in electricity sector. This aspect has been considered in the National Electricity Policy which states that

“5.3.3 Open access in transmission has been introduced to promote competition amongst the generating companies who can now sell to different distribution licensees across the country. This should lead to availability of cheaper power. The Act mandates non-discriminatory open access in transmission from the very beginning. When open access to distribution networks is introduced by the respective State Commissions for enabling bulk consumers to buy directly from competing generators, competition in the market would increase the availability of cheaper and reliable power supply. The Regulatory Commissions need to provide facilitative framework for non-discriminatory open access. This requires load dispatch facilities with state-of-the art communication and data acquisition capability on a real time basis. While this is the case currently at the regional load dispatch centers, appropriate State Commissions must ensure that matching facilities with technology upgrades are provided at the State level, where necessary and realized not later than June 2006.”

17. There is no gainsaying the fact that grant of open access needs to be encouraged for the development of electricity industry in the country and this aspect has been repeatedly dwelt upon by the Appellate Tribunal for Electricity in its various judgments. In the judgment dated 22.1.2007 in Execution Petition No.1 of 2006, (The RPPL Limited Vs Transmission Corporation of A.P. Ltd and Others), the Appellate Tribunal held as under:

“25.....In case of rejection of the request it obviously implies that the open access and wheeling shall not be made available. It is one of the most important objects of the Act to provide open access. In spite of the fact that the Act provides for open access, which needs to be encouraged for the development of the electricity industry, there still

appears to be some reservations in certain quarters for allowing open access and wheeling of electricity. The argument that the application for change in the schedule of the existing consumers can be permitted only twice in a year cannot be countenanced in law. Such a submission is not in conformity with the Explanation 3 of Clause 1.16 on which reliance was placed by the learned counsel for the respondent nor the same is in keeping with the spirit of the Act, which requires fillip to be given to open access and wheeling of electricity to generate competition.”

18. The above position was reiterated by the Appellate Tribunal in the judgment dated 5.7.2007 in Appeal No.169 of 2006 (RVK Energy Pvt. Ltd vs Central Power Distribution Company & others) and other related appeals as it flows from the extracts of paras 26 and 27 of the judgment placed below:

“26.In case use of open access by a consumer is made onerous by imposing excessive levies, it will amount to barring open access to him. This will result in discrimination of the consumer qua the licensee and generator. Therefore, the above provisions must be looked at, keeping in view the object and reasons of the Act. The provisions must be worked out to promote open access as it will boost competition. Competition benefits the consumer. It pulls down the prices. It improves the quality of service to the consumers. In case open access is inhibited by making it uneconomical for the consumer to choose its source of power, it will have deleterious effect on competition resulting in scarcity of electricity and high tariff. Open access must be utilized to mop up every bit of power available with the generators to surmount shortages and outages of electricity. This is possible in case the surcharge and additional surcharge is reasonable.

27. Though the legislative intent is to give impetus to competition, the APERC by its impugned orders, by taking recourse to the Embedded Cost Methodology to work out the surcharge, has acted contrary thereto. The initiative of the consumers to seek open access must be sustained and kept alive. If the Regulatory Commission goes for an overkill by imposing burdensome cross subsidy surcharge and additional surcharge for open access, it will hit generation for generators will not increase capacity, as it will be hard to find consumers willing to buy expensive power. The Commission in its consultative paper had referred to Residual Generation Rate method but in the impugned order it failed to utilize the same to compute the effect of surcharge determined through various methodologies. It should have adopted such level of cross subsidy surcharge as would have maintained the right

equilibrium between promotion of competition and financial security of the utility (distributor). Unless the consumers can avail of the open access at a reasonable cost not exceeding the rate at which electricity is available within the area of supply of the distribution licensee, it will be difficult for the private entrepreneurs to set up generating stations. The Regulatory Authorities must face the reality. There is no denying the fact that there are crippling shortages of electricity in the country. The economic growth which is about 9% of the GDP, cannot be sustained and further accelerated unless substantial capacity addition takes place. The Regulatory Commissions need to encourage the entrepreneurs to set up generating stations by their visionary orders.”

19. There is no denial of the fact that the applications made by the petitioner have either been turned down or they 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 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 object and purpose 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 also 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. The respondent has not averred that concurrence for open access was refused on the ground of unavailability of surplus transmission capacity or congestion of corridor. Under these circumstances and going by the purpose of open access, it is the obligation of the respondent to provide open access on its network. The respondent, as operator of the State Load Despatch Centre is to be guided by this criterion, while considering the applications

for concurrence for open access. Therefore, in our considered view the respondent was not justified in either refusing concurrence for open access to the petitioner or keeping the applications pending.

20. Before parting we consider it necessary to point out that there is no justification at all to deny open access for the period from 1.6.2009 to 31.8.2009 sought by the petitioner by its application dated 6.3.2009. It was stated by the learned counsel for the petitioner at the Bar that the State Government had presently authorised the respondent to buy power till end May 2009. Its period of validity has not been extended further. These statements have not been refuted. Therefore, even if it is assumed (without accepting though) that the order of the State Government came in the way of grant of concurrence of open access; this ground cannot be said to be in existence while considering the applications for the period 1.6.2009 and onwards.

21. Accordingly, we direct that the applications for concurrence for open access on the State grid for inter-State transmission of electricity made by the petitioner, including the application dated 6.3.2009 presently pending shall be considered by the respondent and decided strictly in accordance with provisions of the open access regulations, in particular regulation 8 thereof.

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

Sd/-
(V. S. VERMA)
MEMBER

Sd/-
(S.JAYARAMAN)
MEMBER

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON

New Delhi, dated the 5th May, 2009

