

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 84/2009**

**Coram**

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

**DATE OF HEARING: 27.10.09**

**DATE OF ORDER: 11.1.2010**

**In the matter of**

Petition under Section 146 read with Sections 142, 149 and 11(2) of the Electricity Act 2003.

M/s Global Energy Ltd. (GEL), New Delhi      ... Petitioner

Vs.

1. State of Karnataka through Principal Secretary, Energy Deptt., Bangalore,
  2. Karnataka State Load Despatch Centre (SLDC) , Bangalore
  3. Karnataka Power Transmission Corporation Ltd. (KPTCL), Bangalore
  4. Western Regional Load Despatch Centre (WRLDC), Mumbai
- .... Respondents

**Parties Present**

Shri Sanjay Sen, Advocate, GEL  
Shri Rajiv Yadav, Advocate, GEL  
Shri Anand K Ganesan, Advocate, KPTCL

The petition has been filed alleging denial of open access by the first three respondents in contravention of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 (Open Access regulations) and seeking the following

“(a) Pass an order, directing the Respondents to implement the order dated 3.2.2009, passed by this Hon’ble Commission in petition no. 153 of 2008, by giving concurrence to the Petitioner’s inter-State open access applications;

(b) Pass an order, imposing maximum penalty under Sections 142 and 146 of the Electricity Act, 2003 against the Respondent Nos. 2 & 3 and their erring officials;

(c) Pass an order, directing the Respondent Nos.1, 2 and 3 to pay a sum of Rs. 4,09,25,700/- to the Petitioner, being the financial loss suffered by the Petitioner on account of denial of open access as a result of the government orders notified by the State of Karnataka;

(d) Pass an order, directing the Respondent Nos. 1, 2 and 3 to pay interest @ 18% per annum to the Petitioner on the aforesaid sum of Rs. 4,09,25,700/-;

(e) Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case."

2. We have gone through the material on record and heard at length, the learned counsels for the parties. The submissions made by the parties during the hearing have been detailed in the record of proceedings dated 27.10.2009 which is also in the realm of public records. Accordingly, we are not reproducing those submissions in this order for sake of brevity and proceed to record our findings on the prayers made by the petitioner.

3. As regards the prayer seeking issue of directions to respondents to implement the order dated 3.2.2009 passed by the Commission in Petition No.153 of 2008 by giving concurrence to the Petitioner's request seeking inter-sate open access, learned counsel for the petitioner submitted that the same had become infructuous in the light of the matter, pending before Karnataka High court, relating to Commission's order dated 22.1.2009, having similar issues.

4. The Commission's order dated 22.1.2009 in Petition No.147/2008 has been challenged by the Government of Karnataka in Writ Petition No. 2703-2733/2009. The Hon'ble High Court in its order dated 28.1.2009 has granted stay on the order

of the Commission. The stay order is still subsisting. It has further come to our notice that the order dated 3.2.2009 in Petition No. 153/2008 has been challenged by the Government of Karnataka in the High Court in Writ Petition No.13338/2009. The Hon'ble High Court in its order dated 17.7.2009 has directed for connecting the matter with other similar matters. In the other similar matters like Petition No.2703-2733/2009 etc, orders have been reserved after hearing. Therefore, the Commission's order dated 3.2.2009 in Petition No. 153/2008 is presently sub-judice before the High Court of Karnataka. Accordingly, this prayer is not being taken up for consideration at this stage.

5. As regards the prayer for initiation of penal proceedings against the respondents under section 142 of the Electricity Act, 2003 (the Act), learned counsel for the petitioner submitted that the plea of the State Government order under Section 11 of the Act is not available for denial of open access during the period 19.11.2009 to 17.12.2009. In response to the same, learned counsel for the third respondent pointed out that show cause notice is yet to be issued.

6. The petitioner has made a categorical averment that with effect from 12.11.2008, the third respondent had stopped according concurrence to inter-State open access sought by the petitioner. This averment has not been controverted by the respondent. With regard to processing of applications seeking open access, Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008. (the open access regulations), provides as under in sub-clause (b) and (c) of clause (3) of regulation 8:

(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:

7. From the foregoing, prima facie it appears that the third respondent has not acted in accordance with the provisions of the open access regulations. However, as we have noted in Para 4 above, the order of the Commission dated 3.2.2009 in Petition No. 153/2008 has been challenged in the High Court of Karnataka and the matter has been connected with the other matters where the stay is operating. Since the order of the Commission dated 3.2.2009 is sub-judice before the High Court, we consider it appropriate to keep the issue pending till the disposal of the matter.

8. The petitioner has also made a prayer seeking initiation of penal action against the respondents under section 146 of the Act, extracted hereunder for ease of reference:

**“146. Punishment for non-compliance of order or directions.**—Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which

may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence:

Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121.”

9. Learned counsel for the petitioner did not cite any provision of the Act to substantiate that this Commission is vested with powers to impose penalty prescribed under section 146 which is criminal in nature. It hardly needs any emphasis that in the absence of any specific provision to the effect, such powers cannot be exercised by this Commission. Accordingly, we reject this request.

10. As regards the prayer for payment of compensation, the learned counsel placed reliance on section 11(2) of the Act and regulation 26 of the open access regulations. On the contrary, the respondents have urged that the appropriate Commission under section 11(2) of the Act is the State Regulatory Commission, which has jurisdiction to regulate tariff for the supply of electricity by the generating company to the Distribution Companies in the State as per the order of the State Government.

11. Without expressing any view on the above issue, we observe that the petitioner has not furnished any documents to substantiate its claim. For example, the quantum of power has been uniformly kept at 5 MW in the calculation sheet whereas the applications for open access made by the petitioner is for varying quantum ranging from 2 MW to 3 MW. Under these circumstances, it is not understood as to how the petitioner has claimed compensation at the rate of 5 MW throughout the period. Further it is observed that the State Discom had offered to take only 3.5 MW from the petitioner. In the light of these facts, the

petitioner is directed to submit under affidavit, with advance copies to the respondents, complete details in support of its claim together with supporting documents.

12. The petitioner is further directed to make its submission as to whether its generating plant has a composite scheme for generation and sale of electricity in more than one State and thereby falls under the purview of section 79(1)(b) of the Act. This issue acquires significance in view of the fact that the terms "Appropriate Government" and "Appropriate Commission" used in section 11 of the Act and defined in sub-sections (5) and (4) of section 2 of the Act need to be interpreted in the light of section 79(1) (b) of the Act for the present purpose.

13. List this case for hearing on 9.2.2010 for further directions.

<b>-sd/-</b>	<b>-sd/-</b>	<b>-sd/-</b>	<b>-sd/-</b>
<b>[V. S. VERMA]</b>	<b>[S. JAYARAMAN]</b>	<b>[R. KRISHNAMOORTHY]</b>	<b>[DR. PRAMOD DEO]</b>
<b>MEMBER</b>	<b>MEMBER</b>	<b>MEMBER</b>	<b>CHAIRPERSON</b>