

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 231/2010
with
I A No. 6/2011**

**Coram
Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M Deena Dayalan, Member**

**Date of Hearing: 24.3.2011
Date of Order: 1.10.2012**

IN THE MATTER OF

Petition under Regulation 8(3) of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission), Regulations, 2008 for directions to Maharashtra State Load Despatch Centre to grant No Objection/concurrence/standing clearance for inter-State open access

AND IN THE MATTER OF

1. Tata Power Company Limited
2. Tata Power Trading Company Limited **..... Petitioners**

Vs

1. Maharashtra State Load Despatch Centre, Kalwa
2. Reliance Infrastructure Limited, Mumbai **.....Respondents**

Counsel/Parties Present:

1. Shri Sitesh Mukherjee, Advocate for petitioners
2. Shri Vishal Anand, Advocate for petitioners
3. Shri Sakya Chaudhuri, Advocate for petitioners
4. Shri Abhijeet Kumar Lala, Advocate for petitioners
5. Shri V. H. Wagle, Tata Power
6. Shri B. J. Shroff, Tata Power
7. Shri Abhishek Roy, TPTCL
8. Shri Ashish Alaspurkar, Advocate for MSLDC

9. Shri B. H. Gujrati, MSLDC

ORDER

I A No 6/2011

Through this application the petitioner seeks to place on record the judgment of the Hon'ble Bombay High Court dated 18.1.2011 in Writ Petition No 71/2011. The judgment is taken on record. IA accordingly stands disposed of.

Petition No 231/2010

2. The petitioners in this petition filed on 12.8.2010 under clause (3) of Regulation 8 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission), Regulations, 2008 have prayed for the following reliefs -

- “(a) quash and set aside the communication dated 30th June 2010 issued by Respondent No 1 denying concurrence/standing clearance for inter-state open access for collective transaction to Petitioners requested vide application dated 28th June 2010;*
- (b) declare that the communication dated 30th June 2010 issued by Respondent No 1 denying concurrence/standing clearance for inter-state open access for collective transaction to Petitioner No 2 is in violation of the Electricity Act 2003 and the regulations framed by this Hon'ble Commission;*
- (c) direct the Respondent No 1 to grant standing clearance for inter-state open access in terms of application dated 28th June 2010 and 9th August 2010 respectively on the power exchanges;*
- (d) in addition and without prejudice to prayer (c) above, declare that the no objection/standing clearance is deemed to be granted by the Respondent No 1 in terms of the applications made by the Petitioners;*
- (e) direct that the Petitioners shall be entitled to compensation from the Respondent No 1 for the losses suffered by the Petitioners on account of the difference between the market rate discovered on the power exchanges and the rate of approximately Rs. 3.00 at which the*

Petitioner No 1 is being forced to sell the power to Respondent No 2, due to denial of standing clearance by the Respondent No 1 from 1st July 2010 till the date when such clearance is permitted to the Petitioners;

- (f) direct the Respondent No 1 to show cause and thereafter impose the maximum penalty under section 142 of the Electricity Act, 2003;*
- (g) pass appropriate ad-interim orders allowing the Petitioners to carry out transactions/trades on the power exchanges in terms of the details as to duration and quantum more particularly set out in Petitioner No 2's applications dated 28th June 2010 and 9th August 2010 till the disposal of the present petition;*
- (h) pass ex parte ad interim order in terms of prayer (c) and (g) above;*
- (i) pass such other and further orders/directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."*

3. Tata Power Company Limited (Tata Power), the first petitioner, primarily engaged in the business of generation of electricity also undertakes distribution of electricity in Mumbai as a distribution licensee. The requirement of power for the distribution business of Tata Power is exclusively met through its own generation. Tata Power is also having long-term PPA for supply of power to BEST Undertaking. Tata Power had an arrangement for supply of power to Reliance Infrastructure Ltd (RInfra), the second respondent which is also engaged in the business of distribution of electricity in Mumbai. Tata Power terminated the arrangement for supply of power to RInfra with effect from 1.4.2010. The power becoming surplus as a consequence of this termination was proposed to be utilized for its distribution business or traded through its subsidiary company, Tata Power Trading Company Ltd (Tata Trading), the second petitioner, a licensee for inter-State trading in electricity.

4. After termination of Tata Power's arrangement with RInfra, the State Government of Maharashtra issued a Memorandum dated 7.5.2010 conveying the

Government's view that the Maharashtra Electricity Regulatory Commission ("MERC") should take suitable measures at the earliest, considering the broad principles spelt out in the Memorandum together with other relevant circumstances, and taking into account the interest of consumers of Mumbai including the cross-subsidized consumers of RInfra. In the Memorandum, the State Government advised Tata Power to continue to supply 360 MW of power to RInfra till 30.6.2010 and 200 MW of power thereafter till 31.3. 2011, and utilize the balance 160 MW for its distribution business at regulated tariff with effect from 1.7.2010. However, as Tata Power persisted with the arrangement for supply of power worked out by it after termination of arrangement with RInfra and continued to pursue the matter with Maharashtra State Load Despatch Centre (MSLDC), the first respondent, the State Government issued another Memorandum dated 19.5.2010 by which it issued the following directive:

"The Chief Engineer, State Load Despatch Centre, Kalwa and all the officers and employees working under him, are hereby directed to maintain status quo in respect of scheduling of 360 MW power under reference till further directives are received or obtained from MERC or till further orders /directions in this behalf are issued by State Government."

5. The petitioners had initiated various proceedings against the directives issued by the State Government before the Hon'ble Bombay High Court which also included challenge to the Memorandums dated 7.5.2010 and 19.5.2010 in Writ Petition No 71/2011. The Hon'ble High Court by its judgment dated 18.1.2011 held the Memorandum dated 7.5.2010 *ultra vires* and quashed and set aside the said Memorandum. Hon'ble High Court also held that :

"We also clarify that the setting aside of the memorandum dated 7 May 2010 will not interdict the proceedings which have been conducted by the MERC in pursuance of its notice dated 18 May 2010. This would however have to be

independent of the Memorandum of 7 May 2010 which is set aside. MERC would be at liberty to consider whether a case has been made out for the exercise of its statutory or regulatory powers independent of the memorandum dated 7 May 2010. This order shall not be construed as precluding the exercise of statutory powers by the Commission in accordance with law.”

6. Meanwhile, Tata Trading on 28.6.2010 made an application before MSLDC seeking issuance of standing clearance for sale up to 358 MW generation capacity during 1.7.2010 to 31.7.2010 at the power exchanges, in accordance with the procedure specified under Regulation 8 of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008, as amended (the open access regulations). MSLDC vide its endorsement dated 30.6.2010 made on Tata Trading's application rejected the application stating that –

“As the said matter is pending with Hon'ble Commission, this application cannot be considered at this stage. It shall be considered in view of orders which shall be passed by Hon'ble Commission (MERC pursuant to Memorandum dated 7.5.2010) in the proceeding pending before it.”

7. Tata Trading made another application dated 9.8.2010 before MSLDC requesting for issuance of standing clearance for sale of up to 183 MW generation capacity at the power exchanges for the period 10.8.2010 to 31.10.2010. The present petition was filed on the apprehension that the application would be rejected. There is nothing on record to show that the standing clearance was issued in favour of the petitioners. In fact, MSLDC in its reply has contested the entitlement for standing clearance. During the hearing it was clarified by the learned counsel for the petitioners that the applicant was neither granted standing clearance nor its application was formally rejected. It was submitted that the application was deemed to have been rejected.

8. Aggrieved by rejection or deemed rejection of Tata Trading's applications for issuance of standing clearance the petition has been filed with the prayers noted in para 2 above.

9. The separate replies have been filed by MSLDC as well as RInfra. The sum and substance of their replies is that the State Government was fully justified in issuing the Memorandums dated 7.5.2010 and 19.5.2010 and denial of standing clearances pursuant to the directives of the State Government was just and valid.

DECISION WITH REASONS

10. After having considered the contentions advanced on behalf of the parties and the pleadings before us, it is quite clear that the basis on which Respondent No.1 has tried to justify its action of refusing to schedule 358 MW of power during the period from 1.7.2010 to 31.7.2010 is that the matter was pending before the Maharashtra Electricity Regulatory Commission. This is borne out from the endorsement dated 30.6.2010 by Respondent No.1 on the Petitioner's application dated 28.6.2010 for standing clearance:

“As the said matter is pending with Hon’ble Commission, this application cannot be considered at this stage. It shall be considered in view of orders which shall be passed by Hon’ble Commission (MERC pursuant to Memorandum dated 7.5.2010) in the proceeding pending before it.”

On the matter that is said to be pending before the MERC, the same was disposed of by MERC's Order dated 29 September, 2010. Thereafter, in appeal, Hon'ble Appellate Tribunal delivered its Judgment dated 30 May, 2012 in Appeal No 32 of 2011 setting aside the said MERC's Order dated 29 September, 2010. This only shows that MSLDC's action was not correct. In fact, Hon'ble Tribunal has held that

MSLDC (Respondent No.1 herein) could not have acted on Government instructions contained in the aforementioned Memoranda and refuse to schedule power as requested by TPC because the Hon'ble Bombay High Court in Writ Petition of 71 of 2011 held in its Judgment that the GOM swore an affidavit on 11 June, 2010 to the effect that the Government did not exercise its power under Section 11 or Section 37 of the EA 2003 and that the aforementioned Memoranda are merely advisory in nature. The learned Advocate General of Maharashtra made a submission before the Hon'ble Bombay High Court that the Memorandum was only a request to the MERC and not a statutory directive, and it was recorded in the Hon'ble High Court's orders dated 11 June, 2010 and 16 June 2010. The Hon'ble Tribunal has also held that after the aforesaid developments MSLDC could not have been said to be in a state of flux.

11. As regards Tata Power Trading Co.'s application dated 9.8.2010 requesting for issuance of standing clearance for sale of up to 183 MW generation capacity at the power exchanges for the period 10.8.2010 to 31.10.2010, MSLDC could not show that the same was granted or not. The state of flux theory applies here as well. But in view of Hon'ble Tribunal's aforesaid judgement, MSLDC's actions cannot be condoned due to any state of flux.

12. It is crystal clear that Tata Trading's application dated 28.6.2010 for standing clearance was rejected solely based on State Government's Memorandums dated 7.5.2010 and 19.5.2010. Similarly, the application dated 9.8.2010 was not processed by MSLDC in view of the interdiction contained in these Memorandums. The Hon'ble High Court by the judgment dated 18.1.2011 has already quashed and set aside the Memorandum dated 7.5.2010 as it was not issued by the state Government in

exercise of any statutory power, a fact conceded by the State Government before the Hon'ble High Court. Hon'ble High Court has held that the Memorandum dated 19.5.2010 was consequential to the Memorandum dated 7.5.2010 as seen from the following finding of the Hon'ble High Court:

“But once it came to the conclusion that the exercise of a statutory directive was not warranted at that stage, it would be impermissible for the State Government to issue what it termed as a request but which it treated as a binding advice by issuing a directive in its subsequent memorandum of 19 May 2010. The Memorandum of 19 May 2010 is consequential to the Memorandum of 7 May 2010.” (Emphasis added)

“For all these reasons, we are of the view that the memorandum that was issued by the State Government on 7 May 2010 is clearly ultra vires and would have to be quashed and set aside. There shall be an order in these terms.”

Accordingly, the Memorandum dated 19.5.2010 too stands quashed and set aside.

13. This Commission in exercise of its powers under Section 178 of the Electricity Act, 2003 has specified the open access regulations. Regulation 8 of these regulations lays down the procedure for concurrence/standing clearance of State Load Despatch Centre for bilateral and collective transactions. Clause (3) of Regulation 8 provides as under:

“(3) (a) For obtaining concurrence or ‘no objection’ or prior standing clearance an application shall be made before the State Load Despatch Centre who shall, acknowledge receipt of the application, either by e-mail or fax, or any other usually recognised mode of communication, within twenty four hours from the time of receipt of the application:

Provided that where the application has been submitted in person, the acknowledgement shall be provided at the time of submission of the application.(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:*

Provided that when short-term open access has been applied for the first time by any person, the buyer or the seller, the State Load Despatch Centre shall convey to the applicant such concurrence or 'no objection' or prior standing clearance, as the case may be, within seven (7) working days of receipt of the application by e-mail or fax, in addition to any other usually recognised mode of communication."

14. It is clear from the above that while deciding the application for grant of standing clearance, SLDC is to take into account only two factors, namely, existence of necessary infrastructure and availability of surplus capacity. Consideration given in the present case to GOM Memorandums for deciding the application was extraneous to the statutory regulations. In the instant case, MSLDC mechanically acted on the directives contained in the State Government's Memorandums, without any application of mind. The Hon'ble Tribunal has held in its aforesaid Judgment that MSLDC is undoubtedly a statutory body designed to ensure integrated operation of power system and it acts in terms of Section 33 of the EA 2003. It was not the case of MSLDC that there was network constraint or congestion and lack of required metering infrastructure. The grounds of refusal must be within the parameters of the law and any action which is not within the domain of the Authority would be without jurisdiction.

15. MSLDC is a statutory authority constituted under Section 31 of the Electricity Act, 2003. It is required to act and function as an independent and autonomous

body. Its function is to ensure integrated operation of the power system in the State and to optimize scheduling and despatch of electrical energy in accordance with the contracts entered into with the licensees or generating companies operating in the State and to monitor Grid system. In the discharge of its function as an independent system operator, MSLDC in this particular case should, not have been influenced by anything other than the Act and the rules and regulations made thereunder. Therefore, MSLDC while rejecting or not processing Tata Trading's applications did not act in accordance with the open access regulations. For these reasons the action of MSLDC requires to be deprecated. The actions of MSLDC to reject the applications for standing clearance were erroneous.

16. In the light of above discussion, we set aside and quash the endorsement dated 30.6.2010 made by MSLDSC on the Tata Trading's application dated 28.6.2010 seeking standing clearance for sale of electricity through power exchanges during the period 1.7.2010 to 31.7.2010. However, the petitioners' prayer for grant of standing clearance has become infructuous as the petition was filed only on 12.8.2010 after expiry of the first period (1.7.2010 to 31.7.2010), for which the standing clearance was sought. We, take this opportunity to reiterate that as an independent operator and statutory body under the Electricity Act, MSLDC should consider the applications for concurrence, 'no objection', 'standing clearance' in an impartial manner and in line with provisions of Electricity Act and the open access regulations.

17. The petitioners have sought a direction for compensation against MSLDC for the losses allegedly suffered for denial of standing clearance. The petitioners' claim

for compensation against MSLDC was considered by the Appellate Tribunal in its judgment dated 30.5.2012 in Appeal No 32/2011 filed against the order of MERC, *inter alia*, rejecting the petitioners' claim for compensation. After elaborate discussion of the issue, the Appellate Tribunal concluded that

“In the circumstances, the prayer for compensation is difficult to accept. While saying so, we have no manner of doubt that after the High Court quashed the two Memoranda, there was hardly any scope on the part of the MSLDC to defer scheduling appellant’s Generation Capacity in favour of the TPC-D.”

18. The circumstances under which MSLDC rejected Tata Trading’s application for standing clearance are similar to those considered by the Appellate Tribunal in the above case. We have already held that Respondent No.1 is a statutory body. In such a case an award of damage can only be made if it can be said that the actions are actuated by malice, misfeasance, malafide motive and negligent discharge of duties. The background in which the MSLDC acted is borne out in the aforesaid paragraphs; GOM Memoranda; the Hon’ble High Court’s judgement and the Hon’ble Appellate Tribunal’s judgement. Considering all of these factors, we do not deem it appropriate to hold that MSLDC acted with any malice, misfeasance, malafide motive or is guilty of negligent discharge of duties. No evidence in this regard has been placed before us. Also for parity of reasoning adopted by the Appellate Tribunal in rejecting the petitioners’ claim for compensation in the appeal against the order of MERC, we are not inclined to grant the prayer for compensation.

19. The Petitioner has also made the following prayer as well:-

“(f) direct the Respondent No 1 to show cause and thereafter impose the maximum penalty under section 142 of the Electricity Act, 2003;”

Section 142 of the Act reads as follows:-

“142. In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any provisions of this Act or rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.”

It is settled law that penalty could be imposed if the accused has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation. These factors have not been shown to us. And neither are we, on the basis of the materials before us, able to ascribe these factors to MSLDC. However, the action of the Respondent No. 1 was erroneous and incorrect in view of the Hon'ble High Court's Judgement, particularly in view of the admissions made by GOM and the Advocate General of Maharashtra and in view of the Hon'ble ATE's Judgment dated 30 May, 2011. Hence, we are not inclined to proceed against the Respondent No.1 under Section 142 of the Act.

20. With the above, the petition stands disposed of.

sd/-
(M Deena Dayalan)
Member

sd/-
(V.S.Verma)
Member

sd/-
(S. Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson