

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 132/MP/2012

Coram :

**Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri M. Deena Dayalan, Member
Shri AS Bakshi, Member(EO)**

**Date of Hearing:14.8.2012
Date of Order :19.11.2012**

In the matter of:

Granting of Open Access for Inter State Transmission of Electricity

And in the matter of:

BBM Ispat Ltd

.....**Petitioner**

Vs.

1. State Load Despatch Centre, Karnataka
2. State of Karnataka, Department of Energy
3. Power Company of Karnataka Ltd
4. Karnataka Power Transmission Corporation Ltd
5. Bangalore Electricity Supply Company Ltd
6. Hubli Electricity Supply Company Ltd
7. Mangalore Electricity Supply Company Ltd
8. Chamundeshwari Electricity Supply Company Ltd
9. Gulbarga Electricity Supply Company Ltd
10. Southern Regional Load Despatch Centre

..... **Respondents**

Present:

Shri Shridhar Prabhu, Advocate for the petitioner.
Shri Anant Narayan MG, Advocate for Petitioner
Shri Venkata Subramana TR, Advocate for SLDC Karnataka
Shri Mukesh Kumar, BBM Ispat Ltd



ORDER

The petitioner, BBM Ispat Ltd has filed the present petition with the prayers as follows:

- “(a) To Set aside the letter bearing No.CEE/SLDC/EE/AEE3/37 dated 9th April, 2012 issued by the 1st Respondent, refusing to grant No Objection Certificate for Inter State Open Access to the Petitioner, by declaring the same as arbitrary, illegal, without jurisdiction, ultra virus to the provisions of the Electricity Act, 2003, CERC (Open Access in inter-State Transmission) Regulations, 2008 at ANNEXURE – P1;*
- (b) Direct the 1st Respondent to issue No Objection Certificate for Inter State Open Access to the Petitioner, to the extent of 45 MW power, for the period from 5th April, 2012 to 4th May, 2012, in a time bound manner, in term of Application dated 5th April, 2012 ANNEXURE – P2;*
- (c) Direct the Respondents No. 1 to 9, either jointly or severally, to pay damages to the Petitioner, which is being the difference between Rs. 5.30 per unit, fixed in the GO and the notional price quoted in the trading platform of the Indian Energy Exchange Limited, during the time at which the electricity was injected in the transmission system of the 4th Respondent, from 1st February, 2012, till the open access is allowed to the Petitioner by the 1st Respondent as per the Electricity Act, 2003 and the Regulations framed by this Hon’ble Commission;*
- (d) Award cost of this Petition;*
- (e) To pass such other and further orders, as the Hon’ble Commission deems fit to pass under the facts and circumstances of the case.”*

Facts

2. The petitioner, a generating company within the meaning of the term defined under sub-section (28) of Section 2 of the Electricity Act (the Act), owns and operates two co-generation power plants with a total exportable capacity of 25 MW within the area of supply of Gulbarga Electricity Supply Company Ltd, the ninth respondent, in the State of Karnataka. The generating stations are connected to the State Grid, operated and maintained by Karnataka Power Transmission Corporation Ltd (KPTCL), the fourth respondent, through a 220 kV transmission line.

3. The petitioner entered into an agreement 3.9.2011 with Bangalore Electricity Supply Company Ltd (the fifth respondent) for supply of a part of power generated and the balance of electricity generated is sold outside the State by availing inter-State open access under the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2009 (the Open Access Regulations). The petitioner has mentioned that it made an application dated 25.1.2012 for NOC for grant of short-term inter-State open access under the provisions of the Open Access Regulations, though copy of the application has not been filed..

4. The State Government of Karnataka (State Government) (the second respondent) issued an order bearing No EN 2 PPC 2012 dated 27.1.2012 ("the impugned GO") under Section 11 of the Act, directing the generators in the State to supply their entire exportable power to the State Grid for utilization in the State from 1.2.2012 to 31.5.2012. The impugned GO which was published in the Karnataka Gazette on 15.3.2012 is extracted below:

"In the circumstances explained in the Preamble and in exercise of the powers conferred under section-11 of Electricity Act 2003, the State Government hereby issues the following directions in the public interest with effect from 1st February 2012 and will be in force till 31st May 2012 or until further orders whichever is earlier:

a) All the Generators in the State of Karnataka shall operate and maintain their generating stations to their maximum exportable capacity and shall supply all exportable electricity generated to the State Grid for utilization within the State subject to following conditions:

i) The tentative tariff for supply of energy by the Generators under section 11 and who do not have Power Purchase Agreement with the Electricity Supply Companies shall be Rs. 5.30/unit subject to determination of final tariff by Hon'ble KERC.

- ii) *Joint meter readings taken by ESCOMs on 31.01.2012 midnight shall be the basis for raising the monthly bills.*
- iii) *LC will be provided by the ESCOMs to the extent of cost of power allocated.*
- iv) *Rebate of 2% shall be allowed on the bill amount if payment is made within 5 days from the date of presentation of bill or other wise 1% shall be allowed if the payments are made within 30 days.*
- v) *Due date for making payment shall be 30 days from the date of presentation of the bill.*
- vi) *Surcharge at 1.25% per month shall be payable if the payments are made beyond due date.*
- vii) *The Jurisdictional Distribution Licensee shall raise the bill for the energy imported by the Generators under section 11.*
- viii) *Energy pumped by Generators under section 11 shall be allocated amongst ESCOMs as per Govt. Order dated 12-10-2011 in line with CGS allocation and is as follows:*

<i>BESCOM</i>	<i>:</i>	<i>49.62%</i>
<i>MESCOM</i>	<i>:</i>	<i>08.33%</i>
<i>CESC</i>	<i>:</i>	<i>10.61%</i>
<i>HESCOM</i>	<i>:</i>	<i>18.18%</i>
<i>GESCOM</i>	<i>:</i>	<i>13.26%</i>

- ix) *The Generators shall raise the bills in the above portion to respective ESCOMs.*
- b) *The above tariff is provisional and is subject to approval of Karnataka Electricity Regulatory Commission (KERC).*
- c) *The above proposal shall not be applicable for the Intra-State Generators who are having valid PPA's with the Distribution Licensees in the State of Karnataka.*
- d) *All State Electricity Supply Companies (ESCOMs) shall submit a Memorandum on the power situation within 15 days from date of this order before the Karnataka Electricity Regulatory Commission (KERC) and request to fix the tariff for supply of energy by the*

Generators source-wise (i.e. Cogeneration, Biomass, Captive, IPP, etc) under section 11 of Electricity Act 2003.”

5. The preamble of the impugned GO discloses the reasons for invoking Section 11 of the Act, some of the clauses of which are as follows:

- “1. *The State is facing power shortage during 2011-12. There is deficit between demand and supply in the State. Owing to steep increase over the years in demand for power supply, the daily consumption of energy has also increased.*
12. *In view of the Non availability of corridor from ER/WR to SR, power flow to Karnataka from outside sources up to end of May, 2012 is meager.*
13. *The availability of power through Energy Exchanges is also constrained by corridor congestion, rates are fluctuating and there is no guarantee that the required power can be obtained through Energy Exchange. Hence, the State cannot depend on any additional power from outside sources for the period between February 2012 to May 2012.*
14. *There is remote possibility of getting any additional quantum of power from outside generators either through bidding process or bilateral transactions due to corridor congestion.*
15. *In the circumstance, the endeavor of the State is that every possible source of power should be tapped in the coming months. To mitigate the likely power shortages and to maintain regularity and minimize inconvenience to the public is a matter of paramount concern in the coming months.*
16. *The State Government is of the considered opinion that the prevailing power situation in the State warrants measures to protect the public interest. The State is also aware that the genuine economic interests of the generators are to be borne in mind in view of costs of inputs for power generation.*
17. *In view of the non-availability of the corridor for inter-state transmission of power, the only option left is to tap the power from Intra-State Generators of around 660 MW.*
18. *Following are the details of available generation capacity of Private Entrepreneurs in the State of Karnataka:*

Generation source	Net capacity (MW)
<i>Cogeneration without PPA</i>	419
<i>JSWEL, Torangallu</i>	<i>Available for export :250 MW out of 1160 MW a 650 MW is being scheduled against Lol to BESCO b. 260 MW of Captive consumption.</i>

19. *At meeting chaired by the Hon'ble Chief Minister, Govt. of Karnataka on 31.12.2011, it was decided to procure the power from Generators within the State and fix the tentative tariff of Rs. 5.30 per unit obtained against previous tender notification dated 29.10.2011 subject to determination of final tariff by Hon'ble KERC for Generators pumping energy against order issued under Section 11."*

6. Consequent to issue of the impugned GO, SLDC by its letter dated 28.1.2012 forwarded to the petitioner a copy of the impugned GO stating further that the application to sell power under open access for the period 26.1.2012 to 25.2.2012 was not considered. Thereafter petitioner made an application dated 5.4.2012 under Regulation 8 of the Open Access Regulations for the Standing Clearance/NOC for export of power generated by the petitioner for sale outside the State during 5.4.2012 to 4.5.2012. These application was rejected by SLDC vide its letter dated 9.4.2012. Thus, the petitioner supplied power to the State Grid. The petitioner has averred that it suffered losses to the extent of ₹34,00,92,000 as a consequence of refusal of Standing Clearance/NOC. The petitioner has made the present application seeking relief as extracted above.

Grounds

7. The petitioner has raised a number of grounds in support of the relief claimed, as summarized below:

- (a) The State Government is not authorized under Section 11 of the Act to issue the impugned GO to mandate supplies to the distribution companies.
- (b) The GO came into effect on 15.3.2012 when it was published in the Gazette as the State Government did not intend to give effect prior thereto as seen from the fact that it was not published in the Gazette on or before 1.2.2012.
- (c) The refusal of the Standing Clearance/NOC with effect from 1.2.2012, that is, from a date prior to its publication in the Gazette on 15.3.2012 amounts to giving it retrospective effect, which is not permissible under the law declared by the Hon'ble Supreme Court in Cannanore Spinning and Weaving Mills Limited Vs Collector of Customs And Central Excise, Cochin (AIR 1970 SC 1950).
- (d). SLDC allowed M/s. Godavari Bio Refinery, Jindal Power Limited (JPL) and JSW Energy Limited (JSWEL), to continue to inject power for the inter-State Open Access even after issue of the impugned GO.
- (e) The impugned GO was conditional; one of the conditions being opening of the Letter of Credit (LC) by Respondent Nos. 5 to 9, to the extent of cost of power allocated to each of them. The condition precedent was not fulfilled as the eighth respondent did not provide the LC, while the sixth and seventh respondents provided some payment security mechanism bearing resemblance to the LC, though it was standby, conditional and provisional as some extraneous conditions were

imposed. Thus, in effect, the fifth and ninth respondents only provided the LC which cannot be considered as fulfillment of the condition precedent of opening of the LC stipulated under the impugned GO. Unless the conditions precedent was complied with, the impugned GO could not be given effect.

- (f) Neither SLDC nor KPTCL nor Respondent Nos. 5 to 9, who have the responsibility to supply reliable power at reasonable price to the consumers in the State expressed any constraints on the corridor shortage for import of power as alleged in the impugned GO, the impugned GO was issued at the instance of the third respondent entrusted with the function of energy accounting functions of Respondent Nos. 5 to 9.
- (g) With the implementation of the impugned GO, fifth proviso to Section 42 (2) of the Act became redundant. There are no powers vested with the second respondent to take away the right of the consumers to avail open access by mandating supply by the generators to the distribution companies under the impugned GO.
- (h) Availing the inter-State open access by the generators would not have resulted in actual outgo of electricity since Karnataka and other States in Southern Region were net importers of electricity and therefore, the quantum of electricity imported by Respondent Nos. 5 to 9 would have set off against the quantum exported by availing open access and only book adjustment had to be made by netting out. Under these

circumstances, the ground of congestion in power corridor for issuing the impugned GO was invalid.

- (i) SLDC committed illegality while issuing letter dated 9.4.2012 on the basis of the impugned GO, when the impugned GO did not contain any direction of the State Government under Section 37 of the Act, the only provision enabling that Government to issue directions of SLDC.

Reply

8. The reply has been filed by SLDC- and not by any other respondent - who has raised a preliminary objection as to the maintainability of the petition on the ground that the petitioner ought to have approached the State Commission for redressal of its grievances since the directions under Section 11 were issued by the State Government and not the Central Government.

9. On the question of validity of the impugned GO, SLDC has submitted that the Division Bench of the Hon'ble High Court of Karnataka in its judgment dated 26.3.2010 in WP Nos. 590-591/2009 has already upheld invocation of Section 11 by the State Government under similar circumstances. SLDC has sought to justify the impugned GO on the grounds narrated in the preamble stating that the State faced acute shortage of power. It has been submitted that after issue of the impugned GO, SLDC on 28.1.2012 addressed letters to all the generators within the State availing open access, enclosing therewith copy of the impugned GO, informing them of the cancellation of the Standing Clearance/NOC with effect from 1.2.2012 as the impugned GO clearly recited that it came into effect on 1.2.2012. SLDC has explained that the impugned GO was operative up to 31.5.2012 and thereafter it has started issuing NOC for inter-State open access in accordance with the Open Access

Regulations. It has been brought out that Section 11 does not provide for notification of the impugned GO in the Gazette since it uses the expression “specify”. In view of this, SLDC has contended, the argument that the impugned GO had not come into effect till its publication in the Gazette and the averment that the intention of the State Government was not to give immediate effect to the impugned GO are untenable.

10. SLDC has explained that Godavari Bio Refineries had bilateral transaction scheduled by SRLDC during February, March and April, which was approved during the first week of January 2012. After issue of the impugned GO, SLDC claims to have sent a request for cancellation of open access to SRLDC who insisted on the cancellation letter from the trader/generator as per the Open Access Regulations applicable to cancellation of bilateral transactions. In respect of Jindal Power Ltd., SLDC has stated that all its transactions were cancelled except for meager quantum of 8-10 MW. As regards to JSW, on a firm request, supply of power to JSWEL Group of companies located in Andhra Pradesh and Tamil Nadu was allowed to the extent of 5-10 MW out of total capacity of 1000 MW. It has been stated that JSW EL too was forced to inject 350 MW of its exportable power into the State Grid.

Issues

11. Based on the rival contentions, the following issues arise for consideration:

- (a) Whether this Commission has jurisdiction to entertain the petition?
- (b) Whether the impugned GO issued by the State Government under Section 11 of the Act is valid?
- (c) Whether the impugned GO came into effect on 1.2.2012 as recited therein or on 15.3.2012, the date of its publication in the Gazette?

(d) Whether the impugned GO was conditional?

(e) Whether SLDC was justified to withdraw or refuse the Standing Clearance/NOC?

(f) Whether the petitioner is entitled to the compensation on account of denial of inter-State open access?

Re: Jurisdiction

12. SLDC has raised the issue of jurisdiction of this Commission to entertain the petition since, according to SLDC, the impugned GO was issued by the State Government and as such the question of grant of compensation falls within the jurisdiction of the State Commission under sub-section (2) of Section 11 of the Act.

13. In our opinion the contention of SLDC is misconceived. The petitioner is aggrieved on account of cancellation of the Standing Clearance/NOC granted under the Open Access Regulations specified by this Commission for February and March 2012 and also by refusal of SLDC to grant the Standing Clearance/NOC to enable the petitioner to avail inter-State open access during April and May 2012. The petitioner has sought compensation for the alleged losses suffered by it. As specified under Regulation 26 of the Open Access Regulations, all disputes arising thereunder are to be decided by this Commission on an application made by the person aggrieved. Therefore, the dispute raising the question of legitimacy of withdrawal/denial of the Standing Clearance/NOC is within the jurisdiction of this Commission. The adjudication of claim for compensation is incidental to adjudication of the substantive dispute of refusal of open access. Recently, the question of grant

of compensation in a situation of denial of open access was considered by the Appellate Tribunal in Parrys Sugar Industries Limited Vs Karnataka Electricity Regulatory Commission and Others (Appeal No 140 of 2012). In its judgment dated 27.9.2012 the Appellate Tribunal held that -

“This Tribunal has in the past held that any injection by a generating company without any schedule or concurrence could not be recognized for payment by the distribution licensee which did not have any PPA with the generating company, in the interest of security and economic operation of the grid and maintaining grid discipline. However, the Tribunal has also decided to grant compensation for unscheduled injection by the generator in case the circumstances of the case warranted so and where the generator had to inject energy in the compelling circumstances forced by the action of the licensee. The circumstances in the present case are also similar. The Appellant’s application for NOC for open access for the period 15.10.2011 to 31.10.2011 was pending before Respondent no. 3 and despite follow up they did not get any response, either accepting or rejecting the application. The Appellant’s power plant is not a normal power plant and operates only in the crushing season for a few months during the year. According to the Appellant, crushing had to be commenced on 3.11.2011. They, however, did not approach the Respondent no. 3 for granting open access for further period commencing from 3.11.2011 as their earlier application for the period 15.10.2011 to 31.10.2011 was already pending with the Respondent no. 2, without any decision.

We find force in the arguments of the Ld. Counsel for Appellant. In the circumstances of the case, we feel that the claim of the Appellant for compensation could not be outrightly rejected on the technical grounds that the injection of power was subsequent to the period for which open access was sought and the Appellant should have again applied for NOC for the further period. Considering that the injection of power commenced only 3 days after the end of the period for which open access was sought and the Appellant was being made to run from pillar to post to obtain the NOC for open access despite the clear findings of the Central and State Commission in their favour. In our opinion, the Appellant deserves to be compensated for the energy injected. Now, we have to decide the rate at which the compensation may be given to the Appellant to meet the end of justice.” (Emphasis added)

14. In view of the above, the preliminary objection regarding the jurisdiction of this Commission raised by SLDC is liable to be rejected and is accordingly rejected.

Re: Validity of the impugned GO

15. The petitioner has questioned the jurisdiction of the State Government to issue the impugned GO and directing the generators to supply power for consumption in the State. In response, SLDC has relied upon the judgment dated 26.3.2010 of the Hon'ble Karnataka High Court in Petition Nos. 590-591/2009.

16. The Writ Petitions were filed before the Hon'ble High Court challenging the Government Orders dated 17.12.2008 and 30.12.2008 (the GOs) passed by the State Government under Section 11 of the Act. In the order dated 17.12.2008 the State Government directed the co-generation plants in the State to operate and maintain generating stations owned by them and supply electricity generated to the State Grid. Subsequently, by another order dated 30.12.2008 similar directions were issued to all generating companies operating within the State. Both these orders were challenged before the Hon'ble High Court on various grounds. The Hon'ble High Court by order dated 26.3.2010, rejected all the grounds raised and dismissed the writ petitions, upholding the GOs. The Hon'ble High Court in para 111 of the order held as under:

“111. Section 11 of the Act over-rides Section 42. The indication is clear from sub-section (2) of Section 11 whereby the Appropriate Commission has been conferred the power to 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. In other words, though the State Commission has introduced open access and has granted open access to a generating company or a distribution licensee, in such case if the Government were to exercise power under section 11 of the Act and the consequences is that it would have any adverse financial impact on the generating company, then the Appropriate Commission has been vested with the power to off-set such adverse financial impact. In other words, the State Commission has no power to annul the direction issued to the generating company but they have power to offset only the adverse financial impact. Therefore, the contention that no direction

could be issued under Section 11 of the Act so as to affect the open access, is without any substance.” (Emphasis added)

17. Before issue of the impugned GOs, the generators in the State were denied inter-State open access for export of power. Two of them, namely, Renuka Sugars Ltd and Global Energy Ltd filed petitions before this Commission challenging refusal of open access. By order dated 22.1.2009 in Petition No 147/2008 and other connected petitions filed by Renuka Sugars Ltd this Commission directed SLDC/KPTCL to grant concurrence for the inter-State open access for export of power. In the petition filed by Global Energy Ltd (Petition No 153/2008) also, this Commission by its order dated 3.2.2009 directed SLDC/KPTCL to grant open access to Global Energy Ltd. The State Government filed Writ Petitions before the Hon'ble High Court against this Commission's orders dated 22.1.2009 and 3.2.2009, being Writ Petition Nos. 2073/2009, 2733/2009 and 13338/2009. These Writ Petitions were also disposed of by the Hon'ble High Court vide order dated 26.3.2010 in the light of the order in Writ Petition Nos. 590-591/2009 . The operative part of the order is extracted below:

“18. In those connected matters this Court has upheld the order passed under Section 11 of the Act by the Government. It is held therein the concept of open access is not an unbridled right conferred on a generating company or a licensee or a distribution licensee. Such an open access is also regulated by the Act and the Regulations. In the absence of any order under Section 11 passed by the Appropriate Government, the provisions of the Act and the Regulations have to be interpreted so as respect the concept of open access and the rights conferred thereon. The concept of open access only means that the private generating companies shall not be discriminated in the use of transmission lines or distribution system or associated facilities. It does not mean a right is conferred on them absolutely to supply electricity to a consumer or a licensee of their choice and that such a right cannot be curtailed under any circumstances. The Central Electricity Regulatory Commission (Open access in Inter-State Transmission) Regulations, 2008 regulates such open access in the normal circumstances. When once in an extra-ordinary circumstance as contemplated under Section 11 (1) of the Act, the Government issued the direction to a generating

company to operate and maintain a generating station and supply electricity generated to the State Grid, the said order would have overriding effect on the orders passed by the authorities under the Act .Before a person can claim open access from the Appropriate Commission, No Objection from the State Load Despatch Centre is a must. When once the State passes an order under Section 11, the State Load Despatch Centre granting concurrence for open access would not arise. The Central Commission cannot find fault with such an action of the State Load Despatch Centre and it was in total error in passing the impugned orders in these Writ Petitions. Therefore, for the reasons set out in the aforesaid judgment, the impugned order is liable to be quashed. Accordingly, the following

ORDER

- (a) *Both the writ petitions are allowed.*
- (b) *The impugned orders are quashed.*
- (c) *No costs.”*

18. From the orders dated 26.3.2010, passed by the Hon'ble High Court, it follows that the Hon'ble High Court has upheld the power of the State Government to issue directions under Section 11 of the Act and the GOs, with further directions to set aside the orders of this Commission dated 22.1.2009 and 3.2.2009 *ibid*. The appeals have been filed before the Hon'ble Supreme Court against the orders dated 26.3.2009 which are presently pending. Till the time of an authoritative pronouncement by the Hon'ble Supreme Court on the issues raised, the orders of the Hon'ble High Court hold the sway. When seen in the light of this fact, the validity of the impugned GO is to be upheld. This decision is, however, subject to final outcome of the appeals pending before the Hon'ble Supreme Court in the appeals against the orders dated 26.3.2010. Even if there may be some merit in the petitioner's contention that Section 11 of the Act could not be invoked on the ground of congestion on inter-regional corridors, we are not inclined to interfere with the impugned GO for the reason that the Hon'ble High Court in its order dated 26.3.2010

ibid ordained the Appropriate Commission not to annul the direction issued to the generating company.

19. The petitioner has relied upon para 9 of the Constitution Bench of the Hon'ble Supreme Court in PTC India Ltd. Vs. CERC (AIR 2010 SC 1338) in support its contention that the State government does not have power to issue the impugned GO. We are afraid the petitioner's contention in this regard cannot be upheld. The observations made by the Hon'ble Supreme Court and pressed into service by the petitioner are not in any manner relatable to Section 11 of the Act as seen from the following extracts:

"9. The 2003 Act is enacted as an exhaustive Code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 ("1998 Act"), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc."

Re: Effective Date of the Impugned GO

20. The petitioner has contended that the impugned GO came into operation on 15.3.2012 when it was published in the Gazette and therefore withdrawal of the Standing Clearance/NOC with effect from 1.2.2012 was illegal. The petitioner has relied upon the judgments of the Hon'ble Supreme Court in Harla vs The State of Rajasthan (AIR 1951 SC 467), ITC Bhadrachalam Paperborads Vs Mandal Revenue Officer JT 1996 (8) 67, and B.K. Srinivasan vs. State of Karnataka 1987 (1) SCC

658.. On the other hand, SLDC has stated that the impugned GO was effective from 1.2.2012 and that its publication in the Gazette was not mandatory.

21. In *Harla* (supra) the Jaipur Opium Act was enacted by a resolution of the Council of Ministers but the resolution was neither promulgated nor published in the Gazette nor made known to the public. The mere passing of the resolution by the Council of Ministers without publication was held not to be sufficient to make the resolution operative. It was observed that reasonable publication of some sort was necessary and that natural justice required that before a law could operate it had to be promulgated or published or broadcast in some recognizable way. It is noteworthy that in this case the Hon'ble Supreme Court was dealing with a penal statute and the promulgation was held necessary in compliance with the rules of natural justice. The Hon'ble Supreme Court held:

"In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before the law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential. "

22. In *B.K. Srinivasan* it was held that where the parent statute prescribed the mode of publication or promulgation that mode must be followed and where the

parent statute was silent, but the subordinate legislation itself prescribed the manner of publication, such a mode of publication may be sufficient, if reasonable. The Hon'ble Supreme Court noted that if the subordinate legislation did not prescribe the mode of publication or if the subordinate legislation prescribed a plainly unreasonable mode of publication, it took effect only when it was published through the customarily recognized official channel, the Official Gazette or some other reasonable mode of publication. It is important to note that the Hon'ble supreme Court observed that when the subordinate legislation concerned with a few individuals publication or promulgation by other means was sufficient. The Hon'ble Supreme Court observed:

"15. There can be no doubt about the proposition that where a law, whether Parliamentary or Subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint, of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignity. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel. namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."

23. The judgment of the Hon'ble Supreme Court in *ITC Bhadrachalam Paperborads* (supra) is to the same effect.

24. The following principles of law emerge from the above judgments of the Hon'ble Supreme Court:

- (a) Publication of some sort is necessary before a law can operate as required under rules of natural justice.
- (b) Where the parent statute prescribes the mode of publication that mode must be followed.
- (c) Where the parent statute does not prescribe the mode of publication, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication is sufficient.
- (d) If the subordinate legislation does not prescribe the mode of publication, it will take effect when it is published through the customarily recognized official channel or some other reasonable mode.
- (e) When the subordinate legislation concerned with a few individuals, publication by any other means is sufficient.

25. The issue is being examined based on the above principles. The impugned GO has been issued by the State Government by virtue of powers under Section 11 of the Act. For facility of reference, Section 11 is extracted below:

“Directions to generating companies

11. (1) 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."

26. It is seen that Section 11 of the Act empowers the Appropriate Government to "specify" that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government. Section 11 does not prescribe for publication of the directions by the Appropriate Government in the Gazette. Sub-section (1) of Section 180 of the Act mandates the State Government to make rules for carrying out the provisions of this Act by notification. The expression "notification" has been defined in sub-section (48) of Section 2 of the Act as "notification published in the Official Gazette". Sub-section (2) thereof enumerates certain subjects on which the rules may be framed by the State Government. However, sub-section (2) does not refer to the directions issued under Section 11. The expression "specified" as defined under sub-section (62) of Section 2 of the Act is defined as "specified by regulations made by the Appropriate Commission or the Authority....." The directions issued by the Appropriate Government are outside the scope of the term defined. Further, neither the Act nor the impugned GO lays down that the directions issued would come into force only upon publication in the Gazette. Therefore, in keeping with the principles culled out from the judgments of the Hon'ble Supreme Court, it is not mandatory to publish the direction in the Gazette and the directions can be promulgated in a reasonable manner. It is an admitted fact that the copy of the impugned GO was sent to the petitioner and other affected persons by SLDC on 28.1.2012. The communication of

the impugned GO by SLDC to the affected parties individually is considered to be reasonable in the facts and circumstances of the case on hand. Under these circumstances, we do not see any substance in the contention of the petitioner that there was a failure to make the impugned GO known to the petitioner and, therefore, it did not acquire the elements of operativeness and enforceability. In our opinion, the impugned GO came into force on the date contemplated by the State Government, that is, on 1.2.2012. When so construed, the question of retrospective effect to the impugned GO does not survive for further examination.

Re: Whether the impugned GO Conditional

27. The petitioner has submitted that GO was conditional and unless the conditions precedent were met, it could become operational. According to the petitioner, one of the conditions precedent was that Respondents 5 to 9 were to open the LC in favour of the generators. The petitioner has alleged that the condition precedent was not fulfilled as the eighth respondent did not provide the LC, while the sixth and seventh respondents provided some payment security mechanism having semblance of the LC but actually was not the LC. Thus, according to the petitioner, opening of the LC by the fifth and ninth respondents could not be considered fulfillment of the condition precedent stipulated under the impugned GO.

28. For proper examination of the contention raised by the petitioner it is necessary to have a look at the relevant provisions of the impugned GO, reproduced below:

- (i) LC will be provided by the ESCOMs to the extent of cost of power allocated.
- (ii) Rebate of 2% shall be allowed on the bill amount if payment is made within 5 days from the date of presentation of bill or other

wise 1% shall be allowed if the payments are made within 30 days.

(iii) Due date for making payment shall be 30 days from the date of presentation of the bill.

(iv) Surcharge at 1.25% per month shall be payable if the payments are made beyond due date.

29. From the above extracts it appears that the State Government directed the distribution companies to open the LC in favour of the generators who were directed to supply power to the State Grid. However, simultaneously the impugned GO provided for rebates and the surcharge. It was provided that the due date for making payment was 30 days from the date of presentation of the bills by the generators. The distribution companies were entitled to rebate of 1% when payments were made by the due date. It was further provided that in case of delay in making payment beyond the due date, the distribution companies were liable to pay surcharge at the rate of 1.25%. It was also provided in the impugned GO that the distribution companies would be allowed rebate of 2% when the payments were made within 5 days of the presentation of the bill. When all the provisions are cumulatively read, it becomes crystal clear that there was no intention to make payments of the bills only through the LC. If it were so, there was no need to fix the due date of 30 days after the presentation of the bills for making payments and also to lay down the rates of rebate for payments and surcharge for delayed payments. It therefore follows that when the payments were not necessarily to be made through the LC, opening of the LC by the distribution companies was not a pre-condition for operationalising the impugned GO. Therefore, we hold that opening of the LC was not a condition precedent for implementation of the impugned GO

Re: Refusal of NOC by SLDC

30. The petitioner has contended that SLDC could not have refused further Standing Clearance/NOC since there was no direction to that effect in the impugned GO. SLDC has countered that the Standing Clearance/NOC was refused consequent to issue of the impugned GO as the petitioner was mandated to inject power in the State grid for consumption in the State. SLDC has pointed out that the petitioner could not be granted the Standing Clearance/NOC during the period the impugned GO was in force.

31. It has already been held that the impugned GO came into force on 1.2.2012. That being the position, in the face of the directions contained in the impugned GO, SLDC could not have permitted the petitioner to convey power outside the State and the only option available was to supply power to the distribution licensees within the State. Therefore, the Standing Clearance/NOC could not be granted. This question has also been settled by the judgment of the Hon'ble High Court in its order dated 26.3.2010 in Writ Petition No 2703/2009 and other related petitions. The Hon'ble High Court held that once the State passes an order under Section 11, the question of SLDC granting concurrence for open access would not arise.

32. The petitioner has alleged discrimination on the ground that NOC granted to three other generators named by it was not cancelled or withdrawn. SLDC has explained the circumstances under which the named generators continued to export power. We are satisfied with the explanation.

Re: Petitioner's Entitlement to Compensation

33. The petitioner has claimed damages at the rate of difference between ₹5.30 per unit fixed under the impugned GO and the notional price quoted in the trading platform of the Indian Energy Exchange Limited, during the period the electricity was injected by the petitioner into the State Grid from 1.2.2012 till the open access was allowed. The grant of compensation for denial of inter-State open access may be considered when such denial is found to be unjustified. In the present case it has been found that SLDC declined to grant the Standing Clearance/NOC because of the impugned GO. We have not interfered with the impugned GO because of the order of the Hon'ble High Court dated 26.3.2010. Under these circumstances, the question of payment of compensation does not arise.

Conclusion

34. For the reasons discussed above, the petitioner is not considered entitled to the relief claimed by it and the petition is dismissed. There shall be no order as to costs.

Sd/-
(A S Bakshi)
Member

sd/-
(M Deena Dayalan)
Member

sd/-
(S. Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson