

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Coram:

**Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member**

**Date of Hearing: 16.5.2013
Date of Order: 8.10.2013**

Petition No. 265/2009

In the matter of:

Petition under Section 79 (1) of the Electricity Act, 2003.

And

In the matter of:

Gem Sugar Ltd., Bangalore

....**Petitioner**

Vs

1. Karnataka Power Transmission Corporation Limited, Bangalore
2. Hubli Electricity Supply Company Ltd, Dharwad
3. State Load Despatch Centre, Karnataka Power Transmission Corporation Limited
4. Reliance Energy Trading Co. Ltd., Mumbai

... .. **Respondents**

Following were present:

Shri Pradbhuling K. Navagadi, Advocate for the petitioner
Shri Anand Genesan, Advocate for the respondents 1 and 3

ORDER

The petitioner, Gem Sugar Limited has filed this petition against the denial of open access by Karnataka State Load Despatch Centre which is being operated by Karnataka Power Transmission Corporation Limited, the first respondent.



2. Briefly, the submissions of the petitioner are as under:

(a) The petitioner, Gem Sugars Limited is a sugar manufacturing company which has a co-generation plant of capacity of 22.5 MW in the State of Karnataka and is engaged in the business of manufacture of sugar. The petitioner entered into a Power Purchase Agreement (PPA) with Karnataka Power Transmission Corporation Limited on 30.3.2001 for supply of 22.5 MW. Subsequently, the agreement was assigned in favour of the Second respondent, Hubli Electricity Supply Company Ltd.

(b) Second respondent defaulted in payment of dues and thereupon, the petitioner filed a petition before the Karnataka Electricity Regulatory Commission (State Commission). The State Commission vide its order dated 16.4.2009 directed the respondents to pay for the electricity supplied at the rate fixed in the PPA. Subsequently, the first Respondent paid the principal amount due. However, no payment was made in respect of the interest accrued on the principal amount. In the meantime, the petitioner vide its letter dated 11.6.2009 issued notice of termination of the PPA.

(c) In view of the above termination notice and non-payment of arrears by the respondents, the petitioner entered into a PPA with Reliance Energy Trading Company Limited, the fourth respondent. The fact of entering into the above agreement was also intimated to the Second Respondent.

(d) Reliance Energy Trading Company Limited made an application on 25.10.2009 to Karnataka SLDC seeking standing clearance/No-objection for export of electricity from the petitioner's plant for the period from 20.10.2009 to 19.11.2009. The third respondent vide its letter dated 16.10.2009 denied open access on the ground that all the private generators having valid PPA with State utilities shall continue to supply power to the respective power utilities and that the petitioner was having a valid PPA with second respondent.

3. The petitioner has sought the following reliefs through the present petition:

(a) To hold and declare the communication dated 16.10.2009 from the third respondent as illegal and contrary to open access regulations framed by this Commission;

(b) To set aside the impugned communication dated 16.10.2009 by the third respondent;

(c) To issue suitable directions to the third respondents to consider the open access application filed by the petitioner strictly in accordance with the provisions of Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 (hereinafter "the open access regulations).

4. Replies to the petition have been filed by the first and the second respondents.

5. The first respondent in its reply filed under affidavit dated 14.12.2009 has urged the following to justify the denial of open access to the petitioner:

(a) The petitioner had entered into a PPA dated 30.3.2001 and a Supplementary Agreement dated 10.6.2005 with the second respondent. The same was not validly terminated by the petitioner;

(b) Government of Karnataka had, vide its order dated 1.6.2009 issued under Section 11 of the Electricity Act, 2003, directed that all the private generating companies in the State would sell 50% of their exportable capacity to the State grid. This was followed by another order dated 6.6.2009 whereby the private generators not bound by the PPA were exempted from the requirement of supplying 50% of power to the State Grid in modification of the order dated 1.6.2009. Subsequently, the State Government vide its letter dated 13.7.2009 had clarified that the all the private generators having valid PPA with the distribution companies in the State are committed to sell their power only to the distribution companies and not to outside the State through open access.

(c) The Commission's order dated 17.8.2009 in Petition No. 114/2009 directing the KPTCL to grant open access to a generator having a PPA with the

distribution company in the State was stayed by the Hon`ble High Court of Karnataka vide order dated 25.8.2009 in Writ Petition No.25431/2009. The High Court had also referred the matter to the KERC to adjudicate the matter regarding the validity of the PPA.

(d) The petitioner is having a valid and binding PPA with respondent No.2 and therefore, the petitioner is bound by the statutory orders of the Government of Karnataka to supply power to the State and the open access was denied by the first respondent in compliance with the statutory order passed by Government of Karnataka under section 11 of the Act.

6. HESCOM, the second respondent, in its reply affidavit dated 11.10.2009 has submitted that its PPA dated 30.3.2001 between the petitioner and KPTCL which was assigned to the second respondent from 10.6.2005 has not been validly terminated by the petitioner. The second respondent has further submitted that the issue of breach or termination of the PPA falls within the jurisdiction of the State Commission. If the petitioner is having a dispute regarding the PPA, the petitioner should approach KERC in this regard. The second respondent has further submitted that the SLDC is required to discharge its statutory duties in terms of the PPA between the generator and licensee and if the SLDC allows open access to the generator to sell power to the third parties in violation of the PPA, SLDC would aid and permit the generator to commit breach of the PPA. The Second Respondent has also reiterated that denial of open access by KPTCL to the petitioner is valid.

7. The first respondent in its affidavit dated 11.1.2010 has submitted that similar directions as being sought by the petitioner in the present petition were issued by the Commission in orders dated 11.12.2009 in Petition Nos.156, 157 and 158 of 2009. The said orders were challenged by KPTCL before the High Court of Karnataka in Writ Petition Nos.38931-38933 of 2009 and the Hon'ble High Court in its orders dated 4.1.2010 has granted stay on the operation of the orders dated 11.12.2009. The first respondent in its affidavit dated 28.4.2010 has brought on record the order dated 16.3.2010 passed by the High Court in Writ Petition No.2703 and 2733 of 2009 whereunder the orders issued by the Government of Karnataka under section 11 of the Act were upheld.

8. During the hearings of the petition, the parties reiterated their views as taken in their written pleadings. Learned counsel for second and third respondents urged that in view of the stay granted by the High Court of Karnataka on orders dated 11.12.2009 in Petition Nos.156, 157 and 158 of 2009, no directions should be issued in the present petition till the disposal of writ petition Nos. 38931-38933 of 2009.

9. We have considered the submission of the parties. The petitioner has sought directions to the first and third respondents to grant open access by setting aside the order of denial of open access. The respondents on the other hand have resisted the application on the grounds that as per the order of the Government of Karnataka under section 11 of the Act directing the generators in the State with valid PPAs to supply

power to the State grid, the petitioner cannot be granted open access. Moreover, similar orders of the Commission have been stayed by the High Court.

10. Government of Karnataka issued orders under section 11 of the Act vide Notifications dated 17.12.2008 and 30.12.2008 directing the co-generating plants and other generating companies operating within the State to supply power to the State grid. Subsequently, in modification of the above orders, the Government of Karnataka issued an order date 1.6.2009 directing all private generators in the State including co-generation units to supply 50% of their exportable capacity from June 2009 to September 2009 to the State grid. Further, through Government Order dated 6.6.2009, the Government of Karnataka after taking note of the likelihood of onset of early monsoon and increase in reservoir levels, decided that the private generators including co-generating units not bound by the PPA were exempted from supplying 50% of the power to the State grid and accordingly, withdrew the G.O. dated 1.6.2009. However, Govt of Karnataka vide its order dated 13.7.2007 clarified that all private generators in the State with PPA including co-gen units would supply the committed power under the PPA with respect to the distribution companies of the State.

11. The G.O. of Government of Karnataka dated 17.12.2008 and 30.12.2008 were challenged by GMR Energy Limited and Global Energy Limited before the Karnataka High Court. The Hon'ble Court in its order dated 26.3.2010 has upheld the power of the State Government to issue notification under section 11 of the Act and the orders of the Government of Karnataka dated 17.12.2008 and 30.12.2008. Though the order has

been challenged by GMR Energy Limited and Global Energy Limited and also this Commission before the Hon'ble Supreme Court of India, no stay has been granted on the operation of the said judgement.

12. The Commission's orders dated 11.12.2009 in Petition Nos.156, 157 and 158 of 2009 directing KPTCL to grant open access strictly in accordance with the Open Access Regulations of the Commission and not to sit on judgement over the dispute concerning the PPAs between the generators and open access customers was stayed by the High Court of Karnataka vide order dated 4.1.2010 till the disposal of writ petition Nos. 38931-38933 of 2009. The second and third respondents had prayed for deferment of the decision in the present petition till the disposal of the said writ petitions. The High Court of Karnataka in its order dated 22.7.2011 has disposed of the writ petition as under:

"Mr. Ashok Haranachalli, learned Advocate General submits that all the three writ petitions have become infructuous and does not survive for consideration.

2. Submission is recorded. Petitions stand dismissed as having become infructuous.

All questions kept open to be decided in an appropriate suit."

13. In view of the writ petitions in similar matters having been disposed of as being infructuous by the High Court of Karnataka, we have to decide the petition on the merit of the case. The first and third respondents denied open access to the petitioner on the ground that there was a valid PPA between the petitioner and HESCOM and as per the Government of Karnataka G.O. dated 13.7.2009 issued under section 11 of the Act, "all private generators in the State with PPA including co-gen units with PPA shall supply the committed power under the power purchase agreements to the respective

ESCOMs". In view of Hon'ble High Court's order dated 26.3.2010 upholding the power of the State Government to issue order under section 11 of the Act, which has not been stayed by the Hon'ble Supreme Court, we have to take into account the provisions of the G.O. dated 13.7.2009 while considering the cases of open access. The G.O. makes it mandatory for the generating companies operating in the State having power purchase agreements to supply to the State grid. Thus, the provisions of the G.O. will be applicable only when there is a PPA for supply of power to the State grid. If there is no PPA or the PPA has been terminated, then the provisions of the G.O. will not be applicable. While the petitioner has submitted that the PPA stands terminated after it has issued the notice of termination, the HESCOM has submitted that the PPA has not been terminated and is still subsisting. In our view, SLDC is not the forum for adjudication of the dispute relating to validity or the termination of the PPA. The parties to the PPA should approach the appropriate forum to get the dispute settled with regard to the validity of the PPA. Any dispute regarding the PPA between a generator operating within the State and the distribution licensee of the State is within the jurisdiction of the State Commission under Section 86(1)(f) of the Act. Any party disputing the PPA cited by the party seeking open access or claiming that it has a subsisting PPA with the generating company in question should support its claim on the basis of appropriate order of the State Commission. SLDC cannot be expected to sit on judgment on the validity or otherwise of a PPA or adjudicate upon disputes between the parties. SLDC is only required to verify prima facie, whether there is a contract for sale of power by the utility proposing to inject power for the open access transaction. In the present case, HESCOM has disputed termination of the PPA with the petitioner and it is

for HESCOM to establish on the basis of documentary evidence or order from the KERC that the PPA is still subsisting. In the absence of any documentary evidence or order, SLDC cannot reject the application of the petitioner for open access. In our view, denial of open access by SLDC in this case cannot be sustained. It is reiterated that dispute relating to the subsistence or termination of the PPA should be settled by the parties to the PPA in the appropriate forum before approaching the SLDC for open access.

14. The petition is disposed of in terms of the above.

sd/-
(M. Deena Dayalan)
Member

sd/-
(V.S. Verma)
Member