

**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: 30.7.2013**

Petition No. 266/MP/2009

In the matter of:

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

And

In the matter of:

Bannari Amman Sugars Limited, Bangalore

..Petitioner

Vs

1.Karnataka Power Transmission Corporation Limited, Bangalore
2.Sri Chamundershwari Electricity Supply Company, Mysore
3.State Load Despatch Centre, Karnataka Power Transmission Corporation
Limited

.. 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, Bannari Amman Sugars Limited has filed this petition challenging the denial of open access by Karnataka State Load Despatch Centre vide its communication dated 24.8.2009. The petitioner has made the following prayers in the petition:



- (i) hold and declare the communication dated 24.8.2009 from the vide No. CEE/EE/AEE-3/SLDC/480-81 vide Annexure-J issued by Chief Engineer (Electricity) (Respondent No.3) is illegal and contrary to Open Access Regulations framed by this Commission, as amended from time to time;
- (ii) set aside the impugned communication dated 24.8.2009 vide No. CEE/EE/AEE-3/SLDC/480-81 vide Annexure-J issued by Chief Engineer (Electricity) 3rd respondent herein;
- (iii) issue suitable directions to the jurisdictional Load Despatch Centre (3rd respondent herein) to consider the open access application filed by the petitioner, strictly in accordance with law under the provisions of Central Electricity Regulatory Commission (Open Access in inter-State transmission) Regulations, 2008 as amended from time to time, for supply of energy from the petitioner's plant.
- (iv) Grant such other and further relief as this Hon'ble Commission deems fit in the facts and circumstances of this case.

2. Briefly, the case of the petitioner is as under:

- (a) The petitioner has a sugar manufacturing factory at Alaganachi village, Nanjungud Taluk, Mysore District. The petitioner with the permission of the Government of Karnataka installed a co-generation plant of 16 MW. The petitioner entered into a Power Purchase

Agreement (PPA) with Karnataka Power Transmission Corporation Limited (KPTCL) on 25.9.2000 under which KPTCL would purchase the exportable surplus power so generated on the basis of the base price applicable for the year 1994-95 @ Rs.2.25 with annual escalation of 5% over the tariff applicable for the previous year as per the guidelines issued by the Ministry of Non-conventional Energy Sources of Government of India. The PPA was approved by Karnataka Electricity Regulatory Commission (KERC) on 25.9.2000.

(b) Subsequently, the Government of Karnataka vide its letter dated 11.4.2002 permitted the petitioner to expand its capacity from 16 MW to 36 MW by adding 20 MW in the same premises. After completion of the expansion project, the petitioner approached KPTCL to issue amendment to the PPA dated 25.9.2000 and sought synchronization of its plant to the grid. The petitioner initialed a draft Power Purchase Agreement at a purchase price of Rs.2.80/kWh with escalation of 2% per annum over the base tariff every year. The said PPA was approved by KERC on 7.9.2004 but the petitioner did not sign the PPA.

(c) The petitioner filed OP No.39/2006 before the State Commission for approval of the tariff for additional 20 MW of power. During the pendency of the said petition, the petitioner filed OP No.17/2007 for releasing the payments towards the energy supplied to the respondent in respect of additional capacity of 20 MW. During the pendency of the petition, the

petitioner in its affidavit dated 3.6.2008 submitted before KERC that it had entered into a PPA with TATA Power Trading Company for supply of energy and availed open access. Therefore, the question of enforcing the PPA with the first respondent did not arise. KERC vide its order dated 3.7.2008 directed the respondent to pay for the electricity supplied at the rate fixed in the PPA with annual escalation in respect of additional 20 MW power.

(d) Tata Power Trading Company made an application to the Karnataka SLDC seeking short term open access. SLDC vide its letter dated 24.8.2009 stated that all the private generators having valid PPA with State utilities would continue to supply power to the respective power utilities in terms of the Government of Karnataka order dated 13.7.2009 and that since the petitioner was having a valid PPA with second respondent, the petitioner was not granted open access. Aggrieved by the said order of the Karnataka SLDC, the petitioner has filed the present petition.

3. Replies to the petition have been filed by the first and the second respondents. The first respondent in its affidavit dated 16.12.2009 has urged the following to justify the denial of open access to the petitioner:

- (a) The petitioner entered into a PPA dated 11.4.2004 with the first respondent which was subsequently assigned to second respondent. The same has not been 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 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 grid 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.

4. CESCO, the second respondent, in its reply affidavit dated 11.10.2009 has submitted that the PPA dated 11.3.2004 between the petitioner and KPTCL approved by the KERC which was assigned to the second respondent 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 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.

5. 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.

6. During the hearings of the petition, the parties reiterated their views as taken in their written pleadings. Learned counsel for first 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.

7. 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 contested 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.

8. 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.

9. 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.

13. 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."

14. 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 CESCO 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 power 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.

15. The CESCO has submitted that the PPA has not been terminated and is still subsisting. It is noticed that the petitioner had initialled a PPA with the first respondent on 11.4.2004 for supply of power from its additional capacity of 20

MW @ Rs.2.80/kWh with an escalation of 2% per annum. The said PPA was approved by KERC vide its order dated 7.9.2004, but the petitioner has not signed the PPA. It is however noticed that the petitioner approached KERC in Petition No.39/2006 for approval of tariff for 20 MW of power. During the pendency of the petition, the petitioner sought time from KERC to enable it to arrive at a negotiated settlement of tariff with the CESC. Subsequently, the petitioner informed KERC that the negotiated settlement did not succeed. The petitioner informed KERC that it had entered into PPA with Tata Power Company Limited for sale of power through open access. The petitioner brought OP No.17/2007 before KERC for directions to the CESC for release of payments for the power supplied by the second respondent. KERC in its order dated 3.7.2008 has directed KPTCL to pay the charges as per the PPA including the supply of power from its 20 MW additional capacity. KERC in its order dated 3.7.2008 directed as under:

“It is hereby directed that the Respondent shall take the approved draft PPA by the Commission as the valid PPA and pay the Petitioner the tariff at the rate of Rs.2.80 per unit with 2% escalation on the base rate for the energy pumped into the grid from the additional 20 MW power plant of the petitioner.”

By the same order disposing Case No. OP 17/2007, KERC directed that “the Respondent shall release the payment @Rs.2.80 with 2% escalation for the energy already received by the Respondent No.2 from the petitioner’s plant from additional 20 MW project.

16. It appears from the above order of KERC that the approved draft PPA has been directed to be considered as valid PPA for supply of power by the petitioner to the respondent. That being the case, the petitioner is bound to supply electricity to the State Grid in compliance with the order dated 13.7.2009. If the petitioner has any grievance with regard to the PPA, it should approach the State Commission in this regard.

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

sd/-
(M. Deena Dayalan)
Member

sd/-
(V. S. Verma)
Member