

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 228/MP/2017

Coram:

**Shri P. K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 21.08.2019

In the matter of:

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of connectivity, Long-term Access and Medium-term Open Access in inter-State transmission and related matters) Regulations, 2009.

And

In the matter of:

Bhushan Power & Steel Limited,

F- Block, 1st Floor
International Trade Tower, Nehru Place
New Delhi-110019

..... Petitioner

Vs

Electricity Department, UT Chandigarh
Through Power Controller- Cum Executive Engineer
Electricity "OP" Division No.2
U.T. Chandigarh

..... Respondent

For Petitioner : Shri Rajeev Yadav, Advocate, BPSL

For Respondent : Shri Yajur Bhalla, Advocate, UT Chandigarh



ORDER

The present petition has been filed by the Petitioner, Bhushan Power & Steel Limited (hereinafter also referred to as “BPSL”) seeking direction to the Respondent, Electricity Department, Union Territory of Chandigarh for grant of concurrence for grant of Long Term Access (LTA) in accordance with Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (for short, “2009 Connectivity Regulations”).

2. The Petitioner is a Company incorporated under the Companies Act, 1956 and has set up an integrated Steel Plant at Village Thekoloji, P.O. Lapanga, Rengali, District Sambalpur in the State of Orissa. In order to meet the requirements of power consumption for the said steel plant, the Petitioner has set up a 506 MW Captive Power Plant at the aforesaid location. The Petitioner has another Steel Processing Unit at Plot No. 71, Industrial Area, Phase-I, Chandigarh.

3. The Respondent is the State Transmission Utility (STU) and is responsible for granting concurrence to the applications for grant of LTA which are submitted to Central Transmission Utility (CTU) for further processing in accordance with the 2009 Connectivity Regulations. No separate State Load Despatch Centre (SLDC) is there for considering and processing the Open Access Applications in terms of Regulation 10 of the 2009 Connectivity Regulations.

4. The Petitioner has made the following prayers.



“a) pass an order, directing the Electricity Department, Union Territory of Chandigarh to grant concurrence for the proposed Long Term Open Access, sought by the petitioner in terms of its application dated 28.11.2016;

b) pass such other order(s), as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.”

Submissions of the Petitioner

5. The Petitioner has submitted the following.

(a) The Petitioner's Steel Processing Unit in Chandigarh avails power from the Respondent through a 33 kV dedicated feeder against its current contract demand of 14.9 MVA. The petitioner intends to source power from its Captive Power Plant (CPP) in Orissa to its Processing Unit in Chandigarh by availing Long Term Access in accordance with the provisions of 2009 Connectivity Regulations which, *inter alia*, provides that in case an intra-State entity is applying for LTA or Medium Term Open Access (MTOA), concurrence of the SLDC is required to be obtained in advance and should be submitted along with the application to the nodal agency.

(b) The Petitioner, vide its letter dated 4.5.2015, informed the Respondent of its intention to wheel power from its CGP in Orissa through LTA and requested to grant approval of the STU to enable it to make the appropriate LTA application to the CTU. In response, the Respondent, vide its letter dated 27.1.2016 directed the Petitioner to submit the following documents: -

“1. The application complete in all respect for LTA for intra-State transmission system needs to be submitted in the prescribed format.



2. The application shall be accompanied by the fees of `50,000/- (Fifty thousand only) in the form of Demand Draft in favour of Executive Engineer, Electricity Operation Division No.2, UT Chandigarh.

3. Copy of valid PPA/ Contract with the Generating Company from where the power shall be procured.

4. Consent from the CTU/ Transmission Service Agreement (TSA) with the CTU.”

(c) The Petitioner vide letter dated 19.9.2016 applied for grant of MTOA together with demand draft of ₹50000/- towards prescribed fee. The Petitioner informed the Respondent that the proposed open access was sought for sourcing the power from the Petitioner’s own plant and as such there was no requirement of any PPA with the generating company.

(d) The Respondent, vide its letter dated 14.10.2016, informed the Petitioner that Joint Electricity Regulatory Commission Regulations, 2009 (for short, “2009 JERC Regulations”) provides for LTA and Short Term Open Access (STOA). As 2009 JERC Regulations did not have any provision of MTOA, the petitioner was directed to revise its request either for grant of LTA or STOA in terms of 2009 JERC Regulations. The authorized representative of the Petitioner requested the Respondent to treat the MTOA application of the Petitioner as LTA application after making endorsement on the Respondent’s letter dated 14.10.2016. The Respondent vide its letter dated 10.11.2016 directed the Petitioner to submit the LTA application as per the draft procedure of the Respondent.



(e) The Petitioner vide its letter dated 28.11.2016, applied for grant of LTA concurrence to the Respondent seeking open access for a period of 25 years from 1.3.2017 to 28.2.2042 for a quantum of 10 MW. Since the Petitioner's application for concurrence is pending with the Respondent for more than nine months, the Petitioner is unable to procure power from its CGP at Orissa.

6. After hearing the Petitioner, the Commission admitted the petition on 12.4.2018, and issued notice to the Respondent directing it to file reply to the petition.

Submissions of the respondent

7. The Respondent in its reply, vide affidavit dated 3.8.2018, has made the following submissions.

(a) The Petitioner Company is an insolvent and is currently managed by the Acting Insolvency Professional, Shri Mahender Kumar Khandelwal, pursuant to the order dated 26.7.2017 passed in CA No. (1B)-202 (PB)/2017 in the matter of Punjab National Bank (Financial Creditor) Vs. Bhushan Power and Steels Limited (Corporate Debtor) of National Company Law Tribunal, Principal Bench, New Delhi. This being the position, it is not possible for the Petitioner Company to submit Bank Guarantee in lieu of the application for LTA which is one of the mandatory documents sought by the respondent.

(b) The instant petition has been filed by Shri R.P. Goyal of the Petitioner Company, who has been authorized by way of Special Power of Attorney executed in his favour by the Acting Insolvency Professional of the Petitioner to represent



Appeal No. 190 of 2017 before Appellate Tribunal for Electricity at New Delhi in the matter of Bhushan Power and Steels Limited Vs. Central Electricity Regulatory Commission & Ors. Shri R.P. Goyal of the Petitioner Company has no special authorization to file and represent the Petitioner in the present petition.

(c) Section 181 of the Electricity Act, 2003 (for short, “the Act”) confers power of adjudication of the present dispute on Joint Electricity Regulatory Commission for Goa and other Union Territories (hereinafter referred to as “JERC”). The Central Electricity Regulatory Commission has no jurisdiction to adjudicate the present matter and the present petition is liable to be dismissed on this ground alone.

(d) The Petitioner vide letter dated 4.5.2015, sought LTA for wheeling of power up to 15 MW from Orissa to Chandigarh in substitution of the power being availed by it from the Respondent against six connections totaling to the contract demand to which the Respondent did not agree as metering/ accounting was required to be done separately for different premises at different voltage levels. It was also made known to the Petitioner that separate NOC for each connection, the list of documents as prescribed by the Respondent was required to be submitted. The Petitioner neither applied for separate NOC nor did it submit all the necessary documents including copy of valid PPA with generating Company from where the power is to be procured along with the applicable Bank Guarantee. The Respondent demanded NOC from the generating Company but the Petitioner did



not submit the same. The Petitioner itself presumed that the generating company and the supplier Company being the same, there was no requirement of PPA to be entered into and to be submitted to the Respondent.

(e) 2009 JERC Regulations did not have any provision of MTOA and accordingly the Petitioner was asked to apply for STOA or LTA vide its letter dated 14.10.2016. In response to the Respondent's letter dated 14.10.2016, Shri R.P. Goyal of the Petitioner company requested the Respondent on 24.10.2016, to treat the Petitioner's application submitted for MTOA as LTA. However, the Petitioner did not furnish the NOC as required as per draft procedure. JERC vide notification dated 14.3.2018, has repealed the erstwhile 2009 JERC Regulations dated 11.2.2010, under which the Petitioner had applied for LTA and the case of the Petitioner for grant of LTA in terms of new Regulation is under progress.

Analysis and Decision

8. We have considered the submissions of the Petitioner and the Respondent. The following issues arise for our consideration.

Issue (a): Whether Central Electricity Regulatory Commission has the jurisdiction to adjudicate the present petition?

Issue (b): Whether the Petitioner against which insolvency proceedings is instituted before the NCLT, can apply for grant of LTA or MTOA? Whether Shri R.P. Goyal, holder of Special Power of Attorney, is authorized to file the instant petition?

Issue (c): Whether the Petitioner is entitled to grant of concurrence for the grant of LTA in terms of its application dated 28.11.2016?



We deal with these issues in the following paragraphs.

Issue (a): Whether Central Electricity Regulatory Commission has the jurisdiction to adjudicate the present petition?

9. The Respondent has contended that JERC is vested with the jurisdiction to try and entertain the present petition under Section 181 of the Act. On the other hand, the Petitioner has contended that the Respondent is under obligation pursuant to 2009 Connectivity Regulations for granting concurrence for LTA so that the same can be submitted to the CTU for further processing for grant of LTA.

10. As per Section 181 of the Act, the Joint Electricity Regulatory Commission (JERC) may, by notification, make regulations consistent with the Act and the rules generally to carry out the provisions of this Act. It is pertinent to mention here that the power to make regulations under Section 181 of the Act broadly deals with intra-State matters whereas Section 178 of the Act enjoins upon the Central Commission to make regulations pertaining to inter-State matters.

11. We note that the Petitioner is having an integrated steel plant at Thelkoloji Village, Sambalpur District, Orissa with 506 MW Captive Power Plant to meet the power requirement of the said plant. The Petitioner is also having its steel processing unit at Plot No. 71, Industrial Area, Phase-I, Chandigarh, whose metering and energy accounting is done by the Respondent and thereby making it an intra-State entity in terms of Regulation 2(1)(j) of the 2009 Connectivity Regulations.



12. Since the Petitioner intends to wheel the surplus power from its Captive Power Plant located in Orissa to its unit at Chandigarh thereby involving the transmission system of more than one State, it was apparent that the Petitioner was required to obtain Open Access to inter-State Transmission System in terms of the 2009 Connectivity Regulations.

13. Regulation 10(1) of the 2009 Connectivity Regulations, in this regard, provides as under: -

“Provided also that if an intra-State entity is applying for long-term access or medium-term open access, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such form as may be provided in the detailed procedure.”

Further, Detailed Procedure for Grant of Long term Access to ISTS specified under the 2009 Connectivity Regulations, at Clause 23.4, provides as under: -

“23.4 In case an intra-State entity is applying for LTA, concurrence of concerned State Transmission Utilities of the States having injection and drawl points shall be obtained in advance in the prescribed format [FORMAT-LTA-3] and attached with the application.”

Thus, in terms of the above, prior to applying for LTA to CTU, the Petitioner was required to obtain concurrence of concerned State Transmission Utilities of the States having injection and drawl point in prescribed format LTA-3.

14. Further, it emerges from the documents placed on record that the Petitioner had applied to the Respondent, which admittedly functions as STU, seeking concurrence/ NOC to wheel the surplus power from its Captive Power Plant located at Orissa to its unit in Chandigarh in format LTA- 3 in terms of the 2009 Connectivity Regulations read with the Detailed Procedure.



15. Thus, the open access sought for by the Petitioner was with respect to inter-State Transmission System involving the transmission lines of the Respondent, Central Transmission Utility (CTU) and Orissa State Transmission Utility. And it is this Commission which is entrusted with the function of regulating the inter-State transmission of electricity under Section 79(1)(c) and to adjudicate the dispute involving the generating company or the transmission licensee in regard to matters connected with Section 79(1)(a) to (d) under Section 79(1)(f) of the Act. Further, Regulation 32 of the 2009 Connectivity Regulations provides that all the disputes arising out or under the Regulations shall be decided by the Commission on an application made on this behalf by the persons aggrieved.

16. In view of the above observations and taking into account the fact that the dispute involved in the present petition is with regard to non-grant of concurrence for LTA in terms of the 2009 Connectivity Regulations, we hold that this Commission has jurisdiction to entertain the petition in terms of Section 79(1)(f) of the Act and Regulation 32 of the 2009 Connectivity Regulations.

Issue (b): Whether the Petitioner against which insolvency proceedings is instituted before the NCLT can apply for grant of LTA or MTOA? Whether Shri R.P. Goyal, holder of Special Power of Attorney, is authorized to file the instant petition?

17. The Respondent has contended that the Petitioner against which insolvency proceedings has been instituted cannot apply for LTA as it is not possible for the Petitioner to furnish a Bank Guarantee, which is one of the mandatory requirements. The Respondent has further contended that Shri R.P. Goyal of the Petitioner Company,



who has been authorized through Special Power of Attorney by the Acting Insolvency Professional of the Petitioner Company, has authorization only to represent the Petitioner in Appeal No. 190 of 2017 before the Appellate Tribunal for Electricity (APTEL) at New Delhi and that he has no authorization to file the present petition.

18. We have heard the learned counsel for the parties on the above issue. It is not in dispute that the Petitioner applied to the Respondent for grant of concurrence for MTOA along with demand draft of ₹50,000/- on 19.9.2016. The learned counsel for the Respondent has contended that a Company against which insolvency proceedings have been initiated, cannot maintain any application(s) or other affairs of the corporate debtor. To examine the question as to whether a Company which is before the NCLT for insolvency proceedings can file any application on its behalf, we deem it appropriate to refer to the appropriate provisions of Insolvency and Bankrupt Code, 2016 (for short, "IBC") which provides as under: -

"16. (1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(3) Where the application for corporate insolvency resolution process is made by an operational creditor and—(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional."

Section 17 of the IBC provides as under: -

"17. Management of affairs of corporate debtor by interim resolution professional.

(1) From the date of appointment of the interim resolution professional,-



(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional.

(b).....

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional,-"

Section 20 of the IBC provides as under: -

"20. Management of operations of corporate debtor as going concern-

(1) The interim resolution professional shall make every endeavor to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2)(a).....

(b).....

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:"

19. From the perusal of Section 16 of IBC, it is clear that the Adjudicating Authority shall appoint an interim Resolution Professional who may act as an Interim Resolution Professional. Further, Section 17 of the IBC provides that management of affairs of corporate debtor shall vest in the Interim Resolution Professional and the officers and managers of the corporate debtor shall report to him and provide access to such documents and records of the corporate debtor as may be required by him. Section 20(1) of the IBC empowers the Insolvency Resolution Professional to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. After taking into consideration the aforesaid provisions of IBC, we find that there is no bar for the Petitioner which is facing insolvency proceedings before the National Company Law Tribunal, from applying for grant of LTA after following the due process of making application. Accordingly, we are



of the view that the Petitioner which is facing insolvency proceedings before the National Company Law Tribunal can approach the Respondent for grant of concurrence/NOC for availing the LTA.

20. As regards the Special Power of Attorney given to Shri R.P. Goyal, it is observed that the Special Power of Attorney dated 15.9.2017 placed on record by the Petitioner pursuant to the order of Principal Bench of National Company Law Tribunal (NCLT) dated 26.7.2017 in CA No. 1(B)-202 (PB)/2017 in the matter of Punjab National bank (Financial Creditor) Vs. Bhushan Power and Steels Limited (Corporate Debtor) which shows that Shri Mahender Kumar Khandelwal, Partner, BDO Restructuring Advisory LLP is appointed as Insolvency Resolution Professional which satisfy the requirements as contemplated under Section 16 of the IBC. In discharge of its functions, the Insolvency Resolution Professional appointed Shri R.P. Goyal to do all or any of the functions as enumerated in paragraph 1-4 of the said Special Power of Attorney which includes to take necessary steps to follow up Appeal No. 190 of 2017 filed before the Appellate Tribunal for Electricity at New Delhi in the matter of Bhushan Power and Steel Limited Vs. Central Electricity Regulatory Commission & Ors. as well as to sign and verify any petition, application, written statement, rejoinder etc. to be filed before this Commission, Hon'ble High Court or Hon'ble Supreme Court of India. We, therefore, find that Mr. R.P.Goyal is duly authorized to represent the Petitioner before this Commission. Therefore, contention of Respondent is rejected.



Issue No.(c): Whether the Petitioner is entitled to grant of concurrence for the LTA in terms of its application dated 28.11.2016?

21. There is no dispute over the fact that the Petitioner first moved an application seeking 'No Objection Certificate' of the Respondent in format LTA-3 on 4.5.2015, as the petitioner intended to wheel the surplus power from its Captive Power Plant at Orissa to 6 connections within jurisdiction of the Respondent. In response, the Respondent vide letter dated 27.1.2016, intimated the Petitioner that the combined NOC for all 6 connections cannot be granted as the metering/ accounting is being carried out separately as they are separate premises/ locations and that they are at different voltage levels. The Respondent also intimated that if the Petitioner applies for separate NOC for each connection, the Petitioner will be required to submit an application complete in all respects for LTA for intra-State Transmission System, fees of ₹50,000/-, copy of valid PPA/ contract with generating company from where the power is to be procured and consent from CTU/ Transmission Service Agreement with CTU. Thereafter, the Petitioner applied for MTOA vide its letter dated 19.9.2016, along with the prescribed fees of ₹50,000/-. The Respondent vide letter dated 14.10.2016, replied that as per the 2009 JERC Regulations, there is provision for grant of LTA and STOA only (and not MTOA) and hence suggested that the Petitioner may submit its revised request either for LTA or STOA. The Petitioner requested the Respondent to treat its MTOA application dated 19.9.2016 as LTA application to which Respondent vide letter dated 10.11.2016, again asked the Petitioner to apply for NOC as per draft procedure in the format specified. Thereafter, the Petitioner once again applied for LTA on 28.11.2016, and the said application is pending with the Respondent since then.



22. We have already noted above that the Petitioner had applied for inter-State long term access for wheeling of power from its Captive Power Plant in Orissa to its Processing Unit in Chandigarh. Since it involved the inter-State transmission system, the Petitioner had sought the concurrence or no objection of the Respondent, as the drawal point was in the purview of the Respondent in terms of Regulation 10 of the 2009 Connectivity Regulations read with Clause 23.3 of the Detailed Procedure.

23. It is relevant to note that the Regulation 10 of the 2009 Connectivity Regulations further provides as under: -

“(2) Where necessary infrastructure required for energy metering and time-block-wise accounting already exists and required transmission capacity in the State network is available, the State Load Despatch Centre shall convey its concurrence to the applicant within ten working days of receipt of the application.

(3) In case SLDC decides not to give concurrence, the same shall be communicated to the applicant in writing, giving the reasons for refusal within the above stipulated period.”

24. In terms of the above provisions, SLDCs are mandated to convey their concurrence within 10 working days if two conditions are fulfilled i.e. necessary infrastructure for energy metering and time block wise accounting exist and required capacity in the State network is available. If these conditions are not satisfied, then SLDCs are required to communicate in writing with reason within 10 working days. Admittedly, there is no State Load Despatch Centre for considering and processing the applications of open access and the Respondent notified as STU in terms of Clause 1.3(2) of the JERC State Grid Code Regulations, 2010, is processing the open access applications. Hence, in the present case, it was incumbent upon the Respondent to comply with procedure provided in the aforesaid regulation. However, there is nothing



on record which indicates that the Respondent has communicated to the Petitioner any ground for refusal in writing with regard to the above application.

25. Further, the Respondent vide reply affidavit dated 3.8.2018, has submitted that the JERC has, vide notification dated 14.3.2018, notified Joint Electricity Regulatory Commission (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017 (hereinafter referred to “2017 JERC Regulations”) which repealed the erstwhile 2009 JERC Regulations and that in the view of the new Regulations, the application of the Petitioner is under process.

26. In this regard, it would be pertinent to refer to the relevant regulation of the 2017 JERC Regulations, which is reproduced below: -

“3.3 Procedure for Grant of Open Access Involving Inter-State Transmission System

1. The procedure for grant of Long-term Open Access or Medium-term Open Access involving Inter-State Transmission System shall be as per Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009 as amended from time to time. The procedure for grant of Short-term Open Access shall be as per the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 as amended from time to time.

2. The STU shall convey its consent in the case of application for grant of Long-term Open Access or Medium-term Open Access or otherwise as per the provisions of Central Electricity Regulatory Commission Regulations, 2009 as amended from time to time. In case of Short-term Open Access, STU shall convey its consent or otherwise as per the provisions of Central Electricity Regulatory Commission Regulations, 2008 as amended from time to time:

Provided that in respect of a Consumer connected to a Distribution System seeking Inter-State Long-term or Medium-term or Short-term Open Access, the SLDC, before giving its consent shall obtain the consent of the Distribution Licensee concerned in accordance with Clause 3.8 of the Regulations.”



27. As per the above provisions of the 2017 JERC Regulations, in case the open access sought involves the inter-State Transmission System, the procedure for grant of LTA or MTOA shall be as per the 2009 Connectivity Regulations and the STU has to convey its consent or otherwise in terms of the provisions of the 2009 Connectivity Regulations. Therefore, even in terms of the 2017 JERC Regulations, the Respondent is required to follow the due procedure as laid down in the 2009 Connectivity Regulations read with Detailed Procedure. It is further incumbent upon the Respondent in terms of 2009 Connectivity Regulations to convey its concurrence within 10 working days if conditions as contemplated under Regulation 10(2) are satisfied. However, in cases where the Respondent chooses to refuse the concurrence, reasons for such refusal are required to be recorded in writing and be communicated within 10 days.

28. In view of the above, we direct the Respondent to consider the petitioner's application dated 28.11.2016, for grant of concurrence for LTA as per the 2009 Connectivity Regulations read with the Detailed Procedure specified therein. While processing the Petitioner's application dated 28.11.2016, the respondent shall follow the procedural formalities, if any, specified by the Joint Electricity Regulatory Commission in its regulations and convey its decision within 10 working days from the date of issue of this order.

29. The Petition No. 228/MP/2017 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P. K. Pujari)
Chairperson

