

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 200/MP/2017
along with IA No.78/2018**

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

Date of Order: 18th of June, 2019

In the matter of

Payment of outstanding dues towards the power sold to Telangana State Power Corporation Committee (TSPCC).

And

In the matter of

Nirani Sugars Limited
904,9th floor, World trade Centre,
Brigate Gateway Campus
No.26/1,Dr.Rajkumar Road,
Malleswaram (West")

..... Petitioner

Vs.

Global Energy Private Limited
Gera Imperium II, Patta Plaza,
Panjim- 403001, Goa

.....Respondent

Parties Present:

Shri Sridhar Prabhu, Senior Advocate, NSL
Shri Vijay Nirani, NSL
Shri Matrugupta Mishra, Advocate, GE
Shri Shourya Malhotra, Advocate, GEPL

ORDER

This Petition has been filed by the Petitioner, Nirani Sugar Limited (NSL) for seeking direction to the Respondent, Global Energy Private Limited (hereinafter

referred to as “GEPL”) to pay the outstanding dues towards the power sold to Telangana State Power Corporation Committee (TSPCC).

Brief Facts of the Case:

2. The Petitioner owns and operates a 45.56 MW Bagasse based co-generation plant in the State of Karnataka. The Petitioner sells power under Inter-State Open Access. The Respondent, GEPL has been granted a Category-I inter-State trading licence by this Commission. The Petitioner entered into agreements with GEPL through binding Term Sheet for supply of power/ Letter of Intent (hereinafter referred to as “LOI”) for supply of power for the following periods:

Date of LOI	Period of Supply	Quantum of Power (on firm basis)
2.3.2015	4.3.2015 to 31.3.2015	22.50 MW
5.3.2015	1.4.2015 to 30.6.2015	1.4.2015 to 30.4.2015- 24 MW 1.5.2015 to 31.5.2015- 28 MW 1.6.2015 to 30.6.2015- 28 MW
12.3.2015	1.4.2015 to 30.6.2015	1.4.2015 to 30.4.2015- 24 MW 1.5.2015 to 31.5.2015- 28 MW 1.6.2015 to 30.6.2015- 20 MW
6.4.2015	10.4.2015 to 31.4.2015	5 MW
24.4.2015	1.5.2015 to 31.5.2015	6 MW
19.5.2015	1.6.2015 to 30.6.2015	10 MW

3. The Lols/ Term Sheet for supply of power are accompanied by terms and conditions for supply of power. The following terms and conditions with regard to the payment of bills are relevant:

(a) On 2nd day after the payment was received by GEPL from Telangana State Power Co-ordination Committee (TSPCC), the Respondent is required to make payment to the Petitioner. This meant that the Respondent was required to make payments within 9 days after the date of receipt of fax/ email bill subject to receipt of original invoice within due date.

(b) Due date for reimbursement of open access charges paid by NSL on behalf of TSPCC/ GEPL was the 9th day after the date of receipt of fax/ email subject to receipt of original invoice within due date.

(c) Late payment surcharge @1.25% per month was leviable after 32 days from the receipt of bill.

(d) PoC injection charges and losses (including STU/ CTU transmission charges, SLDC/ RLDC operating charges and SLDC/ RLDC application fee, SRLDC application fee and SRLDC operating charges, etc.) up to delivery point were to be borne by NSL.

(e) Telangana withdrawal charges and losses, Telangana State SLDC application fee, operating charges, annual fee and TS Transco transmission charges were to the account of GEPL.

(f) NSL was to apply for short term open access for full contracted capacity for any other charges like UI, reactive charge and grid support charge, etc.

(g) If NSL failed to apply for corridor for full quantity of Lol within 72 hours of receipt of fax copy of Lol from TSPCC to GEPL, security submitted by GEPL to TSPCC was to be forfeited and same was to be borne by NSL.

4. Pursuant to LOIs, the Petitioner supplied power during the above periods and raised monthly bills on the Respondent. On 9.3.2015, the Petitioner issued weekly invoices amounting to Rs. 1,01,47,544/- for the period from 5.3.2015 to 8.3.2015 for supply of 15,39,000 kWh. The Petitioner vide its e-mail dated 10.3.2015 sent Open Access invoice No. 73 for supply of power to TSPCC from the Petitioner for the month of March 2015. The above amount was paid the Respondent.

5. On 12.3.2015, the Petitioner sent the revised term sheet/ LOI for the period from April 2015 to June 2015. On 16.3.2015, the Petitioner sent weekly invoice amounting to Rs. 2,06,20,320/- for supply of power from 9.3.2015 to 15.3.2015. Further, on 9.5.2015 and 16.5.2015, the Petitioner sent weekly invoices for the

supply of power for the period from 1.5.2015 to 8.5.2015 and from 9.5.2015 to 16.5.2015 respectively. The Petitioner vide its email dated 19.5.2015 sent to the Respondent LOI dated 19.5.2015 for supply of 10 MW power on firm basis from 1.6.2015 to 30.6.2015. On 2.6.2015, the Petitioner sent weekly invoice to the Respondent for supply of power for the period from 24.5.2015 to 31.5.2015 along with compensation bill for the month of May 2015 amounting to Rs. 3,74,92,548/- and Rs. 21,21,645/- respectively.

6. The Petitioner vide its e-mail dated 2.6.2015 requested to revise the compensation bill. The Petitioner vide letter dated 2.6.2015 sent LOI/ Term sheet for the month of March 2015 and Term Sheet for the month of April 2015 to June 2015 along with LOI for the month of May and June 2015 for supply of 6 MW and 10 MW respectively. Due to default of payment of the charges for supply of power on the part of GEPL, the Petitioner, vide its e-mail dated 6.6.2015 requested GEPL to pay outstanding dues of Rs. 28,74,33,687.68/- towards the energy supplied. The Respondent vide email dated 9.6.2015 confirmed that the billing of the petitioner is correct and requested to split the invoice into two separate contracts. Accordingly, on 16.6.2015, the Petitioner sent detailed invoice for the period from 9.6.2015 to 15.6.2015. Subsequently, on 24.6.2015, the Petitioner sent weekly invoice to the Respondent for the period from 16.6.2015 to 23.6.2015.

7. GEPL vide its e-mail dated 14.7.2015 informed the Petitioner that certain payment is due from the distribution companies which are required to be staggered and accordingly, GEPL requested for time to reconcile the accounts. On 15.7.2015, NSL informed GEPL that total Rs. 27 crore is outstanding against it and requested

GEPL to liquidate at least Rs. 5 crore to start the power flow through Power Exchange. However, no response was received from GEPL in this regard. Subsequently, NSL sent approximately 12 reminders to GEPL from July 2015 to October 2015 to pay payment. GEPL vide its email dated 9.10.2015 informed NSL that the process of reconciliation is underway and assured that it would release the payment from the 1st week of November 2015. On 23.11.2015, GEPL paid Rs. 5 crore as the first installment towards the total payment of Rs. 15 crore. NSL vide its letter dated 7.12.2015 informed GEPL that the total outstanding amount is Rs. 13,94,00,000/- which includes surcharge and PoC charges paid on behalf of Telangana State and requested GEPL to clear the outstanding dues within a week.

8. Subsequently, GEPL vide its e-mail dated 10.12.2015 stated that cheque of Rs. 1 crore was refused by the Petitioner despite the settlement terms and sought the mode of payment for rest of the amount. In response, the Petitioner vide its e-mail dated 12.12.2015 informed GEPL that there was no settlement between them and that GEPL has committed a "Criminal Breach of Trust" by utilizing the money which has been remitted by Telangana State Electricity Board for payment of electricity supplied by GEPL as GEPL is only entitled for the trading margin. Further, the Petitioner informed GEPL that if the dues were not remitted within three days, it would be constrained to take a legal action against GEPL.

9. GEPL vide its letter dated 2.1.2016 informed the Petitioner that total Rs. 9 crore is outstanding against it and any proceedings initiated by the Petitioner would be at its risk and cost. Subsequently, on 15.6.2016, GEPL informed the Petitioner that it has paid Rs. 1.5 crore through NEFT. GEPL vide its letter dated 20.12.2016

informed the Petitioner that only Rs. 9.50 crore was due as on 30.6.2016 from GEPL against the claim of the Petitioner of Rs.10,27,66,501/-. In response, the Petitioner vide its email dated 1.7.2016 informed GEPL that as on 30.6.2016, Rs.10,27,66,501/- is outstanding against GEPL.

10. Subsequently, GEPL vide its e-mail dated 27.5.2017 invited the Petitioner for discussion to resolve the issue regarding pending payment and for an amicable settlement of the issue. However, GEPL never showed any seriousness to settle the matter. Subsequently, the Petitioner filed a criminal complaint against the GEPL under Section 154 of the Code of Criminal Procedure.

11. The Petitioner vide its letter dated 1.6.2017 informed Bangalore Electricity Supply Company Limited (BESCOM), a Distribution Agency of the State of Karnataka that it has lodged criminal complaint at Mudhol Police Station against GEPL for default in payment of Rs. 7.22 crore and requested to release the amount of GEPL which is in the possession of BESCOM. Further, the Petitioner vide its email dated 11.7.2017 informed GEPL that as on 10.7.2017 total Rs. 11,08,76,431/- is outstanding against it and requested to release the payment at the earliest. However, no response was received from GEPL.

12. The Petitioner has submitted that GEPL has clearly admitted its liability to make payment of Rs.11,08,76,431/- as on 10.7.2017 to the Petitioner towards supplies made by the Petitioner to the distribution companies of the State of Telangana. The Petitioner has requested to take strict action against GEPL to compel it to make payment to the Petitioner. The Petitioner in its interim payer has submitted that GEPL is a trading licensee of this Commission and if the GEPL is

allowed to go scot free, the gullible stakeholders across India would be put to great jeopardy due to the action of GEPL. Accordingly, the Petitioner has requested to suspend the trading licence of GEPL in the interest of justice and equity. Against the above background, the Petitioner has made the following prayers:

“(a) To direct the Respondent to pay a sum of Rs.11,08,76,431/- (Rupees Eleven crore Eight Lakh Seventy Six Thousand Four Hundred Thirty One Only) legitimately due and payable by the Respondent to the Petitioner pursuant to an Inter State Open Access transaction; and

(b) To direct the Respondent to pay cost of this Petition.”

Submission of GEPL

13. The Petition was admitted on 16.1.2018 and notice was issued to GEPL to file its reply. GEPL vide its reply dated 20.8.2018 has submitted as under:

(a) GEPL was engaged by the Petitioner for trading the power supplied by the Petitioner on the Power Exchange on inter-State basis since April 2014 and in this regard no disputes arose between the parties. Subsequently, GEPL entered into Power Supply Arrangement with TSPCC. TSPCC issued purchase order dated 27.3.2015 in favour of GEPL for procurement of round the clock electricity from captive power plants in Karnataka. Pursuant to the above arrangement with TSPCC, GEPL entered into separate independent contracts with several captive power plants including the Petitioner.

(b) GEPL, during the same time when it had the above obligation to supply power to the electricity distribution companies in the State of Telangana, also had agreements to supply power to the beneficiaries/ consumers within the State of Karnataka. Therefore, both the above transactions, including the transaction to supply power to electricity distribution companies in the State of Telangana, through TSPCC, were both the inter-State and intra-State in nature on account of the fact that power was being supplied by GEPL at the same time, within the State of Karnataka, as well as outside the State.

Therefore, this Commission cannot intervene in a matter in which it is not possible to classify a transaction as inter-State.

(c) Since the power was pooled from various other generators for the accomplishment of the power supply arrangement with the TSPCC, the reconciliation of accounts became far more complex than normal bilateral transaction. Therefore, GEPL vide its letter dated 14.7.2015 requested the Petitioner to schedule a joint meeting in order to reconcile the statements. However, the Petitioner did not respond to such requests and started making arbitrary demands for payments without reconciling the accounts and the same could not be made due to non-cooperation of the Petitioner.

(d) Subsequently, several discussions for the resolution of the dispute regarding outstanding payments were held between the Petitioner and GEPL after which the parties crystallized Rs. 15 crore as the full and final settlement amount of the outstanding amount payable. Pursuant to the settlement, on 17.11.2015, GEPL made payment of Rs. 5 crore to the Petitioner and communicated the same to the Petitioner vide letter dated 23.11.2015. However, in response, the Petitioner informed GEPL that Rs. 13.94 crore is outstanding on 7.12.2015. Moreover, till date GEPL has made payment of Rs. 9.5 crore to the Petitioner through RTGS.

(e) GEPL has filed Civil Suit No. (L) 6092/2017 before the Bombay City Civil Court for adhering to the settlement terms of Rs. 15 crore and the same was filed prior to the institution of the present Petition filed by the Petitioner. Therefore, the issues in question in the present Petition are sub-judice before another court. Accordingly, the present Petition cannot be adjudicated without awaiting the outcome of the proceedings before the Bombay City Civil Courts as the subject matter in both the above proceedings is directly and substantially the same. The same is also the principle behind Section 10 of the Civil Procedure Code, 1908. Civil jurisprudence demands that the courts of first instance should not render conflicting findings for issues which are substantially the same qua the same parties.

(f) The Petitioner in the present Petition is seeking a monetary claim from GEPL. However, under Section 79 of the Electricity Act, 2003 (hereinafter referred to as the 'Act'), the Commission has no power to adjudicate any disputes between a generating company and trading licensee. Since, the present dispute between the parties is purely commercial in nature between a generator and a trader and no regulated tariff is involved, the Commission has no power to adjudicate. The Petitioner has prayed in the Petition for suspension of trading licence of GEPL. However, under the Act, the Commission has no power to suspend the licence of any trading licensee. The statute grants power to this Commission to suspend the licence of a distribution licensee under Section 24 of the Act. However, the present dispute does not involve the distribution licensee, instead involves a trading licensee. Therefore, interim prayer is not maintainable.

IA No. 78/2018 filed by GEPL

14. GEPL has filed an Interlocutory Application (IA) for dismissal of the present Petition and the Commission does not have jurisdiction to adjudicate the present Petition on the following grounds:

(a) The Respondent made all payment as per its contract with the Petitioner. However, the Petitioner raised certain issues with respect to the alleged non-payment of the dues by GEPL.

(b) The present Petition has been filed under the garb of seeking suspension of licence of GEPL. Regulation 14C of the Trading Licence Regulations provides for suspension of trading licence. However, Section 19 of the Act, which provides for revocation of trading licence, does not talk about suspension of trading licence. Section 178 of the Act conferring the power to the Commission to frame Regulations, does not contain any power to make regulations under Section 19 of the Act. Therefore, when there is no power available under Section 178 of the Act to make regulations under Section 19, then no regulations can be framed regarding suspension of trading licence.

Further, Section 24 of Act provides for suspension of distribution licence. Therefore, power to revoke a licence under Section 19 cannot at all include power to suspend a trading licence, as the same has been specifically excluded by virtue of insertion of Section 24 of the Act.

(c) GEPL has filed a Writ Petition i.e. WP(C) No. 7423/2018 before the Hon'ble High Court of Delhi challenging the Regulation 14 of the Trading Licence Regulations. The Hon'ble High Court of Delhi issued notice on the Writ Petition and is seized of the matter. Therefore, suspension of licence cannot be entertained by the Commission when High Court of Delhi is seized of the Writ Petition. Thus, the only fulcrum on which the jurisdiction of this Commission has been invoked by the Petitioner does not exist.

(d) This Commission has powers to adjudicate upon any dispute involving a generating company, having a composite scheme, with respect to issues connected with clauses (a) to (d) of Section 79(1) of the Act. Out of the said clauses, clause (a) and (c) are not related to the present Petition. As regards clauses (b) and (d), this Commission can only adjudicate upon a dispute related to tariff payable by a distribution licensee to the Petitioner (which is not the case in the present Petition) and any dispute of the Petitioner qua tariff of a transmission licensee involved in an inter-State transmission of electricity (which is also not the case in the present Petition). Therefore, in the facts and circumstances of the present Petition, the said clauses are inapplicable to the present case, and the present Petition ought to be dismissed.

(e) The present Petition cannot be adjudicated without awaiting the outcome of the proceedings before the Bombay City Civil Courts as the subject matter in both the above proceedings is directly and substantially the same.

15. The Petitioner vide its rejoinder dated 6.12.2018 to the reply of GEPL has mainly submitted that with regard to settlement of Rs. 15 crore, the Respondent has not produced any material to show that the Petitioner and the Respondent have arrived at a settlement of Rs. 15 crore and the Petitioner has never agreed for any such settlement as claimed by the Respondent. However, the Petitioner has received payment of Rs. 5 crore from the Respondent. The Petitioner has submitted that the present dispute is with respect to the settlement of accounts post reconciliation process. However, the dispute of payment was not settled.

16. The Petitioner, vide its affidavit dated 14.12.2018, to the reply of IA filed by GEPL has submitted as under:

(a) Under the Act or the Regulations made by the Commission thereunder, there is no provision to file an application for dismissal of the Petition and in the absence of a statutory provision enabling the filing of an application of this nature, the Respondent's application is not maintainable. Section 10 of the CPC contemplates staying of a civil suit and not any other Petition or case. As the present Petition is for a different relief and is based on distinct cause of action both of which are quite distinct from the so called suit said to have filed by the Respondent in Mumbai Civil court. Since a civil court and this Commission are not courts of concurrent jurisdiction, Section 10 of CPC has no application to the facts of the present case. Therefore, the IA is liable to be rejected.

(b) Section 10 of the CPC does not contemplate dismissal of any case but it merely contemplates staying of a suit filed before a Civil Court. Section 3 of the CPC provides for the hierarchy of the court and by implication a term "Court" contemplated in the CPC does not refer this Commission or any court other than a Civil Court. The Hon`ble Supreme Court in the case of National Institute of Mental Health and Neur Science (NIMHANS) Vs. C. Parameshwara [(AIR 2005) 2 SCC 256] has held that Section 10 of CPC is

preferable to a suit instituted in a Civil Court and the proceedings before any other court cannot be equated with the proceedings before a Civil Court. Since, Civil Court and this Commission are not the Courts of concurrent jurisdiction, Section 10 of CPC has no application to the facts of the present case.

Analysis and Decision on Maintainability of the Petition

17. We have carefully considered the submissions of the Petitioner and GEPL. The first question that arises for consideration is whether the Petition is maintainable.

18. The Respondent, GEPL has submitted that the present Petition is liable to be dismissed for several reasons. Firstly, since the earlier suits involving similar issues are pending before the Bombay City Civil Court, the present Petition is liable to be dismissed in view of the bar under Section 10 of the CPC. Secondly, there is no provision for suspension of trading licence in the Act and the Commission cannot make regulations for suspension of licence when there is no power available under Section 178 to make regulations under Section 19. Thirdly, the Respondent has stated that it has challenged the Regulation 14 of the Trading Licence Regulations, which has provisions as regards suspension of trading licence, before the Hon`ble High Court of Delhi. Therefore, the prayer regarding suspension of trading licence cannot be entertained by the Commission when the Hon`ble High Court is seized of the Writ Petition. Fourthly, the Commission has no power to adjudicate any monetary dispute between a generating company and a trading licensee stating that it is not covered under Section 79(1)(f) of the Act. The above issues have been dealt with in succeeding paragraphs.

19. The Respondent, GEPL has argued that it has filed a Civil Suit No. (L) 60920/2017 before the Bombay City Civil Court prior to the institution of the present Petition for seeking declaration against the Petitioner for adhering to the settlement terms of Rs. 15 crore. The Respondent has argued that since the issues in question in the present Petition are sub-judice before the Bombay City Civil Court and since the subject matter in the said prior instituted Civil Suit is exactly the same as in the present Petition, it is legally incorrect for this Commission to adjudicate the matter since this may lead to the contrary findings resulting in grave miscarriage of justice. In view of this, the Respondent has submitted that the present Petition cannot be adjudicated by this Commission without awaiting the outcome of the proceedings before the Bombay City Civil Court. The Respondent has further submitted that civil jurisprudence demands that the courts of first instance should not render conflicting findings for issues which are substantially the same qua the same parties. Therefore, the Respondent has stated that propriety demands that the present Petition before the Commission be dismissed till the adjudication of the proceedings before the Bombay City Civil Court.

20. *Per contra*, the Petitioner has submitted that the Respondent has filed the Civil Suit maliciously to avoid further payment to the Petitioner. The proceedings before the Civil Court do not have any bearing on the current proceedings. The cause of action before this Commission is not sub-judice. The Petitioner has submitted that the present Petition has been filed for different relief and is based on a distinct cause of action.

21. The Respondent has argued that the Commission doesn't have jurisdiction under Section 79(1)(f) of the Act to adjudicate upon the amount due and it can be decided only by Bombay City Civil Court. It has submitted that the Commission has to await decision of the monetary dispute between the Petitioner and the Respondent before proceeding with the request of the Petitioner in the instant Petition. The Petitioner has submitted that the subject matter in the Civil Suit before the Bombay City Civil Court and the instant petition before the Commission are different and that the Commission has jurisdiction to adjudicate the matter.

22. In response to GEPL's reliance on Section 10 of the CPC, the Petitioner has stated that the argument of GEPL is misplaced. In support of non-applicability of Section 10 of CPC in the instant case, the Petitioner has placed reliance upon judgment of Hon'ble Supreme Court in the case of National Institute of Mental Health & Neuro Science vs. C. Parameshwara [(2005) 2 SCC 256] wherein it was held that Section 10 does not apply to proceedings initiated under a different statute.

23. We have considered the submissions of the Petitioner and the Respondent. GEPL has made the following prayers in the Civil Suit before the Bombay City Civil Court:

“a. Declare that the settlement as recorded in Plaintiff's letter dated 23.11.2015 is binding upon the Plaintiff and the Defendant and that the Plaintiff has cleared and settled all due of the Defendant;

b. Pass a decree of mandatory injunction directing the Defendant to adhere to the terms of Settlement record in Plaintiff's letter dated 23.11.2015;

c. Pass a decree of permanent injunction restraining the Defendant through its officers, agents, servants or men trespassing and entering into

the office premises of the Plaintiff located at 104, 10th Floor, Maker Chambers, Nariman Point, Mumbai-400021 without prior written permission of the Plaintiff;

d. Pass any other order in favour of the Plaintiff, as this Hon'ble court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.”

Thus, we note that in the Civil Suit, the Respondent has inter alia sought declaration that the settlement as recorded in the GEPL's letter dated 23.11.2015 in which GEPL has agreed to pay Rs. 15 crore in four installments pursuant to settlement, is binding upon the parties and that GEPL has cleared and settled all dues of the Petitioner.

24. On the other hand, we note that in the present Petition, the Petitioner has sought direction to the Respondent to pay outstanding dues pursuant to inter-State open access (amounting to approx. Rs. 11 crore) and has prayed for suspension of trading licence granted to the Respondent. Therefore, we do not agree to the contention of GEPL that the issues raised before the Civil Court and this Commission is the same. The matter in the present Petition is neither directly nor substantially related to the issue in Civil Suit filed by GEPL before the Bombay City Civil Court.

25. GEPL has argued that the present Petition is hit by Section 10 of the Code of Civil Procedure, 1908 (CPC). Section 10 of CPC provides as under:

“10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.”

26. We have already noticed above that the scope of the Civil Suit filed by GEPL before Bombay City Civil Court and the present Petition are different. We also note that no superior court has stayed the proceedings before this Commission. According to the Petitioner, GEPL may have filed the Civil Suit before the Bombay City Civil Court based on the financial settlement assumed by GEPL itself. We do not find merit in the contention of the Respondent that pendency of the Civil Suit before the Bombay City Civil Court will be a bar under Section 10 of the CPC for the Commission to proceed in the matter within its jurisdiction.

27. Before we proceed further, we deem it appropriate to go through relevant provisions of the Act.

Section 2(71) of the Act:

“(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;”

Section 79(1)(e) of the Act:

“(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;”

Section 12 of the Act:

“Section 12. (Authorised persons to transmit, supply, etc., electricity):

No person shall

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity,

unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.”

Extract from Section 14 of the Act:

“Section 14. (Grant of licence):

The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person –

*(a) to transmit electricity as a transmission licensee; or
(b) to distribute electricity as a distribution licensee; or
(c) to undertake trading in electricity as an electricity trader,*

in any area as may be specified in the licence:

xxxx”

Extract from Section 15 of the Act:

“Section 15. (Procedure for grant of licence): ---

xxxx”

Extract from Section 16 of the Act:

“Section 16. (Condition of licence):

The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

xxxx”

Extract from Section 18 of the Act:

“Section 18. (Amendment of licence):

xxxx”

Extract from Section 52 of the Act:

“Section 52. (Provisions with respect to electricity traders): ---

xxxx

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.”

28. Thus, according to Section 2(71) of the Act, trading means purchase of electricity for sale thereof. Clause (e) of sub-Section (1) of Section 79 of the Act vests in the Central Commission the power to issue licenses to persons to function as electricity trader with respect to their inter-State operations. Section 12 of the Act provides that no person shall undertake trading in electricity unless he is allowed to do so by a licence issued under Section 14 of the Act. Section 14 of the Act

provides that the appropriate Commission may on an application made to it under Section 15 of the Act grant any person, licence to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence. Section 15 of the Act provides for the procedure for making application for licence. Section 16 of the Act provides that the Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence. Section 18 deals with the circumstances and procedure for amendment of the licence. Section 52(2) of the Act provides that “*every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission*”.

29. The Commission has specified the Trading Licence Regulations which contain the terms and conditions for grant of inter-State trading licence, network requirement and credit worthiness for grant of trading licence, the obligations of licensee, revocation of licence, offences and punishment to the licensee, etc.

30. Regulation 7 of the Trading Licence Regulations specifies the following obligations for inter-State trading licensees:

“7. Obligations of the Licensee: The licensee shall be subject to the following obligations; namely:-

(a) The licensee shall comply with the requirements of laws in force and, in particular, the Act, the Rules and the Regulations, Grid Code, orders and directions issued from time to time by the Commission and any of the State Electricity Regulatory Commissions in accordance with law.

(b) The licensee shall not exceed the volume of trading authorized under the licence, but may, in exceptional circumstances, undertake trading in electricity up to the maximum of 120 per cent of the volume of trade authorized under the licence granted to him:

Provided that the licensee, on exceeding the volume of trading authorized in a year under the licence granted to him shall pay licence fee applicable to the higher category for that particular year:

Provided further that the licensee may with the prior approval of the Commission and on such terms and conditions as the Commission may decide, exceed the specified limit of 120% in a year.

(c) The licensee shall not charge any amount exceeding the trading margin for the inter-State trading in electricity, fixed by the Commission from time to time.

(d) The licensee shall continue to be governed by the qualifications or disqualifications specified in these regulations for making an application for licence throughout the period of licence.

(e) The licensee shall establish adequate communication facilities like telephone, fax, computer, internet facilities, before undertaking trading.

(f) The licensee may coordinate with Regional Power Committees, the Central Transmission Utility, State Transmission Utilities, the Regional Load Despatch Centers, and the State Load Despatch Centers with regard to his trading- related activities, to the extent authorized by the concerned buyer and seller.

(g) The licensee shall render all assistance to any person authorised by the Commission to carry out his duties relating to the licence.

(h) The licensee shall carry out trading in accordance with the agreed terms and conditions, and may take such safeguards as he may consider necessary with regard to payment security mechanism from the buyers, but shall always ensure timely payment of dues to the seller for purchase of the agreed quantum of electricity either through a letter of credit or any other appropriate instrument or as may be mutually agreed between the seller and the licensee.

(i) The licensee shall ensure that appropriate agreement for purchase and sale of electricity are entered into by him with the sellers and the buyers prior to scheduling a transaction, and that the agreement shall specify the following, namely-

(i) the boundaries, that is to say, upper and lower MW limits of electricity to be purchased or sold,

(ii) modalities for scheduling,

(iii) persons authorized to specify the schedule, or to modify it after it has been intimated to the Regional Load Despatch Centre or the State Load Despatch Centre,

(iv) whether the buyer or the seller can unilaterally advise modification of the schedule, or whether the modification can only be advised jointly by the buyer and the seller,

(v) the liabilities of the parties (seller, buyer and licensee) in case the scheduled quantum (MW) and time of scheduling differs from the agreed terms, or in case of modification in schedule, and in the latter case, the party that will bear non-refundable part of short-term open access charges.

(j) The licensee shall ensure that there is no discrepancy or scope for dispute in the scheduling advised to the Regional Load Despatch Centre and in case of any discrepancy or ambiguity in the scheduling advice, the decision of the Regional Load Despatch Centre on the acceptance or otherwise of such advice shall be binding.

(k) The licensee shall ensure that the buyer and the seller are, either grid connected entities or represent such entities, with special energy meters on their periphery and that the mechanism for Unscheduled Interchange accounting by the appropriate authority is in place.

(l) The licensee shall not purchase electricity from the entities and the associates of such entities, defaulting in payment of Unscheduled Interchange charges, transmission charges, reactive energy charges, congestion charge and fee and charges for National Load Despatch Centre or Regional load Despatch Centre or the Unified Load Despatch and Communication Scheme or any other payment levied by the Commission or any of the State Commissions under the provisions of the Act or any regulation made thereunder, when so advised by the Commission.

(m) The licensee shall regularly pay the licence fee specified by the Commission from time to time.

(n) The licensee shall not omit or neglect to undertake trading activity.

(o) The licensee shall not enter into any agreement for purchase or sale of electricity that may lead to abuse of his dominant position or enter into a combination which causes or is likely to cause an adverse effect on competition in electricity industry.

(p) The licensee shall maintain up-to-date record of all the Trading transactions undertaken by him, separately for bilateral transactions, inter- State as well as intra-State, and those through the power exchange.

(q) The licensee shall make an appropriate application before the Commission for prior approval of the Commission whenever so required, in accordance with the Conduct of Business Regulations.

(r) The licensee shall, subject to settlement of commercial terms in accordance with law, not omit sale of electricity to a consumer allowed open access by the concerned State Commission.”

31. 14A of the Trading Licence Regulations provides as under:

“14A. Contravention by Licensee

(1) Contraventions of the provisions of the Act, Rules and Regulations framed thereunder and non-compliance of the orders of the Commission by a licensee shall be grouped under two categories such as serious contraventions and non-serious contraventions.

(2) Serious contraventions shall cover the following:

(a) *Violations and non-compliance of the provisions of the Act, Rules and the Regulations specified by the Commission, particularly, Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2009, Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2012, Central Electricity Regulatory Commission (Power Market) Regulations, 2010 and as amended from time to time or any subsequent amendment thereof;*

(b) *Deliberate under-reporting of transaction volume in monthly reporting;*

(c) *Non-compliance of the orders of the Commission including the orders issued for contravention of any regulation of the Commission;*

(d) *any willful, repeated and persistent violation of non-serious contraventions committed by the licensee.*

(e) *Non-payment of the licence fees and surcharge if applicable within the due date as specified in Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2012.”*

32. Further, Regulations 14C of the Trading Licence Regulations provides as under:

“14 C. Penalties for Contravention and non-compliance

(1) Where the charge of serious contraventions is established against the licensee, the Commission may:

(a) direct that the licensee shall pay, by way of penalty, a sum which shall not exceed rupees one lakh for each contravention; and /or

(b) debar the licensee, from trading in short term market or medium term market or through power exchanges for a period not exceeding one year; or

*(c) **suspend the licence for trading in electricity for a period not exceeding one year;** or*

(d) revoke the licence of the licensee; or (e) issue such other directions or impose such other condition as the Commission may deem appropriate.

Provided that in case of debarment or suspension, NLDC or concerned RLDC or SLDC, as the case may be, shall take appropriate action with regard to scheduling and despatch of electricity in respect of the transactions of the licensee.”

33. Section 19 of the Act and Regulation 14C of the Trading Licence Regulations cover the following circumstances for revocation of licence and suspension of trading licence:

- (a) Wilful and prolonged default on the part of licensee in doing anything required of him under this Act or the rules or regulations made thereunder.
- (b) Breach of any of the terms or conditions of licence which is expressly declared to render the licence liable for revocation.
- (c) Failure to establish to the satisfaction of the Commission that the licensee is in a position to fully or efficiently discharge the duties and obligations imposed under the licence.
- (d) Financial conditions of the licensee which prevents the licensee to fully or efficiently discharge its duties and obligations imposed on him by his licence.
- (e) Where the charge of serious contraventions is established against the licensee, the Commission may suspend the licence for trading in electricity for a period not exceeding one year.

34. As per the above provision, where the charge of serious contraventions is established against the licensee, the Commission may suspend the licence for trading in electricity for a period not exceeding one year. Regulation 7 of the Trading Licence Regulations casts a statutory obligation on the person issued with a trading licence by this Commission to discharge such duties in relation to supply and trading of electricity as may be specified by the Commission. Regulation 7(h) provides that the licensee is required to (i) carry out trading in accordance with the agreed terms and conditions; (ii) take such safeguards as he may consider necessary with regard to payment security mechanism with the buyers; (iii) always ensure payment to the seller for the purchase of agreed quantum of electricity either through letter of credit or any other appropriate instrument or as may be

mutually agreed between the seller and the licensee. Thus, a trading licensee is bound to always ensure payment to the Seller for the purchase of the agreed quantum of electricity through appropriate instrument or as may be mutually agreed between the parties.

35. The Respondent has submitted that it has challenged the Regulation 14 including Regulation 14C of the Trading Licence Regulations before the Hon`ble High Court of Delhi through WP (C) No. 7423 of 2018 and Division Bench has issued notice on the above Writ Petition. Therefore, it has been pleaded by the Respondent that the Hon`ble High Court is seized of the matter regarding suspension of licence. In our view, since there is no stay on the Regulations by the Hon`ble High Court, the pendency of the said Suit does not bar the Commission to act within its jurisdiction.

36. The Respondent has submitted that the Commission cannot make regulations for suspension of licence when there is no power available under Section 178 to make regulations under Section 19. Trading Licence Regulations have been framed by the Commission in exercise of its power under Section 178 of the Act. Section 178(1) of the Act provides that the Central Commission may, by notification, make regulations consistent with the Act and the Rules generally to carry out the provisions of the Act. Further, Section 178(2) provides that "*in particular and without prejudice to the generality of power contained in sub-section (1), such regulations may provide for all or any of the following matters*". Section 178(2)(ze) provides that the Central Commission may make regulations in any other matter which is to be or may be specified by the regulations. The Hon`ble Supreme

Court in its judgment dated 15.3.2010 in Civil Appeal No. 3902 of 2006 (PTC India Ltd. Vs. Central Electricity Regulatory Commission and others) has held that this Commission may apart from Section 178(1) which deals with “generality”, make regulations even under Section 178(2)(ze) on any topic which may not fall in the enumerated list provided such power falls within the scope of the Act. Relevant portion of the said judgment is extracted as under:

“43. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of “general application”, a Regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a pre-condition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with “generality” even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act. Trading is an activity recognized under the said 2003 Act. While deciding the nature of an Order (decision) vis-à-vis a Regulation under the Act, one needs to apply the test of general application. ...”

In view of the above judgment, we are not in agreement with the contention of GEPL that the Commission cannot make any regulations on the subject which is not enumerated under Section 178 of the Act.

37. GEPL has also contested the jurisdiction of this Commission on the ground that apart from its obligation to supply power to the distribution companies in the State of Telangana, it also had agreements to supply power to the beneficiaries/ consumers within the State of Karnataka. It has been argued by the Respondent that the transactions through the Petitioner were both inter-State and intra-State in nature since it was supplying power to two States (Telangana and Karnataka) at the same time. We note that the Respondent has itself stated that the transactions were both intra-State and inter-State in nature. Transactions also being inter-State in

nature as admitted by the Respondent itself, we fail to understand the contention of the Respondent that this Commission does not have jurisdiction. The Respondent has neither established that the whole transaction was intra-State in nature in the present case nor has it produced any evidence that it has undertaken these activities as holder of intra-State trading licensee for the States of Telangana and Karnataka. Simply based upon argument of the Respondent itself that the present matter also involved inter-State transaction and that the Respondent is a licensee of this Commission, we reject this objection of the Respondent as regards jurisdiction of this Commission.

38. By referring to provisions of Section 79(1)(f) of the Act, the Respondent has stated that this Commission has jurisdiction only to adjudicate disputes involving generating companies or transmission licensees connected with Clauses 79(1)(a) to 79(1)(d) of the Act and that Section 79(1)(e) has been specifically left out from the scope of the Section 79(1)(f) of the Act. Section 79(1)(e) relates to trading licensees. It has further stated that even though the Petitioner is a generating company, the Respondent is neither a generating company nor a transmission licensee and, therefore, the jurisdictional facts necessary for invoking the jurisdiction of the Commission is not in existence.

39. The question that arises for our consideration is whether adjudication of dispute between the parties is a condition precedent for exercise of the jurisdiction under Trading Licence Regulations. In the present Petition, the Petitioner has not sought adjudication of any dispute with GEPL under Section 79(1)(f) of the Act. Rather the Petitioner has, *inter alia*, filed this Petition for suspension of license of

the Respondent. We note that suspension of trading license is covered under Regulation 14C(1)(c) of the Trading Licence Regulations. In our view, adjudication of dispute between a generator and a trading licensee under Section 79(1)(f) of the Act is not a pre-condition for initiation of action under provisions of Trading Licence Regulations. Thus, reliance of the Respondent on Section 79(1)(f) of the Act is misplaced. In view of the above, this objection of the Respondent is not sustainable.

40. In the light of the above discussions, we conclude that this Commission has jurisdiction in the matter and the present Petition is maintainable under provisions of the Trading Licence Regulations and terms and conditions of licence issued to GEPL.

Analysis and Decision on Merit of the case

41. The Petitioner is a generating company and has set up a 45.56 MW bagasse-based cogeneration power plant. The Petitioner entered into agreements with GEPL through binding Terms Sheets/ Lol for supply of power. The Term sheet for supply of power/ LOIs dated 2.3.2015, 5.3.2015 12.3.2015, 6.4.2015, 24.4.2015 and 19.5.2015 were for supply of power from 4.3.2015 to 31.3.2015, from 1.4.2015 to 30.6.2015, from 10.4.2015 to 31.4.2015, from 1.5.2015 to 31.5.2015 and from 1.6.2015 to 30.6.2015 respectively. The LOIs *inter alia* contains terms and conditions for supply of power with regard to the payment of bills. Clause 9 provides that within 9 days of receipt of email bills by the Petitioner, the Respondent shall make payment of the bill amount to the Petitioner. As per clause 12 of the LOI, late payment surcharge @1.25% per month is leviable after 32 days from the receipt of the bill.

42. The Petitioner has stated that it raised the weekly bills upon the Respondent, GEPL for supplied power for the period from 5.3.2015 to 8.3.2015, from 9.3.2015 to 15.3.2015, from 1.5.2015 to 16.5.2015, from 24.5.2015 to 31.5.2015 and from 9.6.2015 to 15.6.2015 in terms of LOIs. However, it has been alleged by the Petitioner that no payment was made by the Respondent. The Petitioner vide its letter dated 15.7.2015 informed the Respondent that as on date, Rs. 27 crore was outstanding against GEPL and requested to pay at least Rs. 5 crore for due clearance of UI charges and to get further NOC from SLDC and for other operational expenses. The Petitioner vide its letter dated 22.7.2015, informed the Respondent that as on 30.6.2015, approximately Rs. 27.71 crore was outstanding against GEPL and requested to pay the same at the earliest. In response, the Respondent vide its letter dated 9.10.2015 informed the Petitioner that GEPL is in the process of reconciliation of accounts and payments would be made from the 1st week of November 2015. Subsequently, on 23.12.2015, the Respondent informed the Petitioner that it has made payment of Rs. 5 crore through RTGS on 17.11.2015 in accordance with the settlement on the full and final settlement amount of Rs. 15 crore.

43. The Petitioner vide letter dated 7.12.2015 informed the Respondent that as per final account statement, it has to receive Rs. 13.94 crore which includes surcharge and POC charges paid on behalf of distribution companies of the State of Telangana. Subsequently, the Respondent vide letter dated 15.6.2016 informed the Petitioner that it has made payment of Rs. 1.10 crore on 27.5.2016 and 6.2.2016 through NEFT. Further, The Petitioner vide its reminder dated 10.7.2017 requested

the Respondent to pay the outstanding dues of Rs. 10,98,60,799/- However, it has been claimed by the Petitioner that no payment was made by the Respondent.

44. According to the Petitioner, GEPL has made willful default in making payment of outstanding dues of Rs. 10,98,60,799/- for the power supplied under LOIs dated 2.3.2015, 5.3.2015, 12.3.2015, 6.4.2015, 24.4.2015 and 19.5.2015. At the time of filing this Petition, the Petitioner has claimed that the outstanding dues stood at about Rs.11.09 crore.

45. We notice that the Respondent despite admitting its liability to pay the outstanding dues, has not paid them to the Petitioner for supply of power under various LOI/ terms sheet of supply of power. It is noted that the supply of energy, amounts claimed under the invoices raised and the demand letters issued by the Petitioner and interest applicable for delayed payments have not at all been disputed by the Respondent. The Respondent vide its email dated 9.6.2015 has confirmed that the billing of the Petitioner was correct and had requested to split the invoice into two separate contracts. The Respondent on 19.5.2017 had agreed to settle the pending amounts which points to the fact that the Respondent did not dispute its liability. However, no amicable settlement has been reached between the parties.

46. It has been stated by the Respondent that a Civil Suit is pending before Bombay City Civil Court wherein issue regarding final settlement claimed by GEPL is being heard. Regulation 7 (c) of the Trading Licence Regulations provides that 'The licensee shall not charge any amount exceeding the trading margin for the

inter-State trading in electricity, fixed by the Commission from time to time.’ We are of the view that full and final settlement claimed by the Respondent apparently violates the above provisions of the Trading Licence Regulations. Under no circumstances, the Respondent shall charge more than the trading margin permissible under Regulation 7(c) of the Trading Licence Regulations.

47. We also observe that the Respondent has not ensured timely payment of dues to the seller. Neither the Respondent, as an inter-State trading licensee of this Commission, has placed on record any documents that proves that it had a payment security mechanism in place for the power procured by it from the Petitioner.

48. Further, from the documents submitted by the Petitioner and the Respondent, we are not in a position to ascertain whether the quantum of outstanding dues with the Respondent is exactly Rs. 11.09 crore as prayed by the Petitioner.

49. Therefore, the Petitioner and the Respondent are directed to reconcile the payments due in terms of the Lols/ term sheets and the Respondent is directed to liquidate the outstanding dues within a period of 30 days from the date of issue of this Order.

50. After settlement between the parties, the Respondent shall submit an affidavit to the Commission to the effect that the charges claimed by it from the

Petitioner are within the limit allowed under Regulation 7(c) of the Trading Licence Regulations.

51. The Petitioner is granted liberty to approach the Commission for appropriate relief in accordance with law if no amicable settlement is reached between the Petitioner and the Respondent.

52. Since the Petition is being disposed of directing the parties to reconcile and settle their dues, the interim prayer of suspension of licence to GEPL is not granted.

53. The Petition No. 200/MP/2017 and IA 78/2018 are disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson