

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 171 of 2013

Dated: 5th September, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

Ravikiran Power Projects Pvt. Ltd.,

Plot No. 1071,

Road No. 44, Jubilee Hills

Hyderabad

Represented by its Director

Mr. C. Purushotham

Versus

... Appellant (s)

- 1. State Load Despatch Centre,
KPTCL, 28, Race Course Cross Road,
Bangalore-560 009, Karnataka**
- 2. Karnataka Power Transmission
Corporation Ltd.,
Kavery Bhavan,
Bangalore-560 009,
Karnataka.**
- 3. Gulbarga Electricity Supply Co. Ltd.,
Station Main Road,
Gulbarga, 585 101, Karnataka**
- 4. The Karnataka Renewable Energy
Development Limited,
No. 39, "Shanthigruha",
Bharath Scouts & Guides Building,
Palace Road, Bangalore-560 001,
Karnataka.**

5. **Central Electricity Regulatory Commission,**
4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001.

...Respondent(s)

Counsel for the Appellant (s) : Mr. Basava Prabhu Patil, Sr. Adv.,
Mr. Anantha Narayan
Mr. S. Prabhu,
Mr. B. Subramanya Prasad

Counsel for the Respondent(s): Mr. Anand K. Ganesan,
Ms. Swapna Seshadri for R-1& 2
Ms. Shikha Ohri for R-3
Mr. G.S. Kanur

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by Ravikiran Power Projects Pvt. Ltd., a generating company, against the order dated 20.03.2013 of the Central Electricity Regulatory Commission dismissing the petition filed by the Appellant to direct the Karnataka State Load Dispatch Centre to issue "No Objection" for grant of inter-State open access for sale of power from their project outside the State.

2. The State Load Dispatch Centre is the Respondent no.1. Gulbarga Electricity Supply co. Ltd. ("GESCOM"), the Distribution Licensee is the Respondent no.3. The Central Commission is the Respondent no.5.
3. The facts of the case are as under:
 - i) The Appellant has set up a 7.5 MW biomass based power project in the State of Karnataka. The Appellant entered into a Power Purchase Agreement dated 10.06.2002 with KPTCL, the predecessor of GESCOM, the Distribution Licensee, for supply of power generated from the project. Under the PPA the tariff was fixed at Rs. 3.85 per KWH, with an annual escalation of 5% based on Ministry of Non-Conventional Energy, Government of India guidelines. The PPA was duly approved by the State Commission.

- ii) On 05.07.2003, KPTCL issued a letter terminating the PPA with immediate effect and sought to impose unilateral reduction of tariff to Rs. 2.80 per KWH with an annual escalation of 2% only, without assigning any reason.

- iii) According to the Appellant they were coerced to sign a purported Supplemental Agreement on 14.11.2006. Being aggrieved by the action of KPTCL/GESCOM, the Appellant filed a Writ Petition being no. 13043/2011 which is pending before the High Court of Karnataka.

- iv) The Appellant commenced supply of power from July 2005 to GESCOM and submitted monthly tariff invoices for the same to GESCOM. GESCOM committed breaches of material financial obligations of the PPA as also the Supplemental Agreement and failed to cure the same despite notice by the Appellant to cure the default. GESCOM did not make payment in time and also did not pay the

interest on arrears. GESCOM also defaulted in opening Letter of Credit as per the terms of the PPA.

- v) The Appellant issued notice dated 28.10.2011 to GESCOM specifying the events of default. However, despite the notice, GESCOM failed to pay the interest for delayed payments or open LC.
- vi) On 27.02.2012 the Appellant issued termination notice to GESCOM and terminated the PPA.
- vii) The Appellant then entered into a PPA dated 01.06.2012 with PTC India Ltd., a trader, for sale of electricity through the exchange. As the transaction involved inter-State transmission of electricity, it required “No Objection” of the SLDC as per the Regulations of the Central Commission. Accordingly, the Appellant applied to SLDC for grant of “No Objection” for inter-State open access. PTC also applied for “No Objection” on 05.06.2012.

- viii) SLDC by communication dated 03.07.2012 declined “No Objection” to PTC India Ltd. on the ground that the as per State Government order dated 01.09.2009 all the private generators having valid PPAs with State utilities are bound to supply power to the respective power utilities in the State and the Appellant had a valid PPA with GESCOM, as reported by GESCOM.
- ix) Being aggrieved by the non-granting of “No Objection” by the SLDC for inter-State open access, the Appellant filed a petition before the Central Commission to set aside the order/communication issued by SLDC. GESCOM and SLDC filed objections before the Central Commission.
- x) The Central Commission by the impugned order dated 20.05.2013 dismissed the petition of the Appellant. The Central Commission held that the question of denial of “No Objection” by SLDC for inter-State open access would be

gone into by the Commission only after the termination of the PPA has been found valid by the State Commission on the petition filed by the Appellant before the State Commission which is pending.

4. The Appellant has made the following submissions:
 - i) The reasoning of the Central Commission amounts to rewriting of Regulation and governing grant of open access by SLDC to read into it a further parameter, i.e. absence of dispute by the Distribution Licensee as to subsistence of the PPA with the Applicant. It also amounts to rewriting a contract by seeking to impose an additional condition that after termination the Appellant has to approach the State Commission for adjudication of the disputes regarding subsistence or otherwise of PPA.

- ii) According to the Central Commission's Regulations for Inter-State Open Access, the SLDC was required to give concurrence to an inter-State proposal after checking only two parameters viz. availability of transmission capacity and availability of metering infrastructure. No other ground can be the basis for refusal of the Open Access. The Central Commission failed to consider that SLDC was bound by the statutory provisions and could not usurp powers/functions/discretion not vested in it under any law.

- iii) The Central Commission has placed reliance on its earlier decision in Petition no. 188 of 2009 dated 07.09.2012 which again is based on the observation of the Tribunal in Appeal no. 6 of 2008 wherein based on the consent of the parties the dispute regarding termination of PPA was directed to be adjudicated by the State Commission. The said judgment of the Tribunal in Appeal no. 6 of 2008 cannot be a binding

precedent as the same was based on the consent of the parties. Besides, the open access in the said case was directed to be continued.

- iv) GESCOM sometimes in February 2013, filed a Petition (OP no. 7 of 2013) before the Karnataka State Commission under Section 86(1)(f) of the Electricity Act for quashing the Termination Notice wherein the State Commission issued notice to the Appellant only on 05.04.2013. GESCOM in its application has neither prayed nor has it been granted any interim relief. As such, the denial of open access to the Appellant is not justified.

- v) Further at the stage of final hearing only the Respondents brought to the notice of the Central Commission about pendency of Petition (OP no. 7 of 2013) filed by GESCOM. But in the impugned order the Central Commission has recorded as if the Appellant has filed OP no. 7 of 2013 for

declaring that PPA stands validly terminated, which is factually incorrect.

5. GESCOM, the Respondent no. 3 has stated as under:

- i) The State Commission has already by order dated 25.11.2009 upheld the validity and legality of the PPA dated 14.11.2006 and the Supplemental Agreement. The Appellant instead of filing an Appeal before the Tribunal has filed a Petition before the High Court seeking quashing of order dated 25.11.2009.
- ii) The Respondent no.3 has not committed breaches of material obligations of PPA and the Supplemental Agreement.
- iii) The issue of subsistence of PPA could not have been determined by the Central Commission. Therefore, the

entitlement of open access to the Appellant could not have been decided without the issue of subsistence of the PPA being settled. Therefore, the Central Commission has correctly not allowed inter-State open access to the Appellant.

- iv) Subsequent to passing of the impugned order, the Central Commission has amended its open access Regulations on 11.09.2013 wherein a prima facie responsibility has been cast upon the concerned SLDC to satisfy itself that in case of bilateral transaction, there is a valid contract for the proposed transaction and there is no existing contract to sell the same power to any other person.

6. On the above issues we have heard Mr. Basava Prabhu Patil, Senior Advocate representing the Appellant, Ms. Shikha Ohri, Learned Counsel for the GESCOM and Shri

Anand K. Ganesan and Ms. Swapna Seshadri, Learned Counsel for the SLDC. We have carefully considered their submissions and perused the records.

7. In view of the rival contentions of the parties, the following question would arise for our consideration:
 - i) **Whether the Central Commission has erred by holding that unreasonableness of denial of “No Objection” for inter-State open access by SLDC would be gone into only after the termination of the PPA has been found to be valid by the State Commission?**
 - ii) **Whether the Central Commission has erred in not directing the State Load Dispatch Centre to issue “No Objection” for grant of inter-State open access?**

8. The above issues are interconnected and are being considered together.

9. Let us examine the findings of the Central Commission in the impugned order. The findings of the Central Commission are summarized as under:
 - i) It is a settled position that adjudication of dispute regarding termination of PPA which was approved by the State Commission under Section 86(1)(b) of the Act is within the jurisdiction of that State Commission by virtue of Section 86(1)(f) of the Act. This view has been consistently followed by the Central Commission, including in the order dated 07.09.2012 in Petition no. 188 of 2009. The Central Commission's view is based on the observation of this Tribunal in order dated 01.04.2008 in Appeal no. 16 of 2008.

- ii) The question of unreasonable in denial of “No Objection” for inter-State open access by SLDC shall be gone into by the Central Commission only after the termination of the PPA has been found to be valid by the State Commission in the Petition pending before it.
10. We find that the PPA dated 10.06.2002 entered into between KPTCL, the predecessor of GESCO, and the Appellant, there is a clause for termination of PPA due to failure or refusal by the KPTCL to perform its financial and other material obligations under the agreement. The Appellant has to deliver a Default Notice to GESCO specifying the detail of the Event of Default calling upon GESCO to remedy the same. If at the expiry of 30 days for the delivery of the Default Notice, unless the parties have agreed otherwise, or the Event of Default has been remedied, the Appellant can terminate the PPA by delivering the Termination Notice.

11. However, if dispute arises regarding the validity of the Termination Notice between the parties, the same has to be adjudicated by the State Commission under Section 86(1)(f) of the Electricity Act. Admittedly, in this case, GESCOM has filed a petition before the State Commission challenging the validity of the Termination Notice and the matter is pending for adjudication under Section 86(1)(f) of the Electricity Act.

12. According to Section 32(2)(a) of the Electricity Act, the SLDC is responsible for scheduling and dispatch of electricity within the State, in accordance with the contracts entered into with the licensee or the generating companies operating in the concerned State. Thus, if a Distribution Licensee claims that it has a valid PPA with a generating company and if the same generating company seeks “No Objection” for Inter-State open access as it has terminated the PPA, the SLDC cannot grant the “No Objection”. The SLDC cannot sit on the

judgment whether the PPA has been terminated legally when the Distribution Licensee is claiming that the termination is not valid. The validity of the Termination Notice can only be decided by the State Commission under Section 86(1)(f) of the Act.

13. Let us now examine the Inter-State Open Access Regulations of 2008 of the Central Commission.
14. The Appellant under the open access Regulations is an 'Inter-State Entity' where metering and energy accounting is done by the SLDC. As per Regulation 8(1), whenever the proposed bilateral transaction has a State Utility or an Inter-State Entity as a buyer or seller, concurrence of the SLDC has to be obtained in advance. While processing the application for concurrence or "No Objection", the SLDC has to verify the existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance

with the Grid Code and availability of surplus transmission capacity in the State network.

15. It is correct that as per the Inter-State Open Access Regulations, the SLDC has to verify the availability of metering and energy accounting infrastructure and surplus transmission capacity before granting “No Objection” to an Applicant for inter-state open access. However, the SLDC has to also consider the responsibility entrusted upon it under the Electricity Act, 2003 to schedule and dispatch electricity within the State in accordance with the contracts entered into between the Distribution Licensee and the generating company. When the Distribution Licensee is claiming that it has a valid PPA with the generating company and power from the generating station has to be dispatched within the State for consumption by the Distribution Licensee, then the SLDC cannot give “No Objection” for inter-State open access for the same power, ignoring the

claim of the Distribution Licensee. The SLDC cannot decide whether the Termination Notice served by the Appellant was valid or not or whether the default of non-payment of dues has been remedied by GESCOM. Only the State Commission is empowered to adjudicate upon the dispute regarding termination of the PPA between the Appellant and GESCOM under Section 86(1)(f) of the Electricity Act, 2003.

16. The Central Commission has correctly held that they would deal with the issue only after the termination of the PPA has been found to be valid by the State Commission as the adjudication of dispute between the Appellant and GESCOMs is within the jurisdiction of the State Commission u/s 86(1)(f) of the Act.

17. It is correct that the GESCOM has filed the Petition before the State Commission to set aside the termination of PPA by the Appellant which is pending. Incorrect recording of the

facts by the Central Commission that the Appellant has filed the Petition before the State Commission seeking declaration that the PPA stood terminated on 28.02.2012, will not affect the outcome of this Appeal.

18. Summary of our findings.

(i) According to Inter-State Open Access Regulations, the SLDC has to verify the availability of metering and energy accounting infrastructure and surplus transmission capacity before granting “No Objection” to an application for inter-state open access. However, the SLDC has to also consider the responsibility entrusted upon it under the Electricity Act, 2003 to schedule and dispatch electricity within the State in accordance with the contracts entered into between the Distribution Licensee and the generating company. When the Distribution Licensee is claiming that it has a valid PPA with the generating company and power from the

generating station has to be dispatched within the State for consumption by the Distribution Licensee, then the SLDC cannot give “No Objection” for Inter-State open access for the same power sought by the generating company on the ground of termination of PPA, ignoring the claim of the Distribution Licensee. The SLDC cannot sit on the judgment about the validity of the termination of the PPA by the generating company. Only the State Commission is empowered to adjudicate upon the dispute regarding termination of the PPA between the Appellant and GESCOM under Section 86(1)(f) of the Electricity Act, 2003.

(ii) The Central Commission has correctly held that they would deal with the issue only after the termination of the PPA has been found to be valid by the State Commission as the adjudication of dispute between the

Appellant and GESCOM is within the jurisdiction of the State Commission u/s 86(1)(f) of the Act.

19. In view of above, the Appeal is dismissed as devoid of any merit. No order as to cost.

20. Pronounced in the open court on this 5th day of September, 2014.

(Justice Surendra Kumar)
Judicial Member

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(Rakesh Nath)
Technical Member

REPORTABLE/~~NON-REPORTABLE~~
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