

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**I.A. NO. 379 OF 2015
IN
APPEAL NO.231 OF 2015**

Dated: 5th November, 2015

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member.**

In the matter of:-

**UTTAR PRADESH POWER)
CORPORATION LIMITED,)
Shakti Bhawan, 14, Ashok Marg,)
Lucknow, Uttar Pradesh.) ... Applicant**

AND

1. **UTTAR PRADESH)
ELECTRICITY REGULATORY)
COMMISSION,)
IInd Floor, Kisan Mandi Bhawan,)
Gomti Nagar, Vibhuti Khand,)
Lucknow – 226 010.)**
2. **UTTAR PRADESH STATE LOAD)
DESPATCH CENTRE,)
Shakti Bhawan, 14 Ashok Marg,)
Lucknow, Uttar Pradesh.)**
3. **UTTAR PRADESH POWER)
TRANSMISSION CO. LTD.,)
Shakti Bhawan, 14, Ashok Marg,)
Lucknow, Uttar Pradesh.)**

4. **NOIDA POWER COMPANY)**
LIMITED,)
Commercial Complex, H Block,)
Alpha II Sector, Greater Noida,)
Uttar Pradesh.) ... **Respondents**

Counsel for the Appellant(s) : Mr. Amit Kapur,
Mr. Vishal Anand
Mr. Sambit Panja

Counsel for the Respondent(s) : Mr. C.K. Rai
Mr. Paramhans for **R-1**.

Mr. Rahul Srivastava for **R-2**

Mr. M.G. Ramachandran,
Mr. Avinash Menon for **R-4**.

ORDER

PER HON'BLE MR. I.J. KAPOOR – TECHNICAL MEMBER

1. The Applicant - Uttar Pradesh Power Corporation Limited (“**UPPCL**”) is operating as Bulk Supply Licensee in the State of Uttar Pradesh. Respondent No.1 is the Uttar Pradesh Electricity Regulatory Commission (“**UPERC**” or “**State Commission**”). Respondent No.2 is the Uttar Pradesh State Load Dispatch Centre (“**UPSLDC**”). Respondent No.3 is the Uttar Pradesh Power Transmission Company Limited

(“**UPPTCL**”). It is a State Transmission Utility. Respondent No.4 is the Noida Power Company Limited (“**NPCL**”). It is a distribution licensee and is distributing and supplying retail electricity in Greater Noida area in Uttar Pradesh.

2. In this appeal, the Applicant has challenged Order dated 21/7/2015 passed by the State Commission in Petition Nos.934 of 2014 and 976 of 2014. The Applicant has also challenged Order dated 10/9/2014 passed by the State Commission in Petition No.934 of 2014. In this application, the Applicant has prayed that the Impugned Orders dated 21/7/2015 and 10/9/2014 be stayed or in the alternative an ad-interim/interim injunction be granted restraining Respondent No.2 i.e. UPSLDC from curtailing the Applicant’s LTOA/MTOA for granting Short Term Open Access (“**STOA**”) to Respondent No.4 – NPCL.

3. For the purposes of deciding this interim application, certain facts need to be stated. On 7/6/2005, the State

Commission published UPERC Open Access Regulations, which was last amended on 18/6/2009. On 25/1/2008, the Central Electricity Regulatory Commission ("**CERC**") published CERC Inter-State STOA Regulations governing Inter-State STOA which have been amended from time to time. On 20/7/2011, a transmission service agreement was executed between Power Grid Corporation of India Limited ("**PGCIL**"), the Applicant and UPPTCL for the purposes of availing and providing Inter-State transmission services. On 30/1/2014, NPCL entered into a PPA with M/s. Shree Cement Limited ("**Shree Cement**") for procurement of 70 MW power on round the clock basis. In terms of Clause 1 of the said PPA, the power was to be sourced from Shree Cement's power plant located in Rajasthan. On 7/2/2014, Shree Cement on behalf of NPCL sought No Objection Certificate ("**NOC**") of UPSLDC in terms of Regulation 8 of the CERC Inter-State STOA Regulations for availing Inter-State Open Access to transmit 35 MW power at 132 KW Surajpur Sub-station. On 7/2/2014, NPCL wrote a letter to UPTCL with a request to issue directions to UPSLDC to provide its NOC for availing

Inter-State Open Access. Similar letters were sent by NPCL on 8/2/2014 and 10/2/2014. On 12/2/2014, NPCL filed Petition No.934 of 2014 before the State Commission under Section 86(1)(c) & (f), 35 and 36 of the Electricity Act, 2003 (**“the Electricity Act”**) alleging that UPSLDC was arbitrarily holding back its NOC. The NPCL prayed that the Respondents be directed to facilitate Open Access as per the application to be submitted for transmission of power to NPCL. On 14/2/2014, the State Commission passed an interim order. The following is the operative part of the said interim order.

“The commission on hearing the submission of all the parties issues the following interim directions:

- 1. SLDC will continue the arrangement of granting its consent for the Open Access on Day Ahead basis to M/s. NPCL till further orders of the Commission.*

- 2. NPCL is directed to submit Long Term, Medium Term and Short Term power requirement and methodology to meet them to the Commission within fifteen days.”*

4. The Applicant was a party during all the proceedings before the State Commission and, at no point of time, the Applicant raised the point regarding the State Commission's jurisdiction till the conclusion of proceedings on 13/8/2014 when the State Commission reserved its judgment. On 10/9/2014, the State Commission directed the SLDC to grant STOA on firm basis upto three months to NPCL. The State Commission further directed that in case of shortage of Total Transmission Capacity ("**TTC**"), it should be proportionately divided among the DISCOMS including NPCL. On 23/9/2014, UPSLDC filed an application before the State Commission seeking vacation of the Order dated 10/9/2014. Being aggrieved by the allegedly erroneous Order dated 10/9/2014, the Applicant filed a review petition being Review Petition No.976 of 2014. The Applicant, inter alia, contended that the State Commission does not have jurisdiction to decide issues relating to Inter-State Open Access Regulations. Such jurisdiction is vested only in the CERC. The Applicant contended that Order dated 10/9/2014 suffered from error apparent on the face of the record because the State

Commission had no jurisdiction to regulate/adjudicate issues pertaining to Inter-State Open Access and the jurisdiction to deal with such issues lies with CERC. On 21/7/2015, the State Commission disposed of the review petition holding, inter alia, that it had jurisdiction to issue Order dated 10/9/2014. As stated above, being aggrieved by the said Orders dated 10/9/2014 and 21/7/2015, the Applicant has filed the present appeal.

5. We have heard Mr. Amit Kapur, learned counsel appearing for the Applicant, at some length. Mr. Kapoor submitted that the State Commission lacked inherent jurisdiction to pass orders as the dispute pertains to grant of Inter-State Open Access which can only be adjudicated by the CERC under Section 79(1)(c) and (f) of the Electricity Act read with Regulation 26 of the CERC Inter-State STOA Regulations. Counsel submitted that under Section 79(1)(c), the CERC has to regulate the Inter-State transmission of electricity and under Section 79(1)(f), the CERC has to adjudicate upon disputes involving generating companies or transmission

licencees in regard to matters connected with Clauses (a) to (d) of Section 79(1) and it can refer any dispute for arbitration. Counsel submitted that under Regulation 26 of the CERC Inter-State STOA Regulations, all disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved. Counsel submitted that under Section 86(1)(c) of the Electricity Act, the State Commission has to facilitate Intra-State transmission and wheeling of electricity. Counsel submitted that paragraph 14.18 of the UPERC Open Access Regulations states that an application involving Inter-State transaction including power exchange transaction shall be governed by the regulations issued by the CERC. Counsel submitted that in the circumstances, the State Commission could not have passed the impugned orders. The Applicant has extremely good case on merits. The Applicant has made out a case for grant of interim orders as prayed.

6. Mr. Ramachandran, learned counsel appearing for NPCL, on the other hand, submitted that the Applicant has not made

out any case for grant of interim order and the interim application deserves to be dismissed.

7. NPCL entered into an agreement for purchase of power from Shree Cement, a trading licensee which is granted a Category 1 trading licence by the CERC. Under the PPA executed between both the parties, the power was to be supplied from the plant of Shree Cement in the State of Rajasthan, to be delivered at regional periphery of the seller i.e. the northern region exit. Drawl point of buyer i.e. NPCL is at Pali Sub Station in the State of Uttar Pradesh. The drawl point of NPCL does fall in an Intra State System of Uttar Pradesh and NPCL is an embedded customer of the Applicant.

8. To have the full understanding of the entire case, we shall have to get into the merits of the case but, *prima facie*, if we look at the relevant provisions contained in the PPA executed between NPCL and Shree Cement for supply of electricity under STOA, it is clearly stipulated that Shree

Cement's scope is included upto the northern region periphery by conveyance of electricity from their station through CTU network and the NPCL has to take the input by using the network provided by the STU in the State of Uttar Pradesh through Pali Sub-Station which gets into the Intra State Transmission Network. Looking at various provisions contained in the Electricity Act, UPSLDC's permission in the form of NOC is essential for such an arrangement.

9. There has been a Bulk Power Transmission Agreement ("**BPTA**") executed between NPCL and UPPTCL on 27/3/2014 wherein it has been agreed that NPCL would be treated as "Long Term Customer" and conveyance of electricity through its network has been allowed to the extent of 268 MW with a provision of enhancement. The bilateral arrangement through PPA between Shree Cement and NPCL falls within the same ambit.

10. Sub-clause 36 of Section 2 of the Electricity Act provides for a clear definition of Inter State Transmission System which *inter alia* stipulates:-

- “36. *Inter-State Transmission System*” includes –
- (i) *any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;*
 - (ii) *the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
 - (iii) *the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.”*

11. There is no dispute on the point of injection at northern region periphery from Shree Cement’s plant as it falls within the Inter State Transmission System. However, subsequent conveyance of electricity from the northern periphery to NPCL is falling within the Intra State Transmission Network.

12. Having regard to the provisions of Sections 32 and 33 of the Electricity Act pertaining to the functions of the State Load Dispatch Centre and compliance of its directions, in our *prima facie* assessment, this bilateral transaction falls within the provisions of these sections.

13. After examining Section 39 of the Electricity Act wherein functions of State Transmission Utility have been stipulated, this bilateral transaction between Shree Cement and NPCL, in our *prima facie* opinion, is again a subject matter of the Intra State Transmission Network.

14. It is clearly stated in the various prevailing Regulations of CERC/UPERC that any dispute arising due to non-issuance of NOC by UPSLDC/UPPTCL has to be brought before the State Commission which in this case is UPERC and, for the same reason, the UPERC's jurisdiction is attracted.

15. On a *prima facie* assessment of the case put forth before us by the Applicant as well as the Respondents, we are of the opinion that there is no merit in the Applicant's case on jurisdiction and, hence, the Applicant has not made out a case for stay of the impugned orders of the State Commission or for any other relief. Hence, the stay application of the Applicant is dismissed. We, however, make it clear that all our observations are *prima facie* observations expressed for the disposal of the interim application.

16. Registry to place the appeal for hearing on 7/1/2016.

17. Pronounced in the Open Court on this 5th day of November, 2015.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**