

Before the Karnataka Electricity Regulatory Commission, Bangalore

Dated this the 22nd day of January, 2004

Present

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| 1. Sri. Philipose Matthai | - | Chairman |
| 2. Sri. H.S. Subramanya | - | Member |
| 3. Sri. S.D.Ukkali | - | Member |

Case No: OP 14/2003

Between

M/s Jindal Thermal Power Company Ltd.,
Post Box No.9
Village & Post Toranagallu,
Bellary District

Petitioner

and

1. M/s Bhuwalka Pipes Ltd.,
P.O.Vidyanagar - 583 275
Village: Torangallu
District: Bellary
2. M/s Karignur Iron & Steel Ltd.,
Embitee Complex
Bellary Road,
Hospet.
3. M/s. Jindal Vijayanagar Steel Ltd.,
P.O. Vidyanagar - 583 275
Village Torangallu
Bellary Dist.
4. M/s. Karnataka Power Transmission Corpn. Ltd.,
Kaveri Bhavan, K.G.Road,
Bangalore - 560 009.

Respondents

(By Sri. S.S.Nagananda, Adv.for Resp. No.4)

The Petitioner has sought exemption, through this petition, from holding a supply license for supplying power to the Respondents 1 to 3 named above. The facts, in a nutshell, are as follows:

(i) M/s Jindal Praxair Oxygen Co. Ltd. has established an Oxygen Plant and a Power Plant (Petitioner) near the integrated Steel Plant set up by Respondent No.3. The State Government have approved a proposal of Respondent No. 3 to establish an ancillary industrial complex near the steel Plant. As a part of this scheme, Respondent No.1 & 2 have set up ancillary units producing ERW pipes and sponge iron respectively. The State Government, while approving the project, it is contended, has approved supply of power by the Petitioner to these ancillaries on a negotiated tariff basis. It is stated that both these ancillaries require 8 lakh units of power per month. The Petitioner intends to supply the requirement of power of these units through dedicated transmission lines.

(ii) Respondent No.3 has set up a pump house consisting of 5 pumps of 800 kW capacity each to draw water from T B dam for the use of Steel Plant, Oxygen Plant and Power Plant. The pump house draws about 14-lakh unit of power per month. Respondent No.4 is now supplying the power to this pump house. The Petitioner intends to supply the power generated by him to the pump house by using the transmission lines of the Respondent No.4 by paying wheeling charges to the Respondent No.4.

2. The Respondent No.4 has put in appearance and resisted the petition. The following are some of the points brought out in the statement of objections filed by KPTCL:

- (i) The reasons for seeking exemption from obtaining license are not disclosed.
- (ii) Since the concerned supply licensee, GESCOM, is not made a party to the petition, it is liable to be dismissed for non-joinder.
- (iii) There is a Power Purchase Agreement between the Petitioner and 4th Respondent to supply power to KPTCL at mutually negotiated rates. The Petitioner has filed a MFA in the High Court against the orders of the Commission determining the rates. This appeal is still pending.

(iv) The KPTCL and GESCOM are willing to supply power to the ancillary units and the proposal of the Petitioner to supply power to them through dedicated power lines will circumvent the contract between the parties.

(v) As per clause 4.1 of the PPA, the Petitioners wheeling agreement stands suspended during the period of the PPA. Therefore the Petitioner cannot wheel its power to the pump house during the term of the PPA.

(vi) The Government orders relating to set up of ancillary units do not relate to supply of power and exemption from licensing.

(vii) If the petitioner is allowed to supply power to H.T.Industries, it would result into lower realization of revenue by the KPTCL and thereby reducing the extent of cross subsidy provided by the Tariff Order.

3. The case was fully heard under the Karnataka Electricity reforms Act, 1999 and was posted for orders. However, the Electricity Act, 2003, came into effect with effect from 10.6.2003 before the order could be pronounced. Hence the case was reheard in accordance with the provisions of the new legislation.

4. The petitioner has filed an additional affidavit on 11.7.2003, after we decided to re-hear the case in the light of the provisions under the Electricity Act, 2003. The Petitioner has urged the following points in his additional affidavit:

(i) The consent of the Commission was required under section 17 of the Karnataka Electricity Reforms Act, 1999. for supplying electricity to any consumer. However, the Electricity Act, 2003, has brought about significant changes through de-licensing of generation, open access, trading and choice of supply to consumers. The provisions of Karnataka act relating to requirement of consent/approval by the Commission before supplying electricity by a generating company to a consumer are inconsistent with the provisions of Electricity Act, 2003. Under section 10 read with section 12 of the Electricity Act, 2003, the Petitioner is not required to hold a supply license in order to supply power to Respondents 1 & 2.

(ii) Section 42(2) of the Electricity Act, 2003, mandates the Commission to introduce open access and allow non-discriminatory use of transmission and distribution system of the Respondent No.4, to any consumer or generating company. However, the Petitioner does not need the network of the Respondent No.4, for supply of power to ancillary units as power would be supplied through dedicated lines established by the Petitioner. Therefore the regulations under section 42(2) of the Electricity Act, 2003, are not relevant in the present case.

(iii) The permission of Gescom or Respondent No. 4 is not required since their network will not be used and no wheeling charges are required to be paid since

the power will be supplied through dedicated lines to Respondents No. 1 & 2. The question of payment of surcharge or additional surcharge does not arise.

(iv) The tariff is not required to be fixed by the Commission under section 62(1)(d) of the Electricity Act, 2003, for the power that would be supplied to Respondents No.1 & 2, as the parties have to negotiate and finalise the terms and conditions of supply by an agreement under section 49 of the Electricity Act, 2003.

(v) The pump house at T.B.Dam is set up to supply water to the Petitioner, Respondent No.3 and Jindal Praxair Oxygen Company. The Respondent No.4 is bound to permit the use of transmission lines under section 39(2)(d) and section 40 the Electricity Act, 2003. The surcharge cannot be levied since water is predominantly used for its own use. The major portion of the expenditure on transmission line between pump house and power plant was borne by the Petitioner/Respondent No.3.

The Petitioner has sought to modify the prayer of his application on the lines of the above points.

5. Sri L.Vishwanathan, learned Counsel from M/s Amarchand Mangaldas & Co., argued the case for the Petitioner and Respondents 1,2 & 3. Sri S.S.Nagananda, learned Counsel, argued the case for Respondent No.4. We have heard both the Counsels in full. They have also filed the summary of their arguments.

6. Sri L.Vishwanathan, learned Counsel for Petitioner, stated that the Petitioner has filed additional affidavit seeking modification of his earlier prayers in the petition under consideration. He stated that the new legislation has brought out substantial changes in the existing law by introducing de-licensing of generation, open access and trading and choice to the consumers of supply source. He contended that many of the sections of the Karnataka Electricity Reforms Act, 1999, are inconsistent with the new provisions made in the Electricity Act, 2003, and they are inapplicable. He further contended that the Petitioner was forced to amend his application and prayers therein to fall in line with the provisions of new law. He argued that the Petitioner need not hold a supply license under the new Act to supply power to Respondents 1,2 and 3. He stated

that the Respondent No.4 is under the obligation to give open access to the Petitioner for supply of energy, under the new law.

7. Sri. Vishwanathan maintained that section 10 of the Electricity Act,2003, enables the Petitioner to establish, operate and maintain dedicated lines and imparts a right to him to supply power to a licensee or a consumer in general. He argued that this right is unfettered, with an exception of any regulation that may be made under section 42(2) of the Electricity Act, 2003. He contended that the regulations under section 42(2) of the said Act are not attracted since the Petitioner intends to supply power to Respondents 1 & 2 through dedicated lines of his own. He stressed the point that the Electricity Act, 2003 ushers direct commercial relationship between Developer and Consumer, which is evident from Section 49 of the said Act. He further contended that this relationship falls within the definition of 'Supply' under the said Act and therefore a license under section 12 of the Electricity Act, 2003, is not required.

8. Sri Vishwanathan further contended that the Petitioner requires access only to the transmission system of Respondent No.4, in order to supply power to the pump house, and the Electricity Act, 2003 facilitates the open access under section 39 and 40. He argued that the Petitioner does not require access to the distribution system and therefore the regulations under section 42(2) of the said Act will not come in his way. He added that the Commission may determine the transmission charges, and while determining it may take into account the fact that the major portion of expenditure of this transmission line was borne by the Respondent No.3.

9. While answering the queries made by the Commission, Sri Vishwanathan said that the petition was earlier made under the Karnataka Electricity Reforms Act, 1999; but the Electricity Act, 2003, came into effect before the Commission could dispose the petition. He said that the Petitioner filed additional affidavit and sought to amend his prayers in line with the new law. He stated that the reliefs might be given under the Electricity Act, 2003. He further stated that the

ancillary units are independent entities, though the State Government had permitted establishment of the units in the same complex. He added that the Respondent No.3 has a role to play in the selection of ancillaries to be located in the complex. He stated that the present ancillary units either use the products of the steel plant and produce value added products or supply components to the plant. He informed that the matter whether the Petitioner is a captive power plant or an independent generating plant is presently *sub judice* before the Hon'ble High Court of Karnataka in MFA No.4795 of 2002.

10. Sri Vishwanathan contended that the Commission could grant reliefs to the Petitioner under the Electricity Act, 2003, even in the absence of regulations. He stated that the supply of power to ancillary units is not conditional on regulations to be framed and that the supply of power to the pump house may be made on standard transmission charges till the regulations are framed. He opined that the Commission need not regulate, by way of tariff, the sale of power to consumer by a generating company.

11. Sri Vishwanathan relied on the following case laws in support of his arguments:

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| (i) <i>UP State Electricity Board v. City Board Mussoorie and others</i> | AIR 1985 SC 883 |
| (ii) <i>Surinder Singh v. Central Government & Others</i> | AIR 1986 SC 2166 |
| (iii) <i>T.Cajee v. U.Jormanik Diem and another</i> | AIR 1961 SC 276 |
| (iv) <i>Thirumuruga etc Charitable Trust v. State of Tamil Nadu</i> | (1996) 3 SCC 15 |
| (v) <i>Ratan Lal Adukia v. Union of of India</i> | (1989) 3 SCC 537 |

He has cited the first three cases in support of his argument that the Act can be enforced in the absence of Regulations. The last two citations were made on the point relating to repugnancy of two acts simultaneously in force.

12. Sri Nagananda, learned Counsel for the 4th Respondent disagreed with the arguments of Sri Vishwanathan and stated that the amended application of the Petitioner virtually changes the complexion of the case. He pointed out that the Petitioner has shown no cause of action for the amendment. He asserted that the reliefs now sought for by the Petitioner are premature and declaratory in nature, besides being totally different and entirely new. He argued that such amendments couldn't be allowed. He reiterated the points urged by him in the statement of objections. He further added that the Petitioner, like any other industry in the power sector, needed to be regulated and there is no reason why it should be given exemption from holding supply license. He urged that any relief to the Petitioner to supply to H.T.industries will result in loss of revenue to the 4th Respondent and it would go contrary to the Tariff Order of the Commission. He further pointed out that the Commission has to make regulations under section 20 of the Karnataka Electricity Reforms Act, 1999, for granting exemptions from the requirement of the license. He contended that under section 20(1)(c) of the Act, the consent of the supply licensee of the concerned area is mandatory. He further averred that under Regulation 23 of K.E.R.C. (Licensing) Regulations 2000, a procedure has been prescribed for obtaining the exemption, and that the Petitioner has not made any such application to the Commission, nor has he made the supply licensee as a party to the present proceedings. He argued that the Petitioner is barred from supplying power to the pump house by paying the wheeling charges, since his wheeling agreement is under suspension till the period of operation of the present PPA between the Petitioner and the 4th Respondent. He requested not to grant exemption to the Petitioner from holding the supply license under the Karnataka Electricity Reforms Act, 1999.

13. Sri Nagananda contended that 'open access' has to be introduced as prescribed under the new Act, and nothing has happened so far. He maintained that the rights would flow from regulations, and the Petitioner will be able to enforce his rights only after the Commission duly forms the regulations. He argued that the reliefs sought by the Petitioner couldn't be granted at this point of time.

14. Sri Nagananda stated that section 10(2) and 10(3) are very important and these sub-sections are part of the duties imposed on the generating companies by the new Act. He pointed out that the generating company may supply electricity to any consumer subject to the regulations made under sub-section (2) of section 42, as imposed by the Electricity Act, 2003. He also pointed out that the generating company has to co-ordinate with the State Transmission Utility for transmission of the electricity generated by it. He stated that the Petitioner has so far not approached the KPTCL, which is the State Transmission Utility.

15. Sri Nagandand contended, further, that the Petitioner has failed to produce any evidence to show that the Respondents 1 and 2 are his ancillaries. The Government orders enable the Petitioner to set up an ancillary industrial complex and they do not relate to supply of power or for any exemption from obtaining supply license. He argued that the Petitioner has established a captive generating plant and is seeking to sell surplus power to ancillaries and retail consumers, and this activity falls within the ambit of section 62(1) of the Electricity Act, 2003.

16. Sri Nagananda argued that the Petitioner cannot claim the reliefs as a matter of right, since the Commission is yet to make regulations keeping in view the National Electricity Policy, National Electricity Plan and tariff policy published under section 3 of the Electricity Act, 2003. He averred that the contention of the Petitioner that the substantial law has come into force, and the benefits under the law can be granted even in the absence of regulations, is untenable and opposed to public interest.

17. Sri Nagananda stated that the Petitioner desired to dispose of its surplus power after catering to the needs of Respondent No.3 by wheeling and banking arrangements with Respondent No.4. However, he entered into a power-purchase agreement with Respondent No.4, by suspending the wheeling agreement during the period of the PPA. He further stated that the Commission

has approved the PPA on 22.5.2002 and 08.07.2002. He pointed out that the Petitioner has challenged the order of the Commission before the Hon High Court of Karnataka, which has finally heard the case and reserved it for orders. He argued that the Petitioner couldn't go back and ask for wheeling arrangements to supply for the pump house of the Respondent No.3.

18. We have carefully considered the various points raised by the counsels during the arguments. The Respondent No.4 has taken objection for the additional affidavit filed by the Petitioner and states that the Petitioner has not amended his original petition. He contends that the Commission cannot consider the prayers contained in the additional affidavit. As stated in the earlier paragraphs, the Petitioner had filed this petition under the Karnataka Electricity Reforms Act, 1999, seeking exemption from the license. We had heard the petition fully under the 1999 Act. However, the new Act came into force before we could pronounce our orders. The new Act made sweeping changes in the field of regulation of electricity supply and introduced new concepts like 'open access' and 'power trading'. Therefore the Commission, on its own decided to hear the petition under the new law. It is in this context that the Petitioner has filed the additional affidavit and amended the prayers. He could have withdrawn the petition and filed a new petition also. But the effect would be the same. Therefore we do not consider this objection as serious and therefore overrule the same.

19. The learned Counsel for the Petitioner argued before us that the new law enables him to supply power to Respondents 1 and 2, even without the regulations being made by the Commission, since he intends to supply power through dedicated lines of his own. He has placed reliance on Section 10(1) and (2) of the Electricity Act, 2003. He contended that the regulations under section 42(2) of the same Act would not come in his way since he does not need open access to the network of the Respondent No.4. The relevant portion of section 10 of the Electricity Act, 2003, reads as under:

" 10 Duties of generating companies

(1) Subject to the provisions of this Act, the duties of generating company shall be to establish, operate and maintain generating stations, tie lines, substations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under subsection (2) of section 42, supply electricity to any consumer."

Sub-section (2) of section 42 of the Electricity Act, 2003, reads as under:

" 42 Duties of distribution licensee and open access

(1) * * * * *

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints;

Provided that such open access may be allowed before the cross subsidies are eliminated on payment of surcharge in addition to the charges for wheeling as determined by the State Commission;

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee;

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission;

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."

The Respondent contended that the case of the Petitioner falls under S.62(1) Of the Electricity Act, 2003. However, the learned Counsel for the Petitioner contended that S.49 of the new Act overcomes such possibility. Section 49 of the new Act reads as under:

"49. Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."

The Petitioner states that he wants to supply power to the ancillaries (Respondent 1 and 2) by his own dedicated lines. Therefore the question of 'open access' to the network of the Respondent 4 does not arise. This means that section 42 of the Electricity Act, 2003 is not attracted to the case of the Petitioner. The non-obstante clause in S.49 makes it clear that S.62 (1) of the new Act is not applicable to the case of the Petitioner. It is a fact that the Commission has not framed any regulations under section 42(2) of the new Act. It is worthwhile to examine whether the absence of regulations under section 42(2) of the new Act has any ramification on the case before us.

20. In the case of *Surinder Singh v. Central Government & others* (AIR 1986 SC 2166), the Hon Supreme Court has held as below:

"Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words, framing of the rules is not condition precedent to the exercise of power expressly and unconditionally conferred by the statute. The expression 'subject to rules' only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute." (Para 6)

The Hon Supreme Court further adds

"If the legislative intent was that until and unless rules were framed power conferred on the authority under sections 8,16 and 20 could not be exercised, that intent could have been made clear by using the expression 'except in accordance with the rules framed' a displaced person shall not be paid compensation by sale of pool property. In the absence of any such provision the framing of rules could not be a condition precedent for the exercise of power." (Para 7)

In the case of *U.P.State Electricity Board v. City Board Mussoorie and others* (AIR 1985 SC 883) the Hon Supreme Court has held

"But S.46(1) of the Act does not say that no Grid Tariff can be fixed until such regulations are made. It only provided that the Grid Tariff shall be in accordance with any regulations made in this behalf. That means that if there were any

regulations, the Grid Tariff should be fixed in accordance with such regulations and nothing more. We are of the view that the framing of regulations under S.79(h) of the Act cannot be condition precedent for fixing the Grid Tariff."
(Para 7)

21. The above case laws on which the Petitioner has placed reliance are very relevant to the petition before us. It is evident from these judgments that the framing of regulations is not a precondition to exercising powers conferred by the Act, and that depending on the expression used in the text of the Act, it can be put to operation in the absence of Rules and Regulations and their absence would not create a vacuum.

22. The Counsel for the Petitioner stressed the point that the new Act envisages private sector participation in generation and has the objective of distancing regulatory responsibilities from the Regulatory Commissions. In the Statement of Objects and Reasons of the new Act, Para 4. (10) states as follows:

"4. The main features of the Bill are as follows: -

* * * * *

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated."

23. However, we feel that if the Petitioner intends to supply power to a group of consumers even with his own dedicated lines and his own distribution network, he will come under the purview of Part IV of the new Act and would require a distribution license.

24. Now, coming to the issue of supplying electricity to the pump house located at TB dam, the Petitioner pleads that he could supply electricity to Respondent No.3 for his pump house at TB Dam, according to S.10 (2) of the Electricity Act, 2003 and that Respondent No.4 is duty bound to provide open access to him under section 39(2)(d) and under section 40(c) of the same Act. As pointed out by the Respondent No.4, the Petitioner has signed a PPA with him for selling the surplus power to the Respondent No.4. It is also a fact that the

wheeling and banking arrangements made by the Petitioner are suspended during the subsistence of the said agreement under clause 4.1. Therefore, the question of wheeling the energy by the Petitioner by using the network of the Respondent No.4 does not arise.

25. In the light of the above observations and discussions, the petition is disposed accordingly. So ordered.

(Philipose Matthai)

(H.S.Subramanya)

(S.D.Ukkali)