

No.: N/46/13

---

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
BENGALURU**

**Dated : 19<sup>th</sup> March 2015**

- |                          |        |
|--------------------------|--------|
| 1. Sri H.D. Arun Kumar   | Member |
| 2. Sri D.B. Manival Raju | Member |

**OP No.14/2013**

**BETWEEN:**

EID Parry (India) Limited,  
(Formerly Parrys Sugar Industries Limited /  
GMR Industries Limited /  
Bharat Sugar Mills Limited),.  
No.1/2, Kalyana Mantapa Road,  
Jaggasanra, Koramangala,  
Bengaluru – 560 034

..

**PETITIONER**

*[Petitioner represented by M/s. Prabhuling K. Navadgi Associates, Advocates]*

**AND:**

- 1) Hubli Electricity Supply Company Limited,  
P.B. Road, Navanagar,  
Hubballi – 580 029
- 2) Chief Engineer (Electrical),  
State Load Despatch Centre,  
28, Race Course Road,  
Bengaluru – 5670 009

..

**RESPONDENTS**

*[Respondents represented by M/s. Indus Law, Advocates]*

-----

**ORDER**

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, praying for a direction against the Respondents 1 and 2 to make payment as per market rates for the energy supplied between July, 2009 and May, 2011, except for the months of May and June, 2010, amounting to Rs.1158.03 Lakhs, as shown in the Statement attached to the letter dated 19.4.2013 (ANNEXURE – V) addressed to the first Respondent, and for such other reliefs.
  
- 2) The material facts leading to filing of the present Petition may be stated as follows :
  - (a) There has been a Sugar Factory at Hullatti Village, Haliyal Taluk, Uttara Kannada District, Karnataka State, with a Co-generation Plant of 24 Mega Watts (MW) and 20.86 MW exportable capacity (Project). This Project was originally owned by M/s. Bharat Sugar Mills Limited, who had entered into a Power Purchase Agreement (PPA) dated 22.1.2007 with the first Respondent. The Co-Generation Plant achieved Commercial Operation on 9.11.2008 (COD). In the meantime, one M/s. GMR Industries Limited became the owner of the Project and it issued the Default Notice dated 5.6.2009 to the first Respondent, followed by the Termination Notice dated 9.7.2009, terminating the PPA on the ground that the defects pointed out in the Default Notice were not cured within the stipulated time.

- (b) Thereafter, M/s. GMR Industries Limited requested for grant of open access for sale of energy to third party, but the same was not granted by the Respondents.
- (c) The first Respondent filed OP No.34/2009 before this Commission, seeking for a declaration that M/s. GMR Industries Limited (Respondent therein) should be barred from selling power to any third party during the subsistence of the PPA dated 22.1.2007. The Respondent therein contested the said case and ultimately, by Order dated 2.6.2011, this Commission held that the termination of the PPA was valid and that the Respondent therein could not be barred from seeking grant of open access for sale of energy to third party.
- (d) It appears, during the pendency of OP No.34/2009, the name of 'GMR Industries Limited' was changed to 'Parrys Sugar Industries Limited' in November, 2010.
- (e) The first Respondent made payments for the energy received, at the PPA rate, from the date of Termination Notice to the date of the Order in OP No.34/2009, i.e., from July, 2009 to May, 2011.
- (f) Here itself, we may note that from April, 2010 to June, 2010, the State of Karnataka had passed orders under Section 11 of the Electricity Act, 2003,

directing all the generating companies in the State to generate and supply maximum exportable capacity of electricity to the State grid. However, during the months of May and June, 2010, M/s. GMR Industries Limited supplied power to the first Respondent, in terms of the directions under section 11 of the Electricity Act, 2003.

- (g) M/s. Parrys Sugar Industries Limited (formerly known as GMR Industries Limited) filed OP No.19/2011 on 23.5.2011 before this Commission, claiming payment relating to the energy supplied during May and June, 2010, as per the directions under Section 11 of the Electricity Act, 2003, at Rs.5.00 per unit, as against the PPA rate of Rs.2.80 per unit with escalation at the rate of 2% per annum over the base tariff every year. In OP No.19/2011, this Commission, on 25.8.2011, passed the following final Order:

*“Case called. Counsel for HESCOM submits that payment of difference amount is pending for want of revised invoice from petitioners. Petitioner’s Representative Shri B.N. Rath, G M (Legal) undertakes to submit invoices for the balance amount. The Respondents are directed to make payment within two weeks of receiving invoice from Petitioner and the matter is disposed.”*

- (h) Earlier to filing of the above-referred OP No.19/2011, this Commission had determined the rate payable to Co-generation Plants having no PPA for supply of power during the Section 11 period, at Rs.5.00 per unit, from April, 2010 to June, 2010.

- (j) M/s. Parrys Sugar Industries Limited's Unit at Haliyal has become a part of the present petitioner (EID Parry (India) Limited) with effect from 18.3.2013, by virtue of the Order dated 1.2.2013 of the Hon'ble High Court of Karnataka and the Order dated 18.2.2013 of the Hon'ble High Court of Judicature, Madras.
- (k) The difference amount at Rs.2.144 per unit (i.e, Rs.5.00 per unit fixed in OP No.16/2010 minus the PPA Rate of Rs.2.856 per unit) for the months of May and June, 2010, payable by the first Respondent to the Petitioner, is not in dispute. At this differential rate of Rs.2.144 per unit, for the energy supplied by the Petitioner for the months of May and June, 2010, the total amount payable by the first Respondent to the Petitioner works out to Rs.3,71,70,558. However, the first Respondent has claimed a set-off of Rs.2,62,06,447, for the imported energy pumped into the Petitioner's Project, from July, 2009 to May, 2011, at the rate of the temporary tariff. The first Respondent has paid the balance amount of Rs.1,09,64,081 to the Petitioner, as per the letter date 25.3.2013 (ANNEXURE – T).
- (l) The Petitioner has objected that the billing of the imported energy for the whole period from July, 2009 to May, 2011 does not arise and that the first Respondent is not entitled to claim the said amount at the rate of the temporary tariff, which was applicable to the non-PPA holders. According to the Petitioner, as it had received the payment for the energy delivered at the PPA rate, for the months, from July, 2009 to May,

2011 (except for the months of May and June, 2010), the first Respondent could not have claimed the rate of the temporary tariff for the energy pumped into its Project between July, 2009 and May, 2011. Therefore, the Petitioner has contended in this Petition that, as the first Respondent has claimed the rate of temporary tariff for the imported energy, it has been claiming the market rate for the energy supplied during the above-said period. With that grievance, the present Petition is filed before this Commission on 25.4.2013.

- 3) The Respondents have appeared through their counsel and have filed their Statement of Objections in their defence. The gist of their contentions is as follows :
  - (a) The Petition is barred: (i) by limitation; (ii) under Order II Rule 2 of the Code of Civil Procedure; and (iii) on the principles of constructive *res-judicata*.
  - (b) The Respondents have contended that the PPA was terminated on 9.7.2009, and therefore, any claim for payment for energy supplied subsequent to the termination of the PPA ought to be filed within three years from 9.7.2009.
  - (c) The Petitioner having intentionally and deliberately omitted to sue in respect of the present claim in its earlier Petitions, i.e, OP No.19/2011 and

OP No.52/2011, is barred from filing the present petition on the ground of waiver, relinquishment and abandonment of its present claim.

- (d) The first Respondent has already paid to the Petitioner for the energy supplied from July, 2009 to May, 2011 at the PPA rate within the due dates, and that the Petitioner has received the same and had not raised any dispute regarding the same, till the filing of the present Petition.
- (e) The termination of the PPA was under dispute from 9.7.2009 till 2.6.2011, i.e., the date on which the termination of the PPA was held to be valid by this Commission in OP No.34/2009. For this period, the Petitioner was entitled to the PPA rate for the energy supplied, and it is held so in OP No.23/2011 in the case of *M/s. Nandi Sahakari Sakkare Karkhane Niyamita -Vs- HESCOM and another*. It is contended that the effect of the Judgment in the said case is that, the termination of the PPA would take effect from 2.6.2011, the date on which the termination was held to be valid, but not from the date of termination of the PPA, i.e., from 9.7.2009.
- (f) Further, it is contended that the Petitioner was overpaid for the energy supplied during the months of May and June, 2010, in view of the Order dated 24.5.2012 passed by this Commission in OP No.23/2011. Therefore, it is contended that if the Petitioner is entitled to receive payments at the rate of Rs.5.00 per unit for the months of May and June, 2010, treating the Petitioner as being without a PPA from the date of the Termination Notice,

- the first Respondent would also be consequently entitled to invoice the import energy from its grid by the Petitioner at the rate of temporary tariff.
- (g) It is contended that for the period during which the Government Order under section 11 was in force, i.e., from April, 2010 to June, 2010, this Commission, in respect of the existing PPA holders, had fixed the tariff at Rs.5.00 per unit, only if the supplies were made over and above the supplies committed under the PPA. Therefore, it is contended that for the supply of entire energy for the months of May and June, 2010, the Petitioner could not have claimed the tariff at R.5.00 per unit. The Respondents have therefore prayed for dismissal of the Petition.
- 4) We have heard the oral submissions of the learned counsel for both the parties and have also perused the pleadings and documents on record.
- 5) The contentions of the Respondents that the Petition is barred: (i) by limitation; (ii) under Order II Rule 2 of the Code of Civil Procedure; and (iii) on the principles of constructive *res-judicata*, are not acceptable. The period of limitation for filing the present Petition starts from 2.6.2011, i.e., from the date of passing of the Order by this Commission in OP No.34/2009. The causes of action for filing OP No.52/2011 and the present Petition are different, and therefore, Order II Rule 2 of the Code of Civil



Procedure or the principles of *res-judicata* are not applicable to the present case.

- 6) The other issues that would arise for our consideration are as follows:
- (1) Whether the Petitioner is entitled to the market rate, as claimed in the petition for the energy injected into the grid system of the first Respondent, for the period between July, 2009 and May, 2011 (except for the months of May and June, 2010)?
  - (2) What Order?
- 7) After considering the material on record and the submissions of the parties, our findings on the above issues are as follows :
- 8) **ISSUE No.(1) :**
- (a) The entire grievance of the Petitioner is that, the first Respondent, while making payment of the amount due as per this Commission's Order dated 25.8.2011 in OP No.19/2011, has deducted an amount towards the import energy bills from July, 2009 to May, 2011 at a higher tariff as applicable to temporary power supply. It is not in dispute that for this whole period between July, 2009 and May, 2011, the Petitioner was paid the PPA rate for the power supplied. Therefore, the Petitioner has contended that it has filed the present Petition claiming the market rate for the energy supplied from July, 2009 to May, 2011, as the first Respondent has claimed the

temporary tariff for the power imported during the said period. The Petitioner has contended that it cannot be treated as being without a PPA for charging for import energy, and as being with PPA for charging for the export energy. In substance, the contention of the Petitioner is that, as the first Respondent has committed a mistake while charging for the import energy, it has come forward to claim the market rate at average IEx rate for the energy supplied to the first Respondent. This reasoning of the Petitioner is legally not acceptable. If the first Respondent has wrongfully claimed a set-off at a higher rate for the import energy, while making payment towards the amount due in OP No.19/2011, nothing prevented the Petitioner from filing an appropriate application before this Commission for non-compliance of the Order passed by this Commission in OP No.19/2011. Therefore, as already noted above, this cannot be a ground for the Petitioner to file the present Petition.

- (b) The other ground urged by the learned counsel for the Petitioner is that the termination of the PPA has taken place on 9.7.2009 and the validity of the said termination of the PPA was subsequently upheld by Order dated 2.6.2011 by this Commission in OP No.34/2009 and that soon after the termination of the PPA, the Petitioner had applied for grant of open access and the same was not granted by the Respondents, without any valid grounds. Therefore, the Petitioner is entitled to claim the market rate for the energy supplied from the date of termination of the PPA till the disposal of OP No.34/2009. On the other hand, the learned counsel for

the first Respondent, relying upon the Order dated 24.5.2012 in OP No.23/2011, in the case of *M/s. Nandi Sahakari Sakkare Karkhane Niyamita -Vs- HESCOM and another*, has urged that during the period when the termination was in dispute, the Petitioner was entitled to compensation only at the PPA rate, but not any other higher rate, in the absence of any reliable material to support the claim for higher rate. The learned Counsel also pointed out that this decision has been affirmed by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.142 of 2012.

- (c) We are of the considered view that the contention of the learned counsel for Respondents is to be accepted and the petitioner is entitled to be paid for the energy supplied at the PPA rate. The Petitioner has not produced any material in support of its claim for a higher rate than the PPA rate, except submitting a statement of monthly average of the IEX rates for the months of July, 2009 to May, 2011. This statement shows that for certain months, the monthly average of the IEX rates was higher than the PPA rate. The Petitioner has not given any particulars regarding the expenses to be borne while transacting in the power exchange for sale of electricity to third party. In such transactions of electricity through IEX, there is a risk of not getting buyers at the quoted rate, and usually, the seller has to bear the wheeling and transmission charges of electricity, and the Renewable Energy generator has no concessional wheeling and transmission charges. None of these factors has been quantified by the Petitioner to ascertain as

to what was the net amount, which it could have derived from sale of energy. Therefore, we hold that the Petitioner has failed to produce any relevant material in support of its claim for a higher rate. Therefore, we hold Issue No.(1) in the negative.

9) **ISSUE No.(2) :**

For the foregoing reasons, we pass the following:

**ORDER**

The Petitioner is not entitled to the market rate as claimed in the Petition for the energy supplied between July, 2009 and May, 2011 (except for the months of May and June, 2010). Accordingly, the petition is dismissed.

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER