

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 21st June, 2018

Present:

Shri M.K. Shankaralinge Gowda .. Chairman
Shri H.D. Arun Kumar .. Member
Shri D.B. Manival Raju .. Member

OP No.23/2011
[On remand]

BETWEEN:

Nandi Sahakari Sakkare Kharkane Niyamit.
Krishna Nagar,
Hosur Road,
VIJAYAPURA – 587 117

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PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.

- 2) State Load Despatch Centre,
Cauvery Bhavan,
K.G. Road,
Bengaluru-560 009.

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RESPONDENTS

[Represented by Justlaw, Advocates]

ORDERS

- 1) In Civil Appeal No.800/2014, between *M/s.Nandi Sahakari Sakkare Kharkane Niyamit -Vs- KERC and others*, the Hon'ble Supreme Court of India, by its Order dated 19.10.2016, remanded the matter to this Commission for a *de novo* adjudication, in the light of the directions issued in the said Order, after affording an opportunity to both the sides and partially set aside the Order dated 18.02.2013 passed in Appeal No.142 / 2012 by the Hon'ble Appellate Tribunal for Electricity (ATE), under which the Order dated 24.05.2012 passed by this Commission in OP No.23/2011, between *M/s. Nandi Sahakari Sakkare Kharkane Niyamit -Vs- Hubli Electricity Supply Company Limited (HESCOM) and another*, was substantially upheld.

- 2) The material facts required for the disposal of the present case, after remand of the matter by the Hon'ble Supreme Court, may be stated thus:
 - (a) The Petitioner - *M/s.Nandi Sahakari Sakkare Kharkane Niyamit* executed a Power Purchase Agreement (PPA) dated 09.06.2005 with the Karnataka Power Transmission Corporation Limited (KPTCL), the predecessor of the 1st Respondent-*Hubli Electricity Supply Company Limited (HESCOM)* for sale of surplus energy after meeting its captive requirement from its Cogen Power Plant, at the rate and as per the terms and conditions, mentioned in the PPA.

- (b) The Petitioner terminated the PPA with effect from 03.05.2010 by issuing the Termination Notice, as per the relevant term of the PPA. The 1st Respondent (HESCOM) disputed the said termination, thereby, the Petitioner filed OP No.26/2010 for the declaration of the valid termination of the PPA. After hearing the parties, this Commission, by its Order dated 13.01.2011 in OP No.26/2010, upheld the termination of the PPA with effect from 03.05.2010 and permitted the sale of energy from its Cogen Power Plant to third parties.
- (c) The Petitioner has supplied the energy to the Grid during the continuance of the PPA and also subsequent to the date of termination of the PPA till the open access was granted. There was no dispute that the payment for the supply of energy till the termination of the PPA (i.e., 03.05.2010) should be governed by the terms and conditions of the PPA. However, there was no agreement between the parties regarding the rate at which the Petitioner was to be compensated for the energy supplied subsequent to the termination of the PPA till the grant of the Open access (from 04.05.2010 to 12.03.2011). For resolving this dispute, the Petitioner had filed OP No.23/2011 against the Respondents [HESCOM and the State Load Despatch Centre (SLDC)]. In essence, in OP No.23/2011, the Petitioner had sought for the following reliefs:

'To direct the Respondents, jointly and severally, to make payments for the energy delivered from 04.05.2010 to 12.03.2011 at the rate of ₹5.50 per unit along with interest at the rate of 1.5% per month from

the date when payments became due till the payments are made in full.'

- (d) This Commission, in OP No.23/2011, after hearing the parties, by its Order dated 24.05.2012 held that:
- (i) The Petitioner was entitled to be paid for the electricity supplied from the date of termination of the PPA to the date of the Order of this Commission in OP No.26/2010 (i.e., from 04.05.2010 to 13.01.2011) at the PPA rate prevailing at the time of termination of the PPA, without interest; and,
 - (ii) As regards the energy supplied after the Commission's Order dated 13.01.2011, the Petitioner had to take recourse to the remedy provided under the CERC (Open Access for Inter-State Transmission) Regulations, 2008.
- (e) As against the Order dated 24.05.2012 of this Commission, passed in OP No.23/2011, the Petitioner preferred Appeal No.142/2012 before the Hon'ble ATE. The Hon'ble ATE, by its Order dated 10.02.2013 in the said Appeal, affirmed the findings of this Commission regarding the payment of compensation for the energy supplied, for the period from 04.05.2010 to 13.01.2011 and in modification of the Commission's directions asking the Petitioner to approach under the CERC (Open Access for Inter-State Transmission) Regulations, 2008 for the energy supplied for the period from 14.01.2011 to 12.03.2011, granted liberty to the Petitioner to approach this

Commission for claiming compensation for the energy supplied for the said period, from 14.01.2011 to 12.03.2011.

- (f) A reading of the impugned Order dated 24.05.2012 in OP No.23/2011 along with the Order dated 10.02.2013 in Appeal No.142/2012 of the Hon'ble ATE would lead to the conclusion, that:
- (i) The Petitioner was entitled to claim compensation for the period, from 04.05.2010 to 13.01.2011, at the PPA rate without any interest; and,
 - (ii) The Petitioner was granted liberty to approach this Commission, with regard to the claim for compensation for the energy supplied for the period, from 14.01.2011 to 12.03.2011.
- (g) A reading of Paragraph-2 of the Order dated 19.10.2016 of the Hon'ble Supreme Court, noted above, would lead to the conclusion that, the direction of the Hon'ble ATE granting liberty to approach this Commission, for claiming compensation for the energy supplied from 14/01/2011 to 12.03.2011, is upheld and, thereby, that portion of the Order of the Hon'ble ATE remained unaltered.
- (h) The Hon'ble Supreme Court, in the earlier portion of Paragraph-4 of its Judgment, has observed the reason that might have led the Petitioner for non-production of the material evidence for claiming the higher rate than the PPA rate, for the energy supplied, subsequent to the period, from the

date of termination of the PPA to the date of grant of Open Access, and has held in the latter part of the said Paragraph as follows:

"... In the above situation we are of the view that for the ends of justice the appellant should be allowed a further opportunity to lay before the concerned authority materials in support of its claim for a higher rate, if such materials are so available. We, therefore, interfere with the orders of the State Commission and the Appellate Tribunal and remand the matter to the State Commission (Karnataka Electricity Regulatory Commission) for a de novo adjudication in the light of the present directions after affording both sides an opportunity to lay before the State Commission full materials in support of their respective cases as required in terms of the Government Order dated 3rd June, 2016."

- (j) In the concluding part of Paragraph-5 of its Judgment, the Hon'ble Supreme Court has directed as follows:

"Consequently and in the light of the above the appeal is partly allowed in terms of the above directions. The matter be considered afresh by the State Commission in the light of the present directions."

- 3) After receipt of the Order dated 19.10.2016 of the Hon'ble Supreme Court, both the sides were given an opportunity to produce new material, if any, in support of their respective contentions. The Petitioner, as well as the 1st Respondent (HESCOM) have not produced any new material in support of their respective contentions. They have filed only the written submissions. The learned counsel for the parties have also made their oral submissions.

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- 4) The Hon'ble Supreme Court has directed to conduct a *de novo* adjudication in the light of the directions, issued by it. The directions issued relate to providing further opportunity to place any new or additional material in support of the respective contentions, to establish the applicability or otherwise of the terms of the Government Order dated 01.04.2010, published in the Karnataka Gazette, dated 03.06.2010, at Pages 1610 to 1612 (this Government Order dated 01.04.2010 is referred to in the Hon'ble Supreme Court's Order, as the Government Order dated 03.06.2010). This Government Order has brought out the circumstances for fixing the higher cost for the energy to be supplied under Section 11 from April, 2010 to June, 2010, at ₹5.50 per unit for these months. It is stated that, the State was under acute need of power and there was absolute shortage of Bagasse and thereby, the use of Coal had become inevitable for generating 250 MWs of energy from the Cogen Power Plants of the Sugar Factories in the State. Further, it is stated that, the use of Coal instead of Bagasse would incur higher cost per unit of energy to be supplied.
- 5) This Commission, in its earlier Order dated 24.05.2012 in this case, had reached the conclusion that, there was no material to support the claim of the Petitioner for higher tariff in terms of the above-referred Order dated 01.04.2010, thereby, allowed only the PPA rate for estimating the compensation payable to the Petitioner. As already noted, the Petitioner, for the present, has not produced any fresh material, to establish that its case

would fall for claiming the higher tariff in terms of the Government Order dated 01.04.2010. Therefore, one can say that, there is no reason to differ from the earlier conclusion reached by this Commission, even after reconsideration of the pleadings and other material already on record.

6) As already noted, the Hon'ble Supreme Court has directed to conduct a *de novo* adjudication of the present case, after providing an opportunity to the parties to produce fresh material, if any. Even in the absence of production of such fresh material by the parties, this Commission is required to examine the merits or otherwise of each and every issue arising out of the pleadings of the parties, as the directions of the Hon'ble Supreme Court is to conduct a *de novo* adjudication of the present case by this Commission. We may briefly recapitulate the facts and circumstances of the case, as under:

(a) The PPA was terminated with effect from 03.05.2010. The 1st Respondent (HESCOM) has disputed the termination and finally, this Commission upheld the termination on 13.01.2011. Therefore, for the energy injected, from 04.05.2010 to 13.01.2011, the Petitioner was entitled to get the compensation as the energy injected was not unauthorized.

(b) When the termination was in dispute, there was an Order Section 11 of the Electricity Act, 2003 (Act), issued by the Government of Karnataka, to supply

power to the State Grid. This Order was in force from April, 2010 to the end of June, 2010. Therefore, from 04.05.2010 to 30.06.2010, the Petitioner was entitled to claim the tariff as would be payable for the energy supplied under Section 11 of the Act. The Petitioner had filed OP No.16/2010, along with two others, for claiming the tariff for the energy supplied, under Section 11 of the Act. That Petition was allowed on 24.03.2011, along with the other connected cases, fixing the tariff of ₹5.00 per unit. Admittedly, that Order dated 24.03.2011 in OP No.16/2010 was challenged, before the Hon'ble ATE, and the matter was remanded and thereafter, this Commission has re-fixed the tariff at ₹5.72 per unit. The present OP No.23/2011 was filed on 14.06.2011, subsequent to the Order dated 24.03.2011 passed in OP No.16/2010. The Petitioner in the present case has made it clear, in Paragraph-9 of the Petition, that it had already filed a separate Petition claiming payment for the energy supplied under Section 11(2) of the Act and the same was disposed of on 24.03.2011, therefore, the supply of energy, for the period of Section 11 of the Act, was not the subject matter of the present Petition. Therefore, in our considered view, the Order passed in OP No.16/2010 determining the tariff payable, for the energy supplied during the Section 11 of the Act, should govern the rights and liabilities of the parties. In the previous Order, passed by this Commission, the binding effect of the decision in OP No.16/2010 was not considered. Therefore, in the present case, the Commission is required to consider the quantum of compensation that could be awarded for the remaining period from 01.07.2010 to 12.03.2011, for the

energy supplied by the Petitioner. As already noted, the power injected by the Petitioner, for the period from 01.07.2010 to 13.01.2011, the date on which this Commission declared the validity of the termination of the PPA, is not unauthorized. Though, the Petitioner has claimed compensation at the rate of ₹5.50 per unit for this period, no material is produced in support of that rate. Therefore, for this period, compensation should be awarded at the rate payable under the PPA, just before its termination.

- (c) The next period would be, from 14.01.2011 to 12.03.2011. It is not in dispute that the Petitioner has injected certain quantity of energy into the Grid during this period. The Petitioner has claimed compensation, at the rate of ₹5.50 per unit for the energy injected into the Grid during this period also. At the outset, we may note that, after declaration of the validity of termination of the PPA, the Petitioner was not supposed to inject energy into the Grid, without there being any authority to do so. The Petitioner should have applied for the Open Access and it could inject energy into the Grid only after the grant of the Open Access. The Petitioner can claim compensation for the delay, if any, in granting the Open Access by the authority concerned. The Petitioner has stated that, it applied for the Open Access on 14.02.2011, subsequent to the Order dated 13.01.2011, for grant of 'No Objection Certificate', for sale of power under the Inter-State Open Access, through Global Energy Limited, a Trading Licensee. Further, the Petitioner has stated that, this Application was required to be disposed of within three days,

from the date of submission of the Application. In response to the above averments made by the Petitioner, the 2nd Respondent (SLDC) contended that, the Petitioner filed the Application dated 14.02.2011 for grant of Open access before it and thereafter, it addressed a letter dated 29.02.2011, seeking the opinion of the 1st Respondent (HESCOM) for grant of Open Access and in response to it, the 1st Respondent (HESCOM) addressed a letter dated 05.03.2011, informing that the Open Access could be granted, as the PPA was terminated. Further that, soon thereafter, the 2nd Respondent (SLDC) granted the Open Access on 12.03.2011. Therefore, the 2nd Respondent (SLDC) has contended that there was no delay in granting of the Open Access to the Petitioner. It appears that, the 2nd Respondent (SLDC) has wrongly stated, in its Statement of Objections, that the Petitioner applied for the Open Access and ultimately it granted Open Access, instead of stating that the Petitioner had applied for 'No Objection Certificate' for Inter-State Open Access and ultimately it granted such 'No Objection Certificate'.

- (d) Considering the rival contentions and the relevant material, this Commission is of the view that, the Petitioner has failed to establish that there was an undue delay, on the part of the Respondents, in granting the 'No Objection Certificate', that would amount to negligence in discharging the duties of the Respondents, making them liable for payment of compensation to the Petitioner. The reasons may be stated thus:

- (i) The Petitioner itself states that, it applied for grant of 'No Objection Certificate' through Application dated 14.02.2011 before the 2nd Respondent (SLDC). There is no explanation, regarding the delay of one month in applying for the 'No Objection Certificate' from 13.01.2011, the date on which the termination of the PPA was upheld.
- (ii) According to the Petitioner, it applied for the 'No Objection Certificate' before the 2nd Respondent (SLDC), through Global Energy Limited, a Trading Licensee, with a view to obtaining the Inter-State Open Access. The Petitioner has further stated that, the Application for grant of 'No Objection Certificate' was required to be disposed of, within three days, from the date of making the Application. But, the Petitioner has not produced any guidelines or statutory provision to this effect. The Petitioner does not say, whether Global Energy Limited had applied for long-term or short-term Inter State Open Access. In the case of applying for a long-term Inter-State Open Access, the CERC (Grant of Connectivity, Long Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 would apply. In the said Regulations or in the connected Guidelines, there is no provision that the SLDC is required to dispose of the Application for grant of 'No Objection Certificate' within three days. Assuming that, an Application for 'No Objection certificate' was applied for

obtaining the short-term Inter-State Open Access, provisions are made in the CERC Open Access in Inter-State Transmission Regulations, 2008, to get the short-term Inter-State Open Access on complying with certain conditions, in the event the Application for issuance of the 'No Objection Certificate' was not disposed of within the specified period. The person, who applied for a short-term Inter-State Open Access, need not wait till the issuance of the 'No Objection Certificate' by the SLDC, in the event the 'No Objection Certificate' was not granted within the specified time. Therefore, it appears that, there were other reasons for not obtaining the Inter-State Short Term Open Access, apart from the non-grant of 'No Objection Certificate' within three days by the SLDC. At any rate, in such cases, the entire delay exceeding three days cannot be attributed to the SLDC in issuing the 'No Objection Certificate' for the Inter-State Short Term Open Access.

- (e) For the above reasons, we hold that the Petitioner has failed to establish that there was negligence on the part of the Respondents in issuing the 'No Objection Certificate' for getting the Inter State Short Term Open Access. Therefore, the energy injected, if any, during the period between 14.01.2011 and 12.03.2011 does not qualify for awarding any compensation.

- (f) Awarding interest on compensation payable is within the discretion of the Commission. On the facts and in the circumstances of the present case, the Commission is of the considered view that the interest on compensation, prior to the date of the Order, need not be awarded.
- 7) For the forgoing reasons, we pass the following:

ORDER

- (1)(a) The Petitioner shall be paid compensation at the rate of ₹3.024 (Rupees Three Point Zero Two Four) only per unit (PPA rate) for the energy injected into the Grid from 01.07.2010 to 13.01.2011;
- (1)(b) The above amount found due, shall be shared by the 1st Respondent (HESCOM) and the other Distribution Licensees of the State, in proportion to their consumption out of the above-said quantity of energy injected during the period, from 01.07.2010 to 13.01.2011;
- (1)(c) The 2nd Respondent (SLDC) shall find out the proportion in which the above-said quantity of energy was consumed by the 1st Respondent (HESCOM) and the other Distribution Licensees of the State during the above period, within 8 (eight) weeks from the date of this Order and shall intimate the 1st Respondent (HESCOM) and the other Distribution Licensees to pay their dues to the Petitioner, within 15 (fifteen) days from the date of the receipt of such intimation;

- (1)(d) The 1st Respondent (HESCOM), or any other Distribution Licensee, shall pay interest at the rate of 8% (eight percent) per annum on the amount that might be found due from them, in the event they fail to make payment of the amount due to the Petitioner within the stipulated time as noted above, from the date of default till the date of payment;
- (2) For the energy injected for the period from 04.05.2010 to 30.06.2010 (Section 11 period), the rights and liabilities of the Petitioner would be governed by the final Order passed in OP No.16/2010 and the other connected cases, subject to the results in Appeal, etc., that might have been preferred by any aggrieved party; and,
- (3) The Petitioner is not entitled to any compensation for the energy injected, if any, during the period from 14.01.2011 to 12.03.2011.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER