

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE**Dated : 29th March, 2012**

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|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |

(Sri K. Srinivasa Rao, Member, pronouncing a separate Order)

No. OP 04 / 2011**BETWEEN**

M/s. Ugar Sugar Works Limited
Registered Office
Mahaveernagar
SANGLI – 416 416

(Represented by Sri Prabhuling K. Navadgi, Advocate)

..

Petitioner**AND**

1. M/s. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, Kempegowda Road
BANGALORE – 560 009

2. The Chief Engineer (Electricity)
State Load Despatch Centre
28, Race Course Road
BANGALORE – 560 009

3. M/s. Hubli Electricity Supply Company Limited
Navanagar, P.B. Road
HUBLI – 580 025
(Represented by M/s. Just Law, Advocates)

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Respondents

1. The Petitioner has a Co-generation Plant at Ugar with an installed capacity of 44 MW. It has come up with the present Petition for release of payment towards unscheduled energy supplied by it as per UI rates, during the period in which it applied for Open Access, but not granted.

2. The case of the Petitioner is that it does not have any Power Purchase Agreement (PPA) with the 3rd Respondent for supply of power, though the 3rd Respondent had invited the Petitioner by its letter dated 1.10.2008 seeking extension

of PPA, which was in existence earlier. It is submitted by the Petitioner that now it has a Sale of Power Agreement dated 4.9.2009 with Tata Power Trading Corporation Limited (TPTCL) (Annexure-C) and pursuant to the said Agreement, the Petitioner applied for scheduling of power to the 1st Respondent through the 2nd Respondent on 9.10.2009 for injecting 31 MW power between 10.10.2009 and 10.11.2009. Accordingly, the 2nd Respondent granted an NOC dated 9.10.2009.

3. Thereafter, TPTCL requested the 2nd Respondent on 3.11.2009 to grant permission for scheduling of power from 11.11.2009 to 10.12.2009 to sell electricity in Power Exchange. This was not granted and the Petitioner on 11.11.2009 wrote to the 2nd Respondent that even though TPTCL has applied for extension of NOC for supplying power in Power Exchange on 3.11.2009 permission is not granted. Therefore, as it cannot shutdown Sugar / Cogeneration Plant or store the power generated, it will continue to pump unscheduled power to the State Grid till approval is granted and the Respondents shall account it as 'UI' power. The 2nd Respondent on 19.11.2009 granted the NOC for scheduling power. It is submitted by the Petitioner that as it had injected power on 11.11.2009 and 12.11.2009 to the extent of 2,84,000 KWH, the 2nd Respondent was requested to provide UI details to prefer the bills.

4. It is further submitted by the Petitioner that TPTCL again on 16.11.2009 applied to the 2nd Respondent for NOC for scheduling power to be sold in Power Exchange, from 20.11.2009 to 19.12.2009. The 2nd Respondent gave clearance to this request, but only from 24.11.2009. Therefore, it reiterated its request to treat the power pumped from 20.11.2009 to 25.11.009 as 'UI' power and account it accordingly.

5. The 2nd Respondent by its letter dated 7.1.2010 declined the request of the petitioner to treat the power injected from 11.11.2009. to 12.11.2009 and from 20.11.2009 to 26.11.2009 as UI power.

6. Therefore the Petitioner on 12.1.2010 and thereafter approached KPTCL (1st Respondent) to provide details of unscheduled power pumped into the grid to enable it to claim charges for the same from the 3rd Respondent (HESCOM). The 2nd Respondent on 3.8.2010 informed that power injected by it is absorbed into the grid and 'B' Form is available with the officials of HESCOM. However, no payments have been made by the Respondents for the energy pumped in.

7. Aggrieved by the non-payment for the energy pumped, the Petitioner has filed the present Petition.

8. According to the Petitioner, the Respondents are liable to pay for the energy pumped at UI rates as per CERC's earlier orders and Regulation 18 of the CERC (Open Access in Inter-State Transmission) Regulations, 2004, since they failed to grant 'NOC' within the time-frame prescribed in the Regulations.

9. The Respondents have filed a detailed Statement of Objections denying their liability to pay for the energy pumped in at UI rates. It is contended by the 2nd Respondent that there is no delay on its part in granting NOC. The 1st application for NOC was made on 9.10.2009 for the period between 10.10.2009 to 10.11.2009 and this was granted on 9.10.2009 itself, even though in the past there was under-generation by the Petitioner. The 2nd application made by the Petitioner on 11.11.2009 for the period between 11.11.2009 to 10.12.2009 was granted on 13.11.2009. Before granting NOC Petitioner gave an undertaking dated 11.11.2009 to accept for the power supplied in excess of the schedule as per the rate fixed by

the Commission for cogeneration plants. During this period, as evident from the petitioner's letters produced as Annexures R2, R3 and R4, the schedule availed was not adhered to. This delay in granting NOC was on account of under-generation by the Petitioner on the earlier occasion. As regards the 2nd NOC, it was granted only from 25.11.2009 to 26.11.2009 considering erratic generation pattern followed by the Petitioner. As power was pumped without consent / permission, the Petitioner is not entitled to the claim made to pay at UI rates.

10. We have heard Counsels for both the Petitioner and the Respondents, and have also considered the averments made in the Petition, Statement of Objections and the Rejoinder and perused the documents produced.

11. There is no dispute between the parties on the electricity pumped into the grid by the Petitioner on the dates mentioned in the Petition and on the letters / orders produced by both the parties. The only dispute is, 'Whether the Petitioner shall be paid for the energy pumped into the grid, and if yes, at what rate?'

12. It is contended by the Petitioner that even though the Petitioner applied for grant of 'NOC' for Open Access as per the procedure prescribed under the Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2008, the 2nd Respondent neither granted the same nor communicated the rejection within the time prescribed under the said Regulations. It is further contended that the 2nd Respondent having not communicated its decision within the time prescribed, and inspite of the intimation to it that in case 'NOC' is not granted within the time, the Respondents have to pay for the energy pumped in, at the UI rates. The 2nd Respondent did not communicate either acceptance of the Petitioner's application for Open Access or rejected the same.

13. Per contra, the Respondents' case is that, there was no delay on its part in granting NOC, as it has to consider the applications on merits and take a decision.

14. This Commission, in its Order dated 18.6.2009 passed in OP 31/2008 (which has been relied upon by the petitioner), has held that not granting of Open Access does not automatically entitle the Generator, who injects power, to claim UI rates. The relevant extract of the said Order is as follows :

"12. ... In our considered view, non-granting of Open Access does not automatically entitle the petitioner to inject energy into the respondent's grid without any schedule and demand payment at UI rates for energy injected, nor does the responsibility automatically fall on the respondents to pay at UI rates".

15. The stand taken in this case by the Petitioner also is similar to the one taken in the above Petition. Therefore, duly following the above Order, the Petitioner's claim for UI rates, during the period in which the application for grant of Open Access was under consideration, cannot be accepted. Even under the Regulation 20(4) of CERC (Open Access in Inter-State Transmission) Regulations, 2008, on which the Petitioner heavily relies upon for its Claim, does not impose such a liability. As per the said Regulation, UI charges are payable only in case there is a mismatch between the scheduled energy and the actual injection of energy. Admittedly, in the present case, before injecting the power into the grid by the Petitioner, there was no approved schedule and application for schedule was only under consideration. In the absence of an approved Schedule for injecting power, the question of paying at UI rates does not arise. Accordingly, the claim of the Petitioner to pay for the energy pumped in during the pendency of the Open Access application, at UI rates, is rejected.

16. The next question is, 'Whether the Petitioner is not entitled to any charges at all for the energy pumped into the grid?' In our view, the Petitioner is entitled to be paid for the energy pumped during the pendency of its Open Access application, as the 2nd Respondent has not acted on the application for 'NOC' within the specified time prescribed under the Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2008, and communicated its decision of either accepting or rejecting the application to the Petitioner. The Respondents, who deal with electricity, have to act and take decisions diligently. The Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2008, which govern open access, are statutory and binding on all and have to be complied with. From the materials placed before us, the time taken by the 2nd Respondent for considering granting of 'NOC', in our view, though cannot be termed as unjustified, as the 2nd Respondent has to verify the request with reference to availability of the System, etc., the fact that the Petitioner had failed to adhere to the Schedules given by it earlier, is no ground for the Respondent No.2 in not communicating a decision in time. The 2nd Respondent-Chief Engineer, State Load Despatch Centre, who is responsible for maintaining the State's Supply and Demand, has to look into the merits of the application within the time prescribed, as any delay will affect the Petitioner-Generator's interest.

17. The Hon'ble Appellate Tribunal for Electricity, in the case of **Jocil Limited -Vs- Southern Power Distribution Company [(2008) ELR APTEL 0829]** has invoked the principles contained in Section 70 of the Indian Contract Act, 1872, and held that a person who enjoys the benefit of a non-gratuitous act of another person, shall have to compensate the other person who has done the non-gratuitous act.

19. This Commission has followed the above-said Judgment of the Hon'ble ATE in OP No.19/2008 – **Bhoruka Power Corporation Ltd. –Vs- The Managing Director, CESC**, disposed of on 12.3.2009, and held that:

“The Hon'ble ATE on 19.12.2008 in Appeal of Jocil Ltd., V/S Southern Power Distribution Company of AP [Reported in 2008 ELR (APTEL) 0829] after quoting Section 70 of Contract Act has held that once electricity is fed into the grid, by the very nature of electricity, the same gets simultaneously consumed and therefore the recipient is bound to compensate even if there is no agreement to that effect. As all the electricity generated is fed into the grid and the Respondent has utilized the same, as held by the Hon'ble ATE, it has to pay for the said energy even assuming that there is no contract to that effect. But as held above, the Respondent under the PPA is bound to pay for all the energy fed to the grid.”

20. Further, this Commission in OP No.14/2010, - **Orange County Resorts and Hotels Ltd. –Vs- HESCOM and others**, which was disposed of on 1.7.2010, in similar circumstances, has ordered as below :

“Admittedly the petitioner is a generating company and producing electricity after making substantial investments. It was also not the intention of either of the parties to treat the electricity generated be supplied free. In the circumstances of this case we deem it proper to order the respondents to pay the petitioner for the energy pumped to the grid at the rate of Rs.3.40 (which is the rate fixed by this Commission to the wind energy). The respondents may pay this in cash or adjust against the charges payable by the petitioner in future either towards wheeling and banking charges or electricity charges to respondents.”

This Order has been affirmed by the Hon'ble Appellate Tribunal for Electricity on 11.1.2012 in Appeal No.5 of 2011, with some modifications on mode of adjustment.

20. In a later case of **Indo Rama Synthetics (I) Ltd. –Vs- Maharashtra Electricity Regulatory Commission and others** (Appeal No.123 of 2010), the Hon'ble Appellate Tribunal for Electricity has held that Section 70 of the Indian Contract Act, 1872, cannot be invoked by a person who injects electricity without a Schedule. However, in our view, the said Judgment is distinguishable, as in the present case,

the electricity has been pumped in by the Petitioner to the grid, duly informing the same to Respondent No,2, during the pendency of its application for Open Access and the 2nd Respondent, inspite of it, did not inform the Petitioner not to pump in energy during the consideration of the Petitioner's application for Open Access.

21. In the instant case, the Petitioner has supplied electricity and Respondent No.3 and other ESCOMs have utilized the same., as the 2nd Respondent did not take action and communicate its decision on the application of the Petitioner for Open Access, within the time prescribed. Therefore, in our opinion, as per the principles laid down by the Hon'ble ATE in the above-referred case, and this Commission's Order referred to above, the ESCOMs are liable to pay for the electricity pumped into the System by the Petitioner and utilized by ESCOMs during the period in which the Petitioner's application for Open Access was under consideration, at the rate of generic Tariff fixed for Co-generation Plants at the time, which was Rs.3.59 per Unit.

22. The incidental question is, 'Who shall pay for the electricity generated and pumped into the grid and at what rate?' Admittedly, it is the 1st and 2nd Respondents, who were expected to act as per the Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2008, but have not acted in time. Therefore, we have to order the 1st and 2nd Respondents to make the payment to the Petitioner, within two (2) months from the date of this Order, at the rate of Rs.3.59 per Unit.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

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(Represented by M/s. Just Law, Advocates) .. Respondents

1. Being not in agreement with the views expressed by my colleague- Members in the order, I am detailing my points in respect of this order as under:

2. ISSUES :**(A1) Issue No.(1) :**

Whether the petitioner is entitled to be paid at U.I rates for the energy pumped on various dates.

(A2) My views :

I am of the view that there has not been undue delay in granting NOC; Commission in its order passed on 18-6-09 in OP No.31/2008, which has been relied upon by the Petitioner, has held that not granting of Open Access does not automatically entitle the Generator to claim the U.I. rates; Regulation 20(4) of CERC Open Access Regulations, 2004, relied upon by Petitioner, does not also impose any U.I. liability. Accordingly, the Petitioner is not entitled to be paid at U.I. rates for the energy pumped.

(B1) Issue No: (2)

Whether the Petitioner is not entitled to any charges at all for the energy pumped in to the grid.

(B2) My views :

- (i) Although the Petitioner's Plant is a Co-generation Plant, it cannot stop generation if NOC is not considered in time by the Respondents and there is a cost involved in generation, a reference to the facts of the case of *INDO Rama Synthetics (I) Ltd., Vs. MERC et al*, in **Appeal No. 123/2010** with the Hon'ble ATE, reveals that the Hon'ble ATE has held that the Generator injecting power without a schedule or without consent is not entitled to be compensated for pumped electricity. It is seen that in the present case, the Petitioner had informed the respondent that in case NOC applied for not being granted it will continue to pump the power till permission is granted. The Petitioner also informed the Respondent that it being a Co-generation Plant cannot stop generation since respondents did not either accept the application or reject the same within the time specified;

- (ii) The Petitioner's entitlement to be paid for the injected energy at PPA or any other rates needs to be answered in the negative for the following reasons :
- (a) The Respondent not acting on the application for NOC with in the time specified in the Open access regulation and not communicating either acceptance or rejection of the application to the petitioner is an act, which needs strong condemnation. But whether it automatically confers a right upon the Generator (Petitioner) to inject power at its will and demand payment for the energy pumped as a matter of right is the most important question; also whether it is possible to accept that the Petitioner's Plant being a Co-generation Plant cannot stop generation, an involvement of cost element in its generation is there which entitles the petitioner to inject the power on its own volition without any prior schedule etc., needs to be answered;
- (b) The Petitioner has not cited any provision of CERC Regulations in support of his contention that he is entitled to inject power into the grid without any schedule in the context of its Open access application being neither rejected nor accepted. It is further to state that any affected party is at liberty to lawfully agitate their rights before appropriate forums/authorities and cannot afford and cannot be allowed to take law into their hands. Any encouragement of such an attitude will set a wrong precedent and will only introduce chaos in System operation and open up the Pandora's box for such indiscipline. Further, It is seen that on an earlier occasion the petitioner M/s. Ugar Sugars Company have agitated before the CERC in their Petition

No.114/2007 in the context of denial of open access. Nothing herein could have prevented the petitioner to approach the authorities during the period of delay in grant of OA and agitate its rights. The Petitioner informing the Respondent that it being a Co-generation Plant cannot stop generation and hence will pump energy into the grid and doing so without any schedule is an act of defiance of law needing to be taken strong exception of and no authority could allow perpetration of such an act, resulting in opening up of flood gates of indiscipline;

- (c) The respondent on its part has contended that the case of petitioner is covered by the order of the Hon'ble ATE in the case of INDO Rama Synthetic (I) Ltd., Vs., MERC and others in appeal No. 123/10 wherein Hon'ble ATE has held that the generator who injects power without a schedule or without consent is not entitled to be compensated for the electricity pumped. In view of this it is seen that the law is settled as for as injection of power without prior schedule is concerned. However, the respondent unduly delaying grant of OA – by neither rejecting nor approving – is all the more condemnable in no less terms;
- (d) The Petitioner, as is contended by the Respondent, could also have sought a Day-Ahead Schedule to inject power, in the absence of grant of NOC, instead of acting the way it has done;
- (e) The Petitioner, in the case of SLDC not giving any response, has also not provided any evidence of his having taken action as per relevant

provisos under Clause 8(4) of CERC Open Access Regulations, 2008. It should have filed an affidavit to the nodal agency as per provisions of clause 8 (4). Clause 8 (4) of CERC OA Regulation 2008 is extracted below for ready reference:

Concurrence of State Load Despatch Centre for bilateral and collective transactions

8. (1) *Wherever the proposed bilateral transaction has a State utility or an intra-State entity as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such form as may be provided in the detailed procedure.*

(2) *When a State utility or an intra-State entity proposes to participate in trading through a power exchange, it shall obtain a "no objection" or a prior standing clearance from the State Load Despatch Centre in such form as may be prescribed in the detailed procedure, specifying the MW up to which the entity may submit a buy or sell bid in a power exchange.*

(3) *14(a) For obtaining concurrence or 'no objection' or prior standing clearance an application shall be made before the State Load Despatch Centre who shall, acknowledge receipt of the application, either by e-mail or fax, or any other usually recognised mode of communication, within twenty four hours from the time of receipt of the application:*

Provided that where the application has been submitted in person, the acknowledgement shall be provided at the time of submission of the application.

(b) While processing the application for concurrence or 'no objection' or prior standing clearance, as the case may be, the State Load Despatch Centre shall verify the following, namely-

(i) existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force, and.

(ii) availability of surplus transmission capacity in the State network.

(c) Where existence of necessary infrastructure and availability of surplus transmission capacity in the State network has been established, the State Load Despatch Centre shall convey its concurrence or 'no objection' or prior standing clearance, as the case may be, to the applicant by e-mail or fax, in addition to any other usually recognised mode of communication, within three (3) working days of receipt of the application:

Provided that when short-term open access has been applied for the first time by any person, the buyer or the seller, the State Load Despatch Centre shall convey to the applicant such concurrence or 'no objection' or prior standing clearance, as the case may be, within seven (7) working days of receipt of the application by e-mail or fax, in addition to any other usually recognised mode of communication.]

[(3A) In case the State Load Despatch Centre finds that the application for concurrence or 'no objection' or prior

standing clearance, as the case may be, is incomplete or defective in any respect, it shall communicate the deficiency or defect to the applicant by e-mail or fax, in addition to any other usually recognised mode of communication, within two (2) working days of receipt of the application:

Provided that in cases where the State Load Despatch Centre has communicated any deficiency or defect in the application, the date of receipt of application shall be the date on which the application has been received duly completed, after removing the deficiency or rectifying the defects, as the case may be.]

(4) [In case the application has been found to be in order but the State Load Despatch Centre refuses to give concurrence or 'no objection' or prior standing clearance as the case may be, on the grounds of non-existence of necessary infrastructure or unavailability of surplus transmission capacity in the State network, such refusal shall be communicated to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, within the period of three (3) working days or seven (7) working days, as the case may be, from the date of receipt of the application, specified under clause (3), along with reasons for such refusal:

Provided that where the State Load Despatch Centre has not communicated any deficiency or defect in the application within two (2) days from the date of receipt of application or refusal or concurrence or 'no objection' or prior standing clearance, as the case may be, within the specified period of three (3)

working days or seven (7) working days, as applicable, from the date of receipt of the application, concurrence or 'no objection' or prior standing clearance, as the case may be, shall be deemed to have been granted:

Provided further that where concurrence or 'no objection' or prior standing clearance, as the case may be, is deemed to have been granted by the State Load Despatch Centre, the applicant while making application 17[] shall submit to the nodal agency an affidavit (in the format provided in the detailed procedure), duly notarised, declaring that–

4 (a) the State Load Despatch Centre has failed to convey any deficiency or defect in the application or its refusal or concurrence or 'no objection' or prior standing clearance, as the case may be, within the specified time,

4(b) necessary infrastructure for time-block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force, is in place; and enclosing with the affidavit –

(i) a copy of the complete application after removal of deficiency or rectification of defects, if any communicated, made to the State Load Despatch Centre for seeking concurrence or 'no objection' or prior standing clearance, as the case may be, and

(ii) a copy of the acknowledgement, if any, given by the State Load Despatch Centre, or any other

evidence in support of delivery of the application to the State Load Despatch Centre.]

(iii) In view of the above, I hold that the Petitioner is not entitled for any payment for energy injected without prior Schedule.

Sd/-
(K. SRINIVASA RAO)
MEMBER