

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

Dated : 29th May, 2014

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

OP No.1/2013

BETWEEN :

NSL Sugars Ltd.
No.60/1, Residency Road
II Cross
BANGALORE – 560 025 ..
[Represented by Shri Prabhuling K. Navadgi, Advocate]

PETITIONER

AND:

- 1) Karnataka Power Transmission Corporation Ltd.
K.R. Circle
Cauvery Bhavan
BANGALORE – 560 009
- 2) State Load Despatch Centre
Ananda Rao Circle
BANGALORE – 560 009
- 3) Bangalore Electricity Supply Company Ltd.
K.R. Circle
BANGALORE – 560 001 ..

RESPONDENTS

[Respondent No.3 represented by M/s. Justlaw, Advocates]

- 1) This Petition, in substance, is for claiming compensation by the Petitioner-Company from the Respondents for the electricity supplied to the State Grid between 15.11.2012 to 6.12.2012, and for such other reliefs.

2) The material facts relevant for the disposal of this case may be stated as follows :

(a) That the Petitioner established a Sugar Mill with co-generation power plant of 15 Mega Watts (MW) capacity, which was subsequently enhanced to 26 MW. The Petitioner-Company had entered into a Power Purchase Agreement (PPA) with the 1st Respondent in respect of 15 MW capacity on 30.3.2001, and after enhancement of the capacity of the power plant to 26 MW, a Supplemental Agreement came to be executed on 22.3.2002. There was yet another Supplemental Agreement dated 5.4.2007, modifying the rates prescribed in the earlier PPA and the Supplemental PPA. The said PPA and the Supplemental PPAs subsequently came to be assigned to the 3rd Respondent – Bangalore Electricity Supply Company Limited (BESCOM) as per the Transfer Rules issued under the Karnataka Electricity Reforms Act, 1999.

(b) The Petitioner issued a Default Notice dated 19.8.2008 to the 3rd Respondent, as there were payment defaults for the electricity supplied. As the defaults were not cured by making payments, the Petitioner issued a Termination Letter dated 21.11.2008 to the 3rd Respondent, terminating the PPA and the Supplemental PPAs with effect from 30.11.2008. The 3rd Respondent had sent a reply on 25.11.2008, refuting the allegations of delayed payments made by the Petitioner in the Default Notice.

- (c) Subsequently, the 3rd Respondent filed OP No.33/2009 on 9.9.2009 against the Petitioner praying for a declaration that the Petitioner was barred from seeking open access and selling electricity to third parties during the subsistence of the PPA, and for quashing the Termination Notice dated 21.11.2008 and for a direction to the Petitioner to continue to supply electricity as per the terms of the PPA and the Supplemental PPAs.
- (d) After contest, OP No.33/2009 was disposed of on 15.11.2012 by this Commission, holding that the termination of the PPA was valid and legal, and that the 3rd Respondent was not entitled to any of the reliefs as claimed in the Petition.
- (e) During the pendency of OP No.33/2009, the Petitioner was supplying electricity to the 3rd Respondent and was collecting charges as per the rates prescribed in the PPA and the Supplemental PPAs. In OP No.33/2009, this Commission deemed it proper to treat the termination of the PPA effective only from the date of its Order, i.e., 15.11.2012, for the reasons mentioned therein. Therefore, technically, the PPA and the Supplemental PPAs came to be terminated only with effect from 15.11.2012.
- (f) The Petitioner-Company, on the same day when the Order was passed by this Commission, i.e., 15.11.2012, wrote a letter to the 3rd Respondent,

- requesting to receive the electricity injected to the Grid and to pay as per the PPA rate, or any other reasonable rate, till 'NOC' was issued by the State Load Despatch Centre (SLDC) for sale of electricity in Power Exchange, since it was a crushing season, and certain quantity of injection of electricity to the Grid could not be stopped. A copy of the said letter is produced by the Petitioner as ANNEXURE-B in the Petition.
- (g) In order to obtain 'NOC' from SLDC, for sale of electricity to third parties, the Petitioner addressed a letter dated 17.11.2012 to the 3rd Respondent, requesting to issue a Certificate stating that there was no existing PPA between the Petitioner-Company and the 3rd Respondent. A copy of the said letter is produced by the Petitioner as ANNEXRE-C in the Petition.
- (h) On 17.11.2012 itself, the Petitioner also filed an application seeking 'NOC' from the SLDC to sell power of 24 MW exportable capacity under open access. A copy of the application is produced by the Petitioner as ANNEXURE-D in the Petition. Since the SLDC did not communicate any decision on the application filed by the Petitioner requesting for issuance of 'NOC' to sell electricity under the open access, the Petitioner addressed another letter dated 26.11.2012 to the SLDC, stating that its application for 'NOC' should have been disposed of by the SLDC within seven days and that non-issuance of 'NOC' was causing the Petitioner severe financial loss and it would claim the rate prevailing in the Energy Exchange for the energy pumped into the State Grid beyond seven days.

A copy of the said letter is produced by the Petitioner as ANNEXURE-E in the Petition.

- (j) The Petitioner also submitted a letter along with an Affidavit dated 29.11.2012 to Mr. S.K. Sonee, Chief Executive Officer, NLDC, New Delhi, as mandated in CERC (Open Access in Inter-State Transmission) Regulations, 2008, along with a copy of its application for 'NOC' made to the SLDC and the proof of acknowledgment issued by SLDC. In this letter, the Petitioner sought from NLDC an affirmation of deemed 'NOC' under clause (4) of Regulation 8 of the aforesaid CERC Regulations. A copy of the said letter is produced by the Petitioner as ANNEXURE-F in the Petition.
- (k) On 5.12.2012, the 'NOC' was granted by the SLDC for selling electricity to third parties under open access, for the period from 6.12.2012 to 31.12.2012. The Petitioner started exporting electricity under open access from 0000 hours on 7.12.2012. It is submitted that the Petitioner injected electricity into the State Grid during the period between 15.11.2012 and 6.12.2012 and that the 3rd Respondent has received the said power and utilized the same. The Petitioner therefore has claimed Rs.3.85 per KWhr at the PPA rate for the electricity supplied to the 3rd Respondent from 15.11.2012 to 21.11.2012 (midnight), and Rs.6.53 per KWhr as per the prevailing IEX rate for the period from 21.11.2012 to 6.12.2012 (midnight).

3) Upon Notice, the 3rd Respondent (BESCOM) had appeared through its counsel and filed its Statement of Objections. Many of the facts stated by the Petitioner in its Petition are not disputed by the 3rd Respondent. The execution of the PPA and the Supplemental PPAs, the issuance of Default Notice and the Notice of Termination by the Petitioner, filing of OP No.33/2009 and its dismissal by the Commission by its Order dated 15.11.2012 are not in dispute. Further, the Petitioner issuing the letter dated 15.11.2012 requesting the 3rd Respondent to receive electricity injected to the State Grid and issuing another letter dated 17.11.2012 requesting to issue a Certificate that the PPA was not in existence, have not been disputed by the 3rd Respondent. The Petitioner applying for 'NOC' seeking open access on 17.11.2012 and ultimately the grant of 'NOC' by the SLDC on 5.12.2012 are also not in dispute. The facts that the Petitioner had injected electricity into the State Grid from 15.11.012 to 6.12.2012 and the 3rd Respondent had received and utilized the same, are also not disputed by the 3rd Respondent.

4) The 3rd Respondent in its Statement of Objections has contended as follows :

(a) That subsequent to this Commission's Order dated 15.11.2012 in OP No.33/2009, the PPA came to an end, effective from that date, and that the Petitioner was not entitled to inject electricity into the State Grid, without a Schedule, on the pretext that it was a crushing period and the flow of some electricity into the Grid could not be stopped and that as

- per the decision in M/s. Indo Rama Synthetics Ltd., the Petitioner is not entitled to any payment for unscheduled injection of electricity into the State Grid.
- (b) Notwithstanding the lapses in the action of the Petitioner, the 3rd Respondent has processed the invoices raised by the Petitioner, relating to energy supplied, for the period between 15.11.2012 to 6.12.2012 at the rate of Rs.2.52 per Unit, the same being the variable cost applicable to the Petitioner. The said payment made by the 3rd Respondent towards the electricity supplied by the Petitioner pending grant of 'NOC' for open access is in line with the mandate of the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.140 of 2012 in the case of M/s. Parrys Sugar Industries Limited –Vs- Karnataka Power Transmission Corporation Limited (KPTCL) and others. Therefore, the 3rd Respondent has prayed for dismissal of the Petition.
- 5) We have heard the oral submissions made by the learned counsel for the parties, who have reiterated their respective contentions made in the pleadings.
- 6) The following issues arise for consideration and decision of this Commission from the rival contentions of the parties :

- (1) Whether the Petitioner is entitled to compensation for the electricity supplied by it to the State Grid during the period from 15.11.2012 to 6.12.2012?
 - (2) If issue No.(1) is held in affirmative, at what rate, and from whom, the compensation is to be paid?
 - (3) What Order?
- 7) On consideration of the oral submissions of the learned counsel for both the parties, the averments made in the Petition and also the Statement of Objections, along with the documents placed on record by the parties in support of their case, our findings on the above issues are as follows :
- 8) **Issue No.(1) :**
- (a) In the present case, the Petitioner was supplying electricity to the 3rd Respondent during the pendency of OP No.33/2009 before this Commission, till its final Order, viz., 15.11.2012. The said Order of the Commission states that the termination shall become effective only from the date of the Order. In view of this, the Petitioner had no time to arrange for sale of electricity to third parties by obtaining 'NOC' for open access. Admittedly, the Petitioner had intimated the 3rd Respondent the compelling reasons for injecting electricity into the State Grid from 15.11.2012 itself and requested the 3rd Respondent to receive the energy

and to pay for the same. However, the 3rd Respondent had not responded to the Petitioner's request, but admittedly, the 3rd Respondent has received the electricity injected by the Petitioner into the Grid during the relevant period and has even paid for the same at the variable cost. The Petitioner had applied to SLDC for grant of 'NOC' for open access on 17.11.2012. However, the Petitioner's request was not considered by the SLDC within the stipulated time, but it was granted only on 5.12.2012. The fact that it was a crushing season is not disputed by the 3rd Respondent. In the said circumstances, we hold that the Petitioner had compelling reasons for injecting the electricity into the State Grid during the relevant period.

- (b) So far as the entitlement of the Petitioner for the electricity injected to the State Grid, without there being any Schedule for injecting the same, the principle stated under Section 70 of the Indian Contract Act, 1872 is applied by the Hon'ble ATE, in the case of *Jocil Limited, Guntur -Vs- Southern Power Distribution Company of Andhra Pradesh limited, Tirupathi, etc.*, in Appeal No.92 of 2007 and Appeal No.138 of 2007, decided on 19.12.2008, reported in 2008 ELR (APTEL) 0829. On consideration of the facts of that case, the Hon'ble ATE has allowed compensation for the electricity injected into the Grid, without there being any Schedule, and has held that the principles stated under Section 70 of the Indian Contract Act, 1872 are applicable to the facts of that case.

- (c) When the same question arose before the Hon'ble ATE in the case of M/s. *Indo Rama Synthetics*, on consideration of the facts of that case, it was held that the principles stated under Section 70 or Section 72 of the Indian Contract Act, 1872 would not be applicable to that case, and further held that the compensation could not have been awarded in that case.
- (d) In *Parrys Sugar industries Limited* case relied upon by the 3rd Respondent, at paragraph-23 of its Order dated 27.11.2012, the Hon'ble ATE reiterated the principle as follows :

"This Tribunal has in the past held that any injection by a generating company without any schedule or concurrence could not be recognized for payment by the distribution licensee which did not have any PPA with the generating company, in the interest of security and economic operation of the grid and maintaining grid discipline. However, the Tribunal has also decided to grant compensation for unscheduled injection by the generator in case the circumstances of the case warranted so and where the generator had to inject energy in the compelling circumstances forced by the action of the licensee. ..."

- (e) On the facts and in the circumstances of the case, we are of the considered opinion that the principles stated in Section 70 of the Indian Contract Act, 1872, are applicable to this case also and therefore hold that the Petitioner is entitled for compensation for the electricity injected

into the Grid during the period from 15.11.2012 to 6.12.2012. Accordingly, we answer issue No.(1) in the affirmative.

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

- (a) The learned counsel for the 3rd Respondent heavily relied upon the decision rendered by the Hon'ble ATE in the case of *Parrys Sugar Industries Limited -Vs- KERC, etc.*, decided on 27.9.2012, in which the Hon'ble ATE has allowed compensation only at the rate of variable cost of energy injected into the Grid during the period when there was no PPA or no Schedule for injecting the energy. M/s. Parrys Sugar Industries Limited was a Sugar Factory with a co-generation plant. In this case also, after termination of the PPA, the generator had injected electricity into the Grid from 3.11.2011 to 20.12.2011 without any Schedule or 'NOC' for open access. This Commission had disallowed the claim of the generator, by its Order dated 24.5.2012 in OP No.52/2011, for payment of compensation, mainly on the ground that during the said period, the generator had not at all applied for 'NOC' for open access. In Appeal No.140 of 2012 preferred by M/s. Parrys Sugar Industries Limited, the Hon'ble ATE had allowed the Appeal and ordered for payment of compensation to the generator at the variable price of energy injected during the period from 3.11.2011 to 20.12.2011, taking into consideration the previous unjustifiable conduct of the SLDC in not granting 'NOC' for open access for the previous periods.

- (b) In O.P.No.4 of 2012 filed by M/s. Davanagere Sugar Company Limited against KPTCL and others, this Commission, by its majority Order dated 14.2.2013, had allowed compensation to be paid at the generic rate for the energy injected into the Grid during the pendency of the generator's application for grant of 'NOC' for open access. This majority Order of the Commission was challenged by KPTCL and others in Appeal No.88 of 2013 before the Hon'ble ATE. The Hon'ble ATE dismissed the Appeal, by its Order dated 3.2.2014, upholding the grant of compensation at the rate of generic tariff. In Appeal No.88/2013, the Hon'ble ATE had distinguished the facts of the case of M/s. Parys Sugar Industries Limited and held that the said decision cannot be made applicable to the case under consideration before it. It was observed that in the case of M/s. Parys Sugar Industries Limited, there was no application by the generator for grant of 'NOC' for open access during the period in which the electricity was injected into the Grid.
- (c) We have considered, in depth, the facts of the above-referred cases, wherein, the compensation is allowed at the rate of generic tariff and also at the rate of variable cost of electricity. The facts of the case on hand are comparable with the facts of the M/s. Ugar Sugars Limited (OP No.04/2011) and the facts of M/s. Davanagere Sugar Company Limited (OP No.4/2012), wherein compensation was allowed at the rate of the generic tariff determined by this Commission. The decision rendered

in *M/s. Parrys Sugar Industries Limited* case, which is relied upon by the 3rd Respondent, cannot be made applicable to the case on hand.

- (d) In view of the foregoing reasons, and on consideration of the facts and circumstances of the case on hand, we feel it just and equitable to award compensation to the Petitioner at the rate of minimum generic tariff of electricity for co-generation plants that was prevailing at the relevant period. Admittedly, the 3rd Respondent has received the electricity injected into the Grid by the Petitioner during the relevant period. Therefore, we hold that the 3rd Respondent is liable to pay the aforesaid compensation to the Petitioner. We answer Issue No.(2), accordingly.

10) **Issue No.(3) :**

In view of the above we pass the following :

ORDER

The Petition is partly allowed. The 3rd Respondent (BESCOM) shall pay compensation to the Petitioner for the electricity injected into the Grid by the Petitioner and received by the 3rd Respondent, for the period from 15.11.2012 to 6.12.2012, at the rate of Rs.3.90 (Rupees Three and Paise Ninety only) being the minimum generic tariff determined by this Commission for Co-generation Plants in the State of Karnataka, and prevailing during the relevant period, after deducting the amounts

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already paid by the 3rd Respondent to the Petitioner in this regard, within two months from the date of this Order.

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

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

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