

No.N/4/12

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

Dated : 14th February, 2013

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member (Will pronounce Separate Order) |

OP No.4/2012

BETWEEN

Davanagere Sugar Company Limited
No.73/1, P.B.No.312, Shamanur Road
DAVANAGERE - 577 304
(Represented by Prabhuling K. Navadgi, Advocate)

Petitioner

AND

- 1) Karnataka Power Transmission Corporation Limited
Cauvery Bhavan
BANGALORE - 560 009
- 2) The Chief Engineer
State Load Despatch Centre
28, Race Course Road
BANGALORE - 560 001
- 3) Bangalore Electricity Supply Company Limited (BESCOM)
K.R. Circle
BANGALORE- 560 001
*[R1 and R2 represented by M/s. Justlaw, Advocates &
R3 represented by Shri V.Y. Kumar, Advocate]*

Respondents

1) This Petition has been filed by the Davanagere Sugar Company Limited, praying for a direction to the Respondents to release a sum of Rs.4,60,32,000/- with interest at 15% till the date of payment, towards the energy received during the period from 17.12.2010 to 11.1.2011.

2) Upon Notice, the Respondents have appeared before this Commission and filed their Statement of Objections.

3) The Petitioner has contended in the Petition as follows :

(a) The Petitioner has a Co-generation Plant with an installed capacity of 24.5 MW. The Petitioner had a Power Purchase Agreement (PPA) dated 17.1.2002 with the Respondent No.1- Karnataka Power Transmission Corporation Limited (KPTCL), which subsequently came to be assigned to Bangalore Electricity Supply Company Limited (BESCOM). This PPA came to be terminated by the Petitioner on 8.7.2009 on the ground of breach of the terms of the PPA. The validity of this termination was challenged by the Respondent No.3 in OP No.17/2009 before this Commission, which was dismissed by the Commission, vide Order dated 8.10.2009. This Order of the Commission was unsuccessfully challenged by Respondent No.3 in the Hon'ble Appellate Tribunal for Electricity and the Hon'ble Supreme Court.

(b) During the pendency of the above proceedings, the Petitioner had applied for 'NOC' for Open Access under the CERC Open Access Regulations. This was rejected by the 2nd Respondent - Chief Engineer, State Load Despatch Centre (SLDC). Against the non-granting of 'NOC', the Petitioner approached the Central Electricity Regulatory Commission (CERC) in Petition No.114/2009. The CERC, by its Order dated 14.7.2009, allowed the said Appeal. This Order was

challenged by the State of Karnataka in W.P.No,25431/2009. The Hon'ble High Court, by its Order dated 7.12.2009 (Annexure-A), directed the Petitioner to continue to supply electricity to the Respondent at the rate of Rs.5/- per KWH, during the pendency of the Petition. This Order of the Hon'ble High Court was unsuccessfully challenged by Respondent No.3 in Writ Appeal No.4527/2009. Subsequently, the Writ Appeal itself was dismissed by the Hon'ble High Court, vide its Order dated 20.1.2010 (Annexure-B) as withdrawn.

(d) As Respondent No.3 failed to make payments to the Petitioner as per the directions of the Hon'ble High Court, the Petitioner filed OP No.5/2011 before this Commission, praying for a direction to Respondent No.3 to make payments for the period between 4.10.2010 to 16.10.2010 (i.e., the date of disposal of the Civil Appeal by the Hon'ble Supreme Court), which was allowed by this commission, vide Order dated 21.4.2011 (Annexure-C).

(e) The Petitioner thereafter entered into a fresh PPA with M/s. Reliance Energy Trading Company (RETC) for sale of 14 MW surplus power and both the Petitioner and RETC, vide letters dated 10.12.2010 (Annexures-D and D1), applied to Respondent No.2 for 'NOC' for Open Access for the period from 13.12.2010 to 12.3.2011, but the 'NOC' for Open Access was granted by Respondent No.2 only on 10.1.2011. Hence, the Petitioner was forced to inject electricity into the State Grid from 17.12.2010 to 11.1.2011.

(f) The Petitioner issued a letter dated 18.6.2011 (Annexure-E) to Respondent No.2, requesting for payment for the energy received at the rate of Rs.5/- per KWH for the period from 17.12.2010 to 11.1.2011, till the 'NOC' for Open Access was issued, giving details of electricity injected (Annexure-F) and explaining therein the difficulties about the Petitioner's inability to stop injection of electricity into the State Grid as the crushing season was going on and due to other local problems. Respondent No.2, by his letter dated 26.7.2011 (Annexure-G), confirmed receipt of electricity during the period from 17.12.2010 to 11.1.2011 into the State Grid, but, however, directed the Petitioner to approach the concerned Electricity Supply Company (ESCOM) for payment, as the electricity injected was during the non-Open Access period and without a PPA.

(g) Accordingly, the Petitioner, vide its letter dated 4.8.2011 (Annexure-H), approached Respondent No.3 - BESCO requesting for release of payment against the Bills raised by it. However, Respondent No.3 replied, vide letter dated 17.8.2011 (Annexure-J), refusing to make payment to the Petitioner on untenable grounds.

4) Per contra, Respondent No.3-BESCO, in its Statement of Objections dated 29.3.2012, has contended that the Petitioner had exported the surplus electricity to the Grid after utilizing for crushing Sugar Cane, but, however neither the 2nd Respondent SLDC nor the 3rd Respondent-BESCO had scheduled this unauthorized injection of power by the Petitioner to the Grid and hence the Petitioner's claim for payment for the energy injected was not acceptable, as

there was no PPA and no Open Access Approval and the energy injected into the Grid was unauthorized. It is also contended that the 3rd Respondent, by its letter dated 17.8.2011 (Annexure-R5), had informed the Petitioner that any injection of electricity without a PPA / Short-Term Contracts should be treated at the UI Rates, which is dealt by the 2nd Respondent-SLDC. It is further contended that the Hon'ble High Court of Karnataka in W.P.No.25431/2009 had fixed the Tariff of Rs.5/- per Unit as Interim Tariff, which was subject to final accounting after determination of Tariff by this Commission and that the 3^d Respondent had never accepted Rs.5/- per Unit as final Tariff. It is also contended that as per the directions of the Hon'ble High Court, the 3rd Respondent had made payments to the Petitioner at Rs.5/- per Unit till 16.12.2010, which is subject to the final Orders in OP No.16/2011. The 3rd Respondent had filed OP No.16/2011 before this Commission for determination of Tariff and refund of amount towards Tariff paid by the 3rd Respondent and that the said Petition was pending for consideration before this Commission.

5) Respondent No.1-KPTCL and Respondent No.2-SLDC, in their Statement of Objections dated 6.6.2012, have denied the averments made by the Petitioner in the Petition. It is stated that the Petitioner's contention that there was a delay on the part of the Respondents in granting Open Access to the Petitioner which has to be compensated for by the Respondents, is untenable, in view of the chronology of events that indicate that the Petitioner did not follow the prescribed procedure while seeking Open Access. It is contended that the Respondents could not grant Open Access to the Petitioner for the period

13.12.2010 to 16.12.2010 in view of the Interim Order of the Hon'ble High Court dated 7.12.2009, which was in force, and that they could not grant Open Access to the Petitioner for the period 17.12.2010 to 3.1.2011, as they did not have the knowledge of the Order of the Hon'ble High Court dismissing the Writ Petition. It is further contended that the Petitioner had not sent intimation to the Respondents for the energy pumped into the State Grid and no Open Access Schedule had been granted for the period between 17.12.2010-11.1.2011. Also there was no subsisting PPA between Respondent No.3 and the Petitioner, and that no liability accrued upon the Respondents to compensate the Petitioner for the energy supplied by it. It is contended that the Petitioner's case is governed by the Judgment dated 16.5.2010 in Appeal No.123/2010 rendered by the Hon'ble Appellate Tribunal for Electricity (ATE) in the case of *Indo Rama Synthetics (I) Limited -Vs- Maharashtra Electricity Regulatory Commission and others*, which lays down that the electricity supplied into the Grid without a Schedule is not liable for compensation.

6) We have considered the averments made in the Petition and also the Statement of Objections. We have also considered the documents placed on record by the parties in support of their case and the oral submissions made by the Counsel for the parties.

7) The question that arises for consideration and decision is, "Whether the Petitioner is entitled to claim a sum of Rs.4,60,32,000/- with interest at 15% till the

date of payment, towards the energy received during the period from 17.12.2010 to 11.1.2011?"

8) There is no dispute that the Petitioner had applied for 'NOC' for sale of electricity to third parties on 10.12.2010 for the period 13.12.2010 to 12.3.2011 and Respondent No.2 did not consider the same and did not grant Open Access sought. The Petitioner is contending that since Respondent No.2 did not grant Open Access as per the application made, it is entitled to be paid for the electricity generated and supplied to the Grid till the date of grant of 'NOC' for Open Access, at the rate fixed by the Hon'ble High Court in W.P.No,25431/2009 filed against the Orders of the CERC.

9) Per contra, it is contended on behalf of Respondent Nos.1 and 2 that it could not grant the 'NOC' for Open Access, as it was not aware of the final Orders passed by the Hon'ble High Court in the pending Writ Petition till 3.1.2011, i.e., till the certified copy of the Order was received, and as per the earlier Interim Order, the Petitioner was not entitled to sell the electricity through Open Access to third parties.

10) It is the case of the 3rd Respondent that it is not liable to pay for the electricity generated and supplied to it by the Petitioner, as the Contract that was existing with it, was already terminated. It is further submitted that the injection of electricity without a Schedule has to be treated as UI power and has to be paid for on that basis by the 2nd Respondent-SLDC.

11) In our opinion, the stand taken by the 1st and 2nd Respondents cannot be accepted. Being parties to W.P.No,25431/2009 and represented by a Counsel, the Respondents cannot say that they were not aware of the final orders passed by the Hon'ble High Court till they received the certified copy of the Order on 3.1.2011. If there was any communication gap between the Counsel appearing and the 1st and 2nd Respondents, the Petitioner cannot be made responsible for the same. It was the duty of the 1st and 2nd Respondents to verify the status of the pending Writ Petition before the Hon'ble High Court from their Counsel, once they received an application from the Petitioner for grant of 'NOC' for Open Access. The 1st and 2nd Respondents having not done so, the Petitioner cannot be denied payment for the electricity generated and supplied by the Petitioner during the pendency of the application for grant of 'NOC' for Open Access, as the Petitioner had no other option but to generate electricity being a Co-generation Plant and pump the same to the Grid.

12) In OP 4/2011, in the case of *Ugar Sugar Works Limited –Vs- KPTCL and others*, this Commission, by its Order dated 29.3.2012, has taken a view that:

“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.

The above generic Tariff of Rs.3.59 per Unit has been enhanced to Rs.3.90 per by Unit by this Commission consequent to the Order dated 5.4.2011 passed in Appeal No. 148/2010 by the Hon'ble Appellate Tribunal for Electricity (ATE) in the case of *South India Sugar Mills Association –Vs- KPTCL and others*.

13) The Hon'ble ATE, in Appeal No.170/2012 in the case of *Bangalore Electricity Supply Company Limited –Vs- M/s.Reliance Industries Ltd. and another*, decided on 24.1.2013, while upholding the distinction made by this Commission in that case and in the case of *Indo Rama Synthetics (I) Ltd. –Vs- Maharashtra Electricity Regulatory Commission and others* (Appeal No.123/2010, decided on 16.5.2011), has held that even though there was no Agreement or Schedule, as the Appellant therein had derived benefit from the electricity pumped in and therefore the claim of the Petitioner for payment of energy cannot be said to be illegal.

14) In a recent Judgment, the Hon'ble ATE in Appeal No.228/2012 in the case of *M/s.S N J Sugars and Products Limited –Vs- Transmission Corporation of Andhra Pradesh Limited and others*, decided on 4.2.2013, wherein the Generator was not allowed to sell electricity to the parties as per the Orders of the Commission,

has held that the Appellant therein is entitled to claim for the Tariff as determined by the State Commission for similar Plants.

15) In the light of the Judgments of the Hon'ble ATE referred to above and consistent with the view already taken by this Commission in similar cases, the Petitioner is entitled to be paid by Respondent No.2 for the electricity pumped in, from the date of application for grant of 'NOC' for Open Access to the date when it was granted, at the generic rate of Rs.3.90 per Unit applicable to similar Co-generation Plants.

16) Accordingly, Respondent No.2 is directed to arrange to pay to the Petitioner for the electricity supplied between 17.12.2010 to 11.1.2011, within 4 (four) weeks from the date of communication of this Order, at the rate of Rs.3.90 per Unit. Respondent No.2, in turn, is entitled to recover the said amount from the Distribution Licensees to whom the said power was allocated / supplied in proportion to the allocation.

17) Accordingly, the Petition is allowed in the above terms.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

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*[R1 and R2 represented by M/s. Justlaw, Advocates &
R3 represented by Shri V.Y. Kumar, Advocate]*

Respondents

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- 1) As I am not in agreement with the conclusion arrived at by my learned colleague members I am writing this detailing my conclusion.

2) I am in general agreement with the presentation regarding the details of the case submission of the petitioner and respondents and hence not repeating the same. Points of difference, if any, will be detailed during the course of this presentation.

3) The petitioner, though entered into a PPA with M/s. Reliance Energy Trading Company (RETC), details of the date of entry of this PPA with RETC have not been furnished. In view of this one is not in a position to verify whether the petitioner even during the validity of the existing PPA entered into an agreement with M/s. RETC for sale of power to 3rd Parties.

4) The petitioner as well as RETC applied for open access, vide their letters dated 10th December 2010. Whereas, Writ Petition No. WP 25431/2009 filed by the Government of Karnataka challenging the order of Hon'ble CERC, issued in petition of 114/2009 dated 14-07-2009, was pending consideration before the Hon'ble High Court of Karnataka on 10-12-2010. The Hon'ble High Court of Karnataka had stayed the operation of the order of the Hon'ble CERC granting Open Access to the petitioner and the final order came to be issued only on the 16th December 2010. Accordingly the respondent SLDC could have rejected the application of the petitioner and RETC on the ground that the issue of grant of open access to the petitioner was pending consideration of the Hon'ble High court of Karnataka. SLDC, however, granted NOC only on 10-1-2011 and permitted Open Access (OA).

5) The petitioner made applications for NOC to carry out 3rd party sale on OA, not only on 10th December 2010, during the pendency of the challenge by the GOK of the orders of CERC granting OA to the petitioner before the Hon'ble High Court of Karnataka, but also admittedly during the pendency of the proceedings before this Commission in regard to the validity of its termination of PPA on 8th July 2009. It would have been only fair for the petitioner to have brought this to the notice of this Commission in appropriate time. Soon after terminating the PPA on 8-7-2009, on grounds contended the petitioner chose to file a petition before the Hon'ble CERC for availing OA for 3rd party sale, with no intimation provided to this Commission.

6) The reasons assigned by the petitioner for injecting energy into the grid without any proper schedule by SLDC are :

- (a) Anticipating SLDC clearance: this reasoning does not offer any logical explanation since it was the duty of the petitioner in pursuance of proviso No.1 under Regulation No. 8(4) of CERC Open Access in inter-State Transmission) Regulations, 2008, according to which in case SLDC fails to communicate either way regarding acceptance or rejection of the application for OA the petitioner's OA shall be deemed to have been granted; further the petitioner, in accordance with (a) and (b) under proviso 2 of regulation 8(4) was required to file an affidavit with the nodal agency giving

details: nodal agency could have then played a role in scheduling the transaction for the petitioner through the concerned RLDC. Petitioner therefore has not acted as per/violated the provisions of the CERC regulations in this regard.

- (b) Crushing season started: On the one hand the petitioner made an application for OA with SLDC on 10th December 2010 itself, while the petition filed by the GOK with Hon'ble High Court of Karnataka was still under the consideration of the Hon'ble Court. Even if the crushing season already commenced and the petitioner could not stop generating from its plant there was no stoppage of the petitioner from applying for day ahead schedule with SLDC for injection of power from its plant with the SLDC and obtaining generation schedules, instead of taking recourse to injecting without proper schedule, which has resulted in the petitioner interfering with the assigned function of the SLDC, as per the Electricity Act 2003. It has been submitted that the petitioner has on many earlier occasions sought & obtained day ahead schedules for the generation from its plant. This act of the petitioner leads one to think the petitioner is acting as per its own choice and not uniformly. Unauthorised injection of power by the generators has been dealt in the orders of the Hon'ble ATE issued in Appeal No: 123/2010 in case of Indorama Synthetics (I) Limited Vs. Maharashtra Electricity Regulatory Commission and others.

- (c) OP No.5/2009 involving the petitioner as a respondent was under the consideration of this Commission during which the petitioner failed to inform this Commission of the details of its application for OA or its having injected unscheduled energy into the grid.
- 7) On the part of the Respondents they have also violated, by their actions, detailed as under:
- (a) The respondents, SLDC & BESCO have pleaded ignorance of the final orders of the Hon'ble High Court of Karnataka in Writ Petition / Writ Appeal of GOK / BESCO challenging the orders of the Hon'ble CERC granting OA to the petitioner, although their counsels were representing their cause before the Hon'ble High Court of Karnataka. Citing this as the reason for delaying grant of OA to the petitioner beyond 16-12-2009 cannot be accepted.
- (b) SLDC failed to satisfy the provisions of CERC Regulation on OA by neither refusing nor sanctioning the request for grant of OA. In accordance with the CERC Regulations SLDC should have given a clear cut decision within three days of the date of application by the petitioner. Failing to act in time as per the provisions of Regulations makes the submissions of SLDC not acceptable.

8) In view of the foregoing it is seen that both the parties have failed to meet the provisions of the CERC Regulation and the role of petitioner in injecting without a proper schedule renders it ineligible for any payment for the power injected without schedule. However the Hon'ble ATE in a similar case of unauthorized injection in the case of OP 52/2011 In appeal No. 140/2012 have remanded the case back to this Commission for determination of variable charges for the injections without schedule by the generators. Considering the peculiar nature of injection without schedule in this case (OA duration sought and the period of injection without schedule being the same) and pursuant to the order of the Hon'ble ATE in appeal No: 140/2012, as a one-time measure, specifically for this case, I am of the opinion that the petitioner is entitled to the payment of applicable variable charges for the period of power injection as under :

- (i) 17-12-2010 to 31-12-2010 : Rs. 1.78 paise per KWhr.
- (ii) 01-01-2011 to 11-01-2011 : Rs. 1.87 Paise per KWhr.

9) As regards payment to the petitioner is concerned the issue of validity of termination by the petitioner of PPA with BESCO w.e.f 8-7-2009 has been finally settled by the order of Hon'ble Supreme Court dt. 4th October 2010; also as per the order of the Hon'ble High Court of Karnataka BESCO has paid at Rs. 5/- per K.W.H. for the relevant period. In view of this BESCO is not bestowed with any responsibility on its own to pay for the injections by the petitioner between 17-12-2010 to 11-1-2011. The responsibility falls on the SLDC for the reason that OA was

not either refused nor sanctioned w.e.f. 17-12-2010 and was granted belatedly w.e.f. 10-01-2011. SLDC is at liberty to apportion this payable amount among the ESCOMs in the proportion of allocation of power by the GOK.

10) It is hereby ordered that the payment to the petitioner for the unscheduled energy injected between 17-12-2010 & 11-01-2011 shall be released by the SLDC within 4 weeks from the date of this order variable charge rates as indicated above.

Sd/-
(K. SRINIVASA RAO)
MEMBER