

No. N/46/2013

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

Dated: 26.11.2021

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

OP No.14/2013
(On Remand)

BETWEEN:

EID Parry (India) Limited,
(Formerly Parrys Sugar Industries Limited/
GMR Industries Limited/
Bharat Sugar Mills Limited),
No.1/2, Kalyana Mantapa Road,
Jakkasandra, Koramangala,
Bengaluru-560 034.
Authorised signatory B.M. Rath,
(General Manager, Legal)

....PETITIONER.

(Represented by Sri Shridhar Prabhu, Advocate
for M/s Navayana Law Offices)

AND:

1) Hubli Electricity Supply Company Limited (HESCOM),
A Company incorporated under the
Companies Act, 1956,
PB. Road, Navanagar,
Hubballi-580 025.
(Represented by its Managing Director)

2) The Chief Engineer (Electrical),
State Load Dispatch Centre,
28, Race Course Road,
Bengaluru-560 009.

....RESPONDENTS

(Respondents represented by Ms. Drishya Shetty,
Advocate for M/s Indus Law)

ORDERS

1. In Appeal No.52 of 2016, between EID Parry (India) Limited Vs. HESCOM & Others, the Hon'ble Appellate Tribunal for Electricity, New Delhi, by its Order dated 30.10.2018, has set aside the Order dated 19.03.2015 in OP No.14/2013 passed by this Commission, and remanded the matter to this Commission for fresh disposal, as per the directions noted in para 9 of the said Order of the Hon'ble ATE, which reads thus:

"9 – In view of the submissions of the learned counsel appearing for the Appellant and learned counsel appearing for the first Respondent, as stated supra, and in the light of the Order of the Hon'ble Supreme Court dated 19.10.2016 passed in Civil Appeal No.800/2014 [M/s Nandi Sahakari Sakkare Karkhane Niyamita Vs. Karnataka Electricity Regulatory Commission & Others] in para 4, the instant appeal filed by the Appellant is disposed of in terms of the said Order and for the reasons stated therein with the following directions:

(a) The instant Appeal filed by the Appellant is allowed in so far it relates to the claim of the Appellant.

(b) Impugned Order dated 19.03.2015 passed in OP No.14/2013 on the file of the Karnataka Electricity Regulatory Commission, Bengaluru, is hereby set aside.

(c) The matter stands remitted back to the third Respondent/ State Regulatory Commission for reconsideration afresh in the light of the Order of the Hon'ble Supreme Court dated 19.10.2016 passed in Civil Appeal No.800/2014, as held in para 4 of the said Order and dispose of the same as expeditiously as possible taking into consideration that the matter was pending for adjudication between the parties for several years.

All the contentions of the parties are left open.

Parties to bear their own costs.

With these observations the instant appeal stands disposed of."

Here itself we may note, the directions given in para 4 of the Order dated 19.10.2016 passed by the Hon'ble Supreme Court of India in Civil Appeal No.800/2014 [M/s Nandi Sahakari Sakkare Karkhane Niyamit Vs. Karnataka Electricity Regulatory Commission & Others], as extracted in para 8 of the above said Order of the Hon'ble ATE, which reads as under:

"4. Reading the order of the State Commission dated 24th May 2012 (paragraph 12 thereof), rejecting the aforesaid claim of the appellant, which has been approved by the Appellate Tribunal by the impugned order dated 18th February, 2013, it appears that the basis for declining any higher rate to the appellant is the absence of materials in support of its claim as required in terms of the Government Order dated 3d June, 2010. But that is not how the case had proceeded. The claim of the appellant was not based on the terms of the Government Order but on the basis that the PPA itself stood terminated with effect from 3rd May, 2010. The absence of any materials can be constructed to be on account of the above. 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 of 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, 2010."

2. The petitioner had filed OP No.14/2013 on the file of this Commission under Section 86 (1) (f) of the Electricity Act, 2003, praying for a direction against the respondents No.1 & 2 to make payment as per the market rates based on average IEX rates for the energy supplied between July 2009 & May 2011 except for the months of May & June 2010, amounting to Rs.1,158.03 lakhs, as shown in the statement attached to the letter dated 19.04.2013 (Annexure-V) addressed to the 1st respondent (HESCOM) and for such other reliefs. After conducting the proceedings, this Commission had dismissed the petition by Order dated 19.03.2015. Against the said order, the petitioner had preferred the above noted Appeal No.52 of 2016 on the file of the Hon'ble ATE.
3. Subsequent to the remand of the matter by the Hon'ble ATE, this case was re-filed and the notices were issued to the parties. They appeared through counsel. The parties requested time to file the additional material, if any. Accordingly, the case was being adjourned from time to time.
4. The petitioner filed certain documents disclosing the price of electricity at IEX for the years 2009 to 2011. The petitioner also urged certain grounds in the application dated 29.01.2019 filed before the Commission on 01.02.2019, stating to be the additional information and material placed before the Commission.
5. The 1st respondent (HESCOM) filed statement of objections to the application dated 29.01.2019 of the petitioner.

6. The material facts stated by the petitioner leading to filing of the present petition may be re-captured as follows:

a) There has been a Sugar Factory at Hullatti Village, Haliyal Taluk, Uttara Kannada District, Karnataka State, with a Cogeneration 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 22.01.2007 with the 1st respondent (HESCOM). The Co-Generation Plant achieved Commercial Operation on 09.11.2008 (COD). In the meantime, one M/s GMR Industries Limited became the owner of the Project and it issued the Default Notice dated 05.06.2009 to the 1st respondent (HESCOM), followed by the Termination Notice dated 09.07.2009, 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 on 13.07.2009 for grant of open access for sale of energy to third party, but the same was not granted by the respondents.

c) The 1st respondent (HESCOM) 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 3rd party during the subsistence of the PPA dated 22.01.2007. The Respondent therein contested the said case and ultimately, by Order dated 02.06.2011, 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 3rd 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 1st respondent (HESCOM) 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 the Cogenerating companies in the State to generate and supply maximum exportable capacity of electricity to the State grid. However, during the months of May & June, 2010, M/s GMR Industries Limited supplied certain quantity of power to the 1st respondent (HESCOM). During these months of May & June, 2010, OP No.34/2009 filed by the 1st respondent (HESCOM) was pending for disposal.
- g) M/s Parrys Sugar Industries Limited (formerly known as GMR Industries Limited) filed OP No.19/2011 on 23.05.2011 before this Commission, claiming payment relating to the energy supplied during May & 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. The 1st respondent (HESCOM) appeared and admitted to pay the differential tariff for the energy supplied during May & June 2010 as claimed by the petitioner. In OP No.19/2011, this Commission on 25.08.2011 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 passing the Order dated 25.08.2011 in the above referred OP No.19/2011, this Commission had determined the rate payable to Cogeneration Plants having no PPA for supply of power during the Section 11 of Electricity Act, 2003, period at Rs.5.00 per unit from April, 2010 to June, 2010. This is referred by the petitioner in para 25 of its petition as follows:

“25. Subsequently, this Commission vide its Common Order dated 24th March 2011 confirmed the rate at Rs.5/- for the energy supplied during this period only for those units who do not have PPA. This Commission held as under:

“The generators with existing PPAs are therefore, obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs and the higher rate of Rs.5.00 per kWh shall be applicable only if the supplies are made over and above the normal PPA obligations. For determining the normal supply obligation of such

generators, we direct that the utilities shall take into account the quantum of power supplied by them during the months of April, May & June during the previous three years and any supplies made in excess of the average supply of last three years shall be eligible for payment at Rs.5.00 per kWhr determined under this order”.

- i) The Unit at Haliyal of M/s Parrys Sugar Industries Limited, has become a part of the present petitioner (EID Parry (India) Limited) with effect from 18.03.2013, by virtue of the Order dated 01.02.2013 of the Hon'ble High Court of Karnataka and the Order dated 18.02.2013 of the Hon'ble High Court of Judicature, Madras.
- j) 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 & June, 2010, payable by the 1st 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 & June, 2010, the total amount payable by the 1st respondent to the petitioner works out to Rs.3,71,70,558. However, the 1st 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 1st respondent (HESCOM) has paid the balance amount of Rs.1,09,64,081 to the petitioner, as per the letter dated 25.03.2013 (Annexure-T).
- k) The petitioner has contended that there was a meeting between representatives of the petitioner and the 1st respondent (HESCOM) on

28.02.2013 at the chambers of the Managing Director, HESCOM, in connection with the payments to be made for the energy supplied during Section 11 period and other issues. The petitioner has stated in para 34 of the petition that in the said meeting, the petitioner had made several suggestions including the suggestion that no issues shall be raised regarding import & export of power from July, 2009 to June, 2011 subject to the condition that the 1st respondent (HESCOM) paying the amount due under Order dated 25.08.2011 passed in OP No.19/2011. The petitioner has further stated that the 1st respondent (HESCOM) agreed for it and the issue was amicably settled as per Minutes of the Meeting marked as Annexure-S. The petitioner has stated that contrary to the said terms of settlement, the 1st respondent (HESCOM) claimed charges for import energy at the temporary tariff from the date of termination of PPA till the date of order upholding the termination.

- 1) 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 1st respondent (HESCOM) 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 & June, 2010), the 1st respondent (HESCOM) could not have claimed for the energy pumped into its project between July, 2009 & May, 2011 at the

temporary tariff. Therefore, the petitioner has contended in this petition that, as the 1st respondent (HESCOM) has claimed the rate of temporary tariff for the import energy, it has been claiming the market rate for the energy supplied during the above said period and with that grievance, the present petition is filed before this Commission on 25.04.2013.

7. 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, 1908; and (iii) on the principles of constructive *res-judicata*.
- b) The respondents have contended that the PPA was terminated on 09.07.2009, and therefore, any claim for payment for the energy supplied subsequent to the termination of the PPA ought to be filed within three years from 09.07.2009.
- c) The 1st respondent (HESCOM) has not disputed that it had admitted the claim made by the petitioner in OP No.19/2011. The 1st respondent (HESCOM) contended that subsequent to the Order dated 25.08.2011 passed in OP No.19/2011, the petitioner had also filed OP No.52/2011 claiming for payment at market rates for the energy fed into the grid for the period from 03.11.2011 to 20.12.2011, on the ground that its application for open access was rejected. 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 referred in the petition & OP No.52/2011 stated above, is barred from filing the present petition on the ground of waiver, relinquishment and abandonment of its present claim. The petitioner could and ought to have raised its claim if any, for payment of energy supplied to the 1st respondent (HESCOM) after termination of the PPA in its earlier petitions, namely; OP No.19/2011 & OP No.52/2011. Therefore, the petition is also barred under the principles of Order II Rule 2 of the CPC which clearly mandates that a petitioner must sue in respect of the whole claim, and any omission to sue in respect of any claim which he could or ought to have raised in the earlier proceedings cannot be agitated in a subsequent proceeding. The petition cannot be entertained on the ground of constructive *res-judicata*, as the issue raised in this petition (i.e., payment for energy supplied after termination of the PPA) ought to have been raised in the earlier petitions namely; OP No.19/2011 & OP No.52/2011.

- d) The 1st respondent (HESCOM) 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 09.07.2009 till 02.06.2011, 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 only to the PPA rate for the energy supplied, as held in OP No.23/2011 dated 24.05.2012 in the case of *M/s Nandi Sahakari Sakkare Karkhane Niyamita Vs. HESCOM & Another*, wherein this Commission held that a petitioner would be entitled to pay at the rate prescribed in the PPA for the period from the date of termination notice till the date of declaratory order of the Commission upholding the termination.
- f) Further, it is contended that the petitioner was overpaid for the energy supplied during the months of May & June, 2010, in view of the Order dated 24.05.2012 passed by this Commission in OP No.23/2011 (*M/s Nandi Sahakari Sakkare Karkhane Niyamita Vs. HESCOM & Another*). 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 & June, 2010, treating the petitioner as being without a PPA from the date of the Termination Notice, the 1st respondent (HESCOM) would also be consequently entitled to invoice the import energy supplied from its grid to the petitioner at the rate of temporary tariff.
- g) So far as the agreement/settlement arrived at during the meeting on 28.02.2013 and the interpretation of Minutes of the Meeting dated 28.02.2013 as claimed by the petitioner, the 1st respondent (HESCOM) in para 28 of its Statement of Objections has contended as follows:

“28 –The petitioner has maliciously interpreted the minutes of the meeting dated 28.02.2013 to contend that the respondent had agreed that no issues regarding import and export for the period of July 2009 to May 2011 shall be raised and that the same is amicably settled. A perusal of the minutes of meeting would clearly indicate that the respondent had specifically suggested that if the petitioner is to be paid at the rate of INR.5 per unit for the energy supplied for the months of May & June 2010, the respondent would also be entitled to invoice the import of energy at temporary tariff rate. The petitioner did not agree to this suggestion. The petitioner in fact suggested that the respondent must pay for the months of May & June 2010 at the rate of Rs.5 per unit and that no issues be raised regarding import and export of power during this period. This suggestion was not accepted by the respondent. These were only proposals that was being discussed, but no settlement had been reached.”

- h) The petitioner has made a counter-claim on the ground that the petitioner was not entitled to the tariff of Rs.5.00 per unit for the energy supplied during the months of May & June 2010 but was only entitled to PPA tariff. Therefore, it is stated that a counter-claim of Rs.1,09,64,081 is being claimed as per Annexure-R2. The 1st respondent (HESCOM) has not paid any Court fee (Filing fee) on the counter-claim, therefore, this Commission is not taking cognisance of the counter-claim stated by the 1st respondent (HESCOM).
- i) For the above reasons, the 1st respondent (HESCOM) has requested to dismiss the petition.

8. After remand of the case, the petitioner placed the additional information and material in para 13 of its application dated 29.01.2019. The gist of which excluding the facts repeated, may be stated as follows:

- a) During the relevant months, namely, from July, 2009 to May, 2011 (excluding May & June, 2010) there was an opportunity for the generating companies and traders/licensees to offer power available with them for sale through the platform of Power Exchange. If the Open Access had been allowed, the petitioner could have easily sold the electricity through the power Exchange. The prices prevalent in the Power Exchange are a clear indication of the market rate at which the power from the petitioner's project could have been sold during the relevant months. Accordingly, the measure of compensation payable by the respondents to the petitioner can be related to the price prevalent in the Power Exchange during the relevant months.
- b) The petitioner has duly placed the average rate of the Indian Energy Exchange (IEX) in the State of Karnataka and Andhra Pradesh along with the computation of the market rate for the relevant period. These are already part of the main petition filed in the original proceedings.
- c) The net amount which the petitioner would have derived from the sale of energy through the IEX can also be decided in terms of the decision dated 14.02.2013 passed by this Commission in OP Nos.40 & 41 of 2013 in the matter of Himatsingka Seide Limited Vs. Government of Karnataka and others, wherein this Commission has already quantified

the market rate at Rs.5.72 per unit for selling power in the short term bilateral market (including IEX) after factoring in the deductions of 10 paisa towards marketing, transmission, trading margin.

- d) The different Orders determining the tariff for supply of power as per the directions issued under Section 11 of the Electricity Act, 2003 would also disclose that the price was in the range of Rs.5 per unit to Rs.5.50 per unit during the period from March 2010 to June 2010 and even Rs.6.90 per unit during the Section 11 period in the year 2009.
- e) The Orders passed by this Commission dated 07.12.2010, regarding Multi-Year Tariff Framework and Distribution & Supply Tariff for FY-2011, permitted the ESCOMs to purchase short-term power to an extent of 1000 MW from September 2010 to May 2011 at an average power cost of Rs.4.88 per unit, as there was severe power shortage situation in the State.
- f) Similarly, the Commission in its Order dated 28.10.2011 "On BESCO's Annual Performance Review for FY-11 and approval of revised ARR for FY-12 observed thus:

"The Commission has observed that the ESCOMs, in view of the severe shortage situation in the State, had procured short-term power from various sources at the weighted average rate of Rs.4.99 per unit during FY-2011. This has significantly impacted the power purchase cost. Further, the shortage situation has also continued in FY-2012."

g) It is submitted that since there was huge power deficit within the State of Karnataka there would have been no necessity for the petitioner to sell power outside the State. Hence, the petitioner need not have incurred any interstate open access charges or even the intra state open access much less the trading margin.

9. In respect of the additional information and material placed by the petitioner, the 1st respondent (HESCOM) has filed the objections, the gist of which may be noted as follows:

a) That a reading of the above Order dated 19.10.2016 in Civil Appeal 800/2014 of the Hon'ble Supreme Court of India prima facie makes it clear that the petitioner is required to produce all additional documents in support of their contention for compensation as per market rates failing which the petitioner will be entitled to compensation as per the PPA. It is further submitted that subsequent to remand of the present case, the petitioner has failed to produce any additional material in support of their contention for compensation at market rates for the energy supplied. It is stated that the petitioner has again reiterated the facts stated earlier.

b) Therefore, it is prayed that the contents of the application dated 29.01.2019 filed by the petitioner may be rejected.

10. We have heard the learned counsel for the parties. The learned counsel for the 1st respondent (HESCOM) also filed written submissions. The learned

counsel for the petitioner prayed for two days' time to file the written submissions, but the same is not filed. However, during the earlier proceedings in this case, the petitioner had filed its written submissions 11.03.2015.

11. After considering the entire material on record i.e., the pleadings and documents produced by the parties prior to passing of the Order dated 19.03.2015 in this case and also the pleadings and documents produced subsequent to remand of the case by the Hon'ble ATE and the submissions of the parties, the following issues arise for our consideration:

Issue No.1: Whether the petitioner proves that there was an agreement/ settlement on 28.02.2013 between parties that subject to the 1st respondent (HESCOM) complying the Order dated 25.08.2011 passed in OP No.19/2011, both parties should not raise any issues regarding payment towards import and export of energy for the period from 09.07.2009 to 02.06.2011? and the breach of such agreement by the 1st respondent (HESCOM) gave rise to a cause of action for filing the present petition?

Issue No.2: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by the principles stated in under Order II Rule 2 of the Code of Civil Procedure, 1908?

Issue No.3: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by the principles of constructive res-judicata?

Issue No.4: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by limitation?

Issue No.5: Whether the petitioner is entitled to the market rate, as claimed in the petition for the energy supplied to the 1st respondent for the period between July 2009 & May 2011 except for the month of May & June 2010? If not, at what rate?

Issue No.6: To which reliefs the petitioner is entitled to?

Issue No.7: What Order?

12. After considering the material on record and the submissions of the parties and keeping in view of the directions issued by the Hon'ble ATE in Appeal No.52 of 2016, our findings on the above Issues are as follows:

13. Issue No.1: Whether the petitioner proves that there was an agreement/settlement on 28.02.2013 between parties that subject to the 1st respondent (HESCOM) complying the Order dated 25.08.2011 passed in OP No.19/2011, both parties should not raise any issues regarding payment towards import and export of energy for the period from 09.07.2009 to 02.06.2011? and the breach of such agreement by the 1st respondent (HESCOM) gave rise to a cause of action for filing the present petition?

a) The relevant pleadings in support of the contention of the petitioner that there existed such agreement, are contained in paras 32, 34, 37, 40 to 43 of the petition. Further, the petitioner relied upon Minutes of the Meeting held on 28.02.2013 (Annexure-S). The 1st respondent (HESCOM) has denied such agreement/settlement and in this respect the detailed version of the 1st respondent (HESCOM) is stated in paras 26, 28, 29, 32 & 33 of its Statement of Objections.

b) We have gone through the relevant pleadings. The parties have stuck to their rival contentions as per their respective pleadings. The material document relied upon by the petitioner is Annexure-S, the Minutes of the Meeting. As the interpretation and meaning of this document is at quite variance between parties, we think it is necessary to extract the relevant part of it, which reads thus:

“Managing Director, HESCOM welcomed all Officials and representatives of M/s Parry Sugars Industries Limited, Haliyal Unit to the meeting.

HESCOM suggested as follows:

- 1) HESCOM is ready to pay the different of Rs.2.144 per unit (Rs.5-PPA Rate) as per Hon'ble KERC approved rate for May 2010 and June 2010 (i.e., Rs.5/- per unit) which works out to Rs.3.71 crores, and the import energy bill at the temporary tariff from July 2009 to May 2011, works out to Rs.2.46 crores. The net amount at present Rs.1.25 crores is to be paid and on affidavit to this extent has to be submitted to KERC.*

Parry Sugars:

Parry Sugars representative did not agree to this suggestion and submitted that HESCOM has to comply with the order of KERC in OP No.19/2011 without any adjustments.

The question of billing of import of Power between July-2009 to June-2011, doesn't arise. If HESCOM is eligible for temporary tariff, during this period, M/s. Parry Sugars will also be entitled to receive the market rate of Power exported during this period and not the tariff as per PPA. The rate of Power during May-2010 and June-2010 will be as per the Section-11 order and confirmed by KERC as Rs.5.00 per unit.

HESCOM Officials said for the energy exported for non PPA period has to be shared with all ESCOM's as per GOK orders there and then.

Parry Sugars representatives suggested that HESCOM may pay for the month of May-2010 & June-2010 in compliance with the KERC orders and no issues raised regarding import and export of Power from July-2009 to June-2011 and the issue is amicably settled.

HESCOM has made many correspondences in this regard.

Meeting concluded with vote of thanks.

*sd/-
General Manager (Tech.)"*

- c) On perusal of the Minutes of the Meeting (Annexure-S), we found that there is no clear term in it stating that both the parties agreed that they should not raise any issues regarding payment towards import and export energy for the relevant period. The said document contains the suggestions/versions stated by each of the parties. However, in the end it is stated that "*the issue is amicably settled*". On the basis of the contents of Minutes of the Meeting read as a whole, it is not possible to infer any agreement or settlement as stated by the petitioner, in spite of there being a remark in it that "*the issue is amicably settled*".
- d) There is also no circumstance to infer that the 1st respondent (HESCOM) would agree for receiving import energy charges at temporary tariff rate and would agree for paying market rate for the export energy during the period between July 2009 & May 2011. The reason is obvious that the quantum of import energy would be considerably less than the quantum of export energy. Therefore, one can say that a prudent

officer of the 1st respondent (HESCOM) would not agree for receiving charges for import energy at temporary tariff and for paying charges for export energy at market rate.

- e) The 1st respondent (HESCOM) vide its letter dated 25.03.2013 (Annexure-T) intimated the petitioner regarding the deduction of import energy charges for the period from July 2009 to May 2011, out of the amount payable to the petitioner as per Order in OP No.19/2011 dated 25.08.2011. In response to it, the petitioner wrote letter dated 19.04.2013 (Annexure-V) to the 1st respondent (HESCOM). The contents and the tenor of the letter dated 19.04.2013 (Annexure-V) written by petitioner to 1st respondent (HESCOM) would point out that the petitioner had strongly protested for deducting at the temporary tariff for the import energy out of the outstanding amounts due under OP No.19/2011 and in spite of it, the deduction was effected. Thereafter, it is stated that *“As earlier advised and noted in the said minutes, if you are entitled to high import tariff, being our Company was without PPA from the period commencing 09.07.2009, the Company would also be entitled to market rate of power and not the rate as per PPA. You have not honoured the Order of the Hon’ble KERC in OP No.19/2011 in the right spirit by making this adjustment.”* If really there was an agreement/settlement as pleaded in the petition, the petitioner would not have omitted to state that fact in its letter dated 19.04.2013 (Annexure-V) and that the 1st respondent (HESCOM) had acted

contrary to the terms agreed. On the other hand, this letter makes reference to the Minutes of the Meeting dated 28.02.2013 and further states "*as earlier advised and noted in the said Minutes*", what would be the consequence, in case the 1st respondent (HESCOM) charging temporary tariff for import energy. This would show that there was only an advise to both the parties as how they should deal with import and export energy charges for the period from July 2009 to May 2011 except for the period for May & June 2010 for which the Order in OP No.19/2011 would prevail. Therefore, the Minutes of the Meeting is to be interpreted in the sense that it was an advice to both the parties how they could deal with import and export energy for the earlier period. Hence, we hold that there was no concluded contract/agreement/settlement between parties, as claimed by the petitioner.

- f) Though the petitioner had not stated the date of cause of action for filing the present petition, in the written submissions earlier filed on behalf of the petitioner, it is stated that the deduction in payments made by the 1st respondent (HESCOM) vide letter dated 25.03.2013 (Annexure-T) gave raise to file the present petition. As noted above, such an agreement is not proved, therefore, the deduction effected by the 1st respondent (HESCOM) could not be treated as the event giving raise to cause of action for filing the present petition.
- g) For the above reasons, we hold Issue No.1 in negative.

14. Issue No.2: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by the principles stated in under Order II Rule 2 of the Code of Civil Procedure, 1908?

a) Before analysing the facts relevant on this Issue, we may note the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 which reads thus:

“R.2. Suit to include the whole claim – (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

Relinquishment of part of claim – (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs – (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Illustration:

A lets a house to B at a yearly rent of Rs.1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent for 1905 or 1907.”

b) The reading of the Order II of Rule 2 of the Code of Civil Procedure, 1908 would show that in the event the claim in the present suit is founded upon a cause of action similar to the cause of action for the claim founded in OP No.19/2011, the bar under this provision is attracted. Though the petitioner claimed that it had terminated the PPA with

effect from 09.07.2009, the said fact was under dispute in OP No.34/2009. However, ultimately the validity of the termination with effect from 09.07.2009 was upheld on dismissal of OP No.34/2009 by Order dated 02.06.2011. During this period, the petitioner had supplied the energy to the grid whenever its Cogen plant was generating power. The cause of action for the claim for compensation at market rate (higher than PPA rate) for the energy fed into the grid during the pendency of OP No.34/2009, would arise only on the dismissal of that case upholding the termination of the PPA.

- c) It is admitted fact that during the same period when the termination of PPA was under adjudication, there was Section 11 Order issued by the Government for the months from April to June 2010 and the petitioner had supplied energy to the grid only in the months of May & June 2010. For claiming compensation at a higher rate than the PPA rate even for these two months, the adjudication of the validity of termination was essential. Unless the termination of PPA was upheld, the petitioner could not have claimed the higher price for the energy supplied during these months determined under Section 11 Order. Therefore, the cause of action even for claiming compensation at whatever rate and for whatever period would arise only after upholding the validity of termination of the PPA. The petitioner claiming the price of energy at Rs.5 per unit as payable to energy supplied under Section 11 Order for Cogen plants having no PPA, would arise only after upholding the

termination of the PPA. It is not in dispute that a person supplying energy having PPA to the extent of committed capacity, is not entitled to any higher price or tariff for the energy supplied during Section 11 Order period. Therefore, it is clear that the supply of energy during Section 11 Order period by a person whose termination of PPA is under adjudication can claim compensation for it only after upholding the termination of the PPA. In the event the termination of PPA was held to be invalid, such person cannot claim compensation for the energy supplied and it would be deemed that such supply was under the terms of PPA.

- d) For the above reasons, the Commission is of the considered view that the cause of action for filing OP No.19/2011 and the cause of action for filing the present OP No.14/2013 is one and the same i.e., the event of upholding the validity of termination as per Order dated 02.06.2011 passed in OP No.34/2009. Therefore, we hold that the bar under Order II Rule 2 of the Code of Civil Procedure, 1908, would apply for claiming the relief of compensation prayed in the present case.
- e) OP No.52/2011 was filed by the petitioner for payment at the market rate for the energy pumped into the grid between 03.11.2011 and 19.12.2011 on the ground that the concerned officials of the respondents had illegally refused grant of open access. The perusal of the facts in OP No..52/2011 would disclose that on the date of applying for standing clearance/NoC for open access, it was an admitted fact that the

termination of the PPA dated 22.01.2007, was not in dispute. As already noted, this Commission had upheld the termination dated 09.07.2009, in OP No.34/2009 of the PPA dated 22.01.2007 by Order dated 02.06.2011 (Annexure-H). The Order dated 02.06.2011 was not challenged and it had become final. Admittedly, the application for standing clearance/NoC concerned in OP No.52/2011 was filed a few months after 02.06.2011. Therefore, we are of the considered opinion that the cause of action for filing OP No.52/2011 had arisen subsequent to 02.06.2011, the date on which the termination of PPA was upheld in OP No.34/2009 and had become final. For the above reasons, it cannot be concluded that the cause of action for filing the present OP No.14/2013 and the previous OP No.52/2011 is one and the same. Therefore, this part of the contention of the 1st respondent (HESCOM) is to be rejected.

- f) In the earlier Order dated 19.03.2015 passed in this case, this Commission has stated that the cause of action for filing the OP No.52/2011 and the present petition are different and, therefore, Order II of Rule 2 of the Code of Civil Procedure, 1908, was not attracted. In that Order it was not verified as to whether the cause of action for filing OP No.19/2011 and the present petition is one and the same or not. As there is a direction in the remand order to conduct the *de novo* trial, we think this Commission is not barred from reconsidering that question afresh.
- g) For the reasons stated above, we hold Issue No.2 in affirmative.

15. Issue No.3: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by the principles of constructive res-judicata?

a) The principles of res-judicata stated in Section 11 of the Code of Civil Procedure, 1908, reads as follows:

“S.11. Res Judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I to III xxxxxxxxxxxxxxx

Explanation IV – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V to VIII xxxxxxxxxxxx “

b) The contention of the petitioner is that the claim in the present case is barred on the principles of constructive res-judicata as the present claim in this case ought to have been included in OP No19/2011.

c) The reading of the above principles stated in Section 11 of Code of Civil Procedure, 1908 shows that the principles of res-judicata or constructive res-judicata are not attracted in the facts of the present case. There was no disputed matter in issue in OP No.19/2011. The claim made in that case was admitted by the 1st respondent (HESCOM). Hence,

application of the principles of res-judicata or constructive res-judicata does not arise.

d) For the above reasons, Issue No.3 held in negative.

16. Issue No.4: Whether the 1st respondent (HESCOM) proves that the claim of the petitioner is barred by limitation?

a) The cause of action for the claim made in the present petition would arise on 02.06.2011, the date on which the termination of the PPA was upheld. On upholding the termination of the PPA, the petitioner is entitled to compensation for the energy injected into the grid from the date of termination of the PPA to the date of upholding the termination. The present petition is filed well within three years from 02.06.2011, the date on which the termination of PPA was upheld. Therefore, we hold the present petition is not barred by limitation.

b) For the above reasons, we hold Issue No.4 in negative.

17. Issue No.5: Whether the petitioner is entitled to the market rate, as claimed in the petition for the energy supplied to the 1st respondent for the period between July 2009 & May 2011 except for the month of May & June 2010? If not, at what rate?

a) It is not in dispute that the petitioner has received the PPA rate for the energy supplied between July 2009 & May 2011 except for the months of May & June 2010. It is also an admitted fact that for the months of May & June 2010, the petitioner is paid at Rs.5.00 per unit for the energy supplied as per Order dated 25.08.2011 passed in OP No.19/2011.

b) In the present case, the petitioner has claimed the compensation at market rate based on the IEX price, prevailing during the relevant period. In the earlier Order dated 19.03.2015 passed in this case, the claim for higher compensation than the PPA rate was rejected mainly with the reasons stated as follows:

“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 of 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.”

c) Even after remand of the case with the opportunity to produce further material by the parties, the petitioner has not produced the required particulars as noted above in the earlier order. The petitioner has produced the average rate of the IEX said to be prevailing in the State of Karnataka & Andhra Pradesh for the years from 2009 to 2011. However, average IEX rates for export for the years 2009 to 2011, were mentioned in Annexure-R of the petition, earlier to passing of the Order dated 19.03.2015 in this case. Therefore, the production of the same material again does not improve the case of the petitioner. On comparison of the average rate of the IEX for the years 2009 to 2011,

earlier produced and now produced, we found that the average rate of IEX earlier produced is little lower than the average rate of the IEX now produced.

- d) The petitioner was required to furnish material to ascertain the quantum of expenses to be incurred by a Cogen plant while selling power through IEX during 2009 to 2011. The petitioner has also not stated in its application now filed that the different heads of expenses noted in the earlier Order were not applicable for IEX transactions. Instead of producing the relevant material, the petitioner merely stated that it could have sold the energy in the State itself, as there was scarcity of power in the State during those years. The claim for market rate for the energy supplied, was based on IEX rate as made out in the pleadings of the petitioner. Therefore, it was required to produce evidence to ascertain the expenses to be incurred in IEX transactions. The petitioner further stated in its application that the rate finally fixed for the energy supplied under the directions of Section 11 for non-PPA holders, was more than Rs.5.00 or Rs.5.50 per unit, the petitioner was already paid at Rs.5.00 per unit for the supply of energy for the months of May & June 2010. In the relevant period of the claim made by the petitioner there was no other Order under Section 11 of the Electricity Act, 2003. Therefore, the new material said to be placed on record as narrated in the application dated 29.01.2019 does not help the petitioner.

- e) It can be seen that even in OP No.23/2011 between *M/s Nandi Sahakari Sakkare Karkhane Niyamita Vs. HESCOM & Another*, this Commission ultimately dismissed the claim of petitioner for higher rate for the energy supplied as the petitioner had failed to produce additional evidence even after remand of the case as per the directions of the Hon'ble Supreme Court of India.
- f) For the above reasons, we hold that the petitioner is not entitled to a rate other than the PPA rate for the energy supplied for the relevant period in this case.
- g) Hence, we hold Issue No.5 in negative.

18. Issue No.6: To which reliefs the petitioner is entitled to?

In view of the findings on the above Issues, the petitioner is not entitled to any reliefs.

19. Issue No.7: What Order?

For the foregoing reasons, we pass the following:

ORDER

The petition is dismissed, holding that the petitioner is not entitled to a rate other than the PPA rate for the energy supplied for the period from July 2009 to May 2011 (except for the months of May & June 2010).

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member