Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 140 of 2012

Dated: 27th September, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Parrys Sugar Industries Limited **....Appellant**
1/2, 3rd Floor, Venus Building
Kalayanamantapa Road
Jakkasandra
Bangalore – 560 094

Versus

1. **Karnataka Electricity Regulatory Commission** **...Respondent(s)**
   6th & 7th Floor, Mahalaxmi Chambers
   No. 9/2, M.G. Road
   Bangalore – 560 001

2. **Hubli Electricity Supply Company Limited**
   Nava Nagar, P.B. Road
   HUBLI – 580 025

3. **State Load Dispatch Centre – Karnataka**
   Cauvery Bhavan, K.G. Road
   Bangalore – 560 009

Counsel for the Appellant(s): **Mr. Shridhar Prabhu**
Mr. Anantha Narayana H.G.
Mr. D. Manjunatha Rao
Mr. D.S. Bhat
Counsel for the Respondent(s): **Mr. Anand K. Ganesan for R.2**

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Parrys Sugar Industries Ltd. challenging the order passed by the Karnataka Electricity Regulatory Commission ("State Commission") dated 24.5.2012 disallowing the claim for payment against the energy injected by Appellant into the State grid without any Power Purchase Agreement or generation schedule or permission for open access.

2. The State Commission is the 1st Respondent. The distribution licensee and the State Load Dispatch Centre are the 2nd and 3rd Respondents respectively.

3. The brief facts of the case are as under:

3.1 The Appellant has a sugar factory with co-generation plant of 24 MW capacity and exportable capacity of 20.86

MW at Hullatti village, Haliyal Taluka of Uttara Kannada District in the State of Karnataka.

3.2 A PPA was entered into between the distribution licensee, the 2nd Respondent and the Appellant for sale of surplus energy from the above co-generation facility on 22.1.2007.

3.3 The Appellant continued to supply electricity to the 2nd Respondent but the later did not adhere to the payment schedule. Consequently, the Appellant issued a default notice on 5.6.2009 and thereafter through a Termination Notice dated 9.7.2009 terminated the PPA.

3.4 Thereafter, the Appellant applied before the SLDC the 3rd Respondent for 'No Objection Certificate' / 'Standing Clearance' for open access for sale of electricity to third parties on 13.7.2009. However, this was denied by the 3rd Respondent vide its letter dated 18.7.2009 on the ground

that the Appellant had a valid PPA with the 2nd Respondent, the distribution licensee.

3.5 Aggrieved by denial of open access, the Appellant approached the Central Commission. The Central Commission by its order dated 11.12.2009 held that the open access cannot be denied to the Appellant.

3.6 In the meantime, the Respondent no.2, the distribution licensee approached the State Commission challenging the Termination Notice dated 9.7.2009 of the Appellant and seeking the directions to bar the Appellant from obtaining open access.

3.7 The State Commission by its order dated 2.6.2011 upheld the validity of the Termination Notice dated 9.7.2009 and held that the Appellant could not be barred from seeking open access to sell electricity to third parties in accordance with law.

3.8 Meanwhile, in November 2010 the name of the Appellant was changed from "GMR Industries Ltd." to "Parrys Sugar Industries Ltd." This change of name was communicated by the Appellant to the Respondent no. 2 vide letter dated 26.11.2011.

3.9 The Appellant entered into an agreement on 22.9.2011with Tata Power Trading Co. Ltd. for sale of power from its co-generation plant. Thereafter, Tata Power Trading Company filed an application before the SLDC (3rd Respondent) on 27.9.2011 for 'No Objection Certificate' for availing open access from 15.10.2011 to 31.10.2011.

3.10 Despite the orders of the Central and State Commission's, SLDC, the Respondent no. 3 did not grant open access to the Appellant. Thereafter, on 3.11.2011 the Appellant started its co-generation plant, consequent to the start of crushing operations at the

sugar plant due to the commencement of the seasonal sugar season and injected power into the grid from 3.11.2011 onwards till open access was allowed with effect from 20.12.2011 i.e. subsequent to the period for which open access was sought, without any PPA or schedule or permission for open access.

3.11 Subsequently, the Appellant filed a petition before the State Commission seeking payment @ Rs.5.50 per unit for the energy injected by the Appellant into the State grid.

3.12 The State Commission by its order dated 24.5.2012 dismissed the petition of the Appellant holding that the Appellant was not entitled for any compensation for the unscheduled injection of energy.

3.13 Aggrieved by this impugned order of the State Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

4.1 The Respondent no. 2 has wrongly denied no objection for open access on the ground that the change of the name of the Appellant's company was not effected in their records and the Appellant had not submitted the approval of the State Government regarding change of name, inspite of the Appellant furnishing a Fresh Certificate of Incorporation issued by the Registrar of Companies.

4.2 The State Commission has failed to notice that the application of the Appellant for open access was pending and not rejected by the Respondents having kept the application pending for a long time without any valid reason. The State Commission has wrongly decided that

the Respondents could not be held responsible entirely but at the same time giving directions to streamline the procedure of granting NOC for open access in future.

4.3 The State Commission also failed to appreciate that the Appellant is not a regular power producer but a seasonal co-generation plant which operates 3 to 4 months in a year and denying open access to the Appellant out of limited seasonal power supply period would be suicidal to the economic viability of the Appellant. The Appellant had to start its cogeneration plant without NOC for open access due to commencement of the crushing season. All farmers who have grown their sugar cane in the command areas have to harvest their sugar cane for crushing at the Appellant's plant as per the agreement and are entitled to payment within 14 days as per Sugar Cane Control Order, 1966.

4.4 The acts and omissions on the part of the 2nd and 3rd Respondents in not granting open access to the Appellant tentamount to forcible procurement of energy from the Appellant akin to invoking of Section 11 (1) of the Electricity Act, 2003 by the State Government. Accordingly, the Appellant should be compensated for the injection of energy into the system by the Respondent no.2 at the rate of Rs. 5.50 per unit decided by the State Government in April, 2010 for bagasse cogeneration plants during the time when Section 11 (1) was invoked earlier and the generators were directed to maximize generation and inject power into the State Grid. Thus, the claim of the Appellant for compensation for @ Rs.5.50 per unit is in consonance with the earlier directions of the State Government under Section 11 (1) of the 2003 Act.

4.5 During the period when energy was injected by the Appellant the Respondent no. 2, the distribution licensee was facing shortage and the power supplied by the

Appellant helped in meeting the requirement of its consumers.

5. The Ld. Counsel for Respondent no. 2 in reply made the following submissions:

5.1 The Appellant by its communication dated 12.2.2011 had made a request to keep the change in name of the Appellant's company in abeyance.

5.2 The Tata Power Trading Company with whom the Appellant had signed the PPA had applied for no objection for open access on 27.9.2011 for availing open access for the period 15.10.2011 to 31.10.2011. However, during that period there was no generation by the Appellant. The Appellant injected energy into the system subsequently from 3.11.2011 onwards without any schedule and without any request from the Respondent no. 2.

5.3 On 14.11.2011, the Appellant filed a petition for compensation before the State Commission which was correctly rejected by the State Commission.

5.4 Subsequently on 16.12.2011 no objection for open access was granted by the Respondent no. 3 for the period 20.12.2011 to 16.1.2012.

5.5 The State Government had not given any directions' invoking Section 11 of the 2003 Act during the period when the energy was injected by the Appellant. Therefore, there was no question of compensation to the Appellant under Section 11(2) of the Act.

6. We have heard the Learned Counsel for the Appellant and the Respondent no. 2.

7. After examining the contentions of both the parties, the following questions would arise for our consideration.

i) Whether the State Commission has erred in deciding that the SLDC can not be held entirely responsible for the delay in granting 'Standing Clearance'/'NOC' for open access and at the same time directing the SLDC and the distribution licensees to work out suitable procedure to ensure grant of 'Standing Clearance' / 'NOC' well within the time frame prescribed in the Regulations?

ii) Whether the State Commission was correct in holding that the Appellant was not entitled to be paid at any rate for the energy pumped into the grid without any schedule that too not during the period for which 'Standing Clearance'/'NOC' for open access was sought?

8. As both the issues are interconnected we shall be dealing with them together.

9. Let us first take the sequence of events relevant to the case.

i) The Appellant applied to the SLDC, Respondent no. 3 for 'NOC' / 'Standing Clearance' for open access on 13.7.2009, after terminating its PPA with the Respondent no. 2, the distribution licensee on the ground of non-payment of dues.

ii) The Respondent no. 3 vide its letter dated 18.7.2009 denied the NOC on the ground that the Appellant had a valid PPA with the Respondent no.2.

iii) Aggrieved by the denial of NOC, the Appellant filed a petition before the Central Commission.

iv) The Central Commission by its order dated 11.12.2009 held that the NOC for open access could not be denied to the Appellant on the indicated ground and the Respondents were directed to

examine the application seeking open access strictly in accordance with the provisions of the Open Access Regulations notified by the Central Commission and any deviation from the specified procedure would lead to initiation of penal proceedings.

v) Meanwhile, the 2nd Respondent approached the State Commission challenging the termination notice dated 9.7.2009 of the Appellant and bar the Appellant to seek open access.

vi) The State Commission by its order dated 2.6.2011 dismissed the petition of the Respondent no.2.

vii) In the meantime, the name of the Appellant was changed from 'GMR Industries Ltd.' to Parrys Sugar Industries Ltd.' in November, 2010. The Appellant vide its letter dated 26.11.2010 communicated to the Respondent no.2 about the change in name

enclosing a copy of the Fresh Certificate of Incorporation issued by Registrar of Companies, Karnataka.

viii) The Respondent no. 2 replied on 28.1.2011 advising the Appellant to obtain an order from the Government of Karnataka approving change in name and also advised the Appellant to enter into supplemental PPA for name change, and also unless the said procedure is followed it will not make any payment for power supplied by the Appellant.

ix) On 12.2.2011 the Appellant in reply to the above letter dated 28.1.2011, requested the Respondent no. 2 to keep the request for change in name in abeyance till the necessary formalities to effect the change in name are completed and further informed that the revised bill for the period from November 2010 to January 2011 was being revised in the

original name of the Company i.e. GMR Industries Ltd.

x) On 23.9.2011, the Appellant entered into a PPA with Tata Power Trading Company Ltd. for sale of power. Subsequently on 27.9.2011, the Tata Power Trading Company applied for Standing Clearance for open access for off-taking the power from the Appellant's power station for the period from 15.10.2011 to 31.10.2011. The application also indicated the change of name of the Appellant along with the proof in the form of copy of Fresh Certificate of Incorporation by the Registrar of Companies, Karnataka dated 15.11.2010.

xi) By letter signed on 13.10.2011, the Respondent no. 3 asked the Respondent no. 2 to intimate by return fax within 2 days whether the Appellant had a valid PPA with them. At the same time Respondent no. 3 sought the information regarding availability of

metering arrangement, transmission system capacity, etc., from the Transmission Licensee, viz., KPTCL.

xii) The transmission licensee by its letter dated 25.10.2011 supplied the necessary information to the Respondent no. 3 and indicated that the power from the Appellant's power plant could be evacuated on its transmission system. However, the Respondent no. 2 did not respond to the communication of the Respondent no. 3.

xiv) The Appellant vide its letter dated 5.11.2011 made a request to Managing Director, KPTCL under which the Respondent no. 3 operates, to issue 'No Objection Certificate' for open access stating that they have been following up with the Respondent no. 3 for last one month and they had been informed that they were awaiting confirmation from the Respondent no. 2. The Appellant also informed

that they had started crushing operations on 3.11.2011 and the power was required to be supplied to Tata Power Trading Company Ltd. immediately.

xv) Subsequently, the Appellant filed a petition before the State Commission for compensation @ Rs. 5.50 per unit for energy injected into the grid which was disposed by the State Commission by the impugned order dated 24.5.2012.

xvi) In the meantime, NOC for open access was granted by the Respondent no. 3 on 16.12.2011 for the period from 20.12.2011 to 16.1.2012.

xvii) The change in name of the Appellant was finally accepted by the Respondent no. 2 vide its letter dated 16.1.2012, subsequent to grant of open access by the Respondent no.3.

10. We find that the Tata Power Trading Company and the Appellant had sought for NOC for short term open access for Inter-State transmission of energy. Therefore, the same is governed by the Central Commission's Open Access Regulations.

11. The relevant Central Commission's Regulation which has been quoted in the order dated 11.12.2009 of the Central Commission on the application filed by the Appellant is as under:

"(b) While processing the application for concurrence or 'no objection' or 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 recognized 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."

12. According to the Open Access Regulations, the SLDC while granting no objection or standing clearance for the open access has to verify the existence of infrastructure for metering and availability of surplus transmission capacity in the State network and such approval for short term open access has to be granted not later than 7 working days.

13. The open access application was submitted to the Respondent no. 3 on 27.9.2011. Thus, as per the Open Access Regulations, the Respondent no. 3 should have given the NOC by 4.10.2011. Admittedly, approval was

not granted by the Respondent no. 3 even after the positive response of the transmission licensee regarding availability of metering infrastructure and transmission capacity on 25.10.2011.

14. It is interesting to note the reference made by the Respondent no. 3 to Respondent no. 2 on the open access application. The Respondent no. 3 asked the Respondent no. 2 to confirm if it had a valid PPA with the Appellant before the approval was granted for open access to the Appellant. This issue had already been settled by the State Commission in its earlier order dated 2.6.2011.

15. Interestingly, the same issue was raised in the proceedings before the Central Commission and the Commission had given specific directions in this regard. The relevant extracts from the findings of the Central Commission in its order dated 11.12.2009 are reproduced below:-

"10. From the above extracted statutory provision, it is evident that while examining the request for open access, the SLDCs are required to consider the (i) existence of infrastructure facility for energy metering and accounting and (ii) availability of surplus transmission capacity in the State network. In doing so, the SLDC will need to take into account "the contracts entered into with the licensees or the generating companies operating in that State" because the quantum of power meant for flow in the system would be borne out of such contracts for off-take or injection. Usually, an applicant seeking open access would submit or produce in support of its application for open access a copy of the contract entered into by it with the licensee or generating company, as the case may be. SLDC is only required to verify prima facie, whether there is a contract for sale of power by the utility proposing to inject power for the open access transaction. This does not empower the SLDC to sit on judgment on the validity or otherwise of a contract or adjudicate upon disputes as in the present case, which otherwise is within the scope of Section 86(1) (f). Any party disputing the contract cited by the party seeking open access or claiming that it has a subsisting PPA with the generating company in question, will have to approach the appropriate forum to get the matter adjudicated. SLDC cannot assume the role of adjudicator to decide as to which of the two contracts is valid.

11. In view of the above, we have no doubt that the denial of open access in the present case is not sustainable and accordingly we set aside the impugned communication. We also direct the first and third respondents to examine the applications seeking open access strictly in accordance with the provisions of open access regulations notified by this Commission as open access sought for pertains to inter-state transmission. We also make it clear that any deviation from the above stated procedure will lead to initiation of penal proceedings as permissible under the provisions of the Act."

16. Thus, the Central Commission directed the Respondents to examine the application seeking open access strictly in accordance with the provisions of the Open Access Regulations, which have been reproduced in paragraph 11 above.

17. Subsequently, the State Commission by its order dated 2.6.2011 held that the termination of PPA by its notice dated 9.7.2009 was in order and that the Appellant could not be barred from seeking open access to sell electricity to third parties. Despite the clear orders of the Central and State Commissions, the Respondent no. 2 and 3 ignored the same while not granting NOC for open access on the application filed by Tata Power Trading on 27.9.2009. The Tata Power had submitted a copy of the Certificate of Incorporation from Registrar of Companies of Karnataka which in our opinion was adequate to note the change of name. However, change of name was not the issue on which the Respondent no. 3 had made reference to the Respondent no. 2. The reference made to

the Respondent no. 2 by the Respondent no.3 was to seek confirmation if the Appellant had a valid PPA with them, the issue on which the Central and State Commissions had already given their findings in favour of the Appellant. Despite this Respondent no. 2 remained silent on the reference made by the Respondent no. 3 on the open access application of the Appellant and the Respondent no. 3 also sat over the open access application.

18. Ld. Counsel for the Respondent no. 2 has argued that the Appellant vide letter dated 12.2.2011 had requested for keeping the change in name in abeyance till the formalities to effect the change in name are completed. Ld. Counsel for the Appellant for the Appellant has argued that they had no option but to keep the change in name in abeyance and process the bills in the old name as the Respondent no. 2 had refused to make payment against the electricity supplied to them in the new name of the company till the Appellant obtained the approval of

State Government for change of name. We have gone through the correspondence between Respondent no. 2 and the Appellant in this regard. The correspondence referred to the Respondent no. 3 was not relating to open access procedure. At that time the Appellant had to receive payment from the Respondent no. 2 for the energy supplied from its plant and therefore had no option but to receive payment in the old name as the Respondent no. 2 had refused to recognize the new name without the State Government's approval. However, we feel that for the purpose of NOC for open access sought by Tata Power Trading/Appellant, the procedure as laid down in the Central Commission's Open Access Regulations should have been followed. Even if the supporting document for change in name was required, the Fresh Certificate of Incorporation by the Registrar of Companies, Karnataka furnished by Tata Power Trading regarding change of name of the Appellant was adequate for the purpose of NOC for open access.

19. However, subsequently the open access was granted by the Respondent no. 3 in December, 2011 on the interim directions of the State Commission dated 12.12.2011 and the Respondent no. 3 accepted the change in name on the basis of the Certificate of Incorporation from the Registrar of Companies even before change in name was accepted by the Respondent no. 2.

20. We, therefore, feel that the Respondent no. 3 had violated the Regulations by not granting NOC for open access despite getting clearance from the transmission licensees namely, KPTCL. Similarly, the Respondent no. 2 was also responsible in dragging on the NOC on the ground of change of name and insisted on the State Government's approval when for the purpose of open access only Fresh Certificate of Incorporation from the Registrar of Companies furnished by the Appellant was adequate.

21. The Ld. Counsel for the Respondent no. 2 has argued that the period in which energy was injected by the

Appellant was subsequent to the period for which open access was sought and, therefore, there was no case for compensation.

22. According to the Ld. Counsel for the Appellant since crushing season had commenced they had to start the co-generation on 3rd November, 2011 and inject the energy into the grid even though NOC for open access had not been granted by the Respondent no. 3. According to Ld. Counsel for the Appellant they did not apply for open access for further period as no decision had been taken by the Respondent no. 3 on their earlier application despite follow up.

23. 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. The circumstances in the present case are also similar. The Appellant's application for NOC for open access for the period 15.10.2011 to 31.10.2011 was pending before Respondent no. 3 and despite follow up they did not get any response, either accepting or rejecting the application. The Appellant's power plant is not a normal power plant and operates only in the crushing season for a few months during the year. According to the Appellant, crushing had to be commenced on 3.11.2011. They, however, did not approach the Respondent no. 3 for granting open access for further period commencing from 3.11.2011 as their earlier application for the period 15.10.2011 to 31.10.2011 was already pending with the Respondent no. 2, without any decision.

24. We find force in the arguments of the Ld. Counsel for Appellant. In the circumstances of the case, we feel that the claim of the Appellant for compensation could not be outrightly rejected on the technical grounds that the injection of power was subsequent to the period for which open access was sought and the Appellant should have again applied for NOC for the further period. Considering that the injection of power commenced only 3 days after the end of the period for which open access was sought and the Appellant was being made to run from pillar to post to obtain the NOC for open access despite the clear findings of the Central and State Commission in their favour. In our opinion, the Appellant deserves to be compensated for the energy injected. Now, we have to decide the rate at which the compensation may be given to the Appellant to meet the end of justice.

25. The Ld. Counsel for the Appellant has argued that they have been forced to inject the power due to denial of open access approval. Therefore, this should be treated as a situation akin to the situation when the State Government gave directions to the generating companies under Section 11(1) of the Act and the rate of Rs. 5.50 per unit as decided by the State Government on earlier occasion when Section 11 (1) was invoked, should be applicable in this case too. We do not accept the argument of the Ld. Counsel for the Appellant for compensation at the rate decided by the State Government on an earlier occasion as there was no direction under Section 11 (1) prevailing during the relevant period and therefore compensation under Section 11 (2) could not be made applicable in this case. However, we feel that the end of justice would be met if the Appellant is compensated at the variable price of energy injected during the period 3.11.2011 till the date

from which the NOC for open access has been granted to the Appellant. Admittedly, the Respondent no. 2 has consumed the energy injected by the Appellant. Accordingly, we direct the State Commission to compute the variable charges on the basis of price of Bagasse and specific fuel consumption for Bagasse cogeneration plant as specified in the State Commission's Regulations and the Respondent no. 2 shall make the payment to the Appellant at the rate decided by the State Commission. In case these parameters viz. price of Bagasse and specific fuel consumption, have not been specified in the State Commissions Regulations, the parameters as given in the Central Commission's Regulation shall be adopted.

26. We feel that the compensation at the variable charges of generation will be fair both to the Appellant and the distribution licensee.

27. Summary of our findings:

i) **The SLDC (Respondent no. 3) has violated the Regulations by not granting NOC for open access for the period 15.10.2011 to 31.10.2011 to the Appellant. The Respondent no. 2 has also dragged on the approval for change of name by insisting on the approval of the State Government when for the purpose of open access only Certificate of Incorporation by the Registrar of Companies furnished by the Appellant was adequate thus causing hindrance in the Appellant obtaining NOC from the Respondent no. 3. Both Respondent nos. 2 and 3 have also ignored the directions and findings of the Central and State Commissions in their orders dated 11.12.2009 and 2.6.2011 respectively which were in favour of the Appellant.**

ii) In the circumstances of the present case, the claim of compensation by the Appellant could not outrightly be rejected on the technical ground that the period of injection of power was a few days after the end of the period for which NOC was sought and the Appellant should have again applied for open access despite no action on its previous application. We feel that the ends of justice would be met if the Appellant is paid for at the variable price of generation by the distribution licensee as determined by the State Commission on the basis of price of bagasse and specific fuel consumption as per its Regulations and in the absence of its Regulation as per the Central Commission's Regulations, for the energy injected during the period from 3.11.2011 till the date from which it was granted NOC for open access.

28. In view of above the Appeal is allowed in part as indicated above and the impugned order is set aside. The State Commission is directed to pass consequential order within one month of the date of this judgment. The State Commission will also decide a reasonable period within which the Respondent no. 2 will make payment to the Appellant. No order as to costs.

29. Pronounced in the open court on this ***27th day of September, 2012***.

(Rakesh Nath) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

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REPORTABLE/~~NON-REPORTABLE~~

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