

**ORDER SHEET**  
IN THE HIGH COURT OF SINDH, KARACHI  
C.P.No.D-4646 of 2014

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| Date | Order with signature of Judge |
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07.09.2016

M/s. Dr. Farogh Naseem and Abdul Sattar Pirzada, Advocates for  
Petitioners

M/s. Asim Iqbal alongwith Farmanullah Khan, Advocates for the  
Respondents and Mr. Muhammad Aslam Butt, DAG

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**ORDER**

Petitioners trading under the style of Byco Group have been engaged in the business of importing crude, refining the same and selling the finished products in Pakistan and filed the instant petition praying that the benefit of the Economic Coordination Committee (ECC) Decision dated 21.02.2013 in terms of which the petitioners were permitted reimbursement of the operational cost of the Single Point Mooring (SPM) through Inland Freight Equalization Margin (IFEM) as per PARCO rates should be given to them, since they installed their refinery outside Karachi (which added more transportation cost of the crude oil). In terms of this Court's order dated 03.12.2015, after hearing the counsel of all the parties present, the parties enlisted three grievances of the petitioner, which are reproduced herein below:-

- i. the benefit of IFEM in terms of transportation cost of crude oil as allowed by ECC in its decision dated 16 August, 2011;
- ii. the benefit of IFEM in terms of operational cost of SPM as allowed by ECC in its decision dated 22 February, 2013; and
- iii. the status of "supply source" be given to the petitioners.

As the matter was also agitated before the Oil and Gas Regulatory Authority (OGRA), the counsel for the respondent drew the Court's attention to his Statement dated 11.04.2016 along with which copy of the detailed decision on the issues raised by the petitioner company (Byco

Petroleum Pakistan Limited) with OGRA has been attached. In terms of the said report, we note that two of the above referred grievances have been redressed favorably to the petitioners, however, with regard to reimbursement of the operational cost of SPM following decision has been made:

*The Authority observes that ECC, on February 22, 2013, had allowed the SPM operational cost recovery claim of BPPL based on the recommendations of MP&NR. However, MP&NR through its letter dated March 04, 2015 has conveyed its decision, duly approved by its competent authority, that the said claim cannot be considered in addition to wharfage already being recovered by BPPL, MP&NR has also stated that it shall present its position to ECC for approval, if so desired.*

As it could be noted from the above, in view of the Ministry of Petroleum and Natural Resources' (MP&NRs) changed stance, OGRA decided to defer the reimbursement of operation cost of SPM till such time MP&NR presents its case to ECC for re-consideration. A review of the above detailed report shows that decision to defer the reimbursement has been arrived after a detailed technical and commercial (pricing) analysis of the request of the petitioners in the light of the recommendations thereon from the Competitive Commission of Pakistan and stand of MP&NRs, as well as, on it give full reasoning based on OGRA's own technical and commercial findings.

It seems that through its letter dated March 4, 2015, MP&NR has taken the stand that since Byco is already recovering wharfage through consumer price of furnished products, thus reimbursement of operational cost of SPM on PARCO rates cannot be considered. This seems to be a contrast to of the position which the Ministry took before the ECC decision of 21.02.2013 was made. Notwithstanding therewith, pursuant to the said altered view, OGRA has dilated its decision with reasoning and attempted to allay concerns of the Petitioner trying to distinguish between the business model of the petitioners and that of PARCO (which is a company

solely created with the investment of over one billion US dollars for the transportation of crude from Karachi to Mahmoodkot (870 Km) through its own pipelines as of 1981 with pumping capacity of 6 million tons per year), as well as, from other refineries operating in Karachi being NRL and PRL.

Since these findings are of extreme importance and quite technical in nature, we reproduce the same herein under:-

#### MP&NR's Viewpoint

While MP&NR vide its letter dated March 04, 2015 replied that since BPPL (the petitioner) is already recovering wharfage through consumer prices of finished products, reimbursement of operation cost of SPM on PARCO rates, in addition to the wharfage, cannot be considered. Directorate General (Oil) representatives in the meetings held on August 27, 2015 as well as December 29, 2015, and February 15, 2016, reiterated it's above mentioned stance and informed that the above stance bears approval of the competent Authority i.e. Minister for Petroleum & NR.

MP&NR is of the view that after OGRA sought clarification vide its letter dated September 10, 2014, MP&NR revisited the matter and keeping in view the wharfage element informed OGRA vide letter dated March 04, 2015 that reimbursement of operational cost of SPM on PARCO rates in addition to the wharfage cannot be considered. Further as per Federal Government policy, the local crude is provided to all refineries at the refinery gate by the crude producers. Local crude is provided to the refineries including BPPL for which the refineries have not to pay any transportation cost as crude producers bear the same. The wharfage is given to ARL as part of the price package.

MP&NR is of the view that comparison of BPPL should not be made with PARCO. For apple to apple comparison, BPPL should be compared with other refineries in the south (Karachi) i.e. National Refinery Limited (NRL) & Pakistan Refinery Limited (PRL). These refineries incur port charges on the import of crude since they utilize the port

infrastructure and pay wharfage. Moreover these refineries are transporting crude oil from port to their refineries at their own, for which no operational cost of the pipeline/storage charges is given to them, while BPPL has not to bear said costs and thus availing saving thereon.

On the point that there now exist ECC decision allowing the subject claim to Byco as well as MP&NR's letter denying the same, Director (F&P), DG (Oil), in the hearing, stated that MP&NR will present its position to ECC for approval, if so desired.

#### BPPL's Viewpoint

BPPL is of the view that ECC in its decision of February 21, 2013, allowed the recovery of operational cost of SPM through IFEM as PARCO rates which were also recommended by CCP in its opinion of August 07, 2014. Since the matter pertains to crude oil transportation, therefore, it is obvious that the ECC meant the applicable PARCO crude pipeline rate i.e. Rs.743.86/MT. BPPL is, therefore, entitled to recovery of operational cost of SPM as PARCO rates i.e. Rs.743.86/MT, irrespective of the fact that ECC decision dated February 21st 2013 does not specifically mention, the exact numeric figure of the rate.

Regarding MP&NR and OGRA viewpoint that operational cost of SPM is not payable as BPPL was already recovering wharfage through consumer prices on finished products, BPPL is of the view that ECC in its decision has directed the reimbursement of the subject cost which was also supported by the CCP opinion dated August 7, 2014 which states that "Inclusion of wharfage element in ex-refinery price and operational cost of SPM are two different matters. Hence reimbursement of operational cost of SPM is justified on the same principle by which transportation cost is reimbursed to other refineries from IFEM pool.

#### OGRA'S Position

The nature of the protection given to BPPL is very dissimilar to that of PARCO. PARCO's crude transportation cost is based on a distance of 864 km pipeline from Karachi to

Mehmoodkot. On the contrary, SPM is a floating wharf connected to BPPL refinery through a 15 km pipeline.

Furthermore, BPPL ex-refinery price of HSD and MS includes wharfage of approximately Rs.0.03/liter and 0.10./liter respectively BPPL, however, imports through SPM, therefore, it does not pay any wharfage/port charges on its crude while the remaining refineries (excluding ARL) pay the same on their crude imports. Further, BPPL is also saving Rs.0.03/liter wharfage on crude being imported through SPM. BPPL, therefore, is getting wharfage charges and allowing the SPM cost may lead to double reimbursement at the expenses of the consumers.

Any operator of the oil well that is producing crude oil in Pakistan is required to deliver it to the nearest refinery on its own transportation cost. This facility is available for all the refineries including BPPL depending on the location/availability of crude oil. The policy of FG does not discriminate any refinery against the use of locally available crude. BPPL including other refineries are offered and use local crude when available.

PARCO is being reimbursed crude transportation cost from August 16, 2011, soon after deregulation of petroleum product prices. Before the deregulation PARCO ex-refinery prices included the transportation cost of petroleum products per the Petroleum Policy of 1995 i.e. PARCO was entitled to the transportation cost of refined petroleum products from Keamari-Mehmoodkot. From August 2011, FG allowed PARCO to recover crude transportation cost @ Rs.743.86/ton on production slate basis which results in an estimated annual saving of Rs. 5 billion. In future if there is complete deregulation of ex-refinery prices there is no doubt that PARCO will be able to recover the ex-refinery plus transportation cost (Keamari-Mehmoodkot) of refined products based on replacement cost principle. PARCO will be able to do this primarily due to its location which is in the mid of the country.

BPPL itself decided the location to setup the refinery. In a complete deregulation scenario with full competition, it will

have to compete with imported/southern refinery production at ex-port Qasim price much like the Western Texas Intermediate (WTI) price that is the price prevalent at the Cushing, Oklahoma. Cushing, Oklahoma is a major trading hub for crude oil and has been at the delivery point for crude contracts and therefore is the price settlement point for WTI on the New York Mercantile Exchange for over three decades since it has many intersecting pipelines, storage facilities and easy access to refiners and suppliers. In case of Pakistan, Port Qasim is the major supply and distribution point, therefore, the price prevailing at Port Qasim shall be the benchmark price. BPPL will have to match the ex-refinery/import cost at ex-port Qasim which would be import cost of PSO less freight cost from BPPL to port Qasim. Anything that changes this equation is akin to subsidy at the expense of the petroleum consumer.

BPPL has installed SPM at its own cost and operates as a port since it is able to get deliveries just like a port of crude and other petroleum products. It, therefore, cannot be compared with a pipeline of 867 km as well as with a refinery being operated and delivering petroleum products in the mid of the country. Since it is functioning like a port therefore allowing reimbursement of its cost more than the charges of port Qasim and Karachi port would be akin to subsidizing the operations of BPPL. Since the ex-refinery price already includes wharfage and FOTCO charges, reimbursement of operational cost to BPPL will tantamount to double reimbursement of the same expense. This double dipping at the expense of the consumer hence may not be justified.

SPM acts as a port, therefore, it may be treated as port and the charges given to other ports i.e. Karachi port & Port Qasim are already being given to BPPL in form of wharfage in ex-refinery prices of MS & HSD. Any cost over and above the fee/wharfage of the other ports will burden the consumers.

In a meeting held in May 2014, the minutes of which were issued by MP&NR on September 04, 2014, Secretary (P&NR) stated that issue of reimbursement of operational cost and

other issues are required to be re-examined afresh in light of all the ECC decisions. After detailed discussions it was decided that the SPM operational cost recovery would be examined for submission to the ECC.

In light of the CCP recommendation and the decision taken in the above mentioned meeting, OGRA vide its letter dated September 10, 2014, requested MP&NR to consider OGRA's views/comments, CCP opinion on the subject issue as well as the fact that the ECC decision is silent about the rate of specific products since PARCO has been allowed recovery of MS, HSD, LDO and crude oil which have different rates, while re-examining the same for submission to ECC and advise OGRA accordingly.

Perusal of the above OGRA decision shows that the matter with regard to reimbursement of operational expenses has been given serious thought and analyzed on merit as well as on technical and financial grounds before it has been deferred till such time MP&NR presents its case to ECC for re-consideration, whereupon once a new decision in this matter may come forward from ECC, OGRA thereon would pass appropriate orders, if need be. This finding backed by technical and methodical reasoning given in the said decision appeals to us, as this Court would not like to prejudge any outcome, nor put words in the mouth of the policy makers in respect of the forthcoming ECC decision.

Looking at the matter from another angle, the main grievance which was projected before us and as cited above is that the operational cost of SPM be reimbursed to the petitioners in order to provide them a level playing field. When we enquired as to who would determine these operational costs, the learned counsel for the petitioners responded that "such cost should be taken on the face of it from the audited records of the petitioners as the respondents also reimburse wharf charges to other refineries on the similar basis". However in our opinion the wharf charges

and the operational cost of SPM cannot be equated or merit identical financial treatment, perhaps without indulging into the domain of the policy makers, it could be equitably suggested that a ceiling of PSM operational costs may be fixed *vis-à-vis* the quantum of the wharf charges. It is also important to record that the ECC decision which the Petitioner seeks to enforce simply directs payment of operational cost of PSM without providing a mechanism for determining such amount whether it should be the amount asked or whether it should be as per audited report of the Petitioner or any specified amount and again this aspect could only be decided by the competent authority and not by the Court specially while exercising constitutional jurisdiction.

In our opinion such controversy cannot be decided by this Court while exercising constitutional jurisdiction, since it requires not only the determination of the factual controversy but also a mechanism consisting and comprising financial implications which is beyond the scope and jurisdiction of this Court.

Before we conclude, we wish to refer to the Short Write-up which has been submitted in our chambers by the learned counsel for the Petitioner wherein most of the assertions referred hereinabove are reiterated, however, we observe that emphasis herein has been given to the contention that in the light of Apex court's judgment reported as 2002 SCMR 930 and High Court's judgment reported as PLD 2006 Karachi 479 and 2000 YLR 229, the respondents ought to have implemented ECC decision dated 22.02.2013 under Rule 24 of the Rules of Business, 1973. In our view, initial pair of these cases could be distinguished from the instant case as in those cases petitioners alleged discriminatory and non-transparent treatment given to them on account of certain benefits accruing from ECC decisions and courts held that no such discriminatory treatment could be given; which is not the case at hand. With regards the



third case reported as 2000 YLR 229, it seems to have been wrongly referred to as it pertains to bail application.

For the reasons detailed hereinabove, we dismiss the instant petition along with all pending applications with no orders as to the costs.

Chief Justice

Judge