

1921

KENYA

589

47769

Rec'd
14 SEP 21

FROM

DATE

NAIROBI ELECTRIC POWER
LIGHTING COY LTD

23RD SEPTEMBER 1921

FOR CIRCULATION

SUBJECT

Mr. B... ..

Mr. B... ..

Mr.

Mr. G... ..

Sir H. Lambert

Mr. H. Bond

Mr. H. Bond

Mr. Wood

Mr. Churchill

NAIROBI ELECTRIC CONCESSION

... .. IT VIEWS
that they are under no obligation to provide
power for generating electricity other than is
obtainable from the Falls provided by Govt under
Concession, is concurred in. If not suggests
... ..

Previous Page

M
427901

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... ..
... ..
... ..

(Pp received 16 Oct)

Mr B... ..
Mr H Bond

We had better settle on
action by discussion I think
I shall say something
... ..
... ..

ackd 27 Sept 21
Pty for 15/11 - 18 Oct 21
Cov

Subsequent Page

409 52114

13 30 Well... ..
12... ..
... ..

MINUTES

MINUTES NOT TO BE WRITTEN
ON THIS SIDE

Mr. [unclear]

Here [unclear]

It will remain [unclear]

to [unclear]

[unclear]

[unclear]

MINUTES

MINUTES NOT TO BE WRITTEN
ON THIS SIDE

W. B. ...

Please see suggested

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...

1. The Concession. As Mr. Bushe says in his minute on 42750, the covenant to supply is absolute, the provision with respect to water is permissive.

Where the concession refers to Current derived from the Falls it says so - e.g. Section 5. On the other hand, the provisions as to plant sufficient for the district do not mention the Falls - e.g. Section 8.

The Company's best chance would be under Section 12, providing that the electricity "generated under the Falls" should not be used outside the District. I think it probable that this would "generate" the power of the Falls, but if they were to be used to generate power elsewhere it would then become necessary to supply the District, the question whether part of its current could be allowed to be used outside the District might very well be left open for future settlement in connection with the further concession for such outside supply.

2. The concession itself. It is a condition of the Company's concession from the Ordinance that it shall not quote in response to any offer they accepted the conditions in their letter of 27/2/20. That condition would have to be insisted on if the matter came to arbitration. Apart from that,

(a) It is the case that the Company has maintained this view before - e.g. in paragraph 2c of 68484/19. I proposed to repudiate the claim in the draft originally put forward on 4556/20.

(b) In B/10314/11 Mr. Bayldon said that when the demand exceeded the supply (from the Concession Falls)

"later

off on 4556/20

10650/20.

"later comers will simply have to go without electric current", which amounts to the same thing. He said that he had drawn the attention of the local Government to this in 1906 and had received the reply: "It has not been shown that the waterpower you have been given will be insufficient for generating the power needed for your scheme."

Without the context it is not possible to say whether this was an admission or not, but the point was not taken on the 1911 paper, when our pre-occupation was with the question what was to happen when the Company had exhausted the first (and not the whole) of the Contract Falls.

(c) As regards paragraph 2 of the report of the local Committee (Gov/31286/12), they said that they concurred in Mr. Baylton's view that the only possible solution (of over-demand) was to move to the Thins. The ~~impossibility~~ ^{infeasibility} of engine driven plant - whether from the practical or the legal point of view - was not mentioned.

"later owners will simply have to go without electric current", which amounts to the same thing. He said that he had drawn the attention of the local Government to this in 1906 and had received the reply: "It has not been shown that the waterpower you have been given will be insufficient for generating the power needed for your scheme."

Without the context it is not possible to say whether this was an admission or not, but the point was not taken on the 1911 paper, when our pre-occupation was with the question what was to happen when the Company had exhausted the first (and not the whole) of the Contract Falls.

(c) As regards paragraph 2 of the report of the local Committee (Gov/3128/13), the fact that it concurred in Mr. Baylton's view that the only possible solution (of over-demand) was to move to the Thins. The ^{possibility} impossibility of engine driven plant whether from the practical or the legal point of view was not mentioned.

6/11/11

THE NAIROBI ELECTRIC POWER & LIGHTING COMPANY, LTD

60, MARK LANE.

47789

LONDON, 23rd September, 1921.

REC'D
SEP 24 1921

1. With reference to our letter of the 27th October 1920 and our further letter of the 23rd May 1921 we have to request a definite answer to the question therein raised as to whether the Secretary of State considers in his view, founded on the opinion of Council, that the Nairobi Electric Power & Lighting Co., Ltd., has under its obligation to provide power for the purpose of generating electricity in the Nairobi district other than such as is obtainable from the Falls provided by the Government of the Colony under the terms of our Concession.

2. It may be stated shortly to state the position, which is as follows:-

(a) The nature of power contemplated by the Company's concession is by means of water power from certain falls (see in particular clause (j)). It became apparent at an early date that these falls were incapable of yielding sufficient power, and the Company, as appears from their letters from early in 1911 onwards, have repeatedly raised the contention that their obligations to supply were limited to such current as was available from these falls.

This contention has never been challenged. - On the contrary on reference to paragraph 7 of the Report of the Committee appointed by H.E. the Governor in May 1912 to report upon the subject of the Company's concession it clearly

The Under Secretary of State
for the Colonies,
Colonial Office, S.W.1.

9/21

10/11

11/12

THE NAIROBI ELECTRIC POWER & LIGHTING COMPANY LTD

REGISTERED OFFICE
10, MARK LANE, LONDON, E.C. 3
INCORPORATED IN ENGLAND
REGISTERED IN ENGLAND
NO. 10110

C. O. 47769
LONDON, 23rd September, 1921. 19
No. 24 SEP 21

50, MARK LANE.

With reference to our letter of the 23rd October 1920 and our further letter of the 23rd May 1921 we have to request a definite answer to the question therein raised as to whether the Secretary of State agrees in our view, founded on the evidence of fact, that the Nairobi Electric Power & Lighting Co. Ltd. is entitled to be allowed to provide power for the purpose of generating electricity in the Nairobi district other than such as is obtainable from the Falls provided by the Government of the Colony under the terms of the Concession.

It may be useful shortly to state the position, which is as follows:-

(a) The source of supply contemplated by the Company's concession is by means of water power from certain falls (see 'in particular clause 3'). It became apparent at an early date that these falls were incapable of yielding sufficient power, and the Company, as appears from their letters from early in 1911 onwards, have repeatedly raised the contention that their obligations to supply were limited to such current as was available from these falls.

This contention has never been challenged. - On the contrary on reference to paragraph 7 of the Report of the Committee appointed by H.E. the Governor in May 1912 to report upon the subject of the Company's concession it clearly

The Under Secretary of State
for the Colonies,
Colonial Office, S.W. 1.

Handwritten notes: 1911, 1912, 31219, 1912

oppose that the Company's view was acceded to.

Acting upon the Report of this Committee Government entered into negotiations with the Company in July 1918 for the substitution of falls on the River Taha for those which were referred to in the concession.

These negotiations resulted in an agreement of which a final draft was forwarded by the Solicitors to the Protectorate Government to the Company's solicitors and by them returned approved in August 1918.

The draft provided for the use of the falls in the Taha River for the use of the Company and in substitution of its concession the Company was to be at initiative and without any legal obligation to build a steam plant at Parklands, Nairobi, in order to supply the power which would be available before the falls on the Taha River could be made available. This steam plant is capable of supplying about 6 times the amount of electric current which the Company could rely on obtaining from such of the falls as the Company might be authorized to use under the terms of their Concession other than those which have already been made available for providing a supply.

Meanwhile the Protectorate Government while leaving in abeyance the execution of the agreement procured the passing of legislation in the shape of an Electric Power Ordinance the effect of which if enforced was entirely to deprive the Company of the benefits secured to them under their Concession. The Company protested and after hearing their objections the Secretary of State decided that the Company's Concession should remain in full force and the Company were informed by letter dated the 4th February 1920 that the Secretary of State had agreed to this solution but desired to make it clear that the whole matter must in future be regulated solely by reference to the terms of the Concession, which would be strictly enforced in the future. Subsequently a clause was

agreed which would have the effect of relieving the Company of its undertaking from the operation of the general Ordinance and this was embodied in an amending Ordinance.

(c) The demand for the supply of electricity within the area of the Company's Concession is increasing and the Company anticipate that it may very soon be necessary for them to undertake to meet it that increased amount of capital would be obtained. It will be within the recollection of those who attended the meeting at the Colonial Office when the objections of the Company to the Electric Power Ordinance were presented that the Company were informed that the Protectorate Government would not exercise their option under the Concession of purchasing the Company's existing undertaking upon its expiration in 1932. In that event not only would the Company be in the position that the Government will not exercise their option under the Concession of taking over the existing plant but any further expenditure on plant which they may install during the short period of the Concession which remains unexpired will also not be made good to them. The Company are not prepared in these conditions to install plant which they are under no legal obligation to provide. We desire, however, to add that in order to meet the growing requirements of the Nairobi district the Company would be prepared to incur the expense of installing further steam plant provided that some satisfactory arrangement is arrived at which would protect the Company against any capital loss at the termination of the period of their concession.

50. We believe the above to be a fair summary of the existing position. It is clear that until the Company know that the Secretary of State concurs in their view that the terms of the Concession impose upon them no obligation to supply electricity except such as is generated from power obtained from the Falls therein referred to, or (in the event of the Secretary of State desiring to challenge their contention)

agreed which would have the effect of annulling the Company's undertaking from the operation of the general Ordinance and this was embodied in an amending Ordinance.

(C) The demand for the supply of electricity within the area of the Company's Concession is increasing and the Company anticipates that it may very soon be necessary to make additional expenditure to meet it than increased means of supply should be obtained. It will be within the recollection of those who attended the meeting at the Colonial Office when the objections of the Company to the Electric Power Ordinance were presented that the Company were informed that the Protectorate Government would not exercise their option under the Concession of purchasing the Company's existing undertaking upon its expiration in 1932. In that event not only would the Company be in the position that the Government will not exercise their option under the Concession of taking over the existing plant but any further expenditure on plant which they may install during the short period of the Concession which remains unexpired will also not be made good to them. The Company are not prepared in those conditions to install plant which they are under no legal obligation to provide. We desire, however, to add that in order to meet the growing requirements of the Nairobi district the Company would be prepared to incur the expense of installing further steam plant provided that some satisfactory arrangement is arrived at which would protect the Company against any capital loss at the termination of the period of their concession.

5. We believe the above to be a fair summary of the existing position. It is clear that until the Company knew that the Secretary of State concurred in their view that the terms of the Concession impose upon them no obligation to supply electricity except such as is generated from power obtained from the Falls therein referred to, or (in the event of the Secretary of State desiring to challenge their contention)

UNTIL a legal decision is obtained upon the point, no practical progress can be made in negotiating for the provision of additional power.

Under the circumstances the Secretary of State will, we feel sure, appreciate the importance to the Company of arriving definitely and forthwith whether or not we have met with their view of the proposals. We therefore venture to ask for an answer with the least possible delay.

Should the Secretary of State be advised to challenge our contention we suggest that the matter be referred to arbitration before a single King's Counsel to be agreed upon forthwith. His award could be stated in the form of a special case and a decision of the Courts obtained before the end of the year. This course would enable all parties to know exactly where they stand and arrangements might then, we hope, be concluded which would be satisfactory to all concerned.

Yours, Sir,

Your obedient servants,

FOR THE EASTON ELECTRIC POWER & LIGHTING COMPANY LIMITED.

G. A. Higlett

Secretary

until a legal decision is obtained upon the point, no practical progress can be made in negotiating for the provision of additional power.

Under the circumstances the Secretary of State will, we feel sure, appreciate the importance to the Company of ascertaining definitely and forthwith whether he does or does not accept the latter view of their obligations. We therefore venture to ask for an answer with the least possible delay.

Should the Secretary of State be advised to challenge our contention we suggest that the matter be referred to arbitration before a single King's Counsel to be agreed upon forthwith. His award could be stated in the form of a special case and a decision of the Courts obtained before the end of the year. This course would enable all parties to know exactly where they stand and arrangements might then, we hope, be concluded which would be satisfactory to all concerned.

Yours faithfully,

Your obedient servants,

FOR THE SAISON ELECTRIC POWER & LIGHTING COMPANY LIMITED.

G. A. Higlett

Secretary.

Kenya.

47769/21.

505

MJ

20 Oct
Dona 600 6/12

DRAFT

KENYA,
1571
PO BOX 1571
NORTH BRIT.

DOWNING STREET,
15

MINUTE.

Mr. Bottomley, 14/10/21.

Mr. Bingle 13/10/21

Mr.

Mr. Ginnell

Mr. H. Lambert

Mr. H. Wood 17

Mr. Wood

Mr. Wood

Mr. Church

for action

26357
I have written a letter to the Nairobi Electric Power and Lighting Company (Limited) regarding their contention that they are under no obligation to provide power for generating electricity beyond the quantity obtainable from the Falls provided by Government under the Concession.

Sir,

With reference to my despatch No. 807 of the 26th of May, I have the honour to transmit to you the accompanying copy of a letter from the Nairobi Electric Power and Lighting Company (Limited) regarding their contention that they are under no obligation to provide power for generating electricity beyond the quantity obtainable from the Falls provided by Government under the Concession.

I should be glad to receive your views and those of your legal advisers on the position by telegraph and more fully in a subsequent despatch. The points which appear to me to require special

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Handwritten message from Mr. 47790
referred to table

electricity within the District. I shall be glad to learn whether your Legal Advisers concur in this view.

(d) If the Company's request for arbitration is refused, it is to be presumed that they will fall into default in their supply of electricity and that after six months the power to cancel the Concession will be used. In that event the case will certainly go to arbitration and it is a question for consideration whether the balance of ~~the concession~~ lies in immediate or a postponed arbitration.

DRAFT.

MINUTE

(e) Under the terms of the Concession it is clearly intended that any arbitration should take place in East Africa, but I have no doubt that the Company's suggestion that it should be held in this country will be strongly expressed upon me. ^{It is held in this case} In that case it is inevitable that the hearing of the arbitration should lead to a reference to the Court on legal points, and ~~an~~ ^{an} expense ~~of~~ ^{of} litigation would be involved, which, whatever the result of the arbitration might be, I am anxious to avoid. On the other hand, if the matter is allowed to run until the Company defaults, the arbitration will ^{not} ~~not~~ ^{automatically} take place in East Africa.

It is probable that the Company could be
 anxious

wishes to avoid this contingency ~~but~~
though they would be willing to agree
to a ~~compromise~~ ^{to a compromise in the case of}
to an immediate arbitration in this
country ~~as the understanding that the~~
arbitration award would be binding
without any reference to the Court
of Arbitration. I should be glad to

possible course might usefully be
pursued.

I shall be glad to furnish you with a full expression of your
views ~~on the subject~~ ^{on the subject} ~~as far as possible~~
and ~~will~~ ^{will} ~~be glad to~~ ^{be glad to}
discuss the points raised by the
Company ~~with~~ ^{with} ~~the~~ ^{the} Colonial Government.

I am, etc.,

W. J. H. G. G. G. G.