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Nairobi Electric Light Concession

1919

May

Previous Paper.

3287

Protests against new Electric Ordce. Requests protective clause excluding it from the operation of the Ordce. Asks for report of discussion of Leges Council resp. concession

*[Handwritten signature]*  
for [unclear]

? (1) Tel. to Gov. that we have a letter from the L<sup>o</sup> claiming that the extension of the 1906 agreement has taken effect, probably against the D.D. & generally, & asking for a report of the discussion in Leg. C. as in the middle of April & copy of amendments then made. Ask for them by first mail.

(2) Send copy of letter to Gov. by Lt. and ask for previous a further letter

(3) Mr. Bunker & I to consider in detail

25/5/19  
20/5/19  
27/5/19

Copy for H. H. C. con. 4 June 1919

Subsequent Paper.

3192

50, MARK LANE,

446

LONDON, E.C.3.

26TH MAY, 1919.

31757

Sir,

With reference to your letter of the 14th March (reference No. 12729/19), we now beg to enclose certain representations on the new Electric Ordinance of the British East Africa Protectorate.

1. The Nairobi Electric Power and Lighting Company Limited (hereinafter called "The Company") was incorporated in England on the 23rd February 1906, mainly with the object of taking over and carrying out a Concession in the form of an Agreement dated the 26th July 1906 made between Clement Hirtzel thereinafter referred to as the Contractor and the Crown Agents for the Colonies acting for and on behalf of His Majesty's High Commissioner for the East Africa Protectorate, for the provision and supply of electricity for lighting and power purposes in the district of Nairobi.

2. The principal provisions of the Agreement are as follows:-

(a). The Nairobi District is defined by clause 1 (f) to mean and include.

(1) The Township and all other portions of the area comprised within a circle drawn at a radius of 15 miles from the present office of the Sub-Commissioner in the Township, and also

(2) Such portions of the said district between the said area and the Ruera Falls thereinafter mentioned as shall be situate

Under Secretary of State  
for the Colonies,

Colonial Office,

London, S.W.1.

within 3 miles of any part of the main laid by the Contractor between the said area and the said Falls under the contract.

(b). Clause 2 confers upon the Contractor the exclusive right to supply electricity for lighting and power purposes in the Nairobi District for a term of 10 years from the 8th April 1906.

(c). Clauses 3, 4 & 5 deal with the grant of facilities for water power, leases and way leaves respectively.

(d). The terms for the supply of electricity are regulated by clause 11 which provides for a maximum charge of 8 annas per English Board of Trade unit in the case of electricity supplied for lighting purposes, and of 3 annas per like unit in the case of electricity supplied for power purposes. The clause also provides for alternative methods of charging and for the cost of electric lines laid upon the property of Consumers.

Provision is also made for the supply of electricity for the Municipal Committee of the Township of Nairobi.

(e). By clause 15 the rights of the Contractor are declared to be subject to the provisions of the Indian Electricity Act 1887 and it is further declared that nothing contained in the Concession is to exempt the Contractor from any further legislation or regulations applicable to electrical undertakings in the Protectorate.

(f). Clause 20 provides for an extension of the original term of 10 years for a further period of 15 years provided that during the original term of 10 years the Contractor shall have provided a sum to the reasonable satisfaction of the H...itioner.

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it being, it is submitted, sufficient to point out that on  
no occasion has notice been given as provided by clause 21  
in the event of the Company being in default and that in the

absence of such notice the term of the Concession has become extended and the further period of 15 years from the 31st July 1916 is now in force.

5. The Ordinance as drafted contains no reference whatever to the Company or to their rights, notwithstanding the fact that the Company are believed to be the only concessionaires in the Protectorate who are at work under the terms of an existing Agreement with the Government and are alone entitled to provide a supply of electricity within the Nairobi district. Yet the effect of the Ordinance would be to open the District to competition or encroachment and thereby greatly to impair the value of the present Concession. The immense number of restrictions which would become applicable to the Company's undertaking particularly in the cases of any future works which they may undertake, are utterly inconsistent with the terms of the Concession and would inflict on the Company hardship, loss, and expense and in effect confiscate a large part of the shareholders property.

6. No provision is made by the draft Ordinance for compensation to the Company for any loss or prejudice which it will suffer by reason of the proposed legislative interference with its rights, in respect of either (a) the introduction of competition into the Nairobi District; (b) interference with the existing undertaking of the Company and their methods of carrying on their business or (c) additional expense imposed on the Company in connection with existing and future works for the supply of electricity.

7. By the grant of the Concession and the subsequent consent of H.M. Government to its transfer to the Company

there became vested in the Company valuable rights upon the faith of which the shareholders have invested their money and the Company has incurred heavy expenditures. If a contract of this kind had been made with the Home Government in regard to rights in Crown property in England, Parliament would never sanction a general Act of Parliament which would have the effect of confiscating those rights, or otherwise impairing them except upon the terms of full compensation. The National Telephone Company's case may serve as an illustration of the attitude of Parliament even where the Government itself had entered into no contract. Here the Government itself made the Contract; and the same Government now proposes legislation which will deprive the other contracting party of the benefits conferred by the Government's own contract. The case surely has only to be stated to demonstrate the Company's absolute right to a protecting clause which shall preserve its contractual position intact, or if in the public interest any interference is necessary shall confer upon the Company a right to full compensation. With the above preliminary submission, we proceed to somewhat more detailed observations on the proposed Ordinance.

Art 3 (1) is general and is clearly intended to include the Nairobi Company. This provision is objected to on the ground that by including the Nairobi Company, it submits that Company to all terms of the Ordinance, express or implied, unless expressly excepted. This is dealing with the matter the wrong way round. Prima facie the Government should honour its contracts and not seek to interfere with contractual rights already granted - particularly those granted by itself except:-

- (a) where some definite and specific ground of public policy requires it, and
- (b) upon terms of the fullest compensation.

As drafted, the clause imposes upon the Company the burden of searching through the Ordinance in order to ascertain every conceivable contingency in which it might be affected and the risk of erroneous interpretation of its provisions - no small risk with an instrument so long, so complex and so obscure in its phraseology.

It is therefore submitted that if there be any terms of the Ordinance which the public interest requires should be made applicable to the Nairobi Company the result should be attained by a clause excluding the Company from the operation of the Ordinance altogether except in regard to such specific terms; and that in regard to these, the Company should by express provisions in the clause itself, be given full compensation.

8. Although it is not for the Company to point out all the particular provisions of the proposed Ordinance which must or may prejudicially affect them, they desire, in deference to Viscount Milner's request, to draw attention to the more obvious points while expressly stating that they do so by way of illustration. It is impracticable from the nature of the case to prepare an exhaustive list. The Ordinance is so far reaching in its scope and so complicated in its provisions that it is impossible to do so at the present time. Many points, it is feared, will arise in the future which no one at present can foresee. The following points are submitted as illustrating the nature of the Company's objections to the draft Ordinance.

(A) Art. 3 is Fundamental.

Sub-clause (1) has already been referred to in paragraph 7 supra.

Sub-clause (2) relates to the application of the Ordinance to Prior Licensees and constitutes an obvious infraction of the terms of the Company's concession.

Sub-clause 2 (b) would render the existing works of the Company subject to the provisions of the Ordinance. It is not clear as a matter of interpretation whether the whole of the provisions of the Ordinance are intended to apply to the Company's existing works or only those provisions and regulations which relate to safety and other matters specifically enumerated. In either case for the reasons stated in paragraph 5 supra the Company submit that they are entitled to a clear statement of the Articles by which their undertakings would be affected and of the precise manner and extent in and to which it is proposed that those articles should apply to their undertaking, an opportunity of considering the effect of such articles upon their undertaking and of raising objections to such Articles as may derogate from their rights under their Concession, and to protection from undue and unnecessary interference.

The effect of Sub-clause 2 (a) is to prevent the Company from obtaining any extension or amplification of their powers under the existing concession without first surrendering it, while by the operation of clause 2 (c) all works which the Company may in future undertake under the powers conferred by the existing Concession are rendered subject in all respects to the provisions of the Ordinance and to any regulations made by the Governor-in-Council.



Particular attention is directed to the provisions of sub-clause 2 (g) the effect of which is to render the existing works of the Company entirely subject to the provisions of the Ordinance in the event of the Company desiring, or being called upon under the terms of the Concession, to supply electricity in any part of the area included in their existing concession which is not already being supplied at the date when the Ordinance becomes effective. The result would be that an extension, however small, beyond the present area of the Company's supply would render the whole of the Company's undertaking subject to the provisions of the Ordinance for all purposes.

Even in the area of supply as defined by the Concession no further licence would be obtainable if the Governor-in-Council in the exercise of the absolute discretion conferred upon him by sub-clause 2 (d) thought fit to refuse it; while unrestricted power is conferred upon him by Art 7 to grant licences to competitors in the Company's area.

(B). The application of the provisions of the Draft Ordinance to the supply of new consumers or the execution of necessary works in the area at present served by the Company would in practice lead to absurd results. Under Art 49 the Company will be required to instal a new system of distribution to future consumers. Further effect is given to this policy by Art 50, under which the Company (even on the footing of its remaining a Prior Licensee entitled to supply at the existing pressure over the area now

*After the present order is made the Company will be under a standstill as to the location of their existing works and will be required to comply with the Ordinance in respect of any extension of their area of supply. The Ordinance will be applied to the whole of the Company's undertaking and will render the whole of the Company's undertaking subject to its provisions. The result would be that an extension, however small, beyond the present area of the Company's supply would render the whole of the Company's undertaking subject to the provisions of the Ordinance for all purposes. Even in the area of supply as defined by the Concession no further licence would be obtainable if the Governor-in-Council in the exercise of the absolute discretion conferred upon him by sub-clause 2 (d) thought fit to refuse it; while unrestricted power is conferred upon him by Art 7 to grant licences to competitors in the Company's area. The application of the provisions of the Draft Ordinance to the supply of new consumers or the execution of necessary works in the area at present served by the Company would in practice lead to absurd results. Under Art 49 the Company will be required to instal a new system of distribution to future consumers. Further effect is given to this policy by Art 50, under which the Company (even on the footing of its remaining a Prior Licensee entitled to supply at the existing pressure over the area now*

covered) would be forced to supply at the new pressures on any new lines it may run. The result would be that the Company must maintain two distributing systems and two kinds of transformers. A system under which it may be necessary to supply two adjoining houses at different pressures and under different systems of distribution stands self-condemned.

*note has been*  
*inserted in comparison*  
*of the two systems*  
*for the*

Art 50 (2) would put the Company completely in the hands of the Protectorate Authorities. The Clause is far too wide and would lead to endless delays and expense. All kinds of detailed information (probably obtained only after long experience and at great expense) might be called for which it is contrary to the practice of a designer of a scheme to disclose.

*50 (2) bears*  
*interpretation*

Moreover Art 50 (1) would prevent the Company from connecting up an individual consumer's premises to its mains without the consent of the Governor-in-Council under the penalty of loss of their Concession. In connection with the Company's objections to Articles 49 & 50, it should be recalled that the existing system and pressure were adopted on the advice of the Consulting Engineers to the Company, whose appointment was approved by the Protectorate Government under the provisions of clause 10 of the Concession.

*next page*  
*contains*

(9). It is assumed (although it is by no means clear) that the existing works of the Company will remain unaffected by the provisions of

and subject to immediate assessment and payment of full compensation for any loss or damage, present and prospective, which may result to the Company from the application of such special provisions to its undertaking.

- (b) That in the event of His Majesty's Secretary of State not agreeing to the insertion of such clause, the Company be heard at the Colonial Office in support of their objections as on a Private Bill in Parliament both upon the Preamble and upon Clauses.

Whilst the above memorandum was awaiting approval by our Board of Directors, we received by mail a copy of the East African Standard of the 19th April 1919 purporting to report a discussion in the Legislative Council upon the Electricity "Bill". Mr. McBlain who was sworn in at the meeting as a special member was, we may remind you, the consulting engineer who signed the Engineers' report on behalf of Messrs. Swift Rutherford & Company, Limited, when they applied in October last to His Excellency the Governor for a licence for a new Generating Station on the Maragua River.

He is reported as proposing an amendment which would remove any possible doubt of a licensee of any description from (sic) generating or operating electrical energy except under the terms of the "Bill", and that if a present licence holder fail to apply for a new licence, he will be liable to have his plant and machinery compulsorily sold to someone else.

Under this proposed amendment the rights of the Nairobi Company would be completely repudiated by the Government and a competitor, as for instance Messrs. Swift Rutherford & Company, would be entitled to come in and buy them out.

Mr. McBlain proceeded to allege that the Nairobi Company's concession had run out. Mr. Rodwell then said that if the Company should fail to acquire a new licence under the terms of the amendment, the Governor can authorise someone to buy up the Company's plant. His Excellency replied - "I understand that is so".

In the memorandum we have submitted above, we venture to express the view that the terms of the proposed ordinance were ambiguous, and submitted that it was of the greatest importance that the Company's rights under the Government's own concession should be clearly recognised and established. The discussion which has taken place in the Legislative Council shows how well-founded the anxiety of the Nairobi Company is, that the occasion of introducing the new ordinance might be utilised for confiscating the Company's property: for payment for machinery and plant merely would obviously be no compensation for the expropriation of the Company's whole undertaking at a time when there are 12 years of the concession still to run.

On the suggestion in the discussion that there was some tacit agreement with the Company we would state that no one on behalf of the Company has ever made or had power to make any agreement with the Governor other than the draft agreement which was sent back to the Solicitors for the Crown Agents for the Colonies in London in 1916, approved on behalf of the Nairobi Company.

We have only to add that the discussion which has taken place makes it very urgent in our respectful submission that the Colonial Office should give us the protective clause asked for in para 9 (a), or alternatively the hearing asked for in para. 9 (b), of the above memorandum.

We would also respectfully ask that an official report of the discussion in question should be furnished to us by the Colonial Office, and a copy of the proposed amendments.

We have the honour to be,

Sir,

Your obedient servants,

For and on behalf of

THE NAIROBI ELECTRIC POWER & LIGHTING COMPANY, LIMITED.



Secretary.

M.I. 31757/19 SAP

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31st May 1919

DRAFT

the Light Cavalry

Gentlemen,

I am etc to

ack. the receipt of  
your letter of the 26<sup>th</sup> of

May, & to inform you  
that a further letter regarding

the subject of ordnance in  
the CAP will be addressed

to you - I am comd

I am etc

Edw G. GRINDLE

MINUTE

Mr. Horn 29.5.19  
Mr. Palmer for 29

- Mr.
- Mr. Grindle
- Sir H. Lambert
- Sir E. Holt
- Sir G. Fisher
- Col. ...
- ...

2 drafts  
to you  
31757