

Case No: 62229
Event No: 548963
Dec. No: 44/10/COL

NON-CONFIDENTIAL VERSION

EFTA SURVEILLANCE AUTHORITY DECISION
of 10 February 2010
on the electricity delivery contract
between Nord-Trøndelag Elektrisitetsverk and Södra Cell Folla AS
(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD to the Agreement on the European Economic Area², in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴.

Whereas:

I. FACTS

1. Procedure

The Authority learnt about the power contract between Nord-Trøndelag Elektrisitetsverk FKF (hereinafter referred to as “NTE”) and Södra Cell Folla AS (hereinafter referred to as “Södra Cell”) and some other activities through an article titled “Politiske krafttak”, which was published in Dagens Næringsliv on 26 March 2007.

By letter dated 30 May 2007 (Event No. 422612), the Authority requested information from the Norwegian Authorities regarding some of the circumstances mentioned in the newspaper article. By letter of 4 September 2007 (Event No. 438859), the Norwegian Authorities replied to the Authority’s first request for information.

On 17 July 2009 the Authority sent a second information request to the Norwegian Authorities (Event No. 523342), focusing exclusively on the power delivery contract between NTE and Södra Cell. On 7 September 2009 the Authority received the Norwegian Authorities’ reply to the second information request (Event No. 529417).

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

On the basis of the information available to the Authority, of all measures mentioned in the article “Politiske krafttak” only the contract between NTE and Södra Cell might at the outset potentially involve state aid. Thus, this contract is dealt with in the present decision.

2. Description of the measure

2.1. NTE and Södra Cell

Until 20 June 2007, NTE was a county municipal company (“fylkeskommunalt foretak”), 100% owned by Nord-Trøndelag County Municipality.⁵ The county municipality exercised control over NTE’s activities in line with the Local Government Act of 25 September 1992 No.107 and the company’s ownership and representation arrangements. The main activities of NTE are related to the production, sale and transport of electricity and related construction and commercial activities.

Södra Cell Folla is a mill located at Follafoss in Verran municipality that produces chemi-thermomechanical pulp. It is a subsidiary of the Swedish Södra Group, which produces paper pulp, wood products and bio fuels, and which has also become a large producer of electricity during the recent years.

2.2. Power contract between NTE and Södra Cell

On 15 August 2002, NTE and Södra Cell entered into an agreement regarding the delivery of electricity for the years 2003 through 2010. The following quantities and prices were agreed:

In 2003, 90 GWh should be delivered at a price of [...] øre/kWh and a further 70 GWh at a price of [...] øre/kWh. The average price for the total sum of 160 GWh in the year 2003 thus amounts to [...] øre/kWh.

For the years 2004-2006, 120 GWh per year were agreed to be delivered at the following fixed prices:

2004: [...] øre/kWh

2005: [...] øre/kWh

2006: [...] øre/kWh

The prices for the years 2007 through 2010 were not determined at the time the agreement was concluded, but were to be negotiated in 2006 at the latest.

On 29 September 2006, NTE and Södra Cell entered into an additional agreement covering the year 2007, in which the price for any electricity deliveries up to an amount of 120 GWh was determined as follows: Södra Cell was to pay a) a fixed component of [...] øre/kWh and b) [...]. In accordance with the latter clause, Södra Cell paid an additional amount of [...] million NOK for the electricity delivered by NTE in 2007. The average price paid by Södra Cell for electricity in the year 2007 thus amounts to [...] øre/kWh.

On 11 December 2007 NTE and Södra Cell entered into a supplementary agreement for 2008, according to which NTE would deliver 120 GWh to Södra Cell at the monthly average spot price plus a mark-up of [...] øre/kWh.

⁵ On 20.6.2007, NTE was transformed into a private limited company (“aksjeselskap”) called Nord-Trøndelag Elektrisitetsverk Holding AS. Nord-Trøndelag County Municipality holds 100% of the shares in this company.

On 23 December 2008 the parties agreed on the delivery conditions for 2009, according to which NTE would deliver 160 GWh to Södra Cell at the monthly average spot price plus a mark-up of [...] øre/kWh.

3. Comments by the Norwegian authorities

According to the Norwegian Authorities, the prices for the years 2003-2006 were determined through negotiations between the parties. The basis for these negotiations were the prevailing market prices, including the prices set by NordPool, at the time the contract was entered into (i.e. in 2002).

As regards the electricity prices for 2007, the Norwegian Authorities state that these were agreed in autumn 2006 with Södra Cell's difficult economic situation in mind. Furthermore, NTE wanted to continue its long-standing commercial relationship with Södra Cell and both companies expected the Norwegian Government to implement a national strategy for electricity supplies to power-intensive industries, which would result in lower electricity prices. In addition, NTE wanted to "build bridges" because of the repercussions the closing down of Södra Cell would have for the economic viability of the entire region.

In their letter of 3 September 2009, the Norwegian Authorities provided data regarding the market price of electricity in the years under investigation. First, the Norwegian Authorities referred to St.prp. nr 52 (1998-99), wherein the Norwegian Ministry of Petroleum and Energy sets forth the prices for electricity under certain types of regulated power contracts.

Secondly, the Norwegian Authorities provided information regarding the closing prices at NordPool for standardised yearly (financially settled forward) contracts as of 15 August 2002.⁶ These figures also reflect the price NTE would have obtained if it had sold the electricity at NordPool instead of selling it to Södra Cell.

Thirdly, the Norwegian Authorities provided data compiled by Statistics Norway (Statistisk Sentralbyrå, hereinafter referred to as "SSB") on the average prices in Norway for power deliveries to the wood products (treforedling) industry during the years 2002 through 2007.

II. ASSESSMENT

1. The presence of state aid

1.1. State aid within the meaning of Article 61(1) EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

"Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."

For state aid within the meaning of Article 61(1) of the EEA Agreement to be present, the aid must be granted through State resources; it must confer a selective economic advantage upon the recipient(s); the beneficiary must be an undertaking within the

⁶ At this time, prices were not yet available for 2006 and onwards.

meaning of the EEA Agreement and the aid measure must be capable of distorting competition and affecting trade between the contracting parties.

1.2. Presence of state resources

In the case at hand, there is no direct transfer of money from the county municipality to Södra Cell. However, it is established case law that favourable conditions under a bilateral contract between a private undertaking and an undertaking that is 100% owned and controlled by the state can involve state aid.⁷ In particular, the public company albeit pursuing political goals (such as, *for example*, keeping industry and thus jobs in the region) must act on commercial terms.⁸

In the present case, NTE may have been used as a vehicle to realise the County Municipality's industrial policy aims. At the time relevant for this decision, NTE was a county municipal company, 100% owned by Nord-Trøndelag County Municipality. According to the Local Government Act of 25 September 1992 No.107, such undertakings are part of the county municipality and the highest authority of the company is the county municipality council, which also elects the board members.⁹ The Authority is of the view that these rules make the contract imputable to the public sphere, even though no members of the county municipality council may have been directly involved in the decisions taken by NTE.

1.3. Advantage conferred on Södra Cell

In order for this condition to be fulfilled, the contract with NTE must confer on Södra Cell a financial advantage that relieves it of charges that should normally be borne from its budget. In the case at hand, an advantage would be present if the power price in the contract between NTE and Södra Cell is lower than the market price prevailing at the relevant time.

As regards the years 2008 and onwards, the Authority considers that the linking of the electricity price to the monthly average spot price plus a mark-up ensures that power deliveries are carried out at market terms. Thus, in the following the Authority will concentrate on the electricity prices for the years 2002-2007.

1.3.1. Data

In order to establish the market price, the Authority has assessed several sets of data.

First, the Authority refers to the closing prices at NordPool for standardised yearly (financially settled forward) contracts as of 15 August 2002, i.e. when the contract between NTE and Södra was concluded. At this time, the relevant figures were available for the years 2003 through 2005. The Authority understands that the parties regarded these prices as a relevant price guideline during their negotiations since these figures reflect the price NTE would have obtained if it had sold the electricity at NordPool instead of selling it to Södra Cell.

Second, the Authority relies on price data compiled by SSB on the average prices for power deliveries to the paper and paper products industry during the years 2002 through

⁷ See, for example, joined cases 67, 68 and 70/85 *Van der Kooy v Commission*, [1988] ECR 219.

⁸ The market investor principle, see for example Case 323/82 *Intermills v Commission*, [1984] ECR 3809, and Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v Commission*, [1985] ECR 3727.

⁹ Reference is made to page 1 of the Norwegian Authorities' reply to the Authority's first information request.

2007.¹⁰ This set of data covers power contracts within the same type of industry as Södra Cell; however it is not entirely accurate insofar as it covers the entire country and includes all types of contracts, i.e. fixed price/long term contracts and contracts tied to the spot price.

Third, the Authority relies on an overview of prices of electric energy for power deliveries to the energy-intensive manufacturing and pulp and paper industry provided by SSB.¹¹ This overview distinguishes between different types of contracts, but does not contain separate data for the paper and paper products industry.

Finally, the Authority is of the opinion that the prices set forth in section 5.5, table 5.1. of St.prp. nr 52 (1998-99) cannot be regarded as a relevant standard of comparison in this case. The prices set forth in this document refer to certain types of publicly regulated long-term electricity contracts (duration: 20 years as of 1 January 2001) between Statkraft SF and private companies.¹² However, the contract assessed in the present decision is not sufficiently long-term to be comparable to these contracts, especially as regards the prices negotiated on a yearly basis for the years 2006 and onwards.

1.3.2. Assessment

The following table provides an overview of those prices the Authority has taken into account when establishing the market price at the time under investigation and compares the result to the prices paid by Södra Cell.

Price in øre/KWh	2003	2004	2005	2006	2007
NordPool forward market in 2002	16.75	17	17.72	n/a	n/a
SSB, Paper and Paper Products	16.9	18	19.2	20.7	22.5
SSB, Energy-intensive manufacturing and pulp and paper industry	11.1	11.8	12.2	13	16.8
Average	14.92	15.6	16.37	16.85	19.65
Contract NTE/Södra Cell	[...]	[...]	[...]	[...]	[...]
Difference	[...]	[...]	[...]	[...]	[...]

The table shows that the electricity prices paid by Södra Cell were consistently higher than or equal to the average electricity prices.

¹⁰ Data compiled by SSB, StatBank Norway, Subject 10: Industrial activities, Table 05155: Prices for electricity and grid rent, incl. consumption and excl. VAT (øre/KWh), prices do not include grid rent. Available at: http://statbank.ssb.no/statistikkbanken/default_fr.asp?PLanguage=1

¹¹ Available at: http://www.ssb.no/english/subjects/10/08/10/elkraftpris_en/tab-2010-01-11-04-en.html

¹² See St.prp. nr. 52 (1998-99), Om Statkrafts industrikontrakter og leieavtaler, available at <http://www.regjeringen.no/nb/dep/oed/dok/regpubl/stprp/19981999/stprp-nr-52-1998-99-.html?id=202394>, with further explanations in St.meld. nr. 29 (1998-99), Om energipolitikken, available at <http://www.regjeringen.no/nb/dep/oed/dok/regpubl/stmeld/19981999/Stmeld-nr-29-1998-99-.html?id=192287>

As stated above, none of these sets of data is entirely comparable to the contract between NTE and Södra Cell.

The prices on the NordPool forward market in 2002 are the prices that NTE would have obtained if it had sold the electricity at NordPool instead of selling it to Södra Cell. Thus, the figures do not necessarily reflect the market prices paid by the paper and pulp industry under long-term electricity contracts.

As regards the data compiled by SSB, the Authority observes that the first set of data includes contracts tied to the spot price, which was not the case for the NTE/Södra Cell contract in the years in question. The second set of data does not include such contracts (they are listed separately), but refers to the energy-intensive manufacturing and pulp and paper industry rather than focusing exclusively on the latter.

The Authority, however, considers the average of all the prices available as a good indication for the prices payable under contracts similar to the one concluded between NTE and Södra and observes that the electricity prices paid by Södra Cell are consistently higher than that average. Furthermore, a general assessment of all the data available leads to the conclusion that the prices paid by Södra Cell were inside the normal market price range for comparable contracts during the relevant years. Thus, the figures indicate that no advantage was conferred upon Södra Cell during the years 2003 through 2007.

This assessment holds true even in the light of the Norwegian Authorities' reply to the Authority's first information request, according to which there was a clear intention on the side of NTE to grant favourable terms in order to give Södra Cell an incentive to continue its production in the region. In particular, the clause according to which Södra Cell in 2007 had to pay [...] appears to be commercially rather unusual.

However, as it turns out, the said clause led to Södra paying [...] øre/KWh instead of [...] øre/KWh in 2007. The Authority thus concludes that even though there may have been an intention on the side of NTE to grant state aid to Södra Cell in 2007, it turns out that the prices finally paid by Södra Cell were above or equal to the average market conditions. Thus, the effect of the clause was that no aid was granted to Södra Cell.

III. CONCLUSION

On the basis of the foregoing assessment, the Authority considers that the electricity contract between NTE and Södra Cell does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the electricity contract between NTE and Södra Cell does not involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 10 February 2010

For the EFTA Surveillance Authority

Per Sanderud
President

Kurt Jaeger
College Member