

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 6th December, 2018

Present:

Shri M.K. Shankaralinge Gowda ..	Chairman
Shri H.D. Arun Kumar ..	Member
Shri D.B. Manival Raju ..	Member

O P No. 88/2017

BETWEEN:

Brindavan Hydropower Private Limited,
No.103, Eden Park,
No 20, Vittal Mallya Road,
Bengaluru – 560 001.

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PETITIONER

[Represented by Sri M.S. Raghavendra Prasad, Advocate]

AND:

- 1) Bangalore Electricity Supply Company Limited (BESCOM),
By its Managing Director,
Nrupathunga Road,
Bengaluru – 560 001.
- 2) Gulbarga Electricity Supply Company Limited (GESCOM),
By its Managing Director,
Station Road,
Kalaburagi – 585 102.
- 3) Hubli Electricity Supply Company Limited (HESCOM),
By its Managing Director,
P.B. Road,
Hubballi - 580 029.

- 4) Karnataka Power Transmission Corporation Limited (KPTCL)
By its Managing Director,
Kaveri Cauvery
Bengaluru – 560009.

.. **RESPONDENTS**

*[Respondent 1 represented by Justlaw, Advocates,
Respondent 2 represented by Indus Law, Advocates,
Respondent-3 deleted, vide Order dated 21.12.2017,
Respondent-4 held ex-parte, vide Order dated 23.11.2017]*

ORDERS

- 1) This Petition is filed, under Section 86 read with Section 129 of the Electricity Act, 2003, praying to:
- (i) Pass an Order, directing the Respondent No.1, to pay the Petitioner a sum of Rs.9,62,779/- (Rupees Nine Lakhs Sixty-Two Thousand Seven Hundred and Seventy-Nine) only with interest, at the rate of 18% per annum, from 06.05.2015 till date of repayment;
 - (ii) Pass an Order, directing the Respondent No.2, to pay the Petitioner a sum of Rs.2,39,168/- (Rupees Two Lakhs Thirty-Nine Thousand One Hundred and Seventy-Nine) only with interest, at the rate of 18% per annum, from 06.05.2015 till date of repayment;
 - (iii) Pass an Order, directing the Respondent No.3, to pay the Petitioner a sum of Rs.3,46,058/- (Rupees Three Lakhs Forty-Six Thousand and Fifty-Eight) only with interest, at the rate of 18% per annum, from 06.05.2015 till date of repayment;
 - (iv) In the alternative, if for any reason the Commission comes to a conclusion that, the Respondent Nos.1 to 3 are not liable to pay, then direct the Respondent No.4, to pay the amounts claimed;

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- (v) Award costs of this Petition to the Petitioner; and,
- (vi) Pass such other Order / directions / guidelines, in the circumstances of the case.
- 2) The facts of the case and the grounds urged in support of its prayers by the Petitioner, may be summarized, as follows:
- (a) The Petitioner owns and operates a 24 MW Hydro Power Plant at Tunga Anicut (Upper Tunga Dam Site), Gajanur Village, Shivamogga Taluk and District (herein after referred to as the "Plant"). The Plant was commissioned on 13.06.2014. The Petitioner had entered into a Wheeling and Banking Agreement (W&BA) on 28.06.2014 (with the KPTCL, the MESCOM and the BESCOM). From 13.06.2014 (the date on which the plant was commissioned) to 28.06.2014 (the date of W&BA), the Petitioner had injected 5,61,400 units of energy to the grid amounting to Rs.19,08,760/- at Rs.3.40 per unit.
- (b) The injection of 5,61,400 units of energy was allocated by the KPTCL to the five ESCOMs. The 1st Respondent was allocated 2,83,170.16 units, the 2nd Respondent was allocated 70,343.42 units, the 3rd Respondent was allocated 1,01,781.82 units and the balance was shared between the MESCOM and the CESC. Consequently, for such energy, the 1st Respondent was liable to pay Rs.9,62,779/-; the 2nd Respondent was liable to pay Rs.2,39,168/-; and the 3rd Respondent was liable to pay of Rs.3,46,058/-.

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- (c) The energy generated and supplied as aforesaid was approved and accounted by the KPTCL in the letter dated 04.05.2015 addressed to all the ESCOMS, wherein the KPTCL had mentioned about the allocation of the total units to the ESCOMS. The letter also mentioned about the money payable by the ESCOMS to the Petitioner. To realise payment for the energy generated and supplied, the Petitioner had raised invoices on the ESCOMs. The MESCOM paid Rs.1,59,191/- and the CESC paid Rs.2,01,565/-. The Respondent Nos. 1 to 3 did not pay the amounts due to the Petitioner despite addressing reminders and issuing a legal notice.
- (d) The Respondent Nos. 1 to 3 have either used the energy for themselves or distributed amongst their consumers and received money for such disbursement. The Respondent Nos. 1 to 3 are guilty of wrongful gain and by their actions, have caused wrongful loss to the Petitioner. Appropriating energy generated and supplied by the Petitioner and not paying, amounts to unjust enrichment. There is no justification for not paying the Petitioner in spite of the fact that two ESCOMS, i.e., the MESCOM and the CESC have paid for the energy in the same transaction.
- (e) The Petitioner would not have generated and supplied power, had it known that it would fall into such a situation. Having generated and supplied power, as described above, the Petitioner is legally entitled to be paid for the same.

3) Upon issuance of Notice, the Respondents entered appearance through their Counsel. During the pendency of the proceedings, it was submitted that Respondent Nos. 2 and 3, have paid the dues claimed against them. The Respondent No.1 filed Statement of Objections, the gist of which may be stated, as follows:

(a) The Respondent is an entity created under statute and is bound by the Electricity Act, 2003. The provisions of the Electricity Act, provide that there is a bar on the Distribution Licensee, from purchasing power in the absence of an Agreement duly approved by the Commission. Section 185 of the Electricity Act, 2003 deals with Repeal and Savings. The said section provides that, the Karnataka Electricity Reforms (KER) Act, 1999 has been saved. Section 17 of the KER Act 1999, requires an Agreement to be executed by a licensee with a generating company for the purpose of purchase of electricity and in the manner approved by the Commission, and any agreement to purchase power, without the approval of this Commission, is a nullity. When there is a specific bar, on the purchase of electricity in the absence of an agreement, the question of directing payment for the same, at a particular rate, would not arise.

(b) The Hon'ble Appellate Tribunal (ATE), in Appeal No.123/2010, in the matter of *Indo Rama Synthetics(I) Ltd vs MSERC*, by order dated 16.05.2011, has held that, the energy injected, without intimation, is to be considered to be unauthorized injection, for which no payment is to be made. The Hon'ble ATE,

subsequently, in Appeal No. 120/2016, in the matter of *Kamachi Sponge & Power Corporation Ltd Vs TANGEDCO and Others*, by order dated 08.05.2017, has held that, no payment is liable to be made for any energy injected, in the absence of a PPA or a schedule, issued by the SLDC. In the present case, admittedly, the Petitioner had neither a PPA nor a W&BA in force, during the period of injection. The Petitioner has not stated, as to why it did not schedule the power on day ahead basis. Neither the Respondent-Distribution Companies, nor the SLDC had any intimation about the generation and the injection of power, by the Petitioner.

- (c) In the letter dated 04.05.2015, issued by the Chief Engineer, the SLDC directed the ESCOMs to pay for the energy injected, from the date of commissioning of plant to the date of signing of W&BA, on the basis of the Order of the Commission in R.P.No.2/2014. In RP No. 2/2014, a concession was made by the Respondent therein that payment would be made, at the generic tariff. The Commission has, thereafter, clarified that the concession given by the counsel / party, with regard to the payment of tariff is not binding in law. Further, the said decision has no application to the facts of the present case.
- (d) The Commission, vide Order dated 26.11.2015, in OP No. 32/2014 (*Lalpur Wind Energy Pvt Ltd vs KPTCL & others*), on the similar facts, has held that, it is improbable for officials of the KPTCL to make any assurances regarding the payment for the energy injected, during the period, between Commercial Operation Date (COD) and the execution of W&BA and if such assurance is

made, the same is not legally binding on the KPTCL. When a generator injects energy without a schedule, the utility is not in a position to make effective use of such energy, as most often, the said energy is injected without intimation. If payment for such energy is directed to be made, it would adversely affect the interest of the ESCOMs, as all the generators would resort to injecting unscheduled energy and claim payments for the same. The ESCOMs cannot be made to suffer for the benefit of unscrupulous, private generators. The Petitioner cannot take advantage of his wrongful action of injecting the unscheduled energy into the grid. The electrical energy injected into the grid cannot be stored, and it would be consumed instantly and there would be no option for the Respondents, either to accept or reject the said energy. Therefore, the averment of the Petitioner that, the Respondents are guilty of unjust enrichment and wrongful gain, cannot be sustained, as such injection of power is detrimental to grid discipline.

- (e) Accordingly, the Respondent No.1 has prayed for dismissal of the Petition.
- 4) We have heard the learned counsel for both parties and perused the records. The Petitioner, during arguments, relied on the decision of the Commission in OP No.7/2016 dated 20.06.2017 (*Sugnaneshwara Hydrel Power Pvt. Ltd. -Vs- GESCO & others*). During arguments, the Respondents produced a copy of the Provisional Interconnection Approval, given to the Petitioner and relied on the judgments of the Hon'ble ATE, in Appeal No.267/2014, decided on 15.04.2015 and Appeal No.120/2016, decided on 08.05.2017, and Order

dated 26.11.2015 of this Commission, in OP No.32/2014, in the case of *Lalpur Wind Energy Ltd. -Vs- KPTCL and others.*

- 5) The learned Counsel for the Petitioner submitted that, the energy was injected into the Grid based on the KPTCL's assurance and the same was not gratuitous injection; that all the ESCOMs, except the BESCO, have paid for their shares of energy and if the BESCO does not pay for its share of energy, the KPTCL has to pay; that the application for wheeling was made on 07.05.2013 and the Petitioner had submitted the W&BA to the KPTCL on 17.09.2013 with a request to execute the same; that the letter of the BESCO to the SLDC dated 05.07.2013, reveals that the customers were identified and the BESCO had expressed concurrence for executing of the W&BA; that the energy injected, during the period, from 13.06.2014 to 28.06.2014 was utilized commercially by the ESCOMs, without any demur or protest, and that allowing the ESCOMs, to utilize the said energy, amounts to unjust enrichment on the part of the Respondents. On the other hand, the learned counsel for the Respondents submitted that the Petitioner has injected the energy into the Grid, without any contract or schedule, and the injection of power into the Grid was against the terms of the provisional interconnection approval dated 22.05.2014; that the application for open access was made on 07.05.2013 and the plant was commissioned on 13.06.2014 and by virtue of delay in commissioning the plant, the application dated 07.05.2013, seeking permission for wheeling and banking of energy, was liable to be rejected or had to be treated, as lapsed due to efflux of time.

6) We have heard the learned counsel for the Parties and perused the material placed on record. The following Issues would arise, for our consideration:

- (1) Whether the Petitioner is entitled to any compensation, for the energy injected into the Grid from 13.06.2014, the date of commissioning of its Plant to 28.06.2014, the date of execution of W&BA?
- (2) Whether the letter of the KPTCL dated 22.12.2014 to the SLDC, to account and pay for the energy injected, between 13.06.2014 and 28.06.2014 and the letter of the SLDC dated 04.05.2015, informing the ESCOMs to pay for the said energy, would create a right in favour of the Petitioner, to claim payment for the energy from the ESCOMs?
- (3) Whether payment by the MESCOM, the CESC, the GESCOM and the ESCOM of their share of energy, would create a right in favour of the Petitioner to claim payment from the BESCOM?
- (4) Whether the KPTCL is liable to pay, in case the BESCOM is held to be not liable to pay for its share, as claimed by the Petitioner?
- (5) What Orders?

7) After hearing the learned counsel for the parties and considering the pleadings, arguments and material placed on record, our findings on the Issues are as follows:

8) **ISSUE No.(1):** *Whether the Petitioner is entitled to any compensation, for the energy injected into the Grid from 13.06.2014, the date of commissioning of its plant to 28.06.2014, the date of execution of W&BA?*

(a) One of the conditions in the Provisional Interconnection Approval dated 22.05.2014, granted to the Petitioner's Plant reads, as follows:

"3) You have to furnish W&B agreement. Further you have to obtain prior approval for banking/accounting of the generated power from the concern before pumping to the grid & it is to be noted that, pumping of power without any contractual agreement is not permitted & for any claim in this regard KPTCL is not responsible. However, you have to obtain prior approval of SLDC for injection of power to the grid."

(b) It also states that the Provisional Interconnection Approval would only provide the technical connectivity of the subject Project with the Grid. Contrary to the terms and conditions, the Petitioner has injected power into the Grid, without there being any contract to inject power into the Grid. It is not the case of the Petitioner that, it was not aware of such conditions, imposed in the Provisional Interconnection Approval.

(c) It can also be noted that, the electrical energy injected into the Grid, cannot be stored, and it would be consumed instantly and there would be no option

for the Respondents, either to accept or reject the said energy. Therefore, it is not a case of enjoying the benefit voluntarily by the utilities, but it amounts to thrusting the same upon them, without having the option of refusing the energy injected.

- (d) Regulation 9 of the KERC Open Access Regulations, 2004, as it existed then, provides for the procedure for applying for grant of open access. Regulation 9(6) of the said Regulations, casts a duty upon the Nodal Agency to communicate the capacity available or otherwise for open access to any applicant, within seven days from the date of receipt of application, in case of short-term open access, and within thirty days from the date of receipt of application in case of long-term open access. The other clauses in Regulation 9 provide that, the open access customer shall enter into W&BA with the concerned and a copy of the same, shall be furnished to the Nodal Agency, and thereafter, within three days from the date of receipt of a copy of the W&BA, the Nodal Agency shall inform the open access customer, the date from which the open access would be available. Therefore, the Nodal Agency has a duty to intimate, within three days from the date of receipt of a copy of the W&BA from the open access customer, the date from which the open access would be available. In the present case, the open access application was for grant of long term open access. Therefore, within thirty days from the date of receipt of the open access application, the Nodal Agency had to communicate to the open access applicant, regarding the capacity available or otherwise, for open access. When the Regulation itself

provides for thirty days' time for disposal of the open access application, the question of negligence on the part of the Respondents would arise, only after the expiry of the said thirty days' period, for awarding compensation.

- (e) Whenever there were unexplained and inordinate delay in granting of Open Access and execution of W&BA by the Utilities, this Commission has allowed compensation to the generator for the energy injected into the Grid, during the delayed period. While supporting the grant of compensation in such cases, Section 70 of the Contract Act, was also referred to, in some of the earlier cases decided by the Commission. However, the Commission has held, in OP No. 32/2014, that Section 70 of the Contract Act, cannot be made applicable in all cases. The analysis of the present case shows that, the principles stated in Section 70 of the Contract Act cannot be applied to the present case. During the course of the arguments, the learned counsel for the Petitioner referred to the decision of this Commission, rendered in the *Sugnaneshwara* case, wherein, the compensation was allowed, for the energy injected into the Grid, from the date of interconnection till the date of execution of the W&BA. The question of allowing compensation on the ground of negligence, depends on the facts of each case. In *Sugnaneshwara* case, payment of compensation was allowed, only for the period beyond 30 days provided in the Regulations, on the premise that the Respondent, therein, had delayed execution of the W&BA without proper explanation. We are of the considered opinion that, in OP No.32/2014, the

issue raised in the present case has been examined by this Commission, in detail and from all angles.

- (f) In the present case, there is no pleading or documents, regarding the date of application for open access, to show when the same was granted or rejected. The Petitioner has not based its case on any delay in execution of W&BA by the utilities. During arguments, the counsel for parties submitted that the application for permission for wheeling and banking was made on 07.05.2013. To verify, whether timely action was taken by both parties thereafter, as provided in the Regulations or to decide on, whether there was any negligence on the part of the Officers of the Utilities, the required material particulars are not provided. In fact, it is not the allegation of the Petitioner that the utilities were responsible for delay in the execution of the W&BA.
- (g) The Petitioner filed a Memo dated 01.02.2018, producing certain documents namely, Petitioner's letter to the KPTCL dated 17.09.2013 seeking completion of the W&BA, Petitioner's letter to the KPTCL dated 09.05.2014 seeking approval for synchronization of the Project, the letter of the KPTCL dated 09.06.2014, granting approval to wheel the energy to certain HT installations in the BESCO and the MESCOM areas, and the letter dated 22.12.2014 of the KPTCL addressed to the SLDC, granting approval, to account the energy and payment towards the same, as per Order dated 15.10.2014 in RP No.2/2014.

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- (h) The Petitioner, in the Memo dated 12.06.2018, has stated that, the buyers were identified, close to an year, prior to the date of commissioning and that there was delay by the BESCO, the KPTCL and the MESCOM, in executing the W&BA. But in support this statement made in the Memo, there is no proof to substantiate the allegation of delay. Along with the Memo, the Petitioner had produced copies of the letter dated 05.07.2013 of the BESCO addressed to the SLDC and the letter dated 08.04.2014 of the Petitioner addressed to the KPTCL. In the letter dated 05.07.2013, the BESCO has referred to the letter of the Petitioner dated 04.07.2013 and mentioned that the Petitioner had, in the said letter, stated that the Project was in the final stages and scheduled to be commissioned in July, 2013. Based on this letter of the Petitioner dated 04.07.2013, the BESCO communicated, to the SLDC, its concurrence to execute the W&BA. Thereafter, in the letter dated 08.04.2014, the Petitioner has stated that, the Government of Karnataka, by Order dated 07.04.2014, granted extension of time, from 01.04.2014 to 30.06.2014 to commission the Plant and requested the KPTCL, to complete the process of the W&BA.
- (j) During the arguments, the learned counsel for the Respondents, submitted that, because of more than a year's delay in the commissioning of the Plant after the application for open access, the application was liable to be rejected or it had elapsed. We note that, even if the date of application is accepted as 07.05.2013, it could not have been taken as subsisting, for more than a year, due to the non-commissioning of the Project. Further, there is no

material to prove that, another application was made to the authorities, seeking open access and that there was delay by the authorities in the execution of the W&BA. Therefore, in the absence of a valid application for open access, relying on the earlier application dated 07.05.2013, the KPTCL and the SLDC could not have directed the ESCOMs, to pay for the energy injected.

- (k) The Petitioner established the Mini Hydel Project of 24 MW and intended to sell power to third parties, through Open access. It is stated that, the Petitioner had filed an application, seeking permission for open access on 07.05.2013, with the hope that the Project would be commissioned within two months. It appears that, no further application, requesting open access was made by the Petitioner. Even then, based on the application dated 07.05.2013, the SLDC issued a letter dated 09.06.2014, intimating approval for the wheeling of power to the consumers, mentioned in the said letter. The Project was commissioned on 13.06.2014 and the W&BA executed on 28.06.2014. There is no allegation of negligence, on the part of the authorities in executing the W&BA. The claim of the Petitioner is only based on the letters of the SLDC and the KPTCL. Without alleging and proving negligence, on the part of the Officers of the authorities, the Petitioner cannot claim compensation for the energy injected, prior to the execution of the W&BA.
- (l) For the above reasons, we answer Issue No.(1), in negative.

- 9) **ISSUE No.(2):** *Whether the letter of the KPTCL dated 22.12.2014 to the SLDC, to account and pay for the energy injected, between 13.6.2014 and 28.06.2014 and the letter of the SLDC dated 04.05.2015, informing the ESCOMs to pay for the said energy, would create a right in favour of the Petitioner, to claim payment for the energy from the ESCOMs?*
- (a) The Electricity Act, 2003, specifically defines the functions of the Transmission licensee, the SLDC and the Distribution Licensees. The KPTCL and the ESCOMs, in the State are independent Companies. The ESCOMs are not subordinate entities managed by the KPTCL or the SLDC, in the matter of procurement of energy and making payment, therefor. The KPTCL or the SLDC could not have directed the ESCOMs, to pay for the energy injected by the Petitioner, without a valid contract and even if, such a direction is given, the ESCOMs have to take an independent decision, regarding their liability to pay for the claims of the Petitioner, as any such direction issued by the KPTCL or the SLDC is not binding on the ESCOMs.
- (b) Further, we note that, the reliance on the decision of the Commission, in RP No.2/2014 by the KPTCL, in the letter dated 22.12.2014 and the SLDC in the letter dated 04.05.2015, is incorrect, as in that case, the Commission had agreed to record the submission of the learned counsel for the KPTCL and the ESCOMs that, the payments would be made, for the power injected by the generating company for the period subsequent to the 30 days period prescribed in the Regulations, instead of the earlier notings in the order sheet, to the effect that, the KPTCL and the ESCOMs would pay for the entire energy

injected, till the date of the W&BA, executed in that case. Thereafter, in OP No.1/2015, the Commission has held that, the generating company is not entitled to any payment for the energy injected, during the said 30 days' period. The KPTCL and the SLDC should have considered this aspect before directing the ESCOMs to pay for the energy, in the instant case. After receiving the intimation from the KPTCL and the SLDC, to pay for the said energy, the ESCOMs should have independently analysed, whether the reliance placed on the decision in RP No.2/2014 by the KPTCL and the SLDC was relevant or not, and, thereafter, taken appropriate decision. We expect the ESCOMs to correct their decision of making improper payments, in the light of our findings.

(c) For the above reasons, we answer Issue No.(2), in the negative.

10) **ISSUE No.(3)** : *Whether payment by the MESCOM, the CESC, the GESCOM and the HESCOM of their share of energy, would create a right in favour of the Petitioner to claim payment from the BESCOM?*

(a) As noted above, each ESCOM is an independent Company. Hence, one ESCOM's decision is not binding on the other. In this case, we have held that, legally, the amount is not payable. Even if a similarly situated person pays something, which is not legally payable, there can be no liability on the others to pay. Therefore, the contention of the Petitioner that, as some of the ESCOMs have paid for the energy, the others have to follow the suit and pay,

is not acceptable. As observed by us, the payments made by some of the ESCOMs against demands, which are not legally sustainable, need to be reviewed.

(b) Therefore, we answer Issue No.(3), in the negative.

11) **ISSUE No.(4):** *Whether the KPTCL is liable to pay, in case the BESCO is held to be not liable to pay for its share, as claimed by the Petitioner?*

(a) During arguments, the learned counsel for the Petitioner submitted that, on the assurance of the KPTCL, it injected energy into the grid, before execution of the W&BA. However, there is no pleading that, based on the assurance of KPTCL, it had injected energy. An alternative prayer is made, to direct the KPTCL to pay, if any of the ESCOMs fails to pay.

(b) It appears that, the KPTCL could not have made such an assurance, which is contrary to the conditions, in the Provisional Interconnection Approval dated 22.05.2014, issued by the KPTCL. The subsequent letter of the KPTCL, asking the ESCOMs to pay for their share of energy, does not make the KPTCL liable to pay, if any ESCOM fails to pay or held to be not liable to pay.

(c) Hence, we answer Issue No.(4), in the negative.

12) **ISSUE No.(5):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

The Petition is dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER