

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

Dated : 6th August, 2019

Present:

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

OP No.52/2018

BETWEEN:

Mysore Mercantile Co.Ltd.,
#201,202, 2nd Floor,
Shreshta Bumi,
No.87, K.R. Road,
Basavanagudi,
Bengaluru – 560 004.

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PETITIONER

[Represented by Smt. Poonam Patil, Advocate]

AND:

- 1) Kanataka Power Transmission Corporation Limited,
Kaveri Bhavan,
Bengaluru – 560 001.
- 2) Hubli Electricity Supply Company Limited,
Corporate Office at P B Road,
Navanagar,
Hubballi – 580 029.

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RESPONDENTS

[Respondents represented by Shri Shahbaaz Hussain, Advocate]

ORDERS

- 1) This Petition is filed under section 86(1)(f) of the Electricity Act, 2003, praying for the following reliefs:
 - “(a) Hold and declare that the action of the Respondent No.2 in collecting Wheeling charges at 5% on the entire quantum of energy generated is illegal and arbitrary;
 - (b) Restrain the Respondent No.2 from levying wheeling charges of 5% on the entire quantum of energy generated by the Petitioner in accordance with W & B Agreement dated 25.07.2015;
 - (c) Direct the Respondent No.2 to levy the wheeling charges of 5% only on the actual energy wheeled by the Petitioner;
 - (d) Direct the Respondent No.2 to pay to the Petitioner a sum of Rs.11,10,941/- (Rupees Eleven Lakhs, ten thousand, nine hundred and forty one only) along with interest at 18%, illegally deducted towards wheeling charges for the financial year 2016-17;
 - (e) Grant such other reliefs as this Hon'ble Court deems fit in the facts and circumstances of the case, in the interest of justice.”
- 2) The facts of the case submitted by the Petitioner are:
 - (a) The Petitioner is a Company, registered under the Indian Companies Act, 1956, involved in the generation of Wind energy, having its Plant of 6.3 MW capacity at Gojanur Village, Shirahatti Taluk, Gadag District. The Plant was commissioned on 14.08.2015.

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- (b) The Petitioner entered into a Wheeling and Banking Agreement (WBA) with the Respondents on 25.07.2015. The Petitioner has been supplying power to third parties and paying necessary charges to the Respondents as per the WBA.
- (c) The Petitioner raised an invoice in its usual course, for the month of March, 2017, for a sum of Rs.2,22,25,633/- (ANNEXURE-G), towards charges for energy unutilized at the end of the Financial Year 2016-17. Respondent No.2 made payment of Rs.2,11,14,691/-, as against Rs.2,22,25,633/- claimed by the Petitioner. Therefore, the Petitioner wrote a letter dated 10.10.2017 to Respondent No.2, to clarify the short payment made. As there was no response, the Petitioner addressed two letters dated 12.12.2017 and 02.05.2018, requesting for the reason for short payment or to pay up the balance amount.
- (d) Respondent No.2 is authorized to deduct Banking charges at 2% towards the energy banked by the Petitioner and wheeling charges at 5% towards energy wheeled, as per the Generic Tariff Order of the Commission. However, the Respondent No.2 has been charging 5% on the entire energy generated. The Petitioner has produced monthly bills issued by Respondent No.2, from May, 2016 to April, 2017, and for the months of March and April, 2018, which demonstrate that Respondent No.2 is calculating wheeling charges for the entire quantum of energy generated, as against permissible levy only on energy wheeled (ANNEXURE-L series). Hence, this Petition.

- 3) The Grounds urged by the Petitioner are as follows:
- (a) The action of Respondent No.2 in collecting the wheeling charges on the energy generated, is illegal. Respondent No.2 is not justified in levying 5% wheeling charges on the entire quantum of energy generated and the same amounts to an unjust enrichment of the Respondent. Though the bill issued by Respondent No.2 demarcates the energy generated, the energy wheeled and the energy banked, Respondent No.2 has been deducting 5% on the entire quantum of energy generated, instead of levying the same on only the quantum of energy wheeled.
- (b) Clause 5.7 of the WBA stipulates that, the Respondents shall not levy any transmission or wheeling charges on the quantum of energy banked, which remains unutilized at the end of the year.
- 4) Upon issuance of Notice, the Respondents appeared through their counsel and Respondent No.2 has filed the Objections, as follows:
- (a) The Petitioner has based the claims on assumptions, which have no place in legal proceedings, especially when the matter is covered by an Agreement. All actions of the Respondent are in accordance with the WBA.
- (b) The Petitioner has alleged that the Respondent No.2 has paid Rs.2,11,14,692 as against the invoice of Rs.2,22,25,633 raised by the Petitioner and failed to provide a clarification to that effect despite repeated letters. Clause 12.4 of the WBA states that "Any notice, communication, demand or request

required or authorized by the Agreement shall be addressed to 'The General Manager (Technical), HESCOM, Hubballi'. The Petitioner has, however, sought clarifications from 'The Financial Adviser, HESCOM, Hubballi', as a result of which, the communications were never brought to the notice of the authorized authority of HESCOM. If the correspondence was made to the authorized person, as per the terms of WBA, the Respondents would have provided the clarification sought.

- (c) Clause 6.2.2 of the WBA provides the formula for calculating the banked energy at the end of the months. The term 'Eg' in the formula provides that the Wheeling Charges of 5% is applicable on Eg (Generated energy injected to the Grid, less 115% of imported energy). Hence, the wheeling charges are levied on the energy injected into the system less 115% of import energy, as per the above formula.
- (d) Annexure L-11 of the Petition provides the details of energy generated and banked during the month of March, 2017. In the said Annexure, in the tabular column titled 'COMPUTATION OF ENERGY during the month', the 5th row gives details regarding the wheeling charges levied. It provides that the total energy deducted as wheeling charges is 37,567 kWh, which is 5% of the energy generated (Eg) during the month of March given in the 1st row of the table. It is clarified that wheeling charges of 5% have not been charged on the banked energy of the previous months as given in the 2nd row. The invoices submitted by Petitioner is for higher energy, i.e., 58,10,623 units

(unutilized banked energy), by illegally and arbitrarily adding more than 5% units of energy to the banked units of 55,20,181 units, which remain unutilized. The Respondent No.2 has acted as per Clause 5.7 and there is no violation as alleged by the Petitioner. The Petitioner has not mentioned or provided documentary evidence regarding levy of 5% wheeling charges, only on the quantum of energy wheeled during the month instead of the entire quantum of energy generated during the month. The WBA does not specify levying 5% wheeling charges on only quantum of energy wheeled.

(e) Respondent No.2 has prayed to dispose of the Petition in the light of the submissions made.

5) The Petitioner has filed the Rejoinder, as follows:

(a) Insofar as the averment regarding non-issue of Notice to the person designated under the WBA is concerned, the normal practice is to address matters pertaining to Accounts and Finances to the Finance Department. In the present case, the Financial Advisor, HESCOM, Hubballi, to whom the Petitioner addressed several communications requesting for clarification with regard to part payment of invoice, ought to have redirected the Petitioner to the concerned Officer.

(b) Respondent No.2 may have adhered to the formula stipulated under the WBA for computation of monthly invoices, however the grievance of the Petitioner is limited to the settling of payment with respect to the banked energy available at the end of the Financial year. The general practice

followed over the years by the Electricity Supply Companies (ESCOMs) has been that, they levy 5% of charges on the entire energy generated throughout the Financial Year. At the end of the Financial Year, after the exact quantum of banked energy for the concerned Financial Year is clear, 5% of the amount deducted towards banked energy in the monthly bills, during the subsistence of the Financial Year, is credited to the Generator's account. A copy of the Official Memorandum in the case of another Generator in BESCO's jurisdiction, where BESCO has credited 5% of unutilized quantum of energy at the end of the Financial Year and released the payment, is produced. This shows that, Respondent No.2 has denied the payment deducted initially at 5% on the quantum of energy banked.

- (c) The allegation that, invoices submitted by Petitioner are for higher quantum of energy i.e., 58,10,623 units (unutilized banked energy), as against actual banked energy of 55,20,181 units, is false and denied. The opening balance of energy as on 01.04.2017, i.e., the banked energy remaining unutilized for the previous financial year 2016-17, is 55,20,181 units. In the invoice (Annexure-L11) Banking Charges at 2% and wheeling charges at 5% on the energy pumped is levied. Thus, there is no distinction made in terms of energy banked and energy wheeled. The only criterion adopted is 'energy pumped' and therefore, the usual practice is to levy 5% on the entire quantum of energy remaining unutilized and account for the same, by crediting it the Generator's account. The invoice dated 31.03.2017 at Annexure-G, specifies 58,10,623 units, as against 55,20,092 units remaining unutilized, at the end of

the year 2016-17. The invoice mentions that, 58,10,623 units is arrived at by adding 55,20,092 units, remaining unutilized at the end of the year 2016-17 and 2,90,531 unutilized units, already deducted at 5% as wheeling charges.

- (d) All the energy generated is not wheeled and therefore Wheeling is always accompanied by the concept of Banking, wherein a portion of energy generated, termed as energy utilized / banked, is treated differently and paid differently. The WBA, in proviso to Clause 5.7, provides that, no transmission or wheeling charges or open access charges shall be levied on the quantum of banked energy remaining unutilized at end of the year deemed to have been purchased by ESCOM. In the computation of data provided by Respondent No.2, produced as Annexure-L series, a separate column for Banking charges at 2% on energy pumped and wheeling charges at 5% on energy pumped and again a separate column for net energy available for wheeling and a column for actual energy wheeled, are provided. Therefore, the Respondent has to pay the amount deducted, at 5% on the energy banked in the monthly bills and credit the said amount to the Petitioner at the end of the Financial Year.
- 6) We have heard the Counsel for both sides and perused the records. The following Issues arise for our consideration:
- (1) Whether the levy of wheeling charges by Respondent No.2, on the entire quantum of energy injected by the Petitioner, is proper?

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- (2) Whether while receiving payment for the unutilized banked energy at the end of the year, the Petitioner is entitled to credit of 5% of the wheeling charges, levied during the year on such unutilized banked energy?
- (3) What Order?
- 7) After considering the submissions made by the parties and perusing the material evidence placed on record, our findings on the above issues are as follows:
- 8) **ISSUE No.(1):** *Whether the levy of wheeling charges by Respondent No.2, on the entire quantum of energy injected by the Petitioner, is proper?*
- (a) We note that, the parties are bound by the terms of the WBA dated 25.07.2015. Clause 5.1 of the WBA reads as follows:

“The Company shall pay all the charges to the Corporation/ESCOMs for using their network as per the applicable KERC Regulations/Orders issued from time to time. Such charges shall include transmission charges for the use of the transmission network, wheeling charges for the use of the distribution network/s, cross subsidy surcharge, additional surcharge, charges for backup supply, scheduling and system operation charges, grid support charges, reactive power charges, UI charges under intra-state ABT, transaction charges and charges for the power drawn by the Company from the grid.”

Therefore, the above Clause provides that, the Orders passed by the Commission, from time-to-time, are applicable. The Commission had passed

an Order dated 04.07.2014, determining the Wheeling & Banking charges for the Renewable Energy (RE) Projects. This Order was made applicable to the existing and new Projects, commissioned on or before 31.03.2018, vide Order dated 12.09.2014. The operative portion of the Order dated 04.07.2014, reads as follows:

- “(1) *The Wheeling charges shall be 5% of the injected energy for wind, mini-hydel, Bagasse based co-generation plants and Biomass based project;*
- (2) *The banking charges shall be 2% of the injected energy and shall be applicable for wind and mini-hydel projects only;”*

Therefore, the Wheeling Charges (5%) and Banking Charges (2%) have to be levied on the quantum of ‘Injected energy’ and not the ‘Wheeled Energy’.

- (b) This Issue could also be examined from the definition of ‘Wheeling’, as defined in Section 2(76) of the Electricity Act, 2003, which reads thus:

“2. Definitions,- *In this Act, unless the context otherwise requires,-*

(1) XXX XXX XXX

(76) *‘wheeling’ means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;*

XXX XXX XXX”

Thus, the wheeling charges and/or transmission charges are payable, for use of the transmission and / or distribution network of the licensee, by another person; in this case, the Petitioner (generating company) for conveyance of electricity. The moment the electricity is injected into the grid by a generating company, the transmission and / or distribution network of the licensee is put to 'use' by the generating company, which has availed the facility of wheeling. The electricity, once injected, cannot be stored in the Grid and if the consumer notified by the generating company, to whom the energy was intended to be wheeled, does not consume the whole quantum of the injected energy, the remaining quantum would be consumed by some other consumer. The said remaining quantum is treated as 'banked energy' and allowed to be carried forward during a year. There is no concept of 'banking' in the Electricity Act, 2003. It is only a promotional and concessional measure provided for the RE sources of generation. Thus, the concept of 'unutilized banked energy' is only for accounting purposes. Hence, the transmission and/or wheeling charges have to be paid, on the quantum of the energy injected into the Grid by a generating company, irrespective of the fact, whether the whole quantum wheeled is consumed by the notified consumer or not.

- (c) For the above reasons, we answer Issue No.(1), in the affirmative.

- 9) **ISSUE No.(2):** *Whether while receiving payment for the unutilized banked energy at the end of the year, the Petitioner is entitled to credit of 5% of the wheeling charges, levied during the year on such unutilized banked energy?*

- (a) Clause 5.7 of the WBA reads as follows:

“Charges for banked energy remaining unutilized at the end of water year/wind year/financial year

The ESCOM in whose jurisdiction the Project is situated shall pay at 85% of the latest generic tariff determined by the Commission applicable to the relevant category of RE Power to the Company for the banked energy remaining unutilized at the end of every water year/financial year, as the case may be.

Provided, that no Transmission or Wheeling charges, or open access charges shall be levied on the quantum of banked energy remaining unutilized at the end of the year deemed to have been purchased by ESCOM under this agreement.”

- (b) A reading of the above Clause of the WBA reveals that, the unutilized banked energy at the end of the year is deemed to be purchased by the ESCOM. The question for determination under this issue is, whether the Petitioner is entitled to the credit of 5% of the wheeling charges, already levied and collected, on the unutilized energy, at the end of the Water Year or the Financial year, as the case may be. The above noted proviso to Clause 5.7 of the WBA was added by way of an amendment, vide Order dated 26.02.2015, passed by this Commission, in the matter of, “*The Standard Wheeling and Banking Agreement for Renewable Sources of Energy Projects*”. The amendment was intended to exempt the wheeling charges, already collected, on the unutilized banked energy at the end of the year,

deemed to have been sold to the ESCOMs, in the case of 'Non-REC Route Projects'. Therefore, we are of the considered view that, the proviso should be interpreted, so as to refund the wheeling charges already collected on the unutilized banked energy, at the end of the year, deemed to have been sold to the ESCOMs, in the case of 'Non-REC Route Projects'.

(c) Therefore, we answer Issue No.(2), in the affirmative.

10) **ISSUE No.(3):** *What Order?*

(a) As Issue No.(1) above is held in the affirmative, the Prayers (a), (b) and (c), made by the Petitioner in the Petition, cannot be granted.

(b) Under Prayer (d) made in the Petition, the Petitioner has claimed a sum of Rs.11,10,941/-, being the short payment made by the 2nd Respondent (HESCOM), towards 85% of the Generic Tariff, prevalent during March, 2017, which works out to Rs.3.825 per unit, for the banked energy remaining unutilized at the end of March, 2017. The 2nd Respondent (HESCOM) has disputed this claim. It is an admitted fact that, the banked energy, remaining unutilized as on 31.03.2017, was 55,20,181 units. As already held on Issue No.(2) above, 5% of the wheeling charges, which was deducted from the unutilized banked energy, has to be added to such unutilized banked energy, while making payment. It is also not in dispute that, the 2nd Respondent (HESCOM) has already paid a sum of Rs.2,11,14,692, as against the claim of Rs.2,22,25,633 made by the Petitioner. From the above admitted

figures, the claim of the Petitioner should have been for a sum of Rs.2,21,70,427. Therefore, the amount that remains to be paid to the Petitioner by the 2nd Respondent (HESCOM) would work out to Rs.10,55,735.

- (c) The Petitioner has further claimed interest at the rate of 18% per annum under Prayer (d) made in the Petition, on the amount becoming overdue, towards the unutilized banked energy at the end of the year. We think, the interest at 18% per annum, or at any other rate, cannot be granted to the Petitioner. Because, the proviso, noted above, can be interpreted in a different manner, to the effect that, no further transmission or wheeling charges or open access charges should be levied on the quantum of the banked energy, remaining unutilized at the end of the year and deemed to have been purchased by the 2nd Respondent (HESCOM).
- (d) For the foregoing reasons, we pass the following:

ORDER

The 2nd Respondent (HESCOM) shall pay to the Petitioner, a sum of Rs.10,55,735/- (Rupees Ten Lakhs Fifty Five Thousand Seven Hundred and Thirty Five only) within 4 (four) weeks from the date of this Order; in default, the 2nd Respondent (HESCOM) shall pay interest at the rate of 9% (Nine Percent) per annum, from the date of default, till the date of payment on the above-said amount.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER