

No.: N/201/2018**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION****No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052****Dated :17.12.2019****Present:**

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

OP No.74/2018**BETWEEN:**

M/s Hindustan Aeronautics Limited,
Having its registered office at
15/1, Cubbon Road,
Bengaluru-560 001.

[Represented by *Arista Chambers, Advocates*]

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PETITIONER**AND:**

1) Bangalore Electricity Supply Company Limited (BESCOM),
A Company incorporated under the Companies Act, 1956
Having its registered office at
K.R. Circle,
Bengaluru-560 001.

2) Karnataka Power Transmission Corporation Limited,
A Company incorporated under the Companies Act, 1956
Having its registered office at
Cavuary Bhavan, Kempegowda Road,
Bengaluru – 560 009.

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RESPONDENTS

[Represented by *Sri Shahbaaz Hussain, Advocate*]

ORDERS

- 1) This Petition is filed under section 86 (1) (f) of the Electricity Act, 2003, praying to:
 - a) direct the Respondent No.1 to permit banking of 49,17,902 units of energy injected by the petitioner prior to execution of Wheeling and Banking Agreements (WBAs) and pay to the petitioner by raising monthly bills in terms of the WBAs dated 12.07.2016 as if the wheeling has taken place from 31.03.2016;
 - b) direct the Respondent no.1 to pay interest on the outstanding amounts from 12th July 2016 to the date of actual payment at 12% per annum; and
 - c) pass such orders as deemed fit in the facts and circumstances of the case.

- 2) The facts submitted by the Petitioner, may be summed up, as follows:
 - a) The petitioner is a State-owned aerospace and defence company having its headquarters at Bengaluru.

 - b) The Government of Karnataka vide its Orders No.EN 45 NCE 2016 dated 11.03.2016 and EN 46 NCE 2016 dated 11.03.2016 approved the development of 4.2 MW and 2.1 MW wind power projects by the petitioner at Harapanahalli village and taluk, Davanagere district

out of the total wind power capacity of 45.9 MW initially allotted in favour of M/s Sarjan Realities Limited at various places of Davanagere district. The petitioner made applications in respect of the two wind projects for long term Open Access/execution of WBAs to the Chief Engineer, State Load Dispatch Centre (SLDC) vide letters dated 15.03.2016 (Annexures A & B respectively).

- c) The Respondent No.2 vide letters dated 31.03.2016 (Annexures E & F respectively) sought concurrence from Respondent No.1 regarding Wheeling of energy generated from the two wind projects.
- d) The wind projects were commissioned on 31.03.2016. On 01.04.2016, the Respondent No.1 issued Commissioning Certificates (Annexures J & K).
- e) The Respondent No.1 vide letters dated 02.05.2016 (Annexures L & M respectively) conveyed concurrence to execute WBAs in respect of the two wind power projects. Respondent No.2 vide letters dated 02.06.2016 conveyed its approval for wheeling of energy from the two wind power projects (Annexures N & O respectively).
- f) The Petitioner had injected 49,17,902 units from the date of commissioning till the signing of the WBAs from the two projects. Respondent No.1 had issued B Forms after taking joint meter readings and accounted for the energy.

- g) The petitioner, vide letters dated 01.09.2016 addressed to the General Manager of the Respondent No.1 requested payment for the injected power from the date of commissioning of the two plants based on B forms issued by the Respondent No.1. The General Manager of the Respondent No.1 replied vide letters dated 09.12.2016 that the energy injected should be treated as infirm power in accordance with Clause 5.6 of the WBAs.
- h) The petitioner sent two letters dated 03.04.2017 (Annexures BB & CC)) to the Managing Director of the Respondent No.1 informing about the payment due for the energy supplied from 31.03.2016. It was also requested that the injected energy may be compensated at the average pooled power purchase cost determined by the Commission.
- i) Despite several requests there was no response from the Respondent No.1. Hence, the petitioner vide letter dated 05.12.2017 invoked Article 11 of the WBAs requesting Respondent No.1 to nominate a representative for resolution of the dispute through mutual negotiations. The Respondent No.1 failed to respond. Hence, this petition is filed.
- 3) The grounds urged by the petitioner are as follows:

- a) As per the Government Order, the wind power plants have been set up and energy was injected to a tune of 49,17,902 units from the date of commissioning of the plants on 31.03.2016 till the signing of the WBAs on 12.07.2016. The energy so injected has to be treated as banked energy.
- b) The act of the Respondent No.1 in not paying for the energy injected by the petitioner is illegal and amounts to unjust enrichment. It is the obligation of the Respondent No.1 to make payment for the energy injected by the petitioner as the energy would have been commercially utilized by the Respondent No.1 by selling to third parties and earned revenue.
- c) As per Article 1.1 of the WBAs, the "Commercial operation date" is defined to mean the *"date declared jointly by the Company and Corporation / ESCOM/s on which the project or any of its units is/are declared as available for commercial operation"*. The benefits relating to power generated by a generator start accumulating immediately after achieving COD and the billing period also commences simultaneously. The factum relating to achieving COD is undisputed and categorically admitted by the Respondent No.1. The billing period for the power generated by the projects, therefore, in terms of Clause 1.1 (e) of the WBAs commenced from 00.00 hours of 31.03.2016.

- d) The petitioner had made applications for long term Open Access/execution of WBAs on 15.03.2016 itself. However, Respondent No.2 conveyed its concurrence belatedly on 02.06.2016. The Commission, had on earlier occasions where there were unexplained and inordinate delays in granting of Open Access and execution of WBA by the Utilities, allowed compensation to the generator for the energy injected into the Grid during the delayed period. Section 70 of the Indian Contract Act, 1872 is also relevant for awarding compensation.
- e) The primary objective of the Commission is to promote generation of electricity based on Renewable sources of energy. Hence, the Commission should take measures to compensate generators of renewable energy sources.
- 4) Upon notice, the Respondents entered appearance through their Counsel and filed the Statement of Objections. The gist of the Objections filed by Respondent-1 is as follows:
- a. The petitioner had applied to the SLDC for grant of Open Access vide its letters dated 15.03.2016. In the said letters, the petitioner claimed that all necessary infrastructure for the projects were in place and expressed the desire to enter into WBAs with the 2nd Respondent (KPTCL) and 1st Respondent (BESCOM). However, the application was not accompanied by a bank guarantee as evidenced by the note of the

concerned officer of the SLDC on the application. The bank guarantee (BG) being a pre-requisite for making such an application under Clause 9 (1) of the KERC (Terms & Conditions for Open Access) (3rd Amendment) Regulations, 2015, the non-production of BG would amount to deficiency in the application. The BG dated 22.03.2016 was subsequently furnished.

- b. The claims of the petitioner that the Respondent inordinately delayed the conveying of the approval for open access, is denied. Had the petitioner been acquainted itself with the Regulations, it would have known that the applications were deemed to have been granted if the licensee failed to communicate the concurrence to the SLDC within 15 days from the date of receipt of such application or if the SLDC failed to inform the applicant within 3 days of its receipt from the licensee, as per Clause 9 (6) and 9 (7) of the Regulations. The petitioner, owing to its negligence, failed to act as per Clause (8) of the Regulation 9 and did not submit the WBA along with a notarized undertaking stating that the SLDC failed to communicate the approval or rejection of the application for open access. Thus, even assuming but not accepting that the respondents did cause a delay in communicating the approval or rejection, the petitioner was provided with sufficient safeguards to protect its interest and execute the WBAs at the earliest. Thus, the delay in executing of the WBAs is completely attributable to the negligence of the petitioner.

- c. The Regulations further provide in explicit terms in clause 9 (7) that *“during the pendency of the application for grant of open access, the applicant shall not inject any energy to the licensee’s network and the licensee shall not be liable to pay any charges for the energy injected during such period.”* Hence, the petitioner could not have injected any energy before entering into an agreement and if it did, it is not eligible to claim any payment from the licensee.
- d. The petitioner has claimed that the energy injected from the date of commissioning of the projects to the date of execution of WBAs should be regarded as ‘Banked Energy’. Clause 1.1 (d) of the WBA entered between the petitioner and the respondents, states that *“Banking means the facility by which the electrical energy remaining unutilized by the Exclusive or Non-Exclusive Consumer or Captive Consumer out of the energy injected by the company into the transmission and/or distribution system of Corporation/ESCOM/s, which is allowed to be utilized for wheeling to Exclusive or Non-Exclusive Consumers of the company or captive consumer for later use, as per the terms and conditions set-forth in this agreement”*. The definition of banking in the WBAs makes it clear that the energy injected by the petitioner from the Commissioning date till the date of execution of WBA does not amount to ‘banking’. The injection of energy qualifies to be termed as ‘banking’ only if it is allowed to be utilized as per the terms and conditions set forth in the WBA. Thus,

in the absence of any such agreement, there is no question of banking of energy.

- e. The petitioner has in para 15 of the petition, falsely claimed that the General Manger of Respondent No.1 vide letter dated 09.12.2016 had stated that the energy injected should be treated as 'infirm energy' as per Clause 5.6 of the WBA. The petitioner has misrepresented the facts. The General Manager of Respondent No.1, in the above-mentioned letter, quoted Clause 5.6 of the WBA and further clarified that "the infirm energy is to be considered from the date of injection to the date of COD" as per the above clause. Clause 5.6 of WBA reads thus: "*The infirm energy injected during the period from trial operation date after synchronization up to the commercial operation date shall be deemed to be sold to the ESCOM in whose jurisdiction the project is located and shall be paid for by such ESCOM at the applicable average pooled power purchase cost determined by the Commission.*" This term of the WBA suggests that energy injected from trial operation date up to the date of commissioning of the project qualifies as infirm energy. In the present case, the energy is injected after the date of commissioning and does not come under the provisions of Clause 5.6. Hence, the Respondent No.1 is not liable to make any payment for the energy at the applicable average pooled power purchase cost determined by the Commission under clause 5.6 of the WBA.

- f. Issuing of B form is to record the energy injected and drawn from the grid and as such it creates no legal right in so far as payment is concerned.
- g. In the absence of an agreement to purchase power and without prior concurrence of the distribution licensee, any unauthorised injection of power by any generator cannot be compensated in any manner and on the contrary, damages can be claimed by the licensee on account of unscheduled injection of power causing disturbance in the grid. The petitioner has supplied power to the respondent without any authorization, much less an agreement.
- h. Section 17 of the Karnataka Electricity Reforms Act, 1999 provides that an agreement for purchase of power should be executed by a licensee with a generating company and the same should be approved by the Commission. Any agreement to purchase power, without the approval of Commission, is void. The petitioner does not have any such agreement for purchase of power with the licensee and thus there is no question of payment for unauthorised supply of power. If the Respondent accepts the contentions of the petitioner and decides to make the payment, it will amount to purchase of power without the approval of the Commission and such agreements are illegal.
- i. The Hon'ble Appellate Tribunal, in Appeal No.123/2010 (M/s Indo Rama Synthetics (I) Ltd Vs MSERC) has held that the energy injected without

intimation is to be considered as unauthorised injection, for which no payment is to be made. The Hon'ble Appellate Tribunal, subsequently, in Appeal No.120/2006, (Kamachi Sponge & Power Corporation Ltd Vs TANGEDCO and Others), has held that no payment is liable to be made for any energy injected, be it firm or infirm power, in the absence of PPA or a schedule issued by the SLDC.

- j. Section 70 of the Contract Act is erroneously relied upon by the petitioner in its desperate attempt to unjustly back its prayer. The said Section relates to lawful non-gratuitous actions of a person and in the instant case, the act of injecting power into the grid of respondent by the petitioner without any authorization is unlawful and deserves no legal or equitable relief. When a generator injects energy without a schedule, the utility is not in a state to make use of most of such energy, as 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 generators will resort to injection of unscheduled energy and claim payments for the same. There is no question of unjust enrichment in this case as the Respondents are not benefitted from such unauthorized injection of energy and if the Respondents pay for it, they will suffer huge losses. Thus, the Respondents cannot be made to suffer for the benefit of unscrupulous generators. In any case, provisions of Section 70 will not apply as there is no actual contract or contract in spirit

between the petitioner and the respondent pertaining to the injection of energy before the execution of WBA.

- 5) The gist of the Objections filed by Respondent-2 is as follows:
- a) The petition is devoid of merits and needs to be dismissed *in limine*.
 - b) The Respondent had granted provisional interconnection approval to the Petitioner vide letter dated 30.03.2016 along with the terms and conditions attached to such approval. Subsequent thereto, the petitioner commissioned the project on 31.03.2016.
 - c) The Respondent in the said letter dated 30.03.2016 had stated as follows:

“KPTCL is not responsible for payments and consequences in case of pumping of power in the absence of any contractual agreement such as PPA/W&B agreement/Captive use for selling power. This interconnection approval will provide technical connectivity of the subject project with Grid & KPTCL is not liable to pay any money for any flow of power from this project. However, SLDC approval shall be obtained before pumping of power into the Grid.”

- d) The petitioner commissioned its projects after the provisional interconnection approval was granted by the Respondent with the

above stated condition. Therefore, the petitioner was well aware of its obligation that it ought not to supply power into the Grid without prior approval of SLDC or existence of PPA/WBA. The petitioner has wilfully transgressed the said condition and is claiming payment for injection of unauthorized energy.

- e) The petitioner had not obtained the consent of any of the Respondents for injecting the power and there is no question of payment for such energy injected without a contract/schedule or knowledge of SLDC and the Respondent. If such injection of power is permitted, it would result in Grid indiscipline and insecurity.
- f) The energy injected into the Grid cannot be stored and would be consumed instantly and there would be no option for the Respondents, either to accept or reject such energy. Therefore, it is not a case of enjoying the benefit of such unscheduled energy, but amounts to unapproved injection of energy leading to Grid indiscipline and incapacitating the Respondents from rejecting such infusion.
- g) The averment made by the petitioner that Respondent No.2 conveyed its concurrence for execution of WBAs belatedly on 02.06.2016 is denied as false and erroneous. The petitioner approached SLDC on 15.03.2016 and 30.03.2016 to avail Wheeling and Banking facility to wheel energy to its captive HT consumers in

Respondent No.1's jurisdiction. The SLDC, vide letter dated 31.03.2016 sought concurrence of Respondent No.1. The Respondent No.1 issued concurrence on 02.05.2016.

- h) Based on the concurrence of the Respondent No.1, the SLDC sought concurrence from the Respondent No.2 vide letter dated 18.05.2016. The file was received on 23.05.2016 by DGM (Tech) and was processed for corporate approval on 25.05.2016. After obtaining necessary corporate approval, the Respondent, vide letter dated 27.05.2016 instructed CEE of SLDC to issue consent of this Respondent. The CEE of SLDC vide letter dated 02.06.2016 issued consent of the Respondent to wheel energy generated by this petitioner.
- i) In the absence of an agreement to purchase power and without prior concurrence of the distribution licensee, any unauthorized supply of power by a generator should not be compensated in any manner. On the contrary, damages can be claimed by the licensee on account of unscheduled supply of power causing disturbance in the grid. In the instance case, the petitioner has supplied power to the respondent without any authorization or an agreement.
- j) The petitioner cannot claim immunity from all defects under a policy which is meant to promote Renewable Sources of Energy. It

is bound to act as per the rules and regulations framed. The petitioner cannot take unilateral decision of injecting the energy and seek to justify on the basis of promotion of Renewable Energy.

k) The Respondents have thus, prayed for dismissal of the petition.

6) We have heard the arguments of the learned counsel for the parties. From the facts of the case and the submissions made by the parties, and also on consideration of the Regulation 9 of the Amended KERC (Terms & Conditions for Open Access) Regulations, 2015, the following Issues would arise, for our consideration:

- (1) Whether the Petitioner is entitled to compensation for the energy injected between 31.03.2016 and 01.06.2016, on the ground that there was an inordinate delay in granting the Open Access?
- (2) Whether the Petitioner is entitled to compensation for the energy injected into the Grid during the period prior to the date of commencement of wheeling, on the principles stated in Section 70 of the Indian Contract Act, 1872?
- (3) Whether the petitioner can be granted any relief in respect of the energy injected into the grid from 02.06.2016, the date of grant of Open Access to 11.07.2016, the day prior to the date of the execution of the WBAs?
- (4) What Order?

- 7) After considering the submissions of the parties and the pleadings and material on record, our findings on the above Issues are as follows:
- 8) ISSUE No.(1): *Whether the Petitioner is entitled to compensation for the energy injected between 31.03.2016 and 01.06.2016, on the ground that there was an inordinate delay in granting the Open Access?*
- (a) Now, we shall consider Issue No.1.
- (b) Before dealing with the facts, we may note the relevant Clauses 1 to 10 of Regulation 9 of the Amended KERC (Terms and Conditions for Open Access) Regulations, 2015, which read thus:

“9. Procedure for grant of Open Access other than Day Ahead Transactions:-

- (1) *An application for grant of open access, in the format specified by the Nodal Agency and approved by the Commission, shall be filed before the Nodal Agency with all the required particulars, by an intending open access customer along with, an undertaking that he has not entered into Power Purchase Agreement (PPA) or any other bilateral agreement for the capacity (quantum of power) for which open access is sought and payment of a non-refundable processing fee of five thousand rupees for long-term open access and one thousand rupees for short-term open access.*

Provided that an application for a short-term open access, in respect of power plant(s) or its/their generating unit(s) which is or are yet to be commissioned, shall be made not before two months prior to the commissioning date of such power plant(s) or its/their generating unit(s).

Provided also that an application for long-term open access shall be accompanied by a Bank Guarantee (BG) of ten thousand rupees per MW and shall be kept valid and subsisting till the signing of agreement for wheeling of electricity and such BG shall be encashed by the Nodal Agency, if the application is withdrawn by the applicant prior to the signing of such agreement and on signing of the agreement for wheeling of electricity, the BG shall be returned immediately to the applicant by the Nodal Agency.

Provided further that in cases where after being granted open access pursuant to an application filed, there is any material change in the location of the injection point or a change by more than ten percent in the quantum of power to be interchanged using the intra-State transmission and or distribution system, a fresh application shall be made for the entire capacity to ascertain the system availability and such application shall be accompanied by relevant documents, application fees and in case of long-term open access with required bank guarantee for the additional capacity and in case the additional capacity sought for cannot be accommodated in the existing network, the applicant is entitled for open access to the extent of his original allotment.

- (2) The nodal agency shall acknowledge the receipt of the application, only if the application is complete and accompanied by the relevant documents and fees, by e-mail or fax, in addition to any other usually recognized mode of communication, by the end of working hours of the following working day and where the application is submitted in person, the acknowledgment shall be provided at the time of such submission.*
- (3) Where any application is rejected for any deficiency or defect, the same shall be communicated in writing to the applicant within the time specified above,*

indicating the deficiency or defect and the application fees and Bank Guarantee, if submitted, shall be returned to the applicant and in such cases a fresh application shall be made by the applicant after curing the deficiency or defect.

- (4) The Nodal Agency, in order to ascertain the system availability and subsistence of any PPA for the capacity applied for open access, shall forward an application received on any day to the concerned licensee(s) by e-mail or fax, in addition to any other usually recognized mode of communication, within two working days from the date of receipt of such application.
- (5) The concerned licensee(s) shall acknowledge the receipt of the application by e-mail or fax, by the end of working hours of the following working day.
- (6) Based on the system studies or otherwise, the licensee(s) concerned, after ascertaining the availability of network capacity and the subsistence of any PPA for the capacity applied for open access, shall communicate by e-mail or fax, in addition to any other usually recognized mode of communication, his concurrence or otherwise for the open access to the Nodal Agency within the time schedule:
 - (i) Short term open access – Within five working days from the date of receipt of application from Nodal Agency.
 - (ii) Long term open access – Within fifteen working days from the date of receipt of application from Nodal Agency.

Provided that in cases of long term open access, if augmentation to the existing system is required, the

time required and the probable date by which open access will be granted shall be intimated to the applicant within the above time schedule.

Provided further that the system studies at the injection point to ascertain the availability is not required for an existing generator who was already injecting power into the licensee(s) network under PPA or otherwise, subject to the condition that there is no additional injection beyond the capacity that was being injected earlier.

Provided also that the system studies at the drawal point to ascertain the availability is not required for a consumer of the licensee availing open access, subject to he furnishing an undertaking that, he would not exceed the contract demand specified in his supply agreement with the licensee even after opting for open access.

Provided also that if the licensee concerned fails to communicate his concurrence or otherwise within the time schedule specified above, it shall be deemed that he has given his concurrence for the open access applied for.

- (7) *The Nodal Agency shall communicate to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, the grant of open access or otherwise, within three working days following the day of receipt of the concurrence or otherwise from all the licensees concerned and in the absence of any such communication to the applicant from the Nodal Agency within five working days from the date of filing the application in the case of short-term open access and fifteen working days from the date of filing the application in the case of long-term open access, the open access applied for shall be deemed to have been granted, subject to system availability.*

Provided that in the case of deemed approval, where the Nodal Agency is of the opinion that open access cannot be allowed without system strengthening, it shall identify the scope of the work for system strengthening and the probable date from which the open access can be allowed shall be informed in writing accordingly within five working days from the date of receipt of agreement for wheeling of electricity.

Provided further that during the pendency of application for grant of open access, the applicant shall not inject any energy to the licensee's network and the licensee shall not be liable to pay any charges for the energy injected during such period.

Provided also that for any energy injected into the licensee's network from the date of grant of open access till the date of submission of agreement for wheeling, the applicant shall be entitled for payment of energy charges at Average Pooled Power Purchase cost [APPC] rate.

- (8) *The open access consumer shall execute the agreement for wheeling of electricity in duplicate or triplicate sets, as the case may be, and submit the same to the Nodal Agency and also the concerned licensee(s) within five working days following the day of receipt of the communication for grant of open access or from the date deemed grant of such open access, as the case may be, failing which the open access granted or deemed to have been granted shall stand cancelled.*

Provided that in the case of deemed grant of open access, along with the agreement for wheeling of electricity, the applicant shall submit, an undertaking to the Nodal Agency, duly notarized, stating that the Nodal Agency has failed to communicate approval for open access or otherwise within the time specified in the Regulations and enclose a copy of the

acknowledgment, if any, given by the Nodal Agency or any other evidence in support of application having been delivered to the Nodal Agency.

(9) On receipt of the aforesaid agreement, the licensee (s) concerned shall execute the agreement for wheeling of electricity by signing his copy of the agreement and forward it to the Nodal Agency within seven working days following the day of receipt of such agreement.

(10) The effective date for commencement of operation of wheeling of electricity by the applicant shall be the date of receipt of the agreement for wheeling specified at Regulation (8) above by the licensees.

Provided that the effective date shall also be applicable for banking in the case of solar, wind and mini-Hydel projects.”

(c) The above amended Regulation 9 came into force with effect from 08.10.2015. The claim made in the Petition relates to the period subsequent to this period. Therefore, the rights and liabilities of the parties should be decided as per this amended Regulations. As per Amended Regulation 8 of the KERC (Terms & Conditions for Open Access) Regulations, 2015, the Nodal Agency for arranging Open Access is the SLDC.

(d) Clause 1 of the amended Regulation 9 provides for filing of an application for grant of open access before the Nodal Agency, by furnishing the required particulars and paying the prescribed processing fee and Bank Guarantee. Clause 2 provides for issuance of an

acknowledgment by SLDC for having received the application. Clause 3 provides for consequences of rejection of the application, for any deficiency or defect. Clause 4 provides for forwarding the application to the Licensees concerned, for ascertainment of the system availability and the subsistence of any PPA for the capacity applied for open access. Clause 5 provides for issuance of an acknowledgment by the concerned Licensee(s) for having received the application from SLDC.

- (e) Clause 6 of the amended Regulation 9 provides for communicating the concurrence or otherwise of the Licensee(s) concerned, for the open access applied for, to the SLDC, within the time schedule stated therein. The last proviso to Clause 6 provides that, if the Licensee concerned fails to communicate its concurrence or otherwise, within the time specified, it shall be deemed that he has given his concurrence for the open access applied for. In the present case, the open access application relates to a long term open access. Therefore, if the Licensee concerned fails to convey his concurrence or otherwise, for the open access applied for, within 15 (fifteen) working days from the date of receipt of the application from the SLDC, it shall be deemed that the concurrence for the long term open access, applied for, has been granted.
- (f) Clause 7 provides that, the SLDC should communicate to the Applicant, the grant of open access or otherwise, within 3 (three) working days, following the day of receipt of the concurrence or otherwise of open

access from all the Licensees concerned and in the absence of such communication to the Applicant from the SLDC, the open access applied for long term, shall be deemed to have been granted, subject to system availability. Therefore, Clause 7 provides for the intimation of grant of open access or otherwise and in the absence of such intimation, the deemed grant of open access.

- (g) Clause 8 provides that, the open access customer shall execute the agreement for wheeling of electricity, in duplicate or triplicate sets, as the case may be, and submit the same to the SLDC and also the concerned licensee(s) within five working days following the day of receipt of the communication for grant of open access or from the date deemed grant of such open access, as the case may be, failing which the open access granted or deemed to have been granted shall stand cancelled. Clause 9 provides that, the licensee(s) concerned shall execute the agreement for wheeling of electricity by signing his copy of the agreement and forward it to the SLDC within seven working days following the day of receipt of such agreement.
- (h) Clause 10 provides that, the effective date for commencement of operation of wheeling of electricity by the applicant shall be the date of receipt of the agreement by the licensee(s) for wheeling specified at Clause 8, stated above. Further, it provides that the effective date shall also be applicable for considering the banking of energy.

- (i) In the present case, the Petitioner had filed the applications for long term open access on 15.03.2016. However, the bank guarantee was not produced with the applications. The third proviso to Clause 9 (1) of the Regulations provides that an application for long term open access has to be accompanied by a Bank guarantee and Clause 9 (2) of the Regulations provides that the SLDC shall acknowledge the application only if it is complete and accompanied by the relevant documents. The Respondent has stated that the BG was not produced with the application. In the chronology of events and the rejoinder, it is stated by the petitioner that BGs were submitted on 22.03.2016 and that the petitioner has not sought for any relief for the period when the BGs were not submitted. The letter dated 30.03.2016 of the petitioner addressed to the SLDC is produced by Respondent-2 as Annexure R-1. In this letter it is stated that arranging BGs would take some time. Therefore, the date of production of BGs cannot be taken as 22.03.2016. The date could be considered as 31.03.2016, on which date the Respondent-2 had sought concurrence from Respondent-1 for wheeling. Therefore, it can be stated that the application was 'complete' on 31.03.2016.
- (j) Assuming that, 31.03.2016 is taken as the date on which the open access application was duly filed, it should have been forwarded to the concerned Licensee, within 2 (two) working days, and thereafter, within 15 (fifteen) working days, the Licensee should have intimated the SLDC about the grant or otherwise of the long term open access. Thereafter,

the SLDC should intimate the grant of open access or otherwise, within 3 (three) working days from the date of receipt of the concurrence or otherwise for grant of the open access from the Licensee concerned. Therefore, within a period of 20 (twenty) working days from 31.3.2016, the grant or otherwise of the open access should have been intimated to the Petitioner. The Commission notes that, if the grant or otherwise of the long term open access was not intimated within the specified period, the open access, applied for, is deemed to have been granted. In such a scenario, within 5 (five) working days from the date of the deemed grant of open access, the Petitioner has to submit the required number of WBAs, with the signature of its authorized signatory to the SLDC and also to all the Licensees concerned; in default, the open access, deemed to have been granted, shall stand cancelled. Therefore, in the light of the amended Regulations, the question of delay in grant of open access, does not arise. If the Petitioner commits default in submitting the required number of WBAs to the concerned, within the specified time, the open access granted, or deemed to have been granted, stands cancelled. Therefore, any applicant for open access cannot blame that there was delay in grant of open access.

- (k) The Petitioner does not claim that, it had submitted the required number of the WBAs to each of the Licensees concerned, as required in Clause 9(8) of the Regulations, within the stipulated time, from the date of deemed open access. The consequence would be that, the open

access deemed to have been granted, would stand cancelled. Since the deemed open access granted stands cancelled, the Petitioner cannot claim compensation for the energy injected into the Grid, for any period prior to 02.06.2016, the date on which open access was granted.

- (l) It is contended on behalf of the Petitioner that, the delay in signing of the WBA, by the Respondents, is not relevant for reckoning the commencement of the operation of wheeling of electricity, but the effective date for the commencement of the operation of wheeling should be taken as the date on which plants were commissioned. This contention cannot be accepted, as it is contrary to the prevalent open access Regulations.

- (m) There were allegations that the SLDC and the ESCOMs would cause delays in the execution of the WBAs, causing loss to the Generators, who applied for open access. To overcome this situation, the Open Access Regulations were amended. The Amended Open Access Regulations, 2015, have been framed in order to avoid any delay in the grant of open access by the licensees / SLDC. For this purpose, the said Regulations stipulate the timeline for each activity and in default, the grant of 'deemed open access', to ensure that the parties to the transaction should act, in all alertness, so that the interest of the open access applicant is protected. Any benefit of credit of the wheeled energy or payment of compensation for the energy injected, could be considered

only when the open access applicant strictly follows the amended Regulations, in letter and spirit.

- (n) For the above reasons, we answer Issue Nos.(1) in the negative.
- 9) ISSUE No.(2): *Whether the Petitioner is entitled to compensation for the energy injected into the Grid during the period prior to the date of commencement of wheeling, on the principles stated in Section 70 of the Indian Contract Act, 1872?*
- (a) Section 70 of the Indian Contract Act, 1872, reads thus:
- “70. Obligation of person enjoying benefit of non-gratuitous act.-** *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”*
- (b) The Petitioner has contended that, the energy injected into the Grid has been utilized by the 2nd Respondent (BESCOM) and sold to the consumers, therefore, the 2nd Respondent (BESCOM) is making wrongful gain, at the cost of the Petitioner, and cannot retain the unjust enrichment.
- (c) On the other hand, the Respondents have contended that, the electrical energy injected into Grid cannot be stored and it would be consumed, instantaneously and there would be no option for the Respondents, either to accept or reject the said energy and such injection of power into the Grid is detrimental to the Grid discipline. It is

also contended that, if a Generator injects energy without a Schedule or a PPA, the Utility would not be in a position to make effective use of such energy, as most often, it is not possible to ascertain, where exactly the energy was utilized, whether within the State or outside the State, depending upon the demand for consumption.

- (d) We have gone through the various decisions, relied upon by the parties, in support of their respective contentions. We find that, though, earlier, in certain cases, compensation was awarded, for the energy injected into the Grid prior to entering into a commercial Agreement (PPA or WBA), on the basis of the principles stated in Section 70 of the Indian Contract Act, 1872, the recent decisions of the Hon'ble ATE, would clearly establish that, for the injection of such power into the Grid, no compensation can be granted. The following are the recent decisions of the Hon'ble ATE, in this regard:

Appeal No.120/2016, decided on 08.05.2017, in the case of *Kamachi Sponge & Power Corporation Ltd., -Vs- Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and another;*

Appeal No.117/2016, decided on 13.09.2017, in the case of *Renew Wind Energy Pvt.Ltd. -Vs- Karnataka Electricity Regulatory Commission and others;* and,

Appeal No.37/2016, decided on 08.02.2019, in the case of *Lalpur Wind Energy Pvt. Ld., -Vs- Karnataka Electricity Regulatory Commission and others.*

As contended by the Respondents, it is not possible to ascertain, which consumer of which Distribution Licensee consumes the energy injected

into the Grid. In the present case, the other Distribution Licensees, apart from the 1st Respondent, are not parties. It is not established that, the 1st Respondent alone utilized the injected energy, for which the present claim is made. It may be noted that, to support such a claim there must be an obligation, either express or implied, to pay.

(e) Therefore, on the principles stated in Section 70 of the Indian Contract Act, 1872, no relief can be granted to the Petitioner, for the energy injected prior to 12.07.2016.

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

10) ISSUE No.(3): *Whether the petitioner can be granted any relief in respect of the energy injected into the grid from 02.06.2016, the date of grant of open access to 11.07.2016, the day prior to the date of the execution of the WBAs?*

a) We have already discussed the effect of Clause 7 of Regulation 9, in Para 8 (j) supra. The petitioner has not availed the benefit of the deemed grant of open access, as discussed in Para 8 (j). The nodal agency as well as the respondents treated the earlier application dated: 15.03.2016 filed by the petitioner praying grant of open access, as subsisting and the same application was processed further for grant of open access.

b) The third proviso to Clause 7 of Regulation 9 reads thus:-

“Provided also that for any energy injected into the licensee’s network from the date of grant of open access till the date of submission of agreement for wheeling, the applicant shall be entitled for payment of energy charges at Average Pooled Power Purchase cost (APPC) rate.”

- c) We may reiterate Clause 10 of Regulation 9, which provides for effective date for commencement of the operation of Wheeling and Banking of electricity. The said Clause 10 reads thus:-

“The effective date for commencement of operation of wheeling of electricity by the applicant shall be the date of receipt of agreement for wheeling specified at Regulation (8) above by the licensees.

Provided that the above effective date shall also be applicable for banking in the case of solar, wind and Mini-Hydel projects.”

Note: In the above Clause 10, the words “Regulation 8” should be read as “Clause 8”, as it appears to be a typographical error.

- d) The grant of Open Access has been communicated to the petitioner vide letters dated 02.06.2016 (Annexures N&O). The petitioner has not specifically stated the date on which it submitted the WBAs to respondents as required under Clause 8 of Regulation 9. However, stamp papers for preparing the WBAs were purchased in the name of the petitioner on 06.06.2016, as can be ascertained from the WBAs dated 12.07.2016 (Annexures P&Q). Therefore, the respondents were asked to furnish the date on which the petitioner submitted the WBAs

executed by it to them, as required. In response to it, it is submitted that the respondents are following the old procedure itself, instead of the procedure stated in Clauses 8 & 9 of Regulation 9. It is submitted that after intimating the grant of open access, the petitioner would submit a request letter for finalising the execution of the WBA and thereafter, the 1st respondent would prepare the draft WBA and after getting the approval from the higher authority, the signature of the Generating Company and the signature of the Authorised Officer of the 1st respondent would be obtained and thereafter, the WBA would be sent to the 2nd respondent for its signature. It is submitted that these official procedures would take some time and in the present case, the finalisation of the execution of WBAs could be completed on 12.07.2016. It appears, because of adopting the old procedures by the respondents, the petitioner was prevented from submitting the WBAs as required under Clause 8 of Regulation 9.

- e) From the above facts, it is clear that in spite of the Amendment of the Regulation 9, the respondents are following the old procedures and they account for wheeling and banking of energy injected from the date of finalisation of the execution of WBA. Therefore, in this case, the energy injected was admittedly accounted from 12.07.2016 by the respondents.
- f) The third proviso to Clause 7 of Regulation 9, provides for payment of APPC rate for the quantum of energy injected into the grid from the

date of grant of open access till the date of submission of agreement for wheeling. Clause 10 of Regulation 9, provides that the effective date for commencement of operation of wheeling of electricity by the applicant should be the date of receipt of the agreement for wheeling specified at Clause 8 of the said Regulation. As the respondents have failed to adopt the proper procedure, subsequent to grant of open access, we are of the considered view that the energy injected from 02.06.2016 till 11.07.2016 should be accounted for and credited to the account of the petitioner. We think, it would be appropriate to direct the respondents to consider the quantum of energy injected from 02.06.2016 to 11.07.2016 as energy banked and to account for the same as the opening balance of banked energy as on 01.01.2020. This would meet the ends of justice. Therefore, Issue No.3 is held accordingly.

11) ISSUE No.(4): What Order?

For the foregoing reasons, we pass the following:

ORDER

- a) The petition is partly allowed;
- b) The respondents are directed to account for the quantum of energy injected into the grid from 02.06.2016 to 11.07.2016, as banked energy and the same shall be taken to the credit of the petitioner as opening balance of banked energy as on 01.01.2020.

c) The quantum of energy injected into the grid from 02.06.2016 to 30.06.2016 and from 01.07.2016 to 11.07.2016 shall be calculated on pro-rata basis, considering the total number of days in a month and the total quantum of energy injected in that month.

Sd/-

(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)
MEMBER

Sd/-

(M.D. RAVI)
MEMBER