

**No.N/43/2019****BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,****No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.****Dated: 15.06.2022****Present:**

**Shri H.M. Manjunatha** .. **Member**  
**Shri M.D. Ravi** .. **Member**

**OP No. 15/2019****BETWEEN:**

M/s Umiya Holdings Private Limited,  
A Company registered under  
Companies Act, 1956  
having its Registered Office  
# 29/3 "HM Strafford", 2<sup>nd</sup> Floor,  
7<sup>th</sup> Cross road, Vasanthnagar,  
Bengaluru-560 052.  
(Represented by its Authorised Signatory  
Mr. Srikanth Reddy),

... **PETITIONER**

(Represented by Sri H. Srinivas Rao, Advocate,  
for M/s Srinivas and Badri Counsels)

**AND:**

1) The Managing Director,  
Bangalore Electricity Supply Company Ltd.,  
Corporate Office, KR circle,  
Bengaluru-560 001.

... **RESPONDENT No.1**

2) Deputy General Manager (Tech.)  
Karnataka Power Transmission Corporation Ltd.,  
Kaveri Bhavan, K.G Road,  
Bengaluru-560 009.

(Respondent No.1 & 2 represented  
by Smt. Sumana Naganand, Advocate  
for M/s Justllaw, Advocates)

... **RESPONDENT NO.2**

**ORDERS**

1. The petitioner has filed this petition under Section 86 (1)(f) read with 86 (1) (k) and Section 94 of the Electricity Act, 2003, praying for the following reliefs to:

- a) Direct the respondents to give full credit to the petitioner from the trial operation date to the commercial operation date i.e., up to June 2018 at the rate of Rs.8.80 per unit for the energy injected from the petitioner's installation situated at Thondahatti village, ID Halli, Madhugiri Taluk, Tumkur district.
- b) Direct the respondent to provide credit with interest for the delayed payment for the Power already injected to the grid by the petitioner from September 2017 till June 2018 at the rate of 18% p.a which amounts to Rs.30,72,000/-.
- c) Pass any other Order in the interest of justice and equity.

2. The facts as narrated in the petition are as follows: -

- a) The Government of Karnataka vide its order No. EN 17 NCE 2016, dated 20.01.2016 accorded sanction to the proposal of M/s Cleanmax Harsha Solar LLP for installation of renewable energy based Solar PV Electric Power Generating Station with capacity of 30 MW at Thondahatti village, ID Halli, Madhugiri Taluk, Tumkur district. Thereafter, the Government of Karnataka vide its order No. EN 406 NCE 2017, dated 28.09.2017 accorded approval for transfer of 1.5 MW Solar Power Project capacity in favour of the petitioner from out of the 30 MW capacity Solar PV Power allotted to M/s Cleanmax Harsha Solar LLP, Thondahatti village, ID Halli, Madhugiri

Taluk, Tumkur district. As per the Government order, the petitioner had planned to construct, own, operate and maintain renewable energy based Solar Energy Power Generating Stations.

- b) The petitioner issued a letter dated 28.09.2017 to the Chief Engineer (Electric) SLDC and made an application for entering into Wheeling and Banking Agreement (WBA) for 1.5 MW along with bank guarantee of Rs.20,000. Copy of the said letter cum application dated 28.09.2017 is produced as Annexure-A. On the same date; the Chief Electrical Inspector to the Government accorded approval of the electrical installation pertaining to the Solar Power Plant. Copy of the approval dated 28.09.2017 is produced as Annexure-B.
- c) On 28.09.2017 KPTCL, the 2<sup>nd</sup> respondent permitted the petitioner to have temporary interconnection by approving the same vide letter bearing No.CEE(P&C)SEE(Plg)/EE(PSS)/KCO-93/81141/F-824 stating that the interconnection approval for 1.5 MW has been accorded on a provisional basis in accordance with the approved evacuation scheme dated 28.09.2017. Copy of the provisional interconnection approval dated 28.09.2017 and approved evacuation scheme dated 28.09.2017 are produced as Annexure-C & D.
- d) As the petitioner had obtained all the necessary permissions for effective synchronization by the respondents, the 1<sup>st</sup> respondent issued the Commencement Certificate vide letter bearing No.EE/AAE(O)/JPA/2017-18/5306 dated 07.10.2017 wherein it was specified that 1.5 MW AC (1.8 MW CD) Solar PV modules with inverters and associated electrical equipment

had been commissioned and synchronized successfully on 28.09.2017. Subsequently the 2<sup>nd</sup> respondent also issued the Commencement Certificate vide letter bearing No. EEE/220KV/MDG/ 2017-18/238 dated 09.10.2017 wherein the 2<sup>nd</sup> respondent (KPTCL) stated that the Solar Power Plant was commissioned on 28.09.2017. The copies of the Commencement Certificates dated 07.10.2017 and 09.10.2017 issued by 1<sup>st</sup> & 2<sup>nd</sup> respondents are produced as Annexure–E & F.

e) The 2<sup>nd</sup> respondent issued a letter dated 10.10.2017 to the petitioner and sought for documents viz., Bank guarantee, processing charges, valid evacuation approval, agreement with consumers etc., to process the application for execution of wheeling and banking agreement. The petitioner was also asked to make certain payments which was paid by the petitioner and acknowledged by the 2<sup>nd</sup> respondent (KPTCL). The copy of the payment receipt dated 22.11.2017 is produced as Annexure–G.

f) From 28.09.2017 since the petitioner made the application for entering into WBA, the respondents had been causing undue delay in executing the Agreement. The 2<sup>nd</sup> respondent (KPTCL) issued a letter dated 23.11.2017 to the 1<sup>st</sup> respondent (BESCOM) seeking information whether the petitioner had executed Power Purchase Agreement (PPA) with them. Copy of the letter dated 23.11.2017 is produced as Annexure–H.

g) Further as the respondents were causing undue delay by not executing the WBA; the 2<sup>nd</sup> respondent (KPTCL) on 30.12.2017 issued letter bearing No. CEE(P&C)/SEE(Plg)/EE(PSS)/KCO-93/81141/F-824/ 19946-60 extending the time period for provisional interconnection approval giving reason for

extension of the provisional interconnection that copy of the acknowledgment letter regarding application made to CEE/SLDC for entering into WBA for 1.5 MW SPP pertaining to the petitioner has to be furnished. Copy of letter dated 30.12.2017 by the 2<sup>nd</sup> respondent (KPTCL) is produce as Annexure–J.

h) Subsequent to extending the provisional interconnection, the 2<sup>nd</sup> respondent (KPTCL) issued a letter dated 18.01.2018 to the petitioner where the petitioner was informed that the request for Regular Interconnection will be approved only after providing the copy of the WBA. Copy of the letter dated 18.01.2018 bearing No. CEE(P&C)/SEE(PIg)/EE(PSS)/KCO-93/81141/F-824/21465 is produced as Annexure– K.

i) As the 1<sup>st</sup> respondent (BESCOM) has not accorded approval for execution of WBA, the petitioner issued a letter dated 10.01.2018 requesting the 1<sup>st</sup> respondent to approve the execution of the WBA and informed the same to the 2<sup>nd</sup> respondent. A copy of the said letter was sent to the 2<sup>nd</sup> respondent (KPTCL) informing that the 1<sup>st</sup> respondent (BESCOM) had not yet accorded approval for execution of the WBA letters dated 10.01.2018 issued to 1<sup>st</sup> respondent (BESCOM) & 2<sup>nd</sup> respondent (KPTCL) are produced as Annexure–L & M.

j) As the 1<sup>st</sup> respondent (BESCOM) failed to reply to the letter dated 10.01.2018, the 2<sup>nd</sup> respondent (KPTCL) issued another letter dated 24.03.2018 bearing No.CEE(P&C)/SEE(PIg)/EE(PSS)/KCO-93/81141/F-824/27952-67 to the petitioner where the 1<sup>st</sup> respondent (BESCOM) informed the petitioner that Regular Interconnection has been provided to

23.38 MW out of 30 MW belonging to Solar Park, however, the provisional interconnection to the petitioner was extended instead of being regularized. As per the said letter the 2<sup>nd</sup> respondent (KPTCL) communicated to the petitioner that provisional interconnection approval was from 01.03.2018 to 30.04.2018. Copy of the letter dated 24.03.2018 bearing No.CEE(P&C)/SEE(Plg)/EE(PSS)/KCO-93/81141/F-824/27952-67 is produced as Annexure– N.

k) Subsequently, the 1<sup>st</sup> respondent (BESCOM) after a lapse of one more month delay issued a letter dated 05.04.2018 bearing No. GM(Ele)PP/BC-39-DGME2/AGM2/M-2/F-9734/17-18/1104-07 to the Superintending Engineer (Electy.), State Load Dispatch Centre according to its approval for executing Wheeling and Banking Agreement. The petitioner issued a letter dated 03.05.2018 to the 1<sup>st</sup> respondent submitting Wheeling and Banking Agreement for the purpose of approval and execution. On the same day the petitioner also issued a letter to the State Load Dispatch Centre (SLDC) where it submitted details of Security Deposit. A copy of the letter dated 03.05.2018 bearing No.UHPL/W&BA/IDHalli/001/2018-19 addressed to BESCOM and letter dated 03.05.2018 bearing No.UHPL/W&BA/IDHalli/002/2018-19 addressed to the State Load Dispatch Centre are produced as Annexure–P series.

l) The petitioner as per the Government order dated 28.09.2017 and for the purpose of wheeling up to 1.5 MW of the power generated from the project for its captive use and to sell to the third party utilizing the transmission and/or distribution network belonging to the 1<sup>st</sup> & 2<sup>nd</sup>

respondents entered in to WBA for Solar Power Project dated 08.06.2018 with both the respondents. Copy of the WBA for Solar Power Project dated 08.06.2018 between both the respondent is produced as Annexure–Q.

m) The 1<sup>st</sup> respondent (BESCOM) issued a letter dated 19.06.2018 bearing No. GM (Ele) /PP /DGM-2 /AGM-2 /BESCOM /BC-39 /F-9734/18-19 to the petitioner along with three sets of original WBA signed by both the respondents. Copy of the letter dated 19.06.2018 bearing No. GM(Ele)/PP/DGM-2/AGM-2/BESCOM/BC-39/F-9734/18-19/3451-52 is produced as Annexure-R.

n) The petitioner during the period when provisional interconnection was provided by the 2<sup>nd</sup> respondent had been constantly injecting several units of electricity. The 1<sup>st</sup> respondent was using these units for its consumption and the same units was transferred to the 1<sup>st</sup> respondent reflecting in Form-B from the month of September 2017 to June 2018. Thus the petitioner was injecting electricity generated for more than 9 months and the 1<sup>st</sup> respondent was using the same without making any adjustment for the said units. Number of units injected by the petitioners was about 23,28,075 units which amounted to Rs. 1,99,19,294/- according to the tariff order for the year 2017-18 and 2018-19. Copy of the relevant portion of the Tariff Order, 2018 and Tariff Order 2019 are collectively produced as Annexure –S.

o) The petitioner found that the compensations/adjustments were not being made by the 1<sup>st</sup> respondent in spite of consuming electricity and was advised to issue several bills according to APPC (Average Power Purchase

Cost) and not according to Tariff Order 2018, the petitioner vide letter dated 06.09.2018 bearing No. UHPL/BESCOM/APPC/INVOICE-001 addressed to the 1<sup>st</sup> respondent calling upon them to adjust/set-off the required amount. Copy of the said letter is produced as Annexure-T. The said bills were not as per the tariff authorized by the Commission and the petitioner was ill advised to issue such bills despite the fact the petitioner was entitled for bills to be adjusted as per the Tariff Order 2018.

p) The 1<sup>st</sup> respondent was liable to compensate the petitioner for the number of units which were injected from September 2017 to June 2018 at the rates calculate as per the Tariff Order 2018. Copy of the Form-B for the month of September 2017 to June 2018 along with the table stipulating the units and the entire amount to be claimed from the 1<sup>st</sup> respondent are produced as Annexure-U series & Annexure-V respectively.

q) The petitioner was aggrieved by the consumption of electricity by the 1<sup>st</sup> respondent over a period of 9 months during the provisional interconnection period which was about 23,28,075 units amounting to Rs.1,99,19,294. Hence, the petitioner had approached the Commission for remedy.

r) The petitioner has also averred the following grounds in support of its reliefs paid for:

(i) The petitioner commenced operation from September 2017 and had been generating electricity and the energy generated had been injected to the grid, which was acknowledged by 1<sup>st</sup> respondent (BESCOM) vide Forms-B, which were signed by the Authorities of the



1<sup>st</sup> respondent (BESCOM) which clearly shows that they were aware of the electricity being injected and were also using the electricity. Hence, the respondents cannot say that they are not liable to compensate the petitioner for the electricity consumed by them.

- (ii) The petitioner is a Solar Power Generating Company. They generate renewable energy which would be consumed instantly and the same cannot be stored. The respondents are well aware of the fact that once the provisional interconnection approval is provided, all renewable energy generating companies will be forced to inject energy into the grid and the inordinate delay of 9 months caused in executing WBA was deliberate for which the petitioner should not be penalized. The delay by the respondents was deliberate and not due to uncontrollable or unforeseen circumstances.
- (iii) It is the accepted principle of law that the Government undertakings will have to resort to reasonable timelines for executing agreements for allowing the petitioner to commence their energy transmission, and when delay is caused by the Government or Government undertakings; then it is the Courts which will have to provide justice by compensating the petitioner.
- (iv) The date of commercial operations of the petitioner's Solar Plant is on 28.09.2017. The 2<sup>nd</sup> respondent (KPTCL) also issued Commencement Certificate which was similar to the one issued by the 1<sup>st</sup> respondent (BESCOM). Hence the respondents ought to have

adjusted units injected and provided credit to the petitioner from the date of Commissioning and synchronization of the Solar Plant.

- (v) Alternatively, in Clause 5.6 of the WBA it is clearly stipulated that the 1<sup>st</sup> respondent(BESCOM) shall be liable to compensate for the infirm energy injected during the period from trial operation date after the synchronization up to the Commercial Operation date and the same shall be deemed to be sold to the 1<sup>st</sup> respondent(BESCOM). The relevant Clause 5.6 is reproduced as under:

*"5.6. 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 BESCOM in whose jurisdiction the project is located and shall be paid for by such BESCOM at the applicable average pooled power purchase cost determined by the Commission"*

- (vi) In Clause 5.7 of the agreement it has been agreed between the parties that the un-utilised banked energy remaining at the end of six months shall be deemed to have been purchase by the 1<sup>st</sup> respondent. Therefore, in the alternative, if the Commission were to hold that the petitioner is not liable for full credit for energy injected during the months of September 2017 to June 2018, then Clauses 5.6 and 5.7 shall be made applicable in favour of the petitioner and the 1<sup>st</sup> respondent shall be made liable to compensate the amount from the period of trial operation till the date of commercial operation. Clause 5.7 is reproduced as under:

*“5.7. Any un-utilized banked energy, remaining at the end of six months, shall be deemed to have been purchased by the BESCO (Distribution licensee) of the area where the project is located and shall be paid at 85% of the applicable generic RE tariff, as determined by the Commission from time to time provided that no transmission or wheeling charges, or open access charges shall be levied on the quantum of the banked energy remaining un-utilized at the end of six months and deemed to have been purchased by BESCO under this Agreement”.*

(vii) The 1<sup>st</sup> respondent had utilised energy injected by the petitioner for a period from September 2017 to June 2018 and if the petitioner is not paid for the same, then it would result in unjust enrichment of the 1<sup>st</sup> respondent whereby the petitioner would be put to huge financial loss.

(viii) The petitioner has prayed for directing the respondents to give full credit of the energy to the petitioner from the trial operation date to commercial operation date i.e., up to June 2018 at the rate of Rs.8.80/- per unit for the energy injected from the petitioners project's situated at Thondahatti village, ID Halli, Madhugiri taluk, Tumkur district and also to provide credit with interest for the delayed payment for the power already injected into the grid by the petitioner from September 2017 to June 2018 at the rate of 18% p.a which amounts to Rs. 30,72,000/- and to pass any other order in the interest of justice and equity.

s) For the above reasons the petitioner has prayed for allowing the petition.

3. Both respondents appeared through the same counsel. The 1st respondent (BESCOM) filed statement of objections and the same was adopted by the 2<sup>nd</sup> respondent (KPTCL). The statement of objections filed on behalf of respondents may be stated as follows :

- a) It is stated that the petitioner owns a 1.5 MW Solar Plant at Thondahatti village, ID Halli, Madhugiri taluk, Tumkur district. On 28.09.2017 Government of Karnataka gave approval for transfer of 1.5 MW capacity Solar Power Plant from Cleanmax Harsha Solar LLP to the petitioner.
- b) That on 28.09.2017 2<sup>nd</sup> respondent (KPTCL) accorded provisional interconnection approval to the petitioner with several conditions. Condition No. 10 of the interconnection approval states that provisional interconnection approval is provided only for technical connectivity purpose and KPTCL is not liable to pay any money for energy injected by the petitioner and further the petitioner is also required to obtain approval of SLDC before pumping energy into the grid.
- c) That the petitioner had Commissioned its plant on 28.09.2017 and made a request to the Chief Engineer, SLDC for entering into Wheeling and Banking Agreement. On 10.10.2017 2<sup>nd</sup> respondent (KPTCL) requested the petitioner to submit a bank guarantee and processing charge of Rs. 5000/-, evacuation approval and its agreement with consumers for sale of energy, to process the application for executing Wheeling and Banking Agreement. Copy of the letter dated 10.10.2017 is produced as Annexure-R1.

- d) The petitioner vide letter dated 20.11.2017 furnished bank guarantees and necessary documents to 2<sup>nd</sup> respondent (KPTCL) to process its application. Copy of the letter dated 20.11.2017 is produced as Annexure – R2.
- e) That the 2<sup>nd</sup> respondent (KPTCL) vide letter dated 23.11.2017 requested 1<sup>st</sup> respondent (BESCOM) to intimate its concurrence with respect to the Wheeling and Banking Agreement proposed to be executed by the petitioner. On 30.12.2017 the Chief Engineer (Elec.) (Planning and co-ordination) extended provisional interconnection approval from 30.11.2017 to 28.02.2018 to 10 firms including that of the petitioner.
- f) That the petitioner vide letter dated 10.01.2018 requested 1<sup>st</sup> respondent (BESCOM) to give its consent to execute Wheeling and Banking Agreement.
- g) That the 1<sup>st</sup> respondent (BESCOM) had constituted a Committee to review status of captive generating plants in its jurisdiction. On 27.03.2018 the committee constituted by 1<sup>st</sup> respondent gave approval to wheel energy to the petitioner. Copy of the proceeding of the committee is produced as Annexure – R3.
- h) That on 05.04.2018 1<sup>st</sup> respondent (BESCOM) issued concurrence to execute Wheeling and Banking Agreement. Copy of the letter dated 05.04.2018 is produced as Annexure – R4.
- i) That the 2<sup>nd</sup> respondent (KPTCL) accorded concurrence on 30.04.2018 to execute Wheeling and Banking Agreement by the petitioner and directed the petitioner to pay Rs.2,35,900/-.

- j) That the petitioner submitted draft WBA Agreement to the 1<sup>st</sup> respondent on 03.05.2018.
- k) That on 08.06.2018 the petitioner executed Wheeling and Banking Agreement with the respondents.
- l) That the petitioner on 06.09.2018 requested 1<sup>st</sup> respondent (BESCOM) to make payment for infirm energy injected from September 2017 to June 2018.
- m) That the respondents have delayed execution of Wheeling and Banking Agreement to unjustly enrich themselves. It is also stated that the respondent company is an entity created under a statute and is bound by Electricity Act, 2003, where it is indicated that there is bar on distribution licensee from purchasing power in the absence of an agreement duly approved by the Commission. Any agreement to purchase power without the approval of the Commission would be a nullity. In the present case the respondents do not have an agreement for purchase of power with the petitioner. As there is a specific bar on purchase of electricity in the absence of an agreement, the question of directing the payment for the same does not arise, as it is settled law that no prayer which would perpetuate an illegality can be granted. Hence the 1<sup>st</sup> respondent(BESCOM) states that the prayer sought for by the petitioner cannot be granted.
- n) That Hon'ble Tribunal has in Appeal No. 123/2010 in M/s Indo Rama Synthetics (I) Ltd., vs MSERC dated 16.05.2011 held that energy injected without intimation is to be considered as unauthorized

injection, for which no payment is to be made. Hon'ble Tribunal has in Appeal No. 120/2016 in M/s Kamachi Sponge & Power Corporation Ltd., vs TANGEDCO and Ors. dated 08.05.2017 held that no payment is liable to be made for any energy, be it firm or infirm power, in the absence of a PPA or a Schedule issued by the SLDC.

- o) That the petitioner in the present case did not have a PPA or a Wheeling and Banking Agreement in force during the period of injection. Neither the respondent distribution companies nor SLDC had any intimation about generation and injection of power by the petitioner which clearly shows that the petitioner had injected energy unauthorizedly and hence not entitled for payment of the same. Further the question of granting credit for energy injected prior to the WBA would also not arise.
- p) That as there was no contract between the petitioner and the respondents; no payment could be made to the petitioner. As there was no offer made by the petitioner to supply energy and no acceptance by the respondents, there was no contract between them and hence there could be no liability to pay the claim of the petitioner.
- q) As there was no Wheeling and Banking Agreement in operation during the period when energy was generated and injected into the grid any payment for the energy so injected cannot be claimed by the petitioner.

- r) It is stated that unscheduled energy cannot be effectively utilized. 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. Hence if payment is made for such energy it would adversely affect the interest of ESCOMs as all generators would resort to injecting unscheduled energy and claim payment for the same, which would result in loss to the ESCOMs. Hence the petitioner cannot take advantage of its wrongful action of injecting unscheduled energy into the grid.
- s) As the electrical energy injected into the grid cannot be stored, and it would be consumed instantly, there would be no option for the respondents either to accept or reject the said energy. Hence the contention of the petitioner that the respondent was utilizing the energy injected by the petitioner and not making payment for the same would result in enriching the petitioner to make wrongful gain at the cost of the respondent would be untenable and detrimental to the grid discipline.
- t) Clause 10 of the provisional interconnection approval dated 28.09.2017 is as under: -

*“10) KPTCL is not responsible for payments and consequences in case of pumping power in the absence of any contractual agreements. Provisional interconnection approval will only provide technical connectivity of the subject project with Grid and KPTCL is not liable to pay any money for any flow of power from this project. However, before pumping power into the grid, you shall obtain approval from CEE/LDC Bengaluru”.*



From this, it is clear that KPTCL is not responsible for payment of energy injected without any contractual arrangement.

- u) Regarding the delay on the part of the respondents in executing Wheeling and Banking Agreement, the allegation made are denied and held untenable. The petitioner made the application for execution of Wheeling and Banking Agreement on 28.09.2017 the 2<sup>nd</sup> respondent (KPTCL) communicated on 10.10.2017 to the petitioner to submit bank guarantee and processing charges of Rs.5,000/-. The petitioner vide letter dated 20.11.2017 furnished the bank guarantee and necessary documents to 2<sup>nd</sup> respondent(KPTCL) to process the application. As per 9(1) of Karnataka (Terms and Conditions for Open Access) Regulations, 2015 the petitioner is required to file open access application with all necessary particulars with the nodal agency. The petitioner failed to produce necessary documents and hence cannot attribute any delay to the respondents.
- v) As per clause 8 of KERC (Terms and Condition for Open Access) (Third Amendment) Regulation, 2015 the petitioner was required to submit Wheeling and Banking Agreement to the respondents within 5 days from the communication of grant of open access or deemed grant of open access. The said clause clearly states that in case the generator fails to submit WBA, open access deemed to have granted also stands cancelled. As the petitioner has submitted the WBA on 03.05.2018 after inordinate delay, the petitioner's request for wheeling

of energy as per application dated 20.11.2017 stands cancelled as had been clarified by Commission in O.P No.208/2017 in Amplus Power Solution Vs, SLDC & Others.

w) Second proviso to Clause 7 of KERC (Terms and Condition for Open Access) (Third Amendment) Regulation, 2015 clearly states that the generator is not entitled to any payment for energy injected before execution of WBA. Hence, the petitioner is not entitled for any energy injected prior to the execution of WBA as per KERC (Terms and Condition for Open Access) (Third Amendment) Regulation, 2015.

x) For the above reasons the respondents have prayed for dismissal of the petition.

4. The petitioner has filed Rejoinder to the statement of Objection of the respondents, denying the defences taken by the respondents and reiterating its stand. The petitioner further states that the objections filed by the respondents are devoid of merits, misconceived and are liable to be dismissed.

5. We have heard the learned counsel for the parties. They have also filed the written submissions and relied upon different decisions.

6. From the rival contentions and the records, the following issues arise for our consideration:

Issue No.1: Whether the energy injected into the grid, by the solar power project of the petitioner from 28.09.2017 to 07.06.2018 or any part of it, requires to be credited to the account of the petitioner or paid for, in terms of the Regulation 9 of amended

Regulations, 2015 by the 1<sup>st</sup> respondent (BESCOM) or in terms of the WBA dated 08.06.2018 executed between the parties?

Issue No.2: Whether the petitioner is entitled to any compensation for the energy injected into the grid from 28.09.2017 to 07.06.2018 on the principles stated in Section 70 of the Indian Contract Act, 1872?

Issue No.3: To which reliefs the petitioner is entitled to?

Issue No.4: What Order?

7. After considering the submissions made by the learned counsel for the parties and the material on record our findings on the above issues are as follows:

8. Issue No.1: Whether the energy injected into the grid, by the solar power project of the petitioner from 28.09.2017 to 07.06.2018 or any part of it, requires to be credited to the account of the petitioner or paid for, in terms of the Regulation 9 of amended Regulations, 2015 by the 1<sup>st</sup> respondent (BESCOM) or in terms of the WBA dated 08.06.2018 executed between the parties?

a) The procedure to be followed for grant of open access is specified in KERC (Terms and Conditions for Open Access) Regulation, 2004 (for short referred as OA Regulations, 2004). Certain clauses of this OA Regulations 2004 are amended with effect from 08.10.2015 as per Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access Regulation, 2004) (Third Amendment) Regulations, 2015. We are mainly concerned with the amended Regulation 9 replacing the existing Regulation 9 of OA Regulations, 2004. The amended Regulation 9 is

hereinafter referred as Regulation 9 of amended Regulations, 2015. The present petition relates to the claim arising subsequent to the date of coming into force of the Regulation 9 of amended Regulations, 2015. Therefore, the rights & liabilities of the parties should be decided as per this amended Regulation.

b) Before dealing with the facts, we may note the scope of Clauses (1) to (10) of Regulation 9 of amended Regulations, 2015 which are narrated below:

(i) Clause 1 of the amended Regulation 9 provides for filing of an application for grant of open access before the Nodal Agency (SLDC) by furnishing the required particulars and paying the prescribed processing fee and Bank Guarantee. Clause 2 provides for issuance of an acknowledgement for having received the application. Clause 3 provides for consequences of rejection of the application, for any deficiency or defect in it. 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 acknowledgement by the concerned Licensee(s) for having received the application.

(ii) 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 Nodal Agency, 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 Nodal Agency, it shall be deemed that the concurrence for the long term open access applied for, has been granted.

- (iii) Clause 7 provides that, the Nodal Agency 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 Nodal Agency, 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.
- (iv) 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 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 of 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 Nodal Agency within seven working days following the day of receipt of such agreement.

(v) 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. Clause 10 further provides that the effective date shall also be applicable for considering the banking of energy.

c) For the purpose of this case, Clauses (7) to (10) of Regulation 9 of amended Regulations, 2015 are material, therefore, they are extracted below:

*(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 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 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 above effective date shall also be applicable for banking in the case of solar, wind and Mini-Hydel projects."*

- d) The second proviso to Clause (7) specifies that the energy injected during the period when the application was pending is not liable for payment. The third proviso to the said Clause (7) provides that for the energy injected 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 (APPPC) rate.
- e) The Clause (8) of the Regulation 9 of amended Regulations, 2015 provides for submission of the WBA signed by the applicant to such of the ESCOMs and to the Nodal Agency within five days from the date of receipt of the communication for grant of open access. Clause (9) provides that the concerned licensees shall execute the WBA by signing his copy of the agreement and forward it to the Nodal Agency within seven days following the date of receipt of such agreement.
- f) Clause (10) is material for the purpose of this case. This Clause provides that the effective date for commencement of operation of wheeling



and banking of electricity shall be the date of receipt of the agreement by the Nodal Agency specified at Clause (8), irrespective of the actual date of execution of WBA by the concerned licensees. Such a Clause is introduced to avoid any losses to the applicant, in the event of delay in executing the WBA by transmission licensee and the concerned distribution licensees, for any reason.

g) In the present case, the required events as noted above, have taken place on the dates stated below:

- |  |   |             |
|--|---|-------------|
| (i) The date of commissioning of the project       | - | 28.09.2017. |
| (ii) The date of grant of open access              | - | 30.04.2018. |
| (iii) Submission of WBA to the concerned licensees | - | 03.05.2018. |
| (iv) WBA actually executed                         | - | 08.06.2018. |

h) In view of the above provisions, the petitioner is entitled to payment of energy charges at average APPC rate for the energy injected into the grid from the date of approval of open access till the date of submission of WBA to the concerned licensees i.e., from 30.04.2018 to 02.05.2018 (b.d.i.). Further, the petitioner is entitled to credit of the quantum of energy towards wheeling & banking transaction as provided in Clause (10) of Regulation 9 of amended Regulations, 2015. Therefore, the energy injected into the grid from 03.05.2018 to 07.06.2018 should be credited to the account of the petitioner towards wheeling & banking transactions. Admittedly the energy injected from 08.06.2018 has been accounted by the respondents towards wheeling and banking transactions of the petitioner. However, as per second proviso to clause

(7) of Regulation 9 of amended Regulations, 2015, the petitioner was not entitled to inject any energy to the licensee's network during the pendency of the application for the grant of open access and the licensee is not liable to pay any charges for the injection of such energy. There is a specific bar not to inject energy prior to the approval of open access applied for. Therefore, in terms of the second proviso to clause (7) of the Regulation 9 of amended Regulations, 2015, the petitioner is not entitled to for any compensation for the energy injected prior to the grant of open access. However, the petitioner is entitled to payment for the energy injected from the date of grant of open access till the submission of WBA and entitled to claim credit for the energy injected between the date of submission of WBA till the date of execution of the WBA as noted earlier.

- i) The petitioner has also based its claim for reimbursement of the energy charges for the energy injected into the grid in terms of Articles 5.6 & second para of Article 6.2.1 of the WBA. The relevant part of the above Articles read as follows:

5.6 – “Charges for infirm power:

*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 BESCO in whose jurisdiction the project is located and shall be paid for by such BESCO at the applicable average pooled power purchase cost determined by the Commission.*

6.2.1 - xxxxx

*Any banked energy unutilised at the end of six months as reckoned above, shall be deemed to have been purchased by the BESCO in whose jurisdiction the project is located and shall be paid as per clause 5.7."*

j) Considering the submissions made by the learned counsel for the parties on these points, we are of the considered view that the petitioner cannot be granted any relief for the energy injected prior to the date of grant of open access. The reasons may be stated as follows:

(i) The question of payment for the infirm power injected from trial operation date up to the commercial operation date, would arise only when there is need of trial operation for declaration of Commercial Operation of the Project. Such instance may arise in the case of bagasse based & bio-mass based thermal units. In the case of solar power project, as in the present case, the question of declaration of commercial operation of the unit does not arise. The petitioner has contended that the date of commercial operation is to be considered as the date of execution of the WBA. Therefore, it is contended on behalf of the petitioner that the energy injected from the date of synchronization of the project up to the date of execution of WBA would fall under Article 5.6 of the PPA. This contention also appears to be not correct. The WBA defines commercial operation date as the date declared

jointly by the Company (Project Owner) and the Corporation/BESCOM, on which the project or any of its units is/are declared as available for commercial operation. Therefore, in the present context the “commercial operation date” cannot be interpreted as the date of execution of WBA from which date the commercial transaction of wheeling & banking of energy takes place between the Generator and OA consumer. Therefore, we hold that the petitioner is not entitled to any relief under Article 5.6 of the WBA.

(ii) The payment towards ‘unutilised banked energy’ stated in second para of Article 6.2.1 of the WBA, would arise only after the execution of the WBA. This provision for payment for unutilised banked energy is not applicable to the energy injected prior to the date of submission of WBA followed by approval of open access. Therefore, we hold that the petitioner is not entitled to any relief under second para of Article 6.2.1 of the WBA.

k) For the above reasons, we hold Issue No.1 partly in affirmative to the extent as noted above.

9. Issue No.2: Whether the petitioner is entitled to any compensation for the energy injected into the grid from 28.09.2017 to 07.06.2018 on the principles stated in Section 70 of the Indian Contract Act, 1872?

a) Section 70 of the Contract Act reads as follows:

*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 another 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) As already noted the second proviso to clause 7 Regulation 9 of amended Regulations, 2015 prohibits injection of energy to the state network prior to the date of open access approval. It is an established principle that a claim on the basis of something done against the express provisions of statute or a term of the contract cannot be claimed under this section. It may also be noted that the KPTCL had specifically instructed not to inject energy without there being an agreement for sale either with licensee or with O.A. consumer. The electrical energy cannot be stored and the moment it is injected it is consumed somewhere at the load centres of the distribution network. Therefore, it cannot be said that there is voluntary acceptance of the energy delivered by the BESCO. Further it may be noted that the energy was injected without Schedule and without intimation to SLDC. In that event it is not possible to assume that the energy was consumed only within the jurisdiction of the BESCO network.

c) In the recent past this Commission has not allowed any relief for the unauthorized injection of energy. The petitioner has relied upon certain

decisions wherein compensation was given for the energy injected prior to the execution of the WBA. It may be seen that those decisions relate to the period prior to the Third Amendment to OA Regulations, 2004 which came into force with effect from 08.10.2015. Therefore, those decisions are not helpful.

d) For the above reasons, we hold Issue No.2 in negative.

10. Issue No.3: To which reliefs the petitioner is entitled to?

a) As noted on Issue No.1, the petitioner is entitled to APPC rate for the quantum of energy injected into the grid from 30.04.2018 to 02.05.2018 (b.d.i.), in addition to the credit of the energy injected into the grid from 03.05.2018 to 07.06.2018, towards wheeling & banking transactions. The quantum of energy injected during the above period may be calculated on pro-rata basis taking into consideration the total number of days in a month.

b) One another contention of the petitioner is that there was inordinate delay in executing the WBA by the respondents. The petitioner stated that on 28.09.2017, it filed the application before the 2<sup>nd</sup> respondent (KPTCL) for grant of open access and finally the WBA was executed on 08.06.2018 causing delay of more than nine months from the date of filing the application for grant of open access. It may be seen that the application filed on 28.09.2017 was incomplete. The petitioner furnished the processing fee only on 22.11.2017. Therefore, it can be said that the application for grant of open access was duly filed only on 22.11.2017.

The 1<sup>st</sup> respondent (BESCOM) took some time for scrutinizing the claim of petitioner and some others as captive units by appointing a Committee for scrutiny of the captive status. The said Committee on 27.03.2018 accorded approval for wheeling of energy to the petitioner and three others, as captive units to their respective captive consumption points. Therefore, there was delay by the 1<sup>st</sup> respondent (BESCOM) in intimating its consent to wheel the energy by the petitioner. It may be seen that if there was delay by the 1<sup>st</sup> respondent (BESCOM) or by the 2<sup>nd</sup> respondent (KPTCL) in meeting the timeline specified in Regulation 9 of amended Regulations, 2015, while processing the application of the petitioner for grant of open access, the petitioner should have opted for invoking the benefit of 'deemed approval' as provided in the said Regulation 9 of amended Regulations, 2015. In the absence of exercising that option, the petitioner cannot complain regarding the delay caused by the respondents.

c) For the above reasons, Issue No.3 is held accordingly.

#### 11. Issue No.4: What Order?

For the above reasons, we pass the following:

### **ORDER**

The petition is partly allowed as below:

- a) The 1<sup>st</sup> respondent (BESCOM) shall pay to the petitioner at APPC rate for the quantum of energy injected into the grid from 30.04.2018 to 02.05.2018 (b.d.i.).

- b) The 1<sup>st</sup> respondent (BESCOM) shall credit the quantum of energy injected into the grid from 03.05.2018 to 07.06.2018, towards wheeling & banking account and shall treat the said quantum of energy as unutilised banked energy and pay for the same to the petitioner as per Article 5.7 of the WBA dated 08.06.2018 (Annexure-Q).
- c) The ascertainment of energy injected during the above period may be calculated on pro-rata basis taking into consideration the total number of days of the month during which the energy is injected.
- d) The remaining claim made by the petitioner is rejected.

sd/-

(H.M. MANJUNATHA)  
Member

sd/-

(M.D. RAVI)  
Member