

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 18th July, 2019

Present:

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

OP No.17/2016

BETWEEN:

Jindal Aluminium Ltd.,
Jindalnagar,
Tumkur Road,
Bengaluru – 560 073.

.. **PETITIONER**

[Represented by Shri S.V. Bhat, Advocate]

AND:

- 1) Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 101.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.
- 3) The Deputy General Manager – Technical,
Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.
- 4) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

- 5) The General Manager – Electrical,
Power Purchase,
Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 6) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 019.
- 7) The Superintending Engineer –
Electrical / Commercial,
Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 019.

.. **RESPONDENTS**

*[Respondent-1 and 2 represented by Indus Law, Advocates,
Respondents 4 and 6 represented by Justlaw, Advocates]*

- - - - -

ORDERS

- 1) Originally, the Petitioner has filed the present Petition before this Commission on 09.03.2016 against the 1st Respondent-Gulbarga Electricity Supply Company Limited (GESCOM) alone, praying to:
- (a) direct the said Respondent to pay Rs.40,34,864/-, being the price of 8,97,303 units of energy injected into the Grid, for the period between 04.10.2015 and 17.11.2015;
- (b) Or in the alternative, direct the said Respondent to allot 8,97,303 units of energy injected into the Grid, for the Petitioner's own consumption; and,
- (c) Direct the said Respondent to pay the cost of the present proceedings and such other reliefs, as are just and equitable.

-
- 2) On 28.03.2017, the Petitioner filed an Application to implead Respondent Nos.2 to 7 in the Cause Title of the Petition. That Application was allowed by this Commission and the Petitioner filed the Amended Petition on 11.07.2018.
 - 3) On 28.03.2017, the Petitioner had filed another Application for amendment of the 'Prayer' Column of the Petition, so as to claim interest on the amount that might be awarded to the Petitioner. This Application was opposed by the 1st Respondent (GESCOM). The Commission has not passed any Order on this Application. It appears, the Petitioner has also not pressed for any Order on this Application for amendment of the 'Prayer' Column. Hence, the 'Prayer' Column of the Petition is not amended by the Petitioner.
 - 4) The material facts required for the disposal of the present Petition may be stated as follows:
 - (a) That the Government of Karnataka, vide its Order dated 27.02.2015, permitted transfer of 24.08 MW Wind Power capacity in favour of the Petitioner, from out of 300 MW Wind Power capacity allotted to M/s. Vish Wind Infrastructure LLP. Thereafter, the Petitioner installed 12 MW capacity Wind Power Generating units, out of the capacity of 24.08 MW, allotted to it.
 - (b) The 12 MW capacity Wind Power Project was commissioned on 03.10.2015, as evidenced by the Commissioning Certificate dated 03.10.2015, produced at ANNEXURE-A.

-
- (c) The Petitioner executed a Wheeling & Banking Agreement (W&BA) dated 18.11.2015 with the other signatories to the W&BA, Respondents 1, 2, 4 and 6, i.e., GESCO, KPTCL, BESCO and CESC, respectively, to wheel the energy for its captive consumption and also to its captive consumers. Subsequent to the execution of the W&BA, the Petitioner itself consumed certain quantity of energy generated and sold the remaining quantity of energy to its open access consumers, out of the energy generated from its Wind Power Project.
- (d) The Petitioner claims that, it had injected 8,97,303 units of energy into the Grid, from its Wind Power Project, from 03.10.2015 (date of commissioning of the Project) to 17.11.2015 (before executing the W&BA).
- (e) The Wind Power Project of the Petitioner was situated within the local jurisdiction of the 1st Respondent (GESCO). The captive Drawal Points of the Petitioner and the Drawal Point of one of the open access consumers were within the jurisdiction of the 4th Respondent (BESCO). The Drawal Point of another open access consumer was within the jurisdiction of the 6th Respondent (CESC).
- (f) The Petitioner states that, subsequent to the commissioning of the Wind Power Project, till the execution of the W&BA, the power was injected into the Grid from the Project, amounting to 8,97,303 units and that the 1st Respondent (GESCO) issued 'B' Forms, evidencing the injection of power during the months of October and November, 2015. The Petitioner further states that, since the power so generated was injected into the

Grid of the 1st Respondent (GESCOM), as aforesaid and not used by the Petitioner, the 1st Respondent (GESCOM) was liable to pay for the power so injected and that the Petitioner had raised two Invoices, separately, for the aforesaid quantum of energy, at the rate of Rs.4.50 per unit, but the 1st Respondent (GESCOM) failed to pay the said amounts.

- (g) The energy so injected into the Grid was received by the 1st Respondent (GESCOM) without any demur. Therefore, the 1st Respondent (GESCOM) was liable to pay for the same or to return the said quantity of energy for the use of the Petitioner.
- 5) Upon Notice, the 1st Respondent (GESCOM) appeared through its counsel and filed its Statement of Objections, denying the claim of the Petitioner. The defence taken by the 1st Respondent (GESCOM) may be stated as follows:
- (a) That, the Petition is bad in law for non-joinder of the necessary parties. The other parties to the W&BA dated 18.11.2015 and also the other Distribution Licensees of the State were necessary parties, including the Nodal Agency, who grants the open access. That, in the absence of these parties, the Petition is liable to be dismissed.
- (b) That, the Petition does not disclose any cause of action for the claim made against this Respondent. There was no Agreement between the parties to pay for the energy injected into the Grid, prior to the execution of the W&BA. The provisional interconnection approval dated 01.10.2015 specifically provides that, the Petitioner was not entitled to inject energy

into the Grid, without there being any commercial Agreement for sale of energy and that the KPTCL was not liable for the energy so injected, if any. The Petitioner was undisputedly and unmistakably aware that the unscheduled energy, without a Contract, would not be paid for.

- (c) That, once a Project is synchronized with the Grid, the readings of the energy injected have to be taken, in order to facilitate the energy balancing of the Grid, irrespective of whether there was any commercial Agreement entered into, prior to injection of power or not. The further assertion of the Petitioner that this Respondent generated 'B' Forms, was of no aid to the Petitioner's case. Therefore, the 1st Respondent (GESCOM) denied its liability to pay any amount or to return any energy to the Petitioner, in this regard.
- (d) That, in the event of allowing the claim of the Petitioner, or any part of it, all the ESCOMs of the State were jointly and severally liable to make good the claim of the Petitioner.
- 6) Subsequent to filing of the Statement of Objections by the 1st Respondent (GESCOM), the Petitioner has filed the aforesaid Application to implead the Respondents 2 to 7 and the same has been allowed by this Commission. It may be noted that, the Petitioner has not sought for any consequential amendment in the pleadings and in the 'Prayer' Column, while making the application for impleading the Respondents 2 to 7.
- 7) The other Respondents have also filed their Statement of Objections, denying the claim made by the Petitioner in the Petition.

-
- 8) During the proceedings of the case, the Petitioner was permitted to produce additional documents, if any, and accordingly, the Petitioner has produced the Provisional Interconnection Approval dated 01.10.2015 and the approval for open access dated 28.09.2015 granted by the State Load Despatch Centre (SLDC), permitting the execution of the W&BA, and to make payment of the Security Deposit of Rs.18,80,880/-, before commencement of wheeling of energy.
- 9) We have heard the learned counsel for the parties. The learned counsel for the Petitioner has also filed the Written Arguments.
- 10) From the oral submissions of the learned counsel for the parties and the pleadings on record, the following Issues would arise, for our consideration:
- (1) Whether the Petitioner is entitled to any compensation for the energy injected into the Grid, prior to execution of the W&BA, on the principles stated in Section 70 of the Indian Contract Act, 1872?
 - (2) Under what circumstances, the Petitioner could claim compensation for the energy injected into the Grid, prior to execution of the W&BA and whether the Petitioner has made out such a case for claiming compensation?
 - (3) What Order?
- 11) After considering the rival contentions and the material placed on record, our findings on the above Issues are as follows:

- 12) **ISSUE No.(1):** *Whether the Petitioner is entitled to any compensation for the energy injected into the Grid, prior to execution of the W&BA, on the principles stated in Section 70 of the Indian Contract Act, 1872?*
- (a) The learned counsel for the Petitioner has contended that, on the principles stated in Section 70 of the Indian Contract Act, the Petitioner may be awarded compensation for the energy injected into the Grid, prior to the execution of the W&BA. He has submitted that, the energy injected into the Grid would be consumed, instantly, by the consumers of the one or the other Distribution Licensees of the State. The learned counsel for the Respondents submitted that, the Petitioner has failed to make out a claim under Section 70 of the Indian Contract Act. He has contended that, there was no voluntary acceptance of the power injected into the Grid by any of the ESCOMs and that the injection of such power amounted to thrusting upon the Respondents the amount of energy, without there being any option for the Respondents to refuse it. It is also contended that, the Respondents cannot make use of the unscheduled energy injected into the Grid and it is almost impossible to prove, whether actually the unscheduled energy injected into the Grid was consumed.
- (b) A similar question had arisen in OP No.32/2014, in the case of *Lalpur Wind Energy Private Limited –Vs- KPTCL and others*, decided by this Commission on 26.11.2015. The said Order was upheld by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.37/2016, decided on 08.02.2019. After considering the rival contentions therein and the precedents on this

point, this commission has held in that case that, the person injecting the power into the Grid, prior to the date of execution of the W&BA, was not entitled to any compensation, on the principles stated in Section 70 of the Indian Contract Act. For consideration of this issue, the facts considered in the *Lalpur Wind Energy Private Limited* case and in the present case are similar and one and the same. We think, the reasons stated in Paragraph-9 of the Order dated 26.11.2015 in that case would actually hold good in this case also. The said Paragraph-9 of the Order reads thus:

“9) **ISSUE No.(3): Whether the Petitioner is entitled to any compensation for the energy injected prior to the date of execution of the W&BAs, on the principles stated in Section 70 of the Indian Contract Act, 1872?**

(a) *The Petition does not contain any averments for basing the reliefs, claimed therein, on the principles stated in Section 70 of the Contract Act. The Respondents, in their Statement of Objections, have contended that, in the facts of the present case, Section 70 of the Contract Act has no application for claiming compensation for the energy injected into Grid prior to the execution of the W&BAs. The Petitioner, in its Rejoinder, has contended that the provisions of Section 70 of the Contract Act and the principles of quantum meruit should apply in the present case, wherein an implied contract shall be assumed, from the date of commissioning till the date of execution of the W&BA. The Petitioner has also contended that the delay in granting of Open Access and execution of the W&BA, would attract the applicability of Section 70 of the Contract Act. In view of such pleadings, this issue has been framed.*

(b) 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.'

- (c) *Whenever there were unexplained and inordinate delay in granting of Open Access and execution of W&BA by the Utilities, this Commission had allowed compensation to the generator for the energy injected into the Grid during the delayed period. While supporting the grant of compensation in such cases, Section 70 of the Contract Act was also referred to. The analysis of the present case shows that the principles stated in Section 70 of the Contract Act cannot be applied to the present case. The basis of Section 70 is that, something had been done by one party for the other which the party has voluntarily accepted. It is based on the doctrine of restitution, which prevents unjust enrichment by retaining anything received by a party and which does not belong to him, and he must return it to the person from whom he received it or to pay for its value. The Commentary under Section 70 of the Contract Act by the learned Authors, Pollack & Mulla, 14th Edition, Volume II, states the circumstances under which the ingredients of the said Section are not made out, and reads thus :*

"... A claim on the basis of something done against the express provisions of statute cannot be claimed under this Section...."

"...Where the Defendant informed the Plaintiff that he did not want the work done, the work was not done lawfully. ..."

"...The voluntary acceptance of the benefit of the work done or under delivery is the foundation of the claim under

Section 70. The person on whom the benefit is conferred, enjoys the benefit voluntarily. It means that the benefit must not have been thrust upon him without his having the option of refusing it. Nobody has a right to forcing the benefit upon another. ..."

- (e) In the present case, admittedly, the provisional Interconnection Approvals specifically stated that the generator has to obtain the necessary approval for banking, before injecting the power into the Grid and that any pumping of power without a contractual agreement is not permitted, and any claim in this regard was not maintainable against KPTCL. It is not the case of the Petitioner that it was not aware of such condition imposed in the provisional Interconnection Approvals. Further, it can be noted that the electrical energy injected into the Grid cannot be stored and it would be consumed instantly and there would be no option for the Respondents, either to accept or reject the said energy. Therefore, it is not a case of enjoying the benefit voluntarily by the Utilities, but it amounts to thrusting it upon them, without having the option of refusing it.
- (f) In this connection, the decision of the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal Nos.123 and 124 of 2007, decided on 8.5.2008, in the case of Hyderabad Chemicals Limited –Vs- Andhra Pradesh Electricity Regulatory Commission and others can be usefully referred to. In the said case, the Generating Company approached the APTRANSCO by means of a letter, stating that, in case the generator pumps the energy into the Grid of APTRANSCO before commissioning of the Project and entering into a PPA or necessary Banking-cum-Wheeling Agreement, APTRANSCO will not be required to pay any consideration for the same. After giving such a letter, the Generating Company pumped certain quantity of power into the Grid, and subsequently, made a claim for the quantity of power injected before the date of entering into the PPA. The

Hon'ble ATE has held that the principles under section 70 of the Contract Act cannot be applied in the facts and circumstances of that case, stating that the Appellant intended to deliver the energy gratuitously and there was no obligation on the person, to whom delivery had been made, to pay compensation to the former. In the present case, the first Respondent specifically instructed the Petitioner not to inject the energy till banking arrangement is entered into and that it would not make any payment for the energy injected in the meanwhile. Therefore, the decision of the Hon'ble ATE stated above would clearly apply to the present case. For the reasons stated above, we answer Issue No.(3) in the negative."

- (c) The learned counsel for the Petitioner has relied upon the decision of the Hon'ble Supreme Court, cited in AIR 1962 SC 779, in the case of *State of West Bengal –Vs- M/s. B.K. Mondal & Sons*. We have gone through the said decision and found that, this decision does not improve the case of the Petitioner in the present case, to any extent. In this decision, one of the ingredients required, for applicability of Section 70, is explained as follows:

"... In appreciating the scope and effect of the provisions of this Section it would be useful to illustrate how this Section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case S.70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again S.70 would not apply. In other words, the person said to be made liable under S.70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under S.70 arises. ..."

-
- (d) As already noted, the Distribution Licensee would have no opportunity to either accept or reject the energy, once it is injected into the Grid, without schedule and without the knowledge of such Licensee.
- (e) For the above reasons, we answer Issue No.(1), in the negative.
- 13) **ISSUE No.(2):** *Under what circumstance, the Petitioner could claim compensation for the energy injected into the Grid, prior to execution of the W&BA and whether the Petitioner has made out such a case for claiming compensation?*
- (a) This Commission has taken the view in the aforesaid OP No.32/2014 (*Lalpur Wind Energy Private Limited* case) that, only upon proof of negligence on the part of the Utilities in processing and approving the application for open access and in executing the W&BA, the person injecting the power into Grid could claim compensation for the period, during which such delay had occurred.
- (b) The procedure, for processing and approving of the application for open access and the execution of the W&BA, is stated in Regulation 9 of the KERC (Terms and Conditions for Open Access) Regulations, 2004 (hereinafter referred to as the "O.A. Regulations, 2004"). This Regulation 9 has been amended with effect from 08.10.2015. The approval for the open access and the approval for the execution of the W&BA, were granted in the present case by the Nodal Agency, through communication dated 28.09.2015. Therefore, the rights and liabilities of the parties should be decided as per the existing provisions, prior to the amendment of Regulation 9. This communication stated that, the

Petitioner / Applicant was required to submit a draft W&BA, as per the standard Format, to different officials concerned, so as to initiate action to sign the said Agreement and to pay the Security Deposit of Rs.18,80,880/- in favour of the Chief Engineer, SLDC, before the commencement of wheeling of energy.

- (c) The averment in the Petition does not disclose the date on which the Petitioner submitted the draft W&BA to the different officials concerned and when it paid the said Security Deposit. As per Regulation 15 of the O.A. Regulations, 2004, the Petitioner was required to install Special Meters (ABT Meters), with specifications stated therein, before the actual wheeling of energy could take place. In the present case, as the approval for execution of the W&BA was granted on 28.09.2015, the existing Regulation of the O.A. Regulations, 2004 would apply. In the above-referred case, OP No.32/2014 (*Lalpur Wind Energy Private Limited* case) - a case arising prior to amendment of Regulation 9 of the O.A. Regulations, 2004, this Commission has narrated the circumstances, under which the negligence on the part of the officials concerned could be inferred, while processing the application for grant of open access and execution of the W&BA. As already noted, the Petitioner has not averred even a single fact, to infer negligence on the part of the officials concerned, while processing and executing the W&BA. For the above reasons, we hold that, the Petitioner has failed to make out a case for claiming compensation. Therefore, we answer Issue No.(2), accordingly.

14) **ISSUE No.(3)**: *What Order:*

For the foregoing reasons, we pass the following:

ORDER

The Petition stands dismissed. The Petitioner is not entitled to any of the reliefs, sought for, in the Petition.

Sd/-

(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)
MEMBER

Sd/-

(M.D. RAVI)
MEMBER