

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 26th July, 2018

Present:

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

OP No. 134/2017

BETWEEN:

Matrix Power (Wind) Private Limited,
8-2-277/12, No.296, UBI colony,
Road No.3, Banjara Hills,
Hyderabad-500034.

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PETITIONER

[Represented by J. Sagar Associates, Advocates and Solicitors]

AND:

- 1) Hubli Electricity Supply Company Limited (HESCOM),
Corporate Office,
Navanagar,
Hubballi.
- 2) Karnataka Power Transmission Corporation Limited,
Corporate Offices,
Cauvery Bhavan,
Bangalore – 560 009.

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RESPONDENTS

[Respondents 1 & 2 are represented by Justlaw, Advocates]

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 read with clause 21 of the Karnataka Electricity Regulatory Commission (KERC) (General and Conduct of Proceedings) Regulations, 2000, in effect, praying to:
 - (a) Direct the HESCOM (Respondent-1) to pay Rs.31,25,134/- (Rupees Thirty One Lakhs Twenty Five Thousand and One Hundred Thirty Four) only, along with interest towards energy banked and unutilized by the Petitioner during the period from November, 2013 to March, 2014; and,
 - (b) Pass any other Order which this Commission may deem fit.

- 2) The facts of the case, as submitted by the Petitioner, may be summarized, as follows:
 - (a) The Petitioner is a generating company having Wind Power Projects of gross capacity of 15 MW, located in several villages of Basavanabagewadi Taluk in Vijayapura District, which were commissioned on 09.11.2013. Pursuant to the approval granted by the KPTCL (Respondent-2), the Petitioner signed a Wheeling and Banking Agreement (WBA) with the KPTCL, BESCOM and HESCOM, on 23.11.2013.
 - (b) The Petitioner, on 03.01.2017, requested the Respondent-1 for payment of Rs.31,25,134/- towards unutilized banked energy, during the period November, 2013 to March, 2014, in accordance with this Commission's

Orders dated 04.07.2014 and 12.09.2014. However, the Respondent-1 replied on 25.02.2017 to the Petitioner, stating that the banked energy for the period ending March, 2014 had lapsed in terms of Clause 6.2.3 of WBA, as per which the banked energy expires at the end of commencement of next Wind Year and that the Commission's Order dated 12.09.2014, stipulating payment of 85% generic tariff by the Distribution Licensees for the banked energy, unutilized at the end of the banking period, was applicable prospectively. The Respondent-1, therefore, rejected the claim of the Petitioner.

- 3) The grounds submitted by the Petitioner, in support of the prayers, may be summarized, as follows:
 - (a) The Commission, on 09.06.2005, allowed banking facility in respect of the Wind and Mini-Hydel Projects, apart from determining the Wheeling and Banking charges at 5% and 2%, respectively. Further, on 11.7.2008, the Commission approved the standard Wheeling and Banking Agreement, for the Renewable Energy Projects, which was valid up to 10.07.2013, and thereafter, extended it up to 30.06.2014, vide various Orders of the Commission. Thereafter, the Commission, in the Order dated 04.07.2014, stipulated payment by the Distribution Companies for the unutilized banked energy, at the end of the banking period. Subsequently, the Commission, in the Order dated 12.09.2014, clarified that the stipulation of payment by the Electricity Supply Companies (ESCOMs) for the unutilized banked energy, will be applicable, henceforth, for both the existing as

well as the new Projects, commissioned on or before 31.03.2018, utilizing the banking facility.

- (b) The Petitioner having entered into the WBA, pursuant to the Commission's Order dated 11.07.2008, is entitled to the benefit of 85% of the generic tariff for the unutilized energy used by the ESCOMs, in accordance with the Commission's Order dated 04.07.2014.
- (c) The Hon'ble Appellate Tribunal for Electricity (ATE), in the judgment dated 01.08.2014 in Appeal Nos.59 and 116 of 2013, among other things, has held that, the banking of wind energy is an essential feature to enable the commercial viability of the wind energy generators supplying power to a consumer, captive or otherwise, through open access.
- (d) The Respondent-1 has enjoyed the benefit of the power injected by the Petitioner into the grid and, thereby, the Petitioner is entitled to be compensated, as per Section 70 of the Indian Contract Act,1872 for the unutilized banked energy for the period, from November, 2013 to March, 2014.
- (e) The Hon'ble ATE, in the judgment dated 12.05.2016 in Appeal No.120/15, has upheld the decision of this Commission, allowing compensation to the generating companies for the energy injected, at the generic tariff applicable even prior to entering into the WBA. The Hon'ble ATE, relying on Section 70 of the Indian Contract Act, has rejected the contention of

the Appellant-HESCOM in that case, that as per clause 6.2.2 of the WBA, carry forward of the banked energy was not permitted from one Wind Year to another and, thereby, the Respondent generator was not entitled to the credit of energy wheeled, as the Wind Year 2013-14 had come to an end on 31.03.2014.

- (f) The Hon'ble ATE, in the judgment dated 01.03.2012 in Appeal No.41/2011, has allowed the adjustment of the banked units or refunding of the amounts towards the unutilized banked energy, along with interest, at the SBI's Short-Term Prime Lending Rate, even though, as per the agreement entered into between the Appellant and Respondent, the unutilized banked energy had lapsed.
- (g) The reliance placed upon clause 6.2.3 of the WBA and the contention of prospective application of the Orders dated 04.07.2014 and 12.09.2014, by the Respondent-1, is misconceived and bad in law, and 8,17,028 units of the electricity generated and banked by the Petitioner during the period, from November, 2013 to March, 2014, which remained unutilized and deemed to have been sold to the HESCOM, ought to be compensated.
- (h) This Commission, by allowing the benefits of the Wheeling and Banking facilities to the Wind and Mini-Hydel Power Projects through its Orders, has tried to come out with the development of the Renewable Energy Market, as envisaged in the Electricity Act, 2003, the National Electricity Policy and

the Karnataka State Policy for Promotion of Renewable Energy (2009-2014). The stipulation regarding payment for the unutilized banked energy by the DISCOMs in the Commission's Orders dated 04.07.2014 and 12.09.2014, ought to be made applicable to the Petitioner's case and the benefit of compensation for the unutilized banked energy, ought to be extended for the period prior to July, 2014.

- 4) Upon issuance of Notice, the Respondents appeared through their learned counsel.
- 5) The Respondent-1 filed the Statement of Objections and the submissions made, therein, may be summed up, as follows:
 - (a) The Respondent-1 is not liable to pay the Petitioner for the unutilized banked energy during the period between November, 2013 and March, 2014 as per clauses 6.2.2 and 6.2.3 of the WBA which clearly stipulate that, the banked energy that remains unutilized at the end of the wind year ending on 31.03.2014 cannot be carried forward to the next wind year and the Respondent-1 is not liable to make any payment for the banked energy that remains unutilized at the end of the wind year.
 - (b) The Petitioner having voluntarily agreed to the terms of the WBA (which does not provide for payment towards banked energy), is not entitled for payment as per Section 70 of the Contract Act.

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- (c) The Commission, vide order dated 04.07.2014, deemed the unutilized banked energy as being purchased by the Distribution Licensee of the area where the generator is located, from the date of passing of the Order. Thereafter, the Commission clarified, vide Order dated 12.09.2014, that the Order dated 04.07.2014 is to be enforced prospectively and not retrospectively. Therefore, the Respondent-1 is not liable to make payment to the Petitioner, as per the Orders dated 04.07.2014 and 12.09.2014.
- (d) There is no violation of any provision of the Electricity Act, 2003 and the National Electricity Policy or the State Policy, as contended by the Petitioner. The judgment of the Hon'ble ATE in Appeal No.41/2011, relied on by the Petitioner, is not applicable to the Petitioner's case, as the facts of the two cases are different. The issue for consideration by the Hon'ble ATE, was not the one pertaining to non-payment for the banked energy remaining at the end of the Wind Year, but to non-grant of the credit for the banked energy. Similarly, the judgment of the Hon'ble ATE, in Appeal No.120/2015, is not applicable to the Petitioner's case, as in that case, the issue pertained to grant of the credit for banked energy prior to the execution of the WBA.
- (e) The Petition is not maintainable in law and ought to be dismissed, as the Petition has been filed on 14.08.2017, seeking payment for the unutilized banked energy for the period, between November, 2013 and March, 2014, after a delay of more than three years. Further, even as per clause

13.2 of the WBA, if there is a delay of more than three years in exercising certain rights, such right is deemed to be waived off.

6) We have perused the records and heard the learned counsel for both the parties. The following issues would arise for our consideration:

(1) Whether the Petition is barred by limitation?

(2) Whether the Petitioner is entitled for payment of unutilized banked energy during the period from November, 2013 to March, 2014, in terms of the Commission's Orders dated 04.07.2014 and 12.09.2014?

(3) What Order?

7) After considering the submissions made by the parties and perusing the pleadings and documents placed on record, our findings on the above issues are as follows:

8) **ISSUE No.(1)**: *Whether the Petition is barred by limitation ?*

(a) The Petitioner pleads that the dispute between the parties arose only on 25.02.2017, when the Petitioner's request made on 03.01.2017 for payment towards the unutilized banked energy during the period, from November, 2013 to March, 2014, was rejected by the Respondent-1 on 25.02.2017. That, therefore, the *doctrine of laches* is not applicable to the Petitioner's case. That, further, clause 13.2 of the WBA, dealing with the waiver of

rights, has no application in the present case, as there is no intentional relinquishment of the right by the Petitioner, because the Petitioner has raised a demand for payment for the unutilized units, within three years from the Order dated 04.07.2014.

- (b) Per contra, the Respondent-1 has contended that, the Petitioner's claim is barred by limitation and also that, it can be taken as waived off, as per clause 13.2 of the WBA.
- (c) The claim for compensation for the unutilized energy would arise soon after 31.03.2014. Therefore, the claim for compensation should have been made within three years from 01.04.2014. The Petition is filed, claiming compensation on 16.08.2017, which is beyond three years from the date of the cause of action. Though the Petitioner has made a claim by raising a bill on 03.01.2017, it does not extend the period of limitation to file the Petition. Therefore, the Petition is barred by limitation. As per the recent decision of the Hon'ble Supreme Court, in *Andhra Pradesh Power Co-ordination Committee and others vs Lanco Kondapalli Power Ltd. & others*, reported in (2016) 3 SCC 468, the Limitation Act applies for the claims before the Commission, under Section 86(1)(f) of the Electricity Act, 2003. Therefore, the question of considering the delay and laches does not arise.
- (d) Therefore, we answer Issue No.(1), in the affirmative.

- 9) **ISSUE No.(2):** *Whether the Petitioner is entitled for payment of unutilized banked energy during the period from November, 2013 to March, 2014, in terms of the Commission's Orders dated 04.07.2014 and 12.09.2014?*
- (a) It is the case of the Petitioner that the Commission, by the Order dated 04.07.2014, had provided for payment of 85% of the generic tariff, for any unutilized banked energy as at the end of the Wind Year by a wind generator, by the Distribution Licensee of the area where the generator is located. That, as clarified by the Commission, in the Order dated 12.09.2014, the payment for the unutilized banked energy, stipulated in its Order dated 04.07.2014, is applicable to both the existing as well as the new Projects, commissioned on or before 31.03.2018, utilizing the banking facility. Alternatively, the Petitioner urges that, the benefit extended in the Commission's Order dated 04.07.2014 should be given effect to, from the date of the Discussion Paper, which proposed the payment for the unutilized banked energy.
- (b) The Petitioner also pleads that, even otherwise, the Respondent-1 is liable to pay compensation towards the energy injected by the Petitioner, which has not been utilized by the Petitioner, but used by Respondent-1, as per Section 70 of the Contract Act.
- (c) On the other hand, the Respondent-1 contends that, as clearly stipulated in Clause 6.2.3 of the WBA, there was no intention on the part of the Petitioner to receive any compensation for the banked energy, lapsed at the end of the financial year. That, the Commission's Orders dated

04.07.2014 and 12.09.2014 are effective prospectively and the Commission never intended to make it applicable, retrospectively. Therefore, the claim of the Petitioner, which is neither contemplated under the WBA nor in the Commission's Orders, is not maintainable.

- (d) We note that the Commission in its order dated 04.07.2014, for the first time provided for payment of 85% of the generic tariff for the unutilized banked energy, as at the end of the Wind Year. This was preceded by a Discussion Paper dated 11.06.2014, issued by the Commission, in which, the views of the stake-holders had been sought, on the issue of revision of wheeling and banking charges for renewable energy sources, the period of banking and on the proposal to pay 85% of the generic tariff determined by the Commission towards the unutilized banked energy as at the end of each quarter or a year. After holding a public hearing and considering the views of the stakeholders, the Commission, on 04.07.2014, decided to continue the annual banking facility to the RE Projects under the Non-REC Route and for payment of 85% of the generic tariff for Wind, Mini-Hydel and Solar Plants, towards the unutilized banked energy, as at the end of the banking period. Subsequently, noting that the aspect of payment of 85% of generic tariff is not explicitly mentioned in respect of the existing WBAs, the Commission, in the Order dated 12.09.2014, clarified that its decision for payment of 85% of the generic tariff for the unutilized banked energy, as at the end of the year, shall be applicable, henceforth, for both the existing as well as the new Projects commissioned on or before 31.03.2018, utilizing the banking facility. We may note that the implication

of the clarification is that, even without the amendment of the standard WBAs, already entered into by the existing Projects (to provide for payment towards unutilized banked energy), the provision for payment at 85% of the generic tariff would be available to them, with effect from 31.03.2015. It never intended to extend the benefit to the banking periods, which had already come to an end. A retrospective benefit cannot be sought, without it being specifically provided in the relevant Orders.

- (e) Hence, we are unable to agree with the arguments made by the Petitioner to support its claim for payment, based on the Commission's Orders dated 04.07.2014 and 12.09.2014.

- (f) The WBA, executed by the Petitioner with the Respondent-1, does not provide for any payment towards the unutilized banked energy, as at the end of the Wind Year. As rightly pointed out by the Respondent-1, Clause 6.2.3 of the WBA clearly stipulates that, any unutilized banked energy, as at the of the Wind Year lapses and the utility i.e., Respondent-1 in this case, is not liable for any payments for such energy lapsed. The Petitioner, who had voluntarily agreed to such stipulation before injecting energy into the grid, cannot now seek payment towards the unutilized banked energy, under Section 70 of the Contract Act. Hence, the Petitioner's claim fails on this count also.

- (g) We note that, none of the provisions of the Electricity Act,2003 or the National Electricity Policy or the State's Policies would contemplate providing for banking of energy by the Renewable Energy sources or for payment for any unutilized banked energy. The concept of banking is only a promotional measure to the RE plants and cannot be claimed as a vested right.
- (h) The Hon'ble ATE itself, in its judgment in Appeal Nos.59 and 116 of 2013, has noted that, the various State Commissions have provided for different types of banking facilities and different models for payment for the unutilized energy, to the wind generators, as a promotional measure and thereby, it recognizes that the wind generators do not have any right for claiming any mandatory provision for banking or payment towards the unutilized banked energy. When such is the case, it cannot be taken that, the Hon'ble ATE has specified that payment for any unutilized banked energy should be mandatorily provided by all the State Commissions.
- (j) We agree with the Respondent-1 that the judgments of the Hon'ble ATE, in Appeal No.41/2011 and Appeal No.120/2015, are not applicable to the Petitioner's case, as the facts of the cases decided by the Hon'ble ATE and the facts of the Petitioner's case differ.
- (k) For the above reasons, we answer Issue No.(2), in the negative.

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

For the foregoing reasons, we pass the following;

ORDER

The Petition is dismissed. The Petitioner is not entitled for the relief, sought for, in the Petition.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER