

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 28th May, 2019

Present:

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

OP No.208/2017

BETWEEN:

M/s. Amplus Power Solutions Pvt. Ltd.,
Palm Square Building, 6th Floor,
Golf Couse Extension Road,
Setcor-66,
Gurgaon,
Haryana – 122 102.

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PETITIONER

[Represented by HSA Advocates, Advocates]

AND:

- 1) State Load Despatch Centre,
Cauvery Bhavan,
K.G. Road,
Bengaluru-560 009.
- 2) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 3) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 019.

- 4) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

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RESPONDENTS

[Respondents represented by Justlaw, Advocates]

ORDERS

- 1) In this Petition, the Petitioner has prayed for a direction against the Respondents, to pay, jointly and severally, for the energy injected into the Grid, from 18.04.2017 to 31.05.2017, relating to the period prior to the execution of the Wheeling and Banking Agreement (W&BA) dated 01.06.2017, from its Solar Power Project, at the APPC rate prevailing in FY 2107-18, with interest at the rate of 12% per annum, and to pass such other Orders, as deemed fit in the facts and circumstances of the case. The Petitioner has filed the present Petition on 27.10.2017.
- 2) As per Form-B issued, the net energy exported to the Grid for the month of April, 2017 was 3,44,701 units and for the month of May, 2017 was 17,07,781 units.
- 3) The material facts, required for deciding the claim of the Petitioner, may be stated as follows:
 - (a) The Petitioner has set up a 34.3 MW capacity Solar Power Project at the Solar Park of the Sagitaur Ventures India Pvt. Ltd., in Varavukaval Village,

Chellakere Taluk, Chitradurga District, on seeking permission as per the Government Order dated 30.01.2017.

- (b) On 08.03.2017, the Petitioner made an application to the 1st Respondent-State Load Despatch Centre (SLDC), seeking long term open access for its 34.3 MW Solar Power Project. The 1st Respondent (SLDC), vide letter dated 10.03.2017 (ANNEURE – P2), informed the Petitioner to produce a valid evacuation approval, for processing its application.
- (c) The Government Order dated 30.01.2017 had mentioned the location of the Solar Power Project at "Varavukaval Village", Chellakere Taluk, Chitradurga District, but not at the "Solar Park of the Sagitaur Ventures India Pvt. Ltd., in Varavukaval Village."
- (d) The Petitioner obtained the Corrigendum dated 31.03.2017, issued by the Government of Karnataka, to read the location of the Solar Power Project of the Petitioner as the "Solar Park of the Sagitaur Ventures India Pvt. Ltd., Village in Varavukaval Village" in the Government Order dated 30.01.2017, instead of "Varavukaval Village", as mentioned earlier.
- (e) The Corrigendum dated 31.03.2017 was produced before the 1st Respondent (SLDC) on 03.04.2017 (ANNEXURE – P4) and a request was made to process the grant of open access for wheeling the energy from the Solar Power Project.

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- (f) On receipt of the Corrigendum dated 31.03.2017, the Chief Engineer (Ele) (Planning and Co-ordination) of the 4th Respondent - Karnataka Power Transmission Corporation Limited (KPTCL) issued, on 31.03.2017 itself, the provisional interconnection approval for the First Phase of the 8 MW capacity out of the total capacity of 34.3 MW of the Solar Power Project of the Petitioner. On the same day, the Petitioner also obtained the electrical safety approval, pertaining to the 8 MW Solar Power Project, from the Electrical Inspectorate, and thereafter, on the same day, the 8 MW capacity Solar Power Project of the Petitioner was commissioned to the Thallak Switchyard.
- (g) The Second Phase of the 8 MW Solar Power Project of the Petitioner was commissioned on 13.05.2017, after obtaining the provisional interconnection approval dated 12.05.2017, electrical safety approval dated 05.05.2017 issued by the Electrical Inspectorate.
- (h) Subsequent to the commissioning of the First Phase of the 8 MW Solar Power Project, the 1st Respondent (SLDC), vide letter dated 05.05.2017 (ANNEXURE- P6) conveyed approval for the open access, to wheel the energy to the two non-captive HT consumers in the jurisdiction of the Chamundeshwari Electricity Supply Corporation Limited (CESC) and the Bangalore Electricity Supply Company Limited (BESCOM), from the 34.3 MW Solar Power Project of the Petitioner, on such terms and conditions, as stated therein.

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- (j) The Petitioner submitted the W&BA to the 2nd Respondent (BESCOM) on 06.05.2017, with a covering letter date 05.05.2017 (ANNEXURE – P7). The W&BA dated 01.06.2017 (ANNEXURE – P8) is shown to have been executed by the Petitioner and the 2nd Respondent (BSCOM) and the 4th Respondent (KPTCL). The energy injected on and from 01.06.2017 has been accounted for, towards wheeling and banking transaction.
- (k) Subsequent to the commissioning of the 1st and 2nd Phases of the Solar Power Project, the energy was being injected into the Grid, with effect from 31.03.2017 and 13.05.2017, respectively. However, only the energy injected from 01.06.2017 has been taken into consideration for wheeling and banking. The claim of the Petitioner relates to injection of energy during the period prior to the date of execution of the W&BA dated 01.06.2017.
- (l) The Petitioner has contended that, the date of filing of its application, for grant of open access, could be taken as 03.04.2017, i.e., the date on which it produced the Corrigendum issued by the Government of Karnataka. According to the Petitioner, the open access should have been granted within fifteen days from 03.04.2017, i.e., on or before 18.04.2017. Therefore, the Petitioner has claimed that, the power injected from 18.04.2017 to 31.05.2017 is to be compensated.
- (m) The energy injected into the Grid from the Solar Power Project of the Petitioner for the above-said period has been utilized by the 2nd Respondent

(BESCOM), by supplying the same to its consumers. Thus, the Petitioner has demanded for compensation for the energy injected during the months of April and May, 2017, as per the letter dated 10.07.2017, claiming compensation at the APPC rate and also has sent two more such letters on 02.08.2017 and 28.08.2017, respectively, but without any response from the 2nd Respondent (BESCOM).

- (n) The Petitioner has urged the following grounds for claiming compensation for the energy injected into the Grid, for the period from 18.04.2017 to 17.05.2017:
- (i) That, its application for open access may be taken as 'dully filed' on 03.04.2017, the date on which the Petitioner has produced the Corrigendum dated 31.03.2017, in response to the 1st Respondent (SLDC)'s letter dated 10.03.2017. It is urged that, as per Clauses 6 and 7 of Regulation 9 of the KERC (Terms and Conditions for Open Access) (3rd Amendment) Regulations, 2015 [Amended Open Access Regulations, 2015], the 1st Respondent (SLDC) should have granted open access within fifteen days from 03.04.2017, i.e., on or before 18.04.2017. However, the open access was granted on 05.05.2017 and thereby, there was an unexplained and inordinate delay of sixteen days in granting the open access. Therefore, the Petitioner has claimed compensation for the energy injected into the Grid and utilized by the 2nd Respondent (BESCOM), for the period from

18.04.2017 to 05.05.2017, on the ground of delay in granting open access;

- (ii) Further, it is urged that, Clause 10 of Regulation 9 of the Amended Open Access Regulations, 2015, provides that, the 'Effective Date' for the wheeling of electricity is the date when the W&BA is submitted by the Petitioner to the relevant Distribution Licensee. The Petitioner had submitted the draft W&BA on 05.05.2017 to the 2nd Respondent (BESCOM) and therefore, as per Clause 10 of Regulation 9 of the Amended Open Access Regulations, 2015, 05.05.2017 becomes the 'Effective Date' for commencement of the operation of wheeling of electricity. Therefore, it is urged that the Petitioner is to be allowed compensation for the energy injected into the Grid from 05.05.2017, till the W&BA was formally considered to be executed on 01.06.2017 (i.e., for the period from 05.05.2017 to 31.05.2017), which has been utilized by the 2nd Respondent (BESCOM);
- (iii) Alternatively, the Petitioner has also relied upon Section 70 of the Indian Contract Act, 1872. In support of this contention, the Petitioner has relied upon the case of *Jocil Ltd., Vs Southern Power Distribution Company of Andhra Pradesh*, reported in 2008 ELR (APTEL) 0829, and also the *Fortune Five Hydel* case, in Appeal No.123 of 2015 (*Hubli Electricity Supply Company Limited Vs Fortune Five Hydel Projects Pvt. Ltd., & another*), decided by the Hon'ble Appellate Tribunal for

Electricity (ATE) on 12.05.2016. The Petitioner has also relied upon some other similar cases decided by the Hon'ble ATE.

- 4) Upon Notice, the Respondents have appeared through their counsel. The 2nd Respondent (BESCOM) has filed its Statement of Objections and the other Respondents have filed a common Statement of Objections. The grounds of defence urged in the statement of Objections filed by the 2nd Respondent (BESCOM) and the other Respondents are one and the same and they opposed the claim of the Petitioner on the following grounds:
 - (a) That, the question of giving credit for the energy supplied, prior to the date of execution of the W&BA, would not arise. That, there is no question of paying any compensation for the energy injected into the Grid, as there was no contract between the parties for purchase of energy or for wheeling and banking of energy. There is a bar on the Distribution Licensee from purchasing the power, in the absence of an Agreement, duly approved by the Commission. When there is a specific bar on the purchase of electricity in the absence of an Agreement, the question of directing payment for the same, at a particular rate, would not arise. The question of making payments for the energy injected, in the absence of any Schedule or a Power Purchase Agreement (PPA), would not arise, as held in by the Hon'ble ATE in Appeal No.123/2010, in the case of *M/s. Indo Rama Synthetics (I) Ltd. Vs MSERC*, decided on 16.05.2011, and in Appeal No.120/2016, in the case of *Kamachi Sponge & Power Corporation Ltd. Vs TANGEDCO & Others*, decided on

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- 08.05.2017. The Petitioner has injected the energy, unauthorizedly and is not entitled to any payment for the same.
- (b) That, it would be pertinent to note that, the 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. If payment for such energy is directed to be made, it would adversely affect the interest of the Electricity Supply Companies (ESCOs), as all the generators would resort to injecting unscheduled energy into the Grid and claim payment for the same. The Petitioner cannot take advantage of its wrongful action of injecting unscheduled energy into the Grid.
- (c) That, it can also 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, the contention of the Petitioner that, the Respondent, by utilizing the energy injected into the Grid by the Petitioner and not making payment for the same, is unjustly enriching itself and is making wrongful gain at the cost of the Petitioner, is untenable. Such injection of power into the Grid is detrimental to the Grid discipline.
- (d) That, the provisional interconnection approvals dated 31.03.2017 and 12.05.2017, issued before synchronization, would clearly prohibit the injection

of power into the Grid, without any approval from the KPTCL / SLDC and without there being any commercial Agreement.

- (e) That, soon after the filing of the application for grant of open access, on 08.03.2017, the Petitioner was directed on 10.03.2017 to submit the evacuation approval. The Petitioner has sought for the wheeling and banking for the total capacity of 34.3 MW of power. However, the interconnection approvals were given for different capacities, on different dates and the entire capacity of 34.3 MW was interconnected only on 11.08.2017.
- (f) That, the averments made in the various paragraphs of the Petition, attributing negligence and delay on the part of the Respondents, are denied. The Respondents have, therefore, prayed for dismissal of the Petition.
- 5) 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, the following Issues would arise, for our consideration:
- (1) Whether the Petitioner is entitled to compensation for the energy injected between 18.04.2017 and 05.05.2017, on the ground that there was an inordinate delay of 16 (sixteen) days in granting the open access?

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- (2) Whether the Petitioner is entitled to compensation for the energy injected between 06.05.2017 and 31.05.2017, as per Clause 10 of Regulation 9 of the Amended Open Access Regulations, 2015?
- (3) 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?
- (4) What Order?
- 6) After considering the submissions of the parties and the pleadings and material on record, our findings on the above Issues are as follows:
- 7) **ISSUE No.(1):** *Whether the Petitioner is entitled to compensation for the energy injected between 18.04.2017 and 05.05.2017, on the ground that there was an inordinate delay of 16 (sixteen) days in granting the open access?*
- ISSUE No.(2):** *Whether the Petitioner is entitled to compensation for the energy injected between 06.05.2017 and 31.05.2017, as per Clause 10 of Regulation 9 of the Amended Open Access Regulations, 2015?*
- (a) It is convenient to dispose of Issue Nos.(1) and (2), at a stretch. Therefore, these two Issues are taken up together.

- (b) Before dealing with the facts, we may note the relevant Clauses 1 to 10 of Regulation 9 of the Amended 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 Nodal Agency with all the required particulars, by 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 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 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 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 amended Regulation 9 came into force with effect from 08.10.2015. There is no dispute that the claim made in the present Petition relates to a period subsequent to this amended Regulation No.9. Therefore, the rights and liabilities of the parties should be decided as per this amended Regulation.

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- (d) Clause 1 of the amended Regulation 9 provides for filing of an application for grant of open access before the Nodal Agency, which is the 1st Respondent (SLDC), by furnishing the required particulars and paying the prescribed processing fee and Bank Guarantee. Clause 2 provides for issuance of an acknowledgment 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 acknowledgment by the concerned Licensee(s) for having received the application.
- (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 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.

- (f) 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.
- (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 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. 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.

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- (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.
- (j) In the present case. The Petitioner has filed the application for long term open access on 08.03.2017. The 1st Respondent (SLDC) requested the Petitioner to produce the evacuation approval, for processing the application. Subsequently, the Petitioner, on 03.04.2017, produced the Corrigendum issued by the Government of Karnataka, stating to read the location of the Project in the Solar Park developed by a third party, which dispenses with the production of the evacuation approval by the Petitioner. Therefore, the Petitioner states that, at least 03.04.2017 may be considered as the date, on which the application for open access has been duly filed. The Petitioner states that, the long term open access, requested for, should have been granted, within 15 (fifteen) days from 03.04.2017, as per Clause 6. Assuming that, 03.04.2017 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 Nodal Agency about the grant or otherwise of the long term open access. Thereafter, the Nodal Agency 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 03.04.2017, the grant or otherwise of the open access should have been intimated to the Petitioner. But, it is not within 15 (fifteen) days from 03.04.2017, as claimed by the Petitioner. The Petitioner has not counted 20 (twenty) working days from 03.04.2017, to ascertain, by which date the open access should have been granted. 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. The Commission further notes that, within 5 (five) working days from the date of the deemed grant of open access, the Petitioner has to submit the required number of W&BA, with the signature of its authorized signatory and submit the same to the Nodal Agency and also to all the Licensees concerned; in default, the open access, deemed to have been granted, shall stand cancelled. In that event, the Petitioner has to apply, afresh, for grant of open access. Therefore, we are of the considered opinion that, in the facts of the present case, 18.04.2017 cannot be considered as the date, on which the open access should have been granted, as contended by the Petitioner. If the grant of open access was not communicated by the Nodal Agency to the Petitioner, within the stipulated period, the open access is deemed to have been granted and within 5 (five) working days from the date of communication of the grant of open access, or the deemed grant of open access, the Petitioner should file the required

number of W&BA to the Nodal Agency and also to the other Licensees concerned. Therefore, in the light of the amended Regulations, as noted above, the question of delay in grant of open access, does not arise. In the case of any delay in grant of open access beyond the specified period, the deemed grant of open access comes into play. In either case, the Petitioner had to file the required number of W&BA, within the stipulated time. If the Petitioner commits default in filing the required number of W&BA, 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 1st Respondent (SLDC) granted the long term open access, as per letter dated 05.05.2017 (ANNEXURE – P6). In this letter, it was specifically instructed that, the Petitioner should submit the W&BA, as per the standard Format, to each of the Respondents 2 to 4, and also to pay the Security Deposit, etc., as stated in the said letter. In response to this letter, the Petitioner addressed the letter dated 05.05.2017 (ANNEXURE – P7) to the 2nd Respondent (BESCOM), stating that, “with reference to the above subject, we are submitting the draft copy of the Wheeling and Banking Agreement for your review and confirmation, to sign the Agreement.” This letter would show that, the Petitioner has submitted only one set of the W&BA to the 2nd Respondent (BESCOM). In paragraph-8 of the Petition, it is stated that, after receipt of the communication granting the open access, the Petitioner submitted the W&BA, in the standard Format, with his signature, to the 2nd Respondent

(BESCOM), for its signature and for further circulation of the same to the Respondents 3 and 4, for their execution of the W&BA. In the Petition, the Petitioner does not claim that, it had submitted the required number of the W&BA to each of the Licensees concerned, as required in Clause 8. The consequence of it would be that, the open access granted, would stand cancelled. Since the open access granted stands cancelled, the Petitioner cannot claim that the effective date for commencement of the operation of wheeling of electricity should be the date of receipt of the Agreement for wheeling, specified in Clause 10 and further, it cannot claim compensation for the energy injected into the Grid, from the date of grant of open access till the date of submission of Agreement for wheeling, as provided in the last proviso to Clause 7.

- (l) It is contended on behalf of the Petitioner that, the delay in signing of the W&BA, 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 the W&BA was submitted to the 2nd Respondent (BESCOM), i.e., 06.05.2017. This contention could have been accepted, had the Petitioner submitted the required number of W&BA, with his signature, to the Nodal Agency as well as the other Licensees concerned. Therefore, the Petitioner's contention, in this regard, cannot be accepted.

(m) The Amended Open Access Regulations, 2015, has been framed in order to avoid any delay in the grant of open access and commencement of the operation of wheeling of electricity. 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 customer is protected. There were allegations that the SLDC and the ESCOMs would cause delays in the execution of the W&BAs, causing loss to the Generators, who applied for open access. To overcome this situation, the existing Open Access Regulations were amended. Any benefit of credit of the wheeled energy or payment of compensation for the energy injected, could be considered only when the open access customer strictly follows the amended Regulations, in its letter and spirit. Any open access customer cannot claim ignorance of law as a ground for excusing himself for any deviations from the procedure specified.

(n) For the above reasons, we answer Issue Nos.(1) and (2), in the negative.

8) **ISSUE No.(3):** *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) or the other ESCOMs and they have collected the energy charges from various consumers, therefore, the 2nd Respondent (BESCOM) or the other ESCOMs are making wrongful gain, at the cost of the Petitioner, and they 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, 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:

- (i) 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;*
- (i) 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,
- (ii) Appeal No.37/2016, decided on 08.02.2019, in the case of *Lalpur Wind Energy Pvt. Ltd., -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 2nd Respondent, are not parties. It is not established that, the 2nd 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) We find that, the open access granted, has stood cancelled, as per the relevant provisions of the Amended Open Access Regulations, 2015, as the Petitioner has failed to furnish the W&BA to all the Licensees concerned, within the stipulated time. 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 01.06.2017.

- (f) During the arguments, the Petitioner relied upon Article 5.6 of the W&BA dated 01.06.2017, for the purpose of claiming charges for the energy injected prior to the execution of the W&BA. The said Article reads thus:

“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.”

- (g) A reading of the above Article would show that, it applies only to the infirm energy injected into the Grid, where trial operation is required after synchronization of the Project, till the date of declaration of its commercial operation. In the present case, the Project, in question, being a Solar Project, there was no need for declaration of the commercial operation, after synchronization with the Grid. The Commissioning Certificate of the present Solar Power Project would show that, the date of synchronization itself has been shown as the date of commissioning of the Project. It is submitted that, there were no trial operations after synchronization, for declaring the Commercial Operation Date of the present Project. Therefore, on this ground, the Petitioner cannot claim any charges or compensation.
- (h) For the above reasons, we answer Issue No.(3), in the negative.

9) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

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

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER