

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 10th March, 2016

Present:

- | | |
|---------------------------------|----------|
| 1. Sri M.K. Shankaralinge Gowda | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

OP No.1 / 2015

BETWEEN:

Renew Wind Energy (AP) Private Limited,
Tower 4A, 6th Floor,
DLF Corporate Park,
M.G. Road,
Gurgaon – 122 002

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PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) The State Load Despatch Centre,
28, Race Course Road,
Bengaluru – 560 009.
- 2) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 3) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001

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RESPONDENTS

[Represented by Indus Law, Advocates]

ORDERS

- 1) In substance, the Petitioner in this Petition has prayed for a direction against the Respondents to pay, jointly and severally, for the energy injected into the Grid, at the generic tariff, from the date of commissioning (29.6.2013) of the 18 Mega Watts (MW) capacity Wind Power Project (Project) upto 8.8.2013 (both days inclusive), with interest; or alternatively, to direct the Respondents to give credit of the energy for the said period, to the account of the Petitioner, for its use.

- 2) The material facts required for the disposal of this Petition may be stated as follows :
 - (a) The Petitioner obtained the provisional interconnection to the Grid for its 18 MW capacity Wind Power Project on 28.6.2013. Thereafter, the application dated 8.7.2013 of the Petitioner, for grant of open access to utilize the power from the Petitioner's Project for captive use, was received by the 1st Respondent–State Load Despatch Centre (SLDC) on 10.7.2013. Even after a lapse of more than five months from the date of receipt of the Petitioner's application for grant of open access, the 1st Respondent (SLDC) did not communicate about the fate of the open access application. The Petitioner submitted his grievances before this Commission, in its letter dated 20.12.2013. This Commission treated the said letter as Suo Motu Case No.1/2014 and issued notice to the

1st Respondent (SLDC). During the hearing of the Suo Motu case on 6.3.2014, the Commission directed the SLDC to file an Affidavit explaining the reasons for the delay in disposing of the open access application of the Petitioner. An Affidavit was filed by the General Manager of the Karnataka Power Transmission Corporation Limited (KPTCL) on 12.3.2014, intimating that the Wheeling and Banking Agreement (W&BA) was signed on 31.1.2014 itself, and explaining the reasons for the delay in granting of the open access.

(b) During the hearing of the said Suo Motu case, on 12.3.2014 itself, an oral offer was made by the learned counsel appearing for the KPTCL, that the Electricity Supply Companies (ESCOMs) would pay for the power injected into the State Grid, upto the execution of the W&BA. That submission was recorded, and by granting two weeks' time to the ESCOMs for making payment, the Suo Motu case was disposed of on the same day. It was recorded in the Order Sheet of that case thus:

"KPTCL offers to have payments made by ESCOMs for the power injected by the Complainant till the signing of the W&B Agreement at the generic tariff applicable."

(c) The KPTCL and the ESCOMs disputed the correctness of the concession, as recorded on 12.3.2014 in the Order Sheet of the said Suo Motu case, as noted above, and filed a Review Petition, RP No.2/2014, before this Commission for review of the Order dated 12.3.2014 in Suo Motu Case No.1/2014. In the said Review Petition, it was contended that the KPTCL's

offer was that it would pay for the power injected into the Grid beyond the thirty days' period from the date of receipt of the application for grant of open access, till the date of signing of the W&BA. It was also contended that the payment for the energy injected beyond the thirty days' period, from the date of execution of the W&BA, had been made, as undertaken in the Suo Motu Case. After hearing the parties in RP No.2/2014, this Commission disposed of the Review Petition, by Order dated 15.10.2014, as follows :

"9) In view of the averments made in the Review Petition that the learned counsel for the Review Petitioners had only made a submission offering to have payments made for the power injected by the generating company for the period subsequent to the thirty (30) days time limit within which Wheeling and Banking Agreements are required to be processed by the Nodal Agency, as per Regulation No.9(6) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, the Commission considers it appropriate to record this submission of the Respondents, invoking the power under Order LXVII Rule 1 of Code of Civil Procedure. Accordingly, we accept this submission of the learned counsel and take it on record. However, we leave it open to the generating company to initiate separate proceedings, if it so desires, in the matter of any claims it may choose to prefer with regard to the power injected during the thirty days period specified in the Regulation No.9(6) of the KERC (Terms and Conditions for Open Access) Regulations, 2004.

10) The Review Petition is disposed of accordingly."

- (d) Subsequent to the above Order dated 15.12.2014 in RP No.2/2014, the Petitioner has filed the present Petition. It is not disputed that the

Respondents have made payments for the energy injected into the Grid, for the period from 9.8.2013 to 31.1.2014. The Petitioner claims the payment for the energy injected from the date of commissioning of its Project, i.e., from 29.6.2013, upto 8.8.2013 (both days inclusive), with interest.

(e) On the other hand, the Respondents have contended that they were not liable to pay for the energy injected from the date of commissioning of the Project upto 8.8.2013. According to the Respondents, Regulation 9(6) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 (hereinafter referred to as the 'KERC Open Access Regulations, 2004') provides for thirty days' time from the date of receipt of the long term open access application, to communicate the grant of open access or otherwise.

3) We have heard the learned counsel for the parties. The learned counsel for the Petitioner submitted that, the energy injected into the Grid for the said period has been utilized commercially by the Distribution Companies, without any demur or protest, and that allowing the Distribution Companies to utilize the said energy amounted to unjust enrichment on the part of the Respondents. On the other hand, the learned counsel for the Respondents submitted that the Petitioner has injected the energy into the Grid without any schedule, and that injecting of power into the Grid was against the terms of the provisional interconnection approval

dated 28.6.2013 granted to the Petitioner (produced at ANNEXURE-R1) and that the Petitioner had not obtained the consent of any of the Respondents for injecting the power, and there was no question of payment for such energy injected without any contract / schedule or knowledge of the SLDC and the Distribution Licensees, and if such transaction is permitted, it would result in the Grid insecurity. The learned counsel for the Respondents relied upon the decision of this Commission in OP No.32/2014, decided on 26.11.2015, in the case of *Lalpur Wind Energy Ltd. -Vs- KPTCL and others*, in support of his contentions.

- 4) Based on the above, the following issues would arise for our consideration:
- (1) Whether the Petitioner is entitled to any compensation for the energy injected into the Grid, from the date of provisional interconnection upto 8.8.2013, on the principles stated in Section 70 of the Indian Contract Act, 1872?
 - (2) Whether the Respondents are liable to pay compensation to the Petitioner, for the energy injected into the Grid during the thirty days' period provided for disposal of long term open access application, under Regulation 9(6) of the KERC Open Access Regulations, 2004?
 - (3) What Order?

5) **ISSUE No.(1)** : *Whether the Petitioner is entitled to any compensation for the energy injected into the Grid, from the date of provisional interconnection upto 8.8.2013, on the principles stated in Section 70 of the Indian Contract Act, 1872?*

(a) In OP No.32/2014, in the case of *Lalpur Wind Energy Pvt. Ltd. –Vs- KPTCL and others*, this issue has been discussed, in detail. The facts of that case and the facts of the present case are almost similar. This Commission has noted in that case thus:

“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. ...’

- (b) In the present case, the provisional interconnection approval dated 28.6.2013 (ANNEXURE-R1) specifically states that the pumping of power without any contractual agreement is not permitted, and for any claim in this regard, KPTCL is not responsible. Further, it states that, for injection of power into the Grid, prior approval of the SLDC should be obtained. It also states that the provisional interconnection approval would only provide the technical connectivity of the subject Project with the Grid. Contrary to these terms, the Petitioner has injected power into the Grid, without the approval of the SLDC or without there being any contracting agreement to inject power into the Grid. The injection of power into the Grid without the knowledge of the SLDC might lead to Grid insecurity. It is not the case of the Petitioner that it was not aware of such conditions imposed in the provisional interconnection approval. In fact, the Petitioner has produced only the first page of the provisional interconnection approval dated 28.6.2013 (produced at Page-67 of the Petition), without producing the remaining two pages of the said document, which contain the terms and conditions of the provisional interconnection approval. This itself shows that, knowing such conditions incorporated in the provisional interconnection approval, it seems the Petitioner has omitted to produce the remaining two page of the said document.
- (c) 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, it is not a case of enjoying the benefit voluntarily by the utilities, but it amounts to thrusting the same upon them, without having the option of refusing the energy injected.

- (d) 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.(1) in the negative.

- 6) **ISSUE No.(2)** : *Whether the Respondents are liable to pay compensation to the Petitioner, for the energy injected into the Grid during the thirty days' period provided for disposal of long term open access application, under Regulation 9(6) of the KERC Open Access Regulations, 2004?*

- (a) It cannot be disputed that there is a duty prescribed under the Electricity Act, 2003 against the transmission utility, transmission licensee and also on a distribution licensee, to provide non-discriminatory open access to its transmission or distribution system for transmission of electricity in accordance with the Regulations specified by the appropriate Commission. Regulation 9 of the KERC Open Access Regulations, 2004. Regulation 9 provides for the procedure for applying for grant of open access. Regulation 9(6) of the said Regulations casts a duty on the Nodal Agency to communicate the capacity available or otherwise for open access to the applicant, within seven days from the date of receipt of application in case of short-term open access, and within thirty days from the date of receipt of application in case of long-term open access. The other clauses in Regulation 9 provide that the open access customer shall enter into W&BA with the concerned and a copy of the same shall be

furnished to the Nodal Agency, and thereafter, within three days from the date of receipt of a copy of the W&BA, the Nodal Agency shall inform the open access customer, the date from which the open access would be available. Therefore, the Nodal Agency has a duty to intimate, within three days from the date of receipt of a copy of the W&BA from the open access customer, the date from which the open access would be available. In the present case, the open access application was for grant of long term open access. Therefore, within thirty days from the date of receipt of the open access application, the Nodal Agency has to communicate to the open access applicant regarding the capacity available or otherwise for open access.

- (b) The Petitioner has not furnished any relevant facts or circumstances to infer that the Nodal Agency should have granted the open access application on any day prior to the thirty days' time allowed under Regulation 9(6) of the KERC Open Access Regulations, 2004. In the absence of any such relevant facts, the period allowed under Regulation 9(6) is to be taken as the 'reasonable period', for grant of open access or otherwise. When the Regulation itself provides for thirty days' time for disposal of the open access application, the question of negligence on the part of the Respondents would arise only after the expiry of the said thirty days' period, for awarding compensation.

- (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. During the course of the arguments, the learned counsel for the Petitioner referred to the decision of this Commission rendered in the *Green Infra* case, wherein the compensation was allowed, for the energy injected into the Grid, from the date of interconnection till the date of execution of the W&BA. The question of allowing compensation on the ground of negligence depends on the facts of each case. Assuming that, rightly or wrongly, in that case, the compensation was allowed for the energy injected into the Grid from the date of interconnection, without taking into account the time allowed for consideration of the open access application as specified in the Regulations, that decision is not a binding precedent for disposal of the present case. We are of the considered opinion that, in OP No.32/2014, this question has been examined by this Commission, in detail and from all angles. For the above reasons, we answer Issue No.(2) in negative.

7) **ISSUE No.(3)** : *What Order?*

For the foregoing reasons, we pass the following :

ORDER

The Petition stands dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER