

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

**Dated : 26<sup>th</sup> November, 2015**

**Present:**

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

**OP No.32 / 2014**

**BETWEEN:**

Lalpur Wind Energy Private Limited,  
The IL&FS Financial Centre,  
First Floor, Plot No.C-22, G Block,  
Bandra Kurla Complex,  
Mumbai – 400 051  
*[Represented by HSA Advocates, Advocates]*

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**PETITIONER**

**AND:**

- 1) The Karnataka Power Transmission Corporation Limited,  
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,  
2<sup>nd</sup> Floor, K.R. Circle,  
Bengaluru – 560 001  
*[Represented by Induslaw, Advocates]*

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**RESPONDENTS**

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**ORDERS**

- 1) The Petitioner in the above Petition has mainly sought for the following reliefs :
  - (a) To issue appropriate directions to the Respondents to allow roll over / carry forward of banked power to the tune of 1,27,88,354.00 Units to be utilized by the Petitioner for a period of one year from the date of disposal of the present Petition;
  - (b) In the alternative to prayer (a) above, to award appropriate damages against the Respondents and in favour of the Petitioner for the banked power to the tune of 1,27,88,354.00 Units at the rate of Rs.4.20 per Unit, being the prevailing generic tariff rate of Wind Energy, amounting to Rs.5,37,11,087/-, along with interest at 12% per annum, from 31.3.2014 till the date of actual payment;
  - (c) To pass such other and further orders / directions as this Commission may deem it fit in the facts and circumstances of the case.
  
- 2) The material facts stated by the Petitioner in support of its above reliefs, may be stated as follows :
  - (a) The Petitioner is a Company incorporated under the Companies Act, 1956, having its Registered Office at the address indicated in the Cause-Title. The Petitioner has commissioned and has been operating a total of 44 Mega Watts (MW) Renewable Energy-based Wind Power Generating Stations at Haveri and Dharwad Districts in the State of Karnataka,

- pursuant to the Government Order bearing No.EN 213 NCE 2013, Bengaluru, dated 16.9.2013. This Project consists of 55 Wind Energy Generators (WEGs) divided into five groups, viz., Groups A, B, C, D and E, of different capacities. The Project was envisaged as a Renewable Energy Project, for sale of power to third parties under open access, by utilizing the existing transmission and distribution network of the Respondent-Utilities.
- (b) The different Groups of the WEGs were commissioned after obtaining necessary consents / approvals. The Petitioner parallelly approached various prospective HT consumers, offering to sell power from the Project, and obtained Letters of Intent from them for purchase of certain quantity of power, for a particular period.
- (c) The Petitioner applied to the first Respondent for execution of Wheeling & Banking Agreements (W&BAs) to be entered into for each of the Groups / WEGs. Subsequently, the first Respondent gave consent on different dates to the Petitioner for entering into such W&BAs.
- (d) The different Groups of WEGs and their capacities, the dates of provisional interconnections, R.R. Nos. assigned to each Group, the dates of request for execution of W&BA and the dates of consent for execution of W&BA given by KPTCL, shown in the Table below :

Group # of WEG	Capacity (In MW)	Date of Provisional Inter-connection Approval	R.R. No.	Date of submission of Application for W&BA	Date of consent of KPTCL for execution of W&BA
A	7.2	13.11.2013	IPP-19	17.01.2014	24.02.2014
B	19.2	13.11.2013	IPP-05	24.01.2014	24.02.2014
C	6.4 5.6	13.11.2013 27.11.2013	IPP-06	05.12.2013	26.02.2014
D	4.8	13.11.2013	IPP-07	05.12.2013	26.02.2014
F	0.8	27.11.2013	IPP-08	17.01.2014	25.02.2014

(e) On the basis of the provisional Interconnection Approvals, the Commissioning Certificates have been issued, stating that different Groups of WEGs were commissioned on the respective dates of provisional Interconnection Approvals. In paragraph-7 of the Petition, the Petitioner has stated that the Commissioning Certificates have been issued, certifying that the Project was available for Commercial Operation and that the Project could start injecting power into the Grid. The Petitioner has further stated in the same paragraph-7 that it has started injecting electricity generated at the Project into the Grid, with the clear objective and understanding of banking the same for sale to third party customers, and accordingly joint meter readings were regularly recorded, so as to account for the energy being injected by the Project into the Grid. According to the Petitioner, as stated in paragraph-9 of the Petition, 93% of the total power injected into the Grid by the Petitioner, as per the export meter, is the banked energy. The Petitioner has further stated in

- paragraphs-10 and 11 of the Petition that it had requested the State Load Despatch Centre (SLDC) to permit accounting / recording of the banked energy from the date of commissioning of the Project till the execution of the W&BA, at the time of filing the application for grant of open access and execution of W&BA, and also subsequently after receiving the consent from the Karnataka Power Transmission Corporation Limited (KPTCL) for signing of the W&BA.
- (f) The Petitioner had tied up all his customers in the months of October, 2013 and November, 2013, in the hope that the W&BA could be signed within a month, as required under the relevant Rules, and then the Petitioner would be able to wheel / sell the banked power spread out in three months, i.e., January, 2014, February, 2014 and March, 2014. However, the W&BA was finally executed by the Respondents on 17.3.2014, after an inordinate delay of three and a half months. Immediately after execution of the W&BA by all the parties concerned on 17.3.2014, the Petitioner approached the officials of the Respondent-1, seeking permission for the supply of its banked energy to the consumers, with whom it had entered into Power Supply arrangements. The Petitioner has further stated that the Respondent-1 refused to act on its request for onward supply of the banked energy to its consumers, and on the other hand, the Respondent-1 informed the Petitioner that it had undertaken to purchase the power generated by Renewable Energy generators for the period from the date of commissioning of the Project to the date of signing of the

W&BA, as reflected in some Petitions pending before this Commission and that the Respondents would be accordingly procuring the banked power as per the generic tariff of Rs.4.20 per Unit. It is further stated by the Petitioner that, for this reason, the Respondent-1 had disallowed the request of the Petitioner to sell the banked power to the end-consumers of the Petitioner, however, the Respondents have failed to account for the banked energy and to pay any amount towards it.

- (g) In conclusion, the Petitioner has made the following statements in paragraphs 24 and 25 of the Petition :

*“24. It is respectfully submitted in the facts of the case that (i) the Respondents deliberately and knowingly disregarded the existing provisions of wheeling of banked electricity to end consumers when it was fully aware of such arrangements; (ii) the Respondents so acted despite the knowledge that the non-supply of the banked power to the end consumers will result in loss to the Petitioner since the banked units would lapse on 31.03.2014, and that the Petitioner will not be able to recover the price of such power from the end use consumers; and (iii) the Respondents caused unreasonable and avoidable delay in signing the WBA; and (iv) the Respondents represented to the Petitioner that it will purchase the power at generic tariff and coerced the Petitioner not to proceed further with the third party supply. In the background of such facts, the Respondents are liable to compensate the Petitioner*

*for the loss by it due to the failure to sell banked power up to 31.03.2014 to the third party end consumers. The Petitioner states that it has suffered loss of Rs.5.37 crores due to the malicious and unlawful actions of the Respondents. Details of the loss have been worked out in **Annexure P/18.**"*

*"25. The Petitioner in the alternative seeks necessary directions / clarifications that the quantum of power approx. 12.79 MUs that has lapsed on 31.03.2014 be allowed to be rolled over for one year from the date of disposal of the present petition since the lapse of the banked units was not attributable in any manner to the Petitioner, but solely to the malicious and illegal actions of the Respondent."*

Therefore, the Petitioner has filed the present Petition.

- 3) The Respondents have appeared through their counsel and filed the common Statement of Objections, the gist of which is stated as follows :
  - (a) The Respondents have not denied the allotment of five Groups of WEGs and their capacities, vide Government Order dated 16.9.2013. They have not denied the issuance of provisional Interconnection Approvals to the Petitioner on different dates and the issuance of Commissioning Certificates on the basis of the provisional Interconnection Approvals. They have also not denied the submission of applications for open access

and execution of W&BAs, and the subsequent consents conveyed by KPTCL on various dates for executing the W&BAs, and that the execution of the W&BAs was finally completed on 17.3.2014.

- (b) It is contended that the provisional interconnections for the above Projects to the extent of 37.6 MW had been granted till 30.11.2013 and the provisional interconnection for the additional 6.4 MW was effected on 26.11.2013, apart from extending the earlier provisional interconnection approvals for a further period from 1.12.2013 to 28.2.2014. It is contended that the provisional Interconnection Approvals clearly stated that:

*“Developers / Customers have to obtain necessary approvals for banking / accounting of the generated power from the concerned and it is to be noted that, pumping of power without any contractual agreement is not permitted, and for any claim in this regard, KPTCL is not responsible.”*

Therefore, it was contended that the Petitioner was unmistakably aware that the unscheduled energy without any contract would not be paid for.

- (c) Further, it is contended that, once a Project is interconnected to the Grid, readings have to be taken in order to account for the energy input to the Grid, irrespective of whether any agreement is executed or not, and that this does not amount to an approval to bank the energy injected. Further, it is contended that there can be no question of seeking for the credit of



- unscheduled energy in the absence of any W&BA, and that, in such cases, the generators are, with their eyes open, commissioning their machines and pumping energy, with the knowledge that they do not have any approval to wheel the energy, which would take some time to secure. Therefore, it is contended that the Petitioner, having full knowledge, has injected the power gratuitously and therefore, Section 70 of the Indian Contract Act, 1872, has no application and the State Utilities cannot be held liable to indemnify the Petitioner for commercial risks that it voluntarily undertook, and that there can be no question of wheeling and/or banking of energy prior to execution of a W&BA. Further, they contended that the energy generated subsequent to 17.3.2014, i.e., after the execution of the W&BA, was permitted to be wheeled as per the requests made by the Petitioner.
- (d) The Respondents have denied that any of them had assured the Petitioner of procuring the power injected between the dates of provisional interconnection and the execution of the W&BA, and that they referred to an Order of this Commission dated 13.3.2014, wherein the Respondent-1 had offered a concession and assured payment in respect of the power injected between the date of interconnection and the date of execution of the W&BA, at the generic tariff of Rs.4.20 per unit.
- (e) It is contended by the Respondents that Regulation 9(6) of the KERC (Terms and conditions for Open Access) Regulations, 2004, provides that,

in case of long-term open access, the Nodal Agency is required to communicate the capacity available for open access to the Applicant, based on the system studies, within thirty days from the date of receipt of the application. In other words, according to the Respondents, the request for long-term open access could be either granted or rejected within thirty days from the date of receipt of the application. They have further contended that, after communication of the grant of open access, the question of execution of the W&BA arises and the said Regulations do not provide for any time limit within which the execution of the W&BA by all the parties concerned shall be completed. Further, they have contended that the sequence of events, from the date of request for open access till the date of execution of the W&BA, would clearly show that there is absolutely no delay on the part of the Respondents. They have also contended that the Petitioner had requested for additional installations to be included in the W&BA already submitted, and that the Petitioner also took some time to provide ABT meters at the Drawal Points, and moreover, the Petitioner itself had sought for 'four months' time from the date of commissioning of WTGs to sign the W&BA", as per Annexure – P7 to the Petition. The Respondents have stated the Chronology of Events in respect of all the Groups of the Projects, from the date of filing the applications for grant of open access till the date of execution of the W&BAs at ANNEXURE – R2. Therefore, the Respondents have prayed for dismissal of the Petition.

- 4) The Petitioner filed its Rejoinder to the Statement of Objections of the Respondents. In the Rejoinder, it is stated that this Commission has the inherent power to allow roll-over of the energy generated and injected by the Petitioner into the Grid, from the date of interconnection till the date of signing of the W&BA, having regard to the facts and circumstances of the case, and has further stated that, alternatively, the Respondents would be liable to compensate the Petitioner for the power that has been injected into the Grid under the principles of *quantum meruit*, read with Section 70 of the Indian Contract Act, 1872. Further, it is stated that the power injected prior to the execution of the W&BA should be treated as "banked power", since such power was not supplied to the Grid gratuitously and the Respondents were well aware, at all times, that such power was meant for third party sale, and the power was injected into the Grid with the knowledge of the Respondents, and that the Respondents have never asked the Petitioner, whether as system operators or otherwise, to stop injection of power into the Grid. The Petitioner in the Rejoinder does not specifically deny the existence of a condition in the interconnection approvals, that pumping of power without any contractual agreement is not permitted and that for any claim in this regard, KPTCL is not responsible, and that the Developers / Customers have to obtain necessary approvals for banking / accounting of the generated power from the concerned. But, the Petitioner has contended that in the facts of the case, it is wrong on the part of the Respondents to now contend that the energy injected into the Grid

should not be considered. It is reiterated that there was an inordinate delay in executing the W&BA, inspite of the reasons stated by the Respondents for the time taken for execution of the W&BA. It is stated that there was a typographical error in the letter (Annexure – P7), and that the contents of the entire letter are to be considered. Therefore, the Petitioner has contended that the objections raised by the Respondents are liable to be rejected.

- 5) We have heard the learned counsel for both sides and have considered the respective pleadings and documents produced by the parties in the case. The following issues arise for our consideration:
- (1) Whether the energy injected into the Grid by Wind Power Projects, from respective dates of provisional Interconnection Approvals up to the execution of the W&BAs, has to be treated as, "banked energy"?
  - (2) Whether the first Respondent had assured the Petitioner that the Respondents would pay for the energy injected by Wind Power Projects, from the respective dates of provisional Interconnection Approvals up to the execution of the W&BAs?
  - (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?

- (4) Whether there was any delay in granting of open access and in executing the W&BAs, so as to warrant awarding of compensation to the Petitioner? If so, from which date and at what rate?
- 6) After considering the submissions made by the parties and perusing the pleadings and documents placed on record in the case, our findings on the above issues are as follows :
- 7) **ISSUE No.(1): Whether the energy injected into the Grid by Wind Power Projects, from respective dates of provisional Interconnection Approvals up to the execution of the W&BAs, has to be treated as, “banked energy”?**
- (a) The pleadings of the Petitioner disclose that the energy injected into the Grid by Wind Power Projects, from respective dates of provisional Interconnection approvals up to the execution of W&BAs, should also be treated as “banked energy” and the same can be utilized by the Petitioner at a later date, before the end of the Wind Year, i.e., before 31<sup>st</sup> March of a calendar year. On the other hand, the Respondents have contended that there could be no question of ‘banking of energy’, until and unless the W&BA comes into operation. In paragraph-7 of the Petition, the Petitioner has stated that the Commissioning Certificates have been issued, certifying that the Project was available for Commercial Operation and that the Project could start injecting power into the Grid. We consider that the said averment of the Petitioner is not correct. The Commissioning Certificates marked at Exhibit – P2 do not

show that the Project was available for Commercial Operation and that the Project could start injecting power into the Grid. On the other hand, the Commissioning Certificates would show that these Certificates have been issued on the basis of provisional Interconnection Approvals accorded by the concerned Officer. Therefore, the terms and conditions contained in the provisional Interconnection Approvals are to be read into the Commissioning Certificates. A Project can become available for Commercial Operation, only when a Commercial Agreement, like PPA with ESCOMs or third parties, is entered into for sale of energy generated by the Project. The issuance of Commissioning Certificate only implies that the Project is connected to the transmission system, enabling the Project to inject the power generated into the Grid. Hence, the issuance of Commissioning Certificates does not expressly or impliedly certify that the Project was available for Commercial Operation and it could start injecting power into the Grid. Therefore, one can say that the averments made in paragraph-7 of the Petition, to extent noted above, is incorrect.

- (b) The concept of banking facility was, for the first time, introduced by this Commission in its Order dated 9.6.2005, "in the matter of Determination of Transmission Charges, Wheeling and Cross-Subsidy Charges under Open Access", in respect of Wind and Mini Hydel Projects. In the said Order, the definition of "banking" and the method of calculating the energy banked and the duration of banking, etc., were not laid down. However, subsequently, under Order dated 11.7.2008, this Commission approved the

Standard Format of W&BA in respect of Renewable Energy, after hearing the stakeholders. In the said approved Format, "banking" is defined as follows :

*“**Banking**’ means residual energy after utilization by the ‘Exclusive’ or ‘Partly Exclusive’ Consumer or ‘captive consumption’ out of the injected energy in a month into the transmission and/or distribution system of Corporation/ ESCOMs, which will be utilized for its own use or for wheeling to its ‘Exclusive’ or ‘Partly Exclusive’ Consumers at a later date/month, as per the terms and conditions set forth in this agreement.”*

The other details regarding "banking" are stated in Article 6.2 of the W&BA Format. Article 6.2.4 pertains to calculation of the quantum of energy banked at the end of a month. The Petitioner has produced the W&BAs dated 17.3.2014 at ANNEXURE – P-11 of the Petition. Considering the various provisions relating to the banking of energy stated in the W&BA, it is clear that the banking of power starts only after the W&BA comes into operation. Unless the 'Exclusive' and 'Partly Exclusive' consumers are identified and the energy is wheeled to the said consumers, there is no question of calculating the banked of energy. Mere injection of energy from the Wind Power Projects, there being no wheeling of energy to the 'Exclusive' or 'Partly Exclusive' consumers, does not amount to banking of energy, as defined in the definition of 'banking' given in the W&BA, approved by this Commission as per Order dated 11.7.2008. The facility of

banking, as contended by the Petitioner, is not contemplated under the approved banking facility. The said banking facility is provided to Mini Hydel and Wind Power Projects as a promotional measure, though in certain respects, it puts the distribution licensee into a disadvantageous position, even after collecting the banking charges. Therefore, the facility of banking, as proposed by the Petitioner, has no approval of the Commission or any law and such self-proclaimed arrangement cannot be accepted to fasten the liability on the Respondents. Therefore, we answer Issue No.(1) in the negative.

- 8) **ISSUE No.(2): *Whether the first Respondent had assured the Petitioner that the Respondents would pay for the energy injected by Wind Power Projects, from the respective dates of provisional Interconnection Approvals up to the execution of the W&BAs?***

- (a) In Paragraph-16 of the Petition, the Petitioner has stated as follows :

*“Despite having arranged for the end use consumers for the entire quantum of power banked by the Petitioner since CoD, the Respondent No.1 refused to act on the request of the Petitioner for onward supply of the banked power to the end use consumers. The Respondent No.1 informed the Petitioner that they had undertaken to purchase power generated by renewable energy generators for the period from CoD to signing of WBA as reflected in some pending petitions before this Hon'ble Commission, and that the Respondents would be accordingly procuring the banked power. Respondent No.1 further referred to an order of this*



*Hon'ble Commission's order dated 13.03.2014 wherein the Respondent No.1 had offered a concession and assured payment of banked power as per the generic tariff of Rs.4.20/kwh fixed by this Learned Commission. It is submitted that the Respondent No.1 therefore disallowed the request of the Petitioner to sell the banked power to the end customers of the Petitioners on the assurance of purchasing such power from the Petitioner."*

- (b) The contents of Paragraph-16 of the Petition have been specifically denied by the Respondents and they have contended that the energy cannot be wheeled / banked in the absence of a W&BA, and that the energy of 1.2 MU generated subsequent to 17.3.2014, i.e., after the execution of the W&BAs, was permitted to be wheeled as per the request of the Petitioner, and they have further contended that prior to the execution of the W&BA, there was no question of banking of energy by the Petitioner. The first Respondent has specifically denied having made any assurance, as stated by the Petitioner, for purchase of energy injected into the Grid from the date of commissioning of the Project to the date of execution of the W&BAs.
- (c) The assurance to purchase energy, stated by the Petitioner, is not admittedly in writing. The Petitioner does not say either in its pleadings or in evidence, as to which official of the first Respondent had made such assurance. We are of the considered view that, even if such assurance

had been made by some official of the first Respondent, it does not bind the first Respondent or any other Respondents.

- (d) This Commission has not treated the power injected into the Grid between the date of commissioning of the Wind Power Projects and the date of execution of W&BAs, as 'banked energy'. Where there was unreasonable delay in granting of open access and in executing W&BA, compensation was allowed, on a case-to-case basis, considering its merits.
- (e) It may be noted that, a concession believed to have been made by the learned counsel for the State Utilities, which was recorded in a case filed against them for payment of compensation for the energy injected, from the date of commissioning of the Wind Power Project, till the date of execution of W&BA, was later allowed to be withdrawn in a Review Petition (RP No.2 of 2014 disposed of on 15.10.2014), observing that the concession offered by the learned counsel for the Utilities might not have been correctly recorded. It appears, the Petitioner is referring to that case, in paragraph-16 of its Petition. It appears, the concession so recorded, made the Petitioner to claim in the present case that the energy injected, from the date of commissioning of the Wind Power Project to the date of execution of W&BA, would amount to banking of energy, and to say that the first Respondent had assured to purchase and make payment for such energy. The Commission notes that, any such assurance, even if given by any official of the first Respondent, does not

legally bind the first Respondent. In view of the above, we are of the considered view that, it is improbable for any of the officials of the first Respondent to have made such assurance on behalf of the first Respondent. Therefore, we answer Issue No.(2) in the negative.

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, 14<sup>th</sup> 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.

- 10) **ISSUE No.(4) : Whether there was any delay in granting of open access and in executing the W&BAs, so as to warrant awarding of compensation to the Petitioner? If so, from which date and at what rate?**
- (a) It cannot be disputed that, if due to any negligence on the part of the Utilities, there are any delay and laches in granting Open Access and in executing the W&BA, the Utilities are liable for payment of compensation to the Open Access applicant. It is submitted by the Respondents that there was no negligence on the part of the Utilities in granting Open Access and executing the W&BAs. On the other hand, the Petitioner has contended that there was inexplicable delay in granting the Open Access and executing the W&BAs on the part of the Respondents.
- (b) In paragraph-8 of the Statement of Objections of the Respondents, they have contended that the Petitioner requested for adding additional installations and also took some time to provide the ABT Meters at the drawal and injection points, before execution of the W&BA, and therefore, the Petitioner itself should be blamed for the delay, if any, as there was no fault on their part in this regard. They have also furnished a detailed chronology of events, with dates, for each of the five Groups of the Projects, as per ANNEXURE-R2, and have contended that the sequence of events clearly establishes that there was absolutely no delay on their part. The Petitioner, in its Rejoinder, has stated that the installation of ABT Meters was not a mandatory requirement earlier, but was raised by

the Respondents while processing the W&BAs. The Petitioner has not denied the chronology of events pertaining to each of the Groups of the Projects stated in ANNEXURE – R2.

- (c) The meaning and scope of "Tortious Liability" under the head, "Negligence" can be better understood from paragraphs-7 to 12 of the decision rendered by the Hon'ble Supreme Court, cited in **(1994) 4 (Supreme Court Cases) 1**, in the case of *Jay Laxmi Salt Works (P) Ltd.-Vs- State of Gujrat*.

In Paragraph-8 of the said Judgment, it is observed that:

*"... An action for tort is usually a claim for pecuniary compensation in respect of damages suffered as a result of invasion of a legally protected interest. ..."*

At the beginning of Paragraph-11 of the said Judgment, in respect of liability for negligence, it is observed that:

*"... 'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are –*

- (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;*
- (b) breach of that duty;*
- (c) consequential damage to B."*



Further, in the same paragraph, it is held as follows “

*“... Even improper exercise of power by the authorities giving rise to damage has been judicially developed and distinction has been drawn between power coupled with duty. Where there is duty the exercise may not be proper if what is done was not authorised or not done in the bona fide interest of public. ...”*

XXX

XXX

XXX

*“...Thus the distinction arising out of damage due to negligence and even without it rather unintentionally and innocently is a firmly established branch of law of tort. In 'Read v. J. Lyons & Co.Ltd.', it was observed that the damage caused by escape of cattle to another land was a case of pure trespass constituting a wrong without negligence. Thus negligence is only descriptive of those sum total of activities which may result in injury or damage to the other side for failure of duty both legal or due to lack of foresight and may comprise of more than one concept known or recognized in law, intended or unintended. ...”*

- (d) The term, “open access” is defined in Section 2(47) of the Electricity Act, 2003, as follows :

*“ 'open access' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;”*

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. This Commission has framed the KERC (Terms and Conditions for Open Access) Regulations, 2004. Regulation 9 of the said Regulations 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.

- (e) The procedure specified for applying for grant of open access does not prescribe the time-limit within which the open access customer and others

have to execute the W&BA, after receipt of the intimation of the availability of open access from the Nodal Agency. Regulation 15 of the said Regulations provides for installation of special Energy Meters (ABT Meters), with the specifications stated therein, by the open access customer, before actual wheeling of energy could take place.

- (f) In the present case, all the applications submitted by the Petitioner to the first Respondent were for grant of long-term open access. The chronology of events from the date of submission of the applications till the communication of the grant of open access and the subsequent execution of the W&BA by all the parties concerned, in respect of each of the Groups of the Projects, are as detailed in ANNEXURE – R2 of the Respondents. On a perusal of ANNEXURE – P-10 to the Petition, it can also be noted that the W&BAs were signed by the Petitioner on 11.3.2014 and submitted to the first Respondent on the same day. It appears, the other Respondents have completed the execution of the W&BAs on 17.3.2014. As discussed in ANNEXURE – R2, BESCO, on 17.1.2014 and 1.3.2014, has confirmed the installation of ABT Meters to RR Nos.RMGHT-21 and E4HT-335, and the Petitioner, on 10.2.2014, has confirmed installation of ABT Meters to RR No.E4HT-152.
- (g) The Petitioner has established Wind Power Generating Stations and has applied for grant of open access for sale of electricity to third parties. Any delay in granting of open access would certainly result in incurring of

- losses by the Petitioner. A duty is cast on the transmission and distribution licensee to provide non-discriminatory open access to the applicant within the time specified in the Regulations. Therefore, a duty is owed by the utilities to exercise due care and diligence in processing the applications seeking grant of open access. This duty of exercising due care and diligence is meant for avoiding any delay, which one can reasonably foresee, that it would be likely to injure the open access applicant. The utilities would stand on a special relationship with the open access applicant, and they are under a statutory duty to process the applications for grant of open access, in order to protect the interest of the open access customer.
- (h) The Petitioner has not specifically based its claim for compensation due to delay in granting of open access, except alleging that there was an inordinate delay in granting of open access. The Petitioner has not furnished any particulars to assess the delay, if any, on the part of the Respondents in granting the open access. In the absence of any relevant facts to ascertain the reasonable period for grant of open access, the period allowed under Regulation 9 of the said Regulations may be taken as the 'reasonable period'. As noted above, within thirty days from the date of receipt of the application for grant of open access, the Nodal Agency has to intimate the granting of open access or otherwise to the open access applicant. The open access applicant has to furnish the W&BA, duly signed by him, for execution of the same by the other parties

concerned. For this purpose, no time limit is mentioned in the Regulations. The W&BA has to be executed by the transmission licensee, injecting ESCOM and drawal ESCOM. Therefore, one week's time may be taken as a 'reasonable time' for this purpose. Thereafter, within three days, the Nodal Agency should intimate the date from which the open access would be available. The open access applicant has to install the Special Energy Meters (ABT Meters), as required, at the Drawal Point before the actual wheeling of energy could take place. He should also submit the W&BA, without any loss of time, upon receipt of intimation of granting of the open access. If there is any delay on the part of the open access applicant in installing the Special Energy Meters or in tendering the W&BA for execution by the parties concerned, such period is to be added to the period within which the open access is to be granted to the Applicant.

(j) Keeping in mind the above yardstick, we may now analyze the facts relating to each of the Groups of the Projects, in order to find out the delay in granting the open access to the Petitioner.

(k) The chronology of events in respect of Groups 'C' and 'D' of the Projects is as follows :

**(i) Chronological Order of Events (Pertaining to Group 'C' of Project) :**

Sl.No.	Date	Event
1	13.11.13	Date of commissioning of the plant.
2	5.12.13	Application received from M/s. Lalpur Wind Energy Pvt Ltd to RR Nos.RMGHT-21, E4HT-335 & S4HT-219.

3	5.12.13	Letters addressed to HESCOM & BESCOM requesting consent/ concurrence .
4	20.12.13	Reply from HESCOM received stating that M/s. Lalpur Wind Energy Pvt Ltd has not entered PPA with HESCOM.
5	17.1.14	Concurrence from BESCOM received for the above 3 nos. of installations, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement (ABT meter fixed to RMGHT-21).
6	17.1.14	Application received from firm requesting approval to wheel energy to RR Nos.E4HT-152, S7HT-35 & S7HT-42.
	20.1.14	Letter addressed to firm to provide ABT meters to E4HT-335 and S4HT-219.
7	21.1.14	Letter addressed to BESCOM requesting concurrence to RR Nos.E4HT-152, S7HT-35 and S7HT-42.
8	21.1.14	Firm requested to approve W&B Agreement earliest to those installations which are provided with ABT meters.
9	25.1.14	Note submitted Corporate Office for issuing consent to execute W&B Agreement (RR No.RMGHT-21 for which ABT meter is fixed).
10	3.2.14	Concurrence from BESCOM received for the above 3 nos. of installations bearing RR Nos.E4HT-152, S7HT-35 & S7HT-42, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement.
11	10.2.14	Firm confirmed that ABT meter is provided to E4HT-152.
12	14.2.14	Note submitted to Corporate Office to issue consent to wheel energy to RR No.E4HT-152 wherein ABT meter is provided.
13	26.2.14	Consent received from Corporate Office to RR No.E4HT-152.
14	26.2.14	Consent received from Corporate Office to RR Nos.RMGHT-21, E4HT-335 & S4HT-219.
15	28.2.14	Modification to letters dated 26.2.14 received from Corporate Office stating that approval accorded to RR Nos.RMGHT-21, E4HT-335 & S4HT-219, subject to the condition that ABT meter to be installed.
16	1.3.14	Confirmed by BESCOM that ABT meter is provided to E4HT-335 through Email.
17	4.3.14	Letter addressed to firm conveying approval to submit W&B Agreement & permitted to wheel energy to RR Nos.RMGHT-21, E4HT-335 & E4HT-152.
18	17.3.2014	Date of Agreement.

**(ii) Chronological Order of Events (Pertaining to Group 'D' of Project) :**

Sl.No.	Date	Event
1	13.11.13	Date of commissioning of the plant.
2	5.12.13	Application received from M/s. Lalpur Wind Energy Pvt Ltd to RR Nos.RMGHT-21, E4HT-335 & S4HT-219.
3	6.12.13	Letters addressed to HESCOM & BESCO requesting consent/ concurrence .
4	26.12.13	Reply from HESCOM received stating that M/s. Lalpur Wind Energy Pvt Ltd has not entered PPA with HESCOM.
5	17.1.14	Concurrence from BESCO received for the above 3 nos. of installations, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement and also confirmed that ABT meter installed to RMGHT-21.
6	25.1.14	Note submitted to Corporate Office for issuing consent to execute W&B Agreement (RR No.RGMHT-21).
7	17.1.14	Application received from firm requesting approval to wheel energy to RR Nos.E4HT-152, S7HT-35 & S7HT-42.
8	21.1.14	Letter addressed to BESCO requesting concurrence to RR Nos.E4HT-152, S7HT-35 and S7HT-42.
9	21.1.14	Request letter received from firm to approve W&B Agreement earliest to those installations which have been provided with ABT meters.
10	25.1.14	Again Note submitted Corporate Office for issuing consent to execute W&B Agreement and to wheel energy to RR No.RMGHT-21.
11	3.2.14	Concurrence from BESCO received for E4HT-152, S7HT-35 & S7HT-42, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement.
12	10.2.14	Firm confirmed that ABT meter is provided to E4HT-152.
13	14.2.14	Note submitted to Corporate Office to issue consent to E4HT-152 in addition to RMGHT-21.
14	26.2.14	Consent received from Corporate Office to RR No.E4HT-152.
15	26.2.14	Consent received from Corporate Office to RR Nos.RMGHT-21, E4HT-335 & S4HT-219.
16	28.2.14	Modification to letters dated 26.2.14 received from Corporate Office stating that approval accorded to RR Nos.RMGHT-21, E4HT-335 & S4HT-219, subject to the condition that ABT meter to be installed.
17	1.3.14	Confirmed by BESCO that ABT meter is provided to E4HT-335 through Email.
18	4.3.14	Letter addressed to firm conveying approval to submit W&B Agreement & permitted to wheel energy to RR Nos.RMGHT-21, E4HT-335 & E4HT-152 (after receiving statement of ABT meter installation from RT staff).
19	17.3.2014	Date of Agreement.

- (l) In respect of Groups 'C' and 'D' of the Projects, open access applications were received on 5.12.2013. The Respondents have stated that, in respect of these Groups, the Petitioner had also filed another set of applications, received by them on 17.1.2014, requesting approval to wheel the energy to three additional consumers, which were not stated in its earlier application, received by them on 5.12.2013. The Petitioner has not denied the filing of the subsequent applications on 17.1.2014 in respect of Groups 'C' and 'D' of the Projects, requesting approval to wheel the energy to three other consumers. Therefore, we are of the opinion that the Effective Date of filing of the applications requesting for grant of open access, in respect of Groups 'C' and 'D', has to be considered as 17.1.2014. The Petitioner was intimated, vide letter dated 4.3.2014, conveying approval of open access and to submit the W&BAs. This letter would have been received by the Petitioner on or before 7.3.2014. Subsequently, the Petitioner has submitted the W&BAs on 11.3.2014. Hence, it may be noted that there is a delay of four days in submitting the W&BA. Therefore, in respect of Groups 'C' and 'D' of the Projects, the wheeling of energy should have commenced from 2.3.2014, i.e., after forty four days from 17.1.2014, as noted above. However, the wheeling of energy has commenced only from 17.3.2014.
- (m) In respect of Groups 'A and 'E' of the Projects, the open access applications were received by the Respondents on 17.1.2014, requesting



the wheel the energy to RR Nos.: RMGHT-21, E4HT-335, S4HT.219, E4HT-152, S7HT-42 and S7HT-35. The chronology of events pertaining to Groups 'A' and 'E' is as follows :

**(i) Chronological Order of Events (Pertaining to Group 'A' of Project) :**

Sl. No.	Date	Event
1	13.11.13	Date of commissioning of the plant.
2	17.1.14	Application received from M/s. Lalpur Wind Energy Pvt Ltd to RR Nos.RMGHT-21, E4HT-335, S4HT-219 E4HT-152, S7HT-42 & S7HT-35.
3	20.1.14	Letters addressed to HESCOM & BESCOM requesting consent/ concurrence .
4	27.1.14	Reply from HESCOM received stating that M/s. Lalpur Wind Energy Pvt Ltd has not entered PPA with HESCOM.
5	3.2.14	Concurrence from BESCOM received for the above-said installations, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement.
6	10.2.14	Letter received from firm stating that ABT meters are provided to E4HT-152 & RMGHT-21.
7	14.2.14	Note submitted Corporate Office for issuing consent to execute W&B Agreement (E4HT-152 & RMGHT-21).
8	24.2.14	Consent received from Corporate Office to RR Nos.RMGHT-21, E4HT-335, S4HT-219, E4HT-15, S7HT-42 & S7HT-37.
9	28.2.14	Modification to letters dated 24.2.14 received from Corporate Office stating that approval accorded to RR Nos.RMGHT-21 & E4HT-152, for which ABT meters have already been installed.
10	4.3.14	Letter addressed to firm conveying approval to submit W&B Agreement & permitted to wheel energy to RR Nos.RMGHT-21, E4HT-152.
11	17.3.2014	Date of Agreement.

**(ii) Chronological Order of Events (Pertaining to Group 'E' of Project) :**

Sl. No.	Date	Event
1	27.11.13	Date of commissioning of the plant.
2	17.1.14	Application received from M/s. Lalpur Wind Energy Pvt Ltd to RR Nos.RMGHT-21, E4HT-335, S4HT-219 E4HT-152, S7HT-42 & S7HT-35.

3	20.1.14	Letters addressed to HESCOM & BESCO requesting consent/ concurrence .
4	27.1.14	Reply from HESCOM received stating that M/s. Lalpur Wind Energy Pvt Ltd has not entered PPA with HESCOM.
5	1.2.14	Concurrence from BESCO received for the above-said installations, subject to the condition that ABT meters to be fixed at drawal points before execution of W&B Agreement.
6	10.2.14	Letter received from firm stating that ABT meters are provided to E4HT-152 & RMGHT-21.
7	14.2.14	Note submitted Corporate Office for issuing consent to execute W&B Agreement (E4HT-152 & RMGHT-21).
8	25.2.14	Consent received from Corporate Office to RR Nos.RMGHT-21, E4HT-335, S4HT-219, E4HT-15, S7HT-42 & S7HT-37.
9	28.2.14	Modification to letters dated 26.2.14 received from Corporate Office stating that approval accorded to RR Nos.RMGHT-21 & E4HT-152, for which ABT meters have already been installed.
10	4.3.14	Letter addressed to firm conveying approval to submit W&B Agreement & permitted to wheel energy to RR Nos.RMGHT-21, E4HT-152.
11	17.3.2014	Date of Agreement.

(n) In respect of Groups 'A and 'E' of the Projects, the Petitioner was intimated, vide letter dated 4.3.2014, conveying approval of open access and to submit the W&BAs. This letter would have been received by the Petitioner on or before 7.3.2014. Subsequently, the Petitioner has submitted the W&BAs on 11.3.2014. Hence, it may be noted that there is a delay of four days in submitting the W&BA. Therefore, in respect of Groups 'A' and 'E' of the Projects, the wheeling of energy should have commenced from 2.3.2014, i.e., after forty four days from 17.1.2014, as noted above. However, the wheeling of energy has commenced only from 17.3.2014.

- (p) In respect of Group 'B' of the Project, open access application was received by the Respondents on 24.1.2014, with a request to wheel the energy to RR Nos.RMGHT-21 and E4HT-152. The chronology of events pertaining to Group 'B' of the Projects is as follows :

**(i) Chronological Order of Events (Pertaining to Group 'B' of Project)**

Sl. No.	Date	Event
1	13.11.13	Date of commissioning of the plant.
2	24.1.14	Application received from M/s. Lalpur Wind Energy Pvt Ltd to RR Nos.RMGHT-21, E4HT-152.
3	27.1.14	Letters addressed to HESCOM & BESCO requesting consent/ concurrence .
4	3.2.14	Concurrence from BESCO received for the above-said installations.
5	10.2.14	Firm confirmed that ABT meters installed to RMGHT-21, E4HT-152.
6	14.2.14	Note submitted Corporate Office for issuing consent to execute W&B Agreement (RMGHT-21 & E4HT-152).
7	24.2.14	Consent received from Corporate Office to RR Nos.E4HT-152 & RMGHT-21.
8	1.3.14	Letter addressed to firm conveying approval to submit W&B Agreement & permitted to wheel energy to RR Nos.RMGHT-21, E4HT-152 (after receiving statement of AGBT meter installation from RT staff).
9	17.3.2014	Date of Agreement.

- (q) In respect of Group 'B' of the Project, the Petitioner was intimated vide letter dated 1.3.2014, conveying approval of open access and to submit the W&BA. This letter would have been received by the Petitioner on or before 4.3.2014. Subsequently, the Petitioner has submitted the W&BA on 11.3.2014. Hence, it may be noted that there is a delay of seven days in submitting the W&BA. Therefore, in respect of Group 'B' of the Project,

the wheeling of energy should have commenced from 12.3.2014, i.e., after forty seven days from 24.1.2014, as noted above. However, the wheeling of energy has commenced only from 17.3.2014.

- (r) From the above discussions, it could be seen that in respect of Groups 'A', 'C', 'D' and 'E' of the Projects, there has been a delay of 15 (fifteen) days in the commencement of wheeling of energy, and in respect of Group 'B' of the Project, there has been a delay of 5 (five) days in the commencement of wheeling of energy. Accordingly, the Petitioner is entitled to compensation for the quantum of energy that could have been wheeled during above-mentioned periods of delay in the commencement of wheeling of energy.
- (s) As regards the ascertainment of quantum of energy that could have been wheeled during above-mentioned periods of delay in the commencement of wheeling of energy in the absence of any reliable data that could be secured for the said period, the average quantum of the energy generated per day during the period between the date of commissioning of different WEGs and the date of actual commencement of wheeling of energy could be taken.
- (t) As regards the rate at which the compensation has to be paid for the quantum of energy that could have been wheeled during the above-mentioned period of delay, we are of the view that the average Pooled

Cost of Power Purchase [as explained in Regulation 7(c) of the KERC (Procurement of Energy from Renewable Sources) Regulations, 2011], that was prevailing during the relevant Financial Year could be considered and paid to the Petitioner. Accordingly, we answer Issue No.(4) in the affirmative and in the above terms.

11) For the foregoing reasons, we pass the following :

**ORDER**

- (a) The Respondents shall ascertain the quantum of energy, as mentioned in Paragraph-10(s) above, that could have been wheeled during the period of delay of 15 (fifteen) days in respect of Groups 'A', 'C', 'D' and 'E' of the Projects, and of 5 (five) days in respect of Group 'B' of the Project, in the commencement of wheeling of energy;
- (b) The Respondents shall pay compensation to the Petitioner for the quantum of energy so ascertained, at the average Pooled Cost of Power Purchase [as explained in Regulation 7(c) of the KERC (Procurement of Energy from Renewable Sources) Regulations, 2011], prevailing during the Financial Year 2013-14, within 2 (two) months from the date of this Order; and,
- (c) All other reliefs sought for by the Petitioner in the Petition are hereby rejected.

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER