

No.: N/19/2014

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

**Dated : 31<sup>st</sup> July, 2014**

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar        | Member   |
| 3. Sri D.B. Manival Raju      | Member   |

**OP No.6/2014**

**BETWEEN :**

Narayanpur Power Company Private Limited,  
A-21, Manyata Residency,  
Arabic College Post,  
BANGALORE – 5670 045.

*[Represented by M/s. Link Legal India Law Services, Advocates]*

.. **PETITIONER**

**AND:**

- 1) Gulbarga Electricity Supply Company Limited,  
Station Road,  
GULBARGA – 585 101
- 2) State Load Despatch Centre,  
Ananda Rao Circle,  
BANGALORE – 560 009.
- 3) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
BANGALORE – 560 001.
- 4) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
BANGALORE – 560 009.

*[Respondents represented by M/s. Justlaw, Advocates]*

.. **RESPONDENTS**

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1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, seeking the following reliefs :

- (a) To direct the Respondents to execute a Wheeling and Banking Agreement with the Petitioner with immediate effect;
- (b) To direct the Respondents to credit the energy generated by the Petitioner's Project to the account of the HT Consumers of the 3<sup>rd</sup> Respondent (BESCOM), to whom the 3<sup>rd</sup> Respondent (BESCOM) has already issued concurrence;
- (c) To grant the cost of the complaint to the Petitioner; and
- (d) To pass such other order(s) as deemed fit.

2) The material facts required for the disposal of this Petition are stated as follows :

- (a) The Petitioner is a Renewable Energy Generator situated within the area of distribution of the 1<sup>st</sup> Respondent (GESCOM). The Petitioner had a Power Purchase agreement (PPA) dated 12.2.2008 with the 1<sup>st</sup> Respondent (GESCOM). The dispute regarding the termination of the said PPA was decided in favour of the Petitioner by the Hon'ble Appellate Tribunal for Electricity (ATE), which held that the termination of the PPA by the Petitioner was valid and legal. Thereafter, this Commission, by its

- Order dated 12.12.2013 in OP No.21/2012, declared that the Petitioner was entitled to open access or any other facility as admissible under the relevant Regulations.
- (b) The Petitioner filed an application on 18.12.2013 (ANNEXURE P-3) before the 4<sup>th</sup> Respondent (KPTCL) requesting for approval to enter into a Wheeling & Banking agreement (W&BA). The copies of the said application were marked to the 2<sup>nd</sup> Respondent (SLDC) and the 1<sup>st</sup> Respondent (GESCOM). The Petitioner also wrote a letter dated 17.12.2013 (ANNEXURE-P2) to the 3<sup>rd</sup> Respondent (BESCOM) and a letter dated 21.12.2013 (ANNEXURE-P4) to the 1<sup>st</sup> Respondent (GESCOM), requesting them to give concurrence at the earliest for execution of the W&BA. The Petitioner also wrote a letter dated 10.1.2014 addressed to the 2<sup>nd</sup> Respondent (SLDC), requesting to issue approval for the execution of the W&BA.
- (c) The 3<sup>rd</sup> Respondent (BESCOM), by letter dated 8.1.2014 (ANNEXURE-P6), conveyed its concurrence to wheel the electricity generated from the 7.2 MW capacity Mini-Hydel Project of the Petitioner to a Non-Captive HT Consumer mentioned in the said letter.
- (d) The 4<sup>th</sup> Respondent (KPTCL), in its letter dated 1.1.2014, wrote to the 1<sup>st</sup> Respondent (GESCOM) asking for information as to whether the PPA dated 12.2.2008 between the Petitioner and the 1<sup>st</sup> Respondent (GESCOM) is terminated. Subsequently, it reminded the 1<sup>st</sup> Respondent

(GESCOM) by letters issued on 17.2.2014 and 10.3.2014. Further, by letter dated 20.1.2014 (ANNEXURE-P8), it also informed the Petitioner that it had requested the 1<sup>st</sup> Respondent (GESCOM) to intimate whether the PPA executed by the 1<sup>st</sup> Respondent (GESCOM) with the Petitioner was subsisting or not and that the 1<sup>st</sup> Respondent's (GESCOM) reply, in this behalf, was awaited.

(e) The Petitioner has contended that the 1<sup>st</sup> Respondent (GESCOM) has so far not given its concurrence to the 2<sup>nd</sup> Respondent (SLDC), nor has it come forward to sign the W&BA with the Petitioner, and that it has not even confirmed to the 2<sup>nd</sup> Respondent (SLDC) that its erstwhile PPA with the Petitioner stood terminated. Therefore, the Petitioner has contended that the 1<sup>st</sup> Respondent (GESCOM) has willfully and deliberately disobeyed the Order of this Commission dated 12.12.2013 in OP No.21/2012, and has requested for granting of the reliefs sought.

3) The Respondents have appeared through their counsel. The 1<sup>st</sup> Respondent (GESCOM) has filed its Statement of Objections. The Petitioner has no grievance against the other Respondents. The defense of the 1<sup>st</sup> Respondent (GESCOM) is stated as follows :

(a) The 1<sup>st</sup> Respondent (GESCOM) has contended that it has preferred a Review Petition against the Order dated 7.10.2013 passed in Appeal No.20/2013 on the file of the Hon'ble ATE, and therefore the question of

validity or otherwise of the PPA in question has not attained finality as yet, and that the 1<sup>st</sup> Respondent (GESCOM) has addressed a letter to the 2<sup>nd</sup> Respondent (SLDC) informing it about the pendency of the Review Petition. Further, it has contended that in the light of the same, the 2<sup>nd</sup> Respondent (SLDC) has in its letter dated 5.6.2014 (ANNEXURE – R1), informed the Petitioner about the rejection of its request for consideration of grant of 'NOC' for open access. The 1<sup>st</sup> Respondent (GESCOM) has further contended that until the said Review Petition is adjudicated upon, it cannot be said that the Order passed by the Hon'ble ATE has attained finality, and hence it is not bound to execute a W&BA.

(b) The 1<sup>st</sup> Respondent (GESCOM) has further contended that Regulation-4A of the KERC (Terms and Conditions for Open Access) Regulations, 2004 imposes a bar on availing of open access in the event of existence of a PPA. Therefore, the 1<sup>st</sup> Respondent (GESCOM) has requested to dismiss the Petition.

4) We have heard the learned counsel for the parties. They have reiterated the grounds urged in the pleadings.

5) The following issues would arise for our consideration :

(1) Whether the pendency of the review proceedings before the Hon'ble ATE would bar the Petitioner from availing the open access facility?

(2) What Order?

6) After considering the pleadings and submissions of the parties, our findings on the above issues are as follows :

7) **ISSUE No.(1) :**

(a) There is no dispute that, if the PPA is subsisting, the generator is not entitled to open access for the capacity (quantum of power) for which the PPA is entered into, except in accordance with the terms of such PPA, as provided in Regulation-4A of the KERC (Terms and Conditions for Open Access) Regulations, 2004. In the present case, the Petitioner issued the Termination Notice dated 23.4.2012 terminating the PPA, and this Commission in OP No.21/2012 had held that the termination was not valid and legal. However, the Hon'ble ATE, by Order dated 7.10.2013 in Appeal No.20/2013, has upheld the termination of the PPA, reversing the Order of this Commission.

(b) The 1<sup>st</sup> Respondent (GESCOM) has contended that against the Order dated 7.10.2013 in Appeal No.20/2013, a Review Petition bearing No.DFR-831/2013 filed by it is pending before the Hon'ble ATE, and therefore the question of validity or otherwise of the PPA has not yet attained finality. Admittedly, the 1<sup>st</sup> Respondent (GESCOM) has not obtained any Stay Order against the Order dated 7.10.2013 in Appeal No.20/2013 from the Hon'ble ATE or the Hon'ble Supreme Court. Mere filing of a Review

Petition does not amount to grant of stay of the impugned Order. A party is entitled to the benefits of an Order of an Authority right from the moment the Order is passed, unless the execution of the said Order is stayed by a Competent Authority. The beneficiary of an Order cannot be compelled to wait to realize the benefits of the said Order till the final disposal of the proceedings that might be pending before a superior Authority, unless the impugned Order is stayed. Therefore, one cannot hold that the PPA in question is still subsisting and therefore binding on the parties concerned, merely because a Review Petition is pending as on date. It is needless to say that the subsequent acts of the parties in this regard would be subject to the final outcome of the Review Petition. For the above reasons, we hold that the pendency of the review proceedings before the Hon'ble ATE does not bar the Petitioner from availing the open access facility. The 1<sup>st</sup> Respondent (GESCOM) cannot withhold from giving its consent for executing the W&BA, solely on the premise that a Review Petition against the Order dated 7.10.2013 passed in Appeal No.20/2013 is still pending on the file of the Hon'ble ATE. For the above reasons, we hold Issue No.(1) in the negative.

8) **ISSUE No.(2) :**

- (a) For the foregoing reasons, there is no difficulty in holding that the 1<sup>st</sup> Respondent (GESCOM) should be directed to give its consent for

executing the W&BA, to facilitate the Petitioner to avail open access for sale of electricity to third parties.

- (b) In view of the inordinate delay, as noticed below, by the 1<sup>st</sup> Respondent (GESCOM) in communicating to the Petitioner about its decision on executing the W&BA, we feel it appropriate to issue a direction to give credit of the electricity generated by the Petitioner's Project during the period after this Commission's order declaring that the Petitioner was entitled to open access to the Petitioner's account. The Petitioner had filed, on 18.12.2013 itself, before the 4<sup>th</sup> Respondent (KPTCL), an application seeking permission for signing the W&BA (ANNEXURE P-3) and had marked the copies of the said application to the 1<sup>st</sup> Respondent (GESCOM) and others concerned. The Petitioner also wrote a letter dated 21.12.2013 (ANNEXURE P-4) to the 1<sup>st</sup> Respondent (GESCOM), informing that the Petitioner was entitled to wheel the energy to third parties and requesting it to issue approval for execution of the W&BA at the earliest. The 4<sup>th</sup> Respondent (KPTCL), vide letter dated 1.1.2014 (ANNEXURE P-5), asked the 1<sup>st</sup> Respondent (GESCOM) to clarify its stand with regard to the approval of the W&BA in favour of the Petitioner. Subsequently, the 4<sup>th</sup> Respondent (KPTCL) issued two reminders, on 15.2.2014 and 10.3.2014, asking the 1<sup>st</sup> Respondent (GESCOM) to make its stand clear on approving the W&BA to the Petitioner. In spite of these several letters and reminders, the 1<sup>st</sup> Respondent (GESCOM) has failed to reply to any of these parties in this regard. This conduct of the 1<sup>st</sup>



Respondent (GESCOM) in not communicating its stand to the Petitioner or to others concerned, within a reasonable time after the receipt of letter dated 18.12.2013 (ANNEXURE- P3) or subsequent letters, in our view, amounts to gross negligence of its mandatory duty prescribed under the KERC (Terms and Conditions for Open Access) Regulations, 2004. If the 1<sup>st</sup> Respondent (GESCOM) thought that the pendency of the Review Petition was a good ground to contend that the question of validity or otherwise of the PPA had not attained finality, the said position should have been informed by it to the Petitioner at the earliest. Apparently, the 1<sup>st</sup> Respondent (GESCOM) has taken about six months, for reasons best known to it, to convey its stand with regard to the subsistence or otherwise of the PPA.

- (c) Considering the above willful negligence on the part of the 1<sup>st</sup> Respondent (GESCOM) in not communicating its stand with regard to the request for grant of the W&BA facility to the Petitioner within a reasonable time, we are of the view that the 1<sup>st</sup> Respondent (GESCOM) should be made accountable for the electricity, if any, generated and supplied to the grid by the Petitioner's Project from 18.12.2013, the date on which the Petitioner applied for open access. This accountability can be achieved by directing that the quantum of electricity generated from the Petitioner's Project and injected into the grid of the 1<sup>st</sup> Respondent (GESCOM) shall be deemed to have been banked by the Petitioner with the 1<sup>st</sup> Respondent (GESCOM), and by allowing the Petitioner to wheel the

said quantum of electricity to the HT Consumers of its choice, on or before the closure of the current Water Year. Considering the facts and circumstances of the case, we are also of the view that the 1<sup>st</sup> Respondent (GESCOM) should be directed to pay a cost of Rs.10,000/- (Rupees Ten Thousand only) to the Petitioner.

(d) For the foregoing reasons, we pass the following :

### **ORDER**

- (1) It is hereby directed that the quantum of electricity, if any, generated from the Petitioner's Project and injected into the grid of the 1<sup>st</sup> Respondent (GESCOM) after 18.12.2013 shall be deemed to have been banked by the Petitioner with the 1<sup>st</sup> Respondent (GESCOM), and the Petitioner shall be allowed to wheel the said quantum of electricity to the HT Consumers of its choice, on or before the closure of the current Water Year, i.e., on or before 31.5.2015;
- (2) The 1<sup>st</sup> Respondent (GESCOM) and other Respondents are directed to execute the Wheeling and Banking Agreement as per the applicable norms and Regulations, so as to facilitate the Petitioner to avail the open access for sale of electricity to third parties; and
- (3) The 1<sup>st</sup> Respondent (GESCOM) shall pay a cost of Rs.10,000/- (Rupees Ten Thousand only) to the Petitioner.

Sd/-	Sd/-	Sd/-
(M.R. SREENIVASA MURTHY)	(H.D. ARUN KUMAR)	(D.B. MANIVAL RAJU)
CHAIRMAN	MEMBER	MEMBER