

No. N/44/2019

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 11.08.2021

Present

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

OP No.16/2019

BETWEEN:

Fortune Five Hydel Projects Private Limited
Having its administrative office at
No. 701-702, Prestige Meridian-II,
No. 30, M.G. Road, Bengaluru – 56000
(Represented by its Authorized Signatory)

...PETITIONER

(Represented by Sri Aditya Narayan, Advocate,
Argus Partners, Solicitors and Advocates]

AND:

1. Bengaluru Electricity Supply Company Limited,
Through its Managing Director,
K.R. Circle, Bengaluru – 560001. **...RESPONDENT No. 1**
2. Hubli Electricity Supply Company Limited,
Through its Managing Director,
PB Road, Durgad Bsil, Navanagar,
Hubballi – 580025. **...RESPONDENT No. 2**
3. Mangaluru Electricity Supply Company Limited,
Through its Managing Director,
Corporate Office, MESCOM Bhawana,
Kavoor Cross Road, Bejai,
Mangaluru – 575004. **...RESPONDENT No. 3**

4. Gulbarga Electricity Supply Company Limited,
Through its Managing Director,
Station Road,
Kalaburagi-585102.

...RESPONDENT No. 4

5. Karnataka Power Transmission Corporation Limited,
Through its Managing Director,
Kaveri Bhavan, K.G. Road,
Bengaluru-560009.

...RESPONDENT No. 5

(Represented by Sri Sriranga Advocate for
Just Law Advocates)

ORDERS

This petition filed by the Petitioner under Section 86 (1)(f) of Electricity Act 2003, read with Regulation 11 of KERC (General and Conduct Proceedings) Regulations 2000, praying for the following reliefs: -

- a) to set aside/quash letter dated 14.01.2019 of Respondent No. 4 as illegal and untenable.
 - b) To declare that the Respondent No. 4 GESCOM shall be solely liable for losses that are incurred and suffered by the Petitioner because of the arbitrary actions of the Respondent No. 4 in refusing to sign the Supplemental WBA.
 - c) To pass such other orders as may be deemed fit in the interest of justice and equity.
1. The facts of the case of the petition are: -
 2. The Petitioner is a R.E Generating Company having operating capacity of about 101.2 MW of wind power in Vijayapura District. During the year 2013-14 the Petitioner has signed WBA with the respective ESCOM for wheeling and banking of its energy to its Open Access Consumers. The

said agreements were signed in pursuant to the orders of KERC dated 09.10.2013 and extended the order till 31.03.2014. Thereafter the KERC vide its order dated 04.07.2014, extended the benefit of Annual Banking facility to RE projects commissioned on or before 31.03.2018 for a period of 10 years from the date of commissioning of the respective projects. The KERC has approved the draft WBA for RE projects on 08.07.2014 (Annexure-B Collectively).

3. Further it is stated that the Commission by its order dated 09.01.2018 (Annexure-C) modified its earlier order reducing the banking facility period from 1 year to 6 months. Further the Commission extended the applicability of the said modification to the existing WBA's as well.
4. Aggrieved by the said order dated 09.01.2018, the Petitioner approached the Hon'ble Appellate Tribunal for Electricity, New Delhi (herein after termed as Hon'ble ATE) in Appeal No. 42/2018. Consequently, the Hon'ble ATE has stayed on 08.05.2018 the operation of order dated 09.01.2018 passed by the KERC. Further extended the interim orders of stay until further orders as per order dated 15.11.2018. As the appeal was pending before Hon'ble ATE and the Commission cannot enforce the order dated 09.01.2018.
5. Further it is stated that the KERC revised Wheeling and Banking charges from 5% to 25% by its vide order dated 14.05.2018. Aggrieved by this order the Petitioner and Other RE Generators in Karnataka filed Writ Petitions in WP 23990-23995/2018 and the Hon'ble High Court of Karnataka has granted Interim relief by staying the Commission order

dated 14.05.2018. Both orders of KERC dated 09.01.2018 and 14.05.2018 are challenged in above said Appeal and the Writ Petition in the above and both the proceedings are still pending for consideration. Hence the said order dated 09.01.2018 and 14.05.2018 are not binding on the Petitioner.

6. Further it is the case of the Petitioner that he has identified certain consumers who were interested to purchase the electricity from the Petitioner Plant, approached KPTCL-Respondent No. 5 for approval and the Respondent No. 5 granted the approval on 01.12.2018 (Annexure-K). However, the Respondent No. 5 required the Petitioner to take necessary action in terms of Clause 6.1.1 of the existing WBA. In this background the Petitioner requested the Second Respondent HESCOM, through a letter dated 06.12.2018 (Annexure G) to execute Supplementary WBA in respect of its WTGS situated at various locations in Basavana Bagewadi Taluk, Vijayapura District after receiving the consent from SLDC for wheeling of energy to its open access consumers situated in the jurisdiction of Respondent No. 4. Pursuant thereto, Respondent No. 2-HESCOM through its letter dated 08.01.2019 (Annexure H) to Respondent No.4-GESCOM.
7. Even though the order dated 09.01.2018 and 14.05.2018 are not binding on the Petitioner, the Fourth Respondent replied on 14.01.2019 stating that the Supplemental WBA is in the old format whereas, as per the KERC order dated 09.01.2018 revised banking period is applicable to existing WBA, further the Respondent No. 4 has held that the

Supplemental WBA's must be entered in a new format and requested the Second Respondent to submit the same in the new format (Annexure-J).

8. The position adopted by the Respondent No. 4 is also directly contrary to Clause 6.1.1 of WBA and letter dated 01.12.2018. Clause 6.1.1 of WBA makes it clear that if the generator requires to wheel energy, to any new Consumer it has to execute an agreement with the Consumer to abide by the provisions of the existing WBA (Annexure-K). Further it is stated that in terms of the Interim orders of the Hon'ble ATE, the Respondents are expressly proscribed from precipitating the matter. The immediate and direct effect of the said order is that the Respondents must abide by the terms of existing WBA's without attempting to import the terms of the order dated 09.01.2018. The existing WBA requires the Respondents to wheel banked energy to new customers subject to execution of an agreement undertaking to abide by the terms of the existing WBA. The Respondents by virtue of the order dated 09.01.2018 cannot insist on imposing the new terms in respect of such customers, therefore, the method adopted by the Fourth Respondent through its letter dated 14.01.2019 is directly contrary to the orders of the Hon'ble ATE. Further it is stated that the Petitioner in this back drop requested the Respondent No. 2 as well as Respondent No. 4 to sign the Supplemental WBA as forwarded by the Second Respondent to the Respondent No. 4. But the Respondent No. 4 refused to accept the legitimate and bona fide request of the Petitioner. The act of Fourth

Respondent is wholly contrary to the binding orders of the Hon'ble ATE. Being aggrieved by the said conduct of the Respondent No. 4, the present petition is filed. Hence the Petitioner prays to allow the Petition in the interest of justice and equity.

9. This Commission has issued notice to the Respondents consequently the Respondents have appeared before the Commission through their Counsel and the Fourth Respondent has filed statement of objections. In the said objections the Respondent No. 4 has stated that the Petitioner has not approached the Commission with clean hands and only on this ground, his prayer has to be rejected. Further stated that the Petitioner is indulging in Forum shopping. The Petitioner has not only initiated the proceedings before the Commission, but has also initiated an identical proceeding before the Hon'ble High Court of Karnataka, Bengaluru in Writ Petition No. 7042/2019. The Hon'ble High Court of Karnataka vide its order dated 10.04.2019 has disposed of the Writ Petition by holding that the request made to the Respondent No. 2 to resubmit Supplemental Wheeling and Banking Agreement as per the orders of the Commission dated 09.01.2018 had become infructuous, in view of the setting aside of the order of the Commission dated 09.01.2018 (Annexure R1). In Appeal No. 42/2018 order dated 29.03.2019, the Hon'ble ATE has set aside the KERC's order dated 19.01.2018 in petition Nos. 19/2016, 100/2016, 104/2016, 47/2017 and 130/2017 and remitted back to First Respondent-KERC with the direction to pass the appropriate order in the light of the observations made in

the preceding paragraphs above in accordance with law as expeditiously as possible within a period of six months after receiving the copy of the judgement. However, in WP No. 7042/2019 the Petitioner was given liberty to move before the Respondent No.4-GESCOM to consider the Supplemental Wheeling and Banking Agreement dated 07.01.2019. Under these circumstances, the Respondent submitted that the present petition is barred by principles of res judicata, hence the petition is not maintainable and liable to be rejected.

10. Further the Fourth Respondent has submitted that the Petitioner herein owns 101.4 MW wind power plants and wheeling power under open access. On 20.02.2014, the Petitioner had executed Wheeling and Banking Agreement with Respondent No. 1 and 2 in respect of 51.2 MW wind plants located at Basavana Bagewadi Taluk, Vijayapura District, and again on 30.06.2019 the Petitioner had executed another WBA with Respondent No. 1 and 2 in respect of 51.2 MW wind plants located at Basavana Bagewadi Taluk, Vijayapura District. Thereafter the Petitioner was interested in wheeling energy to consumers located in the jurisdiction of Respondent No. 4, therefore, Petitioner requested the Respondents to execute Supplemental Wheeling and Banking Agreement allowing it to wheel to consumers located in the jurisdiction of Respondent No. 4. On 01.12.2018 the Chief Engineer of SLDC, has accorded approval to the Petitioner to wheel energy to consumers located in the jurisdiction of Respondent No. 4. On 07.01.2019 the Respondent No. 2 has executed the Supplemental Wheeling and

Banking Agreement and forwarded the same to the Respondent No. 4 for signing, on 14.01.2019 the Respondent No. 4 directed the Petitioner to execute Supplemental Wheeling and Banking Agreement in terms of order of Commission dated 09.01.2018.

11. The contention of the Fourth Respondent is that, it is the case of the Petitioner that the Respondents have wilfully and deliberately attempted to over reach the judicial order of the Hon'ble ATE by refusing to execute Supplemental Wheeling and Banking Agreement in old format existing prior to the passing of the order of the Commission dated 09.01.2018. But it is settled position of law that Court will not decide academic issues. Further it is submitted that thereafter the order of the Commission dated 09.01.2018 has been set aside by the Hon'ble ATE vide its judgement dated 29.03.2019 in appeal No. 42/2018. Under these circumstances the present petition has become infructuous.
12. Further it is the contention of the Respondents that the Petitioner has claimed for loss incurred on account of inaction of the Respondent No. 4 is unfounded and not quantified. This claim for loss is wholly without any basis and no material have been placed before the Commission. The other allegations made against the Respondents by the Petitioner are all false and baseless, hence, prayed for rejection of the petition in the interest of justice and equity.
13. During pendency of the present proceedings the Petitioner has filed an application for amendment of the petition under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000, with a prayer

to permit proposed amendment as shown in the application in the interest of justice and equity. The proposed amendment sought by the Petitioner is as follows: -

I. "To insert the following paragraphs after paragraph 21 of the petition:

"21A. It is submitted that the Petitioner was unable to wheel energy to its various customers solely on account of Respondents' refusal to execute the Supplemental WBA in time. The Petitioner has now learnt that the Respondent No. 4, after having refused to sign the Supplemental WBA in January 2019, finally signed the same and returned it to BESCO, i.e., Respondent No.1, only on 15.03.2019. Thereafter, BESCO, i.e., Respondent No.1, took a further period of three months, until 29.06.2019 to sign the Supplemental WBA and sent the same to KPTCL, i.e., Respondent No.5. Respondent No.5 only signed and sent the Supplemental WBA to the Petitioner on 10.07.2019, i.e., five months after the date of filing the Petition. Hence, due to the various untenable and impermissible inactions and inordinate delays at the hands of the Respondents, the execution of the Supplemental was inordinately delayed. Consequently, the Petitioner was, effectively, deprived of open access during the said period resulting in huge revenue loss. A copy of the executed Supplemental WBA is produced as Annexure M.

21B. The Petitioner, due to the Respondents' aforesaid conduct, has suffered huge losses, as follows:

- (i) The Petitioner suffered loss of opportunities to sell electricity, by recourse to its right of open access, to the various customers intending to buy the same, and despite consent for inclusion of such customers into the WBA having been granted by all Respondents, including Respondent No.4.*
- (ii) The Petitioner was unable to supply electricity through open access to these customers only because of the no-inclusion of their names in the WBA. This was solely due to the Respondents contumacious refusal to sign the Supplemental WBA and bring the said customers within the pale of the WBA dated 20.02.2014 and 30.06.2014.*
- (iii) The Petitioner, consequently, was left with an extent of 6,69,68,791 units of energy that remained unsold to*

open access customers during the period in question. The detailed workings depicting the same are produced herewith and marked as Annexure N.

- (iv) Had the Respondents executed the Supplemental WBA in time, the Petitioner would have been able to sell the aforesaid units at Rs.4.30 per unit (this is based on average net tariff received for the power sold in open access for the year 2018-19) to its customers.*
- (v) The fact that the customers of the Petitioner were ready and willing to purchase the said units is clearly established by the copies of the Power Purchase Agreements executed between the Petitioner and its customers, produced herewith and marked as Annexure P1 to P5.*
 - a. The Petitioner, in order to mitigate its losses, was constrained to sell the said energy to its HT customers, within the jurisdiction of HESCOM, at a much lower price. The price difference suffered by the Petitioner, on this account, is Rs.4.30 per unit.*

21C. It is, therefore, crystal-clear that the Petitioner has suffered losses of Rs.4.30 per unit, in respect of 6,69,68,791 units of energy that it could not sell through open access to available customers, solely due to the contumacious and illegal conduct of Respondents described hereinabove. Hence, the total loss suffered by the Petitioner is Rs. 28,79,65,800.

21D. Petitioner craves leave of this Hon'ble Commission to produce such other document as may become necessary to substantiate its claim, in the course of hearing.

II. To insert prayer b (i) as follows:

"b(i).Consequently, direct the Respondents to compensate the Petitioner for the loss of open access in relation to 6,69,68,791 units, at such rate as may be determined by this Hon'ble Commission, and pay the same; and..."

14. Further the Petitioner submitted that he has sought two reliefs in the petition i.e., to issue directions to the Fourth Respondent for execution of Supplemental WBA without reference to the order dated 09.01.2018 and also declare that fourth Respondent is liable to compensate the

Applicant for losses and damages suffered due to its refusal to sign the Supplemental WBA. Since the first relief sought by him has become infructuous as per the orders of Hon'ble High Court of Karnataka in WP 7042/2019, but the Second prayer for the relief to compensate the Applicant remained valid. Further he stated that because of the inordinate delay of the Respondents in signing the Supplementary WBA, the Petitioner could not supply banked power to various third parties through open access and as a result he suffered loss. The Fourth Respondent has finally executed Supplemental WBA and delivered to the Petitioner only on 10.07.2019 i.e., after 5 months from the date of the petition. The quantification of the units which remained unsold due to the Respondents inactions to execute the WBA in time, was possible only after the expiry of the banking period i.e., in the March 2019, after filing of the present petition. Under these circumstances and the subsequent developments and in order to make available all necessary facts to adjudicate the dispute including the claim under prayer, (b) it is necessary that the petition to be amended to bring on record the relevant facts and circumstances, which are subsequent to the date of the filing of the petition. If this application is not allowed the Applicant will be put to irreparable loss and injustice thereby the Petitioner prays to allow the application permitting him to amend as per the proposed amendment in the interest of justice and equity.

15. The Respondent No. 4 has filed objections to the application stating that, the original petition was filed on 07.02.2019. Now the Petitioner has

come up with this interlocutory application on 28.01.2020 seeking for amendment of the petition. Further stated that it is settled position of law that amendment of pleadings which are after thought ought not to be permitted. If the amendment is allowed it results in introducing a new cause of action. The other contentions taken by the Petitioner are all false thereby denied, with this he prays to dismiss the present application in the interest of justice and equity. The Fourth Respondent also filed detailed statement of objections on 17.10.2019 to the main petition.

16. The case is posted for arguments on Interim application filed for the relief of amendment of pleadings as well as on merits of the case. Accordingly, both parties have addressed their arguments through their Counsel apart from placing written submissions.
17. Heard the arguments and perused the records.
18. At this stage the below mentioned issues arise for our consideration.

1. Issue No. 1: Whether the Petitioner has made out valid grounds to show that the proposed amendment is necessary to determine the real question in controversy between the parties, and does not cause any prejudice on the Respondents?

2. Issue No. 2: Whether the Petitioner is entitled to declaratory relief as sought for?

3. Issue No. 3: What Order?

19. Issue No. 1: Whether the Petitioner has made out valid grounds to show that the proposed amendment is necessary to determine the real question in controversy between the parties, and it does not cause any prejudice on the Respondent?

a) During the course of arguments, the Learned Counsel for the Petitioner submitted that after filing of the present petition and also after passing of the orders by the Hon'ble High Court of Karnataka in WP No. 7042/2019 as well as the Hon'ble ATE in Appeal No. 42/2018, the Respondent No. 4 has voluntarily signed Supplemental WBA on 15.03.2019 and thereafter, Respondent No. 1 took a further period of 3 months until 29.06.2019 to sign the Supplemental WBA and sent the same to the Respondent No. 5. Thereafter Respondent No. 5 only signed and sent the Supplemental WBA to the Petitioner on 10.07.2019 (Annexure-M). Because of the refusal of the Respondent to execute the Supplemental WBA within time, the Petitioner was unable to wheel energy to its various customers. Therefore, there is 5 months delay in signing the WBA by the Fourth Respondent though he was well aware of the orders as stated supra. Because of the attitude of the Fourth Respondent the Petitioner could not sell the power to its customers consequently it was left to an extent of 6,69,68,791 units of banked energy. Had the Respondents executed the Supplemental WBA in time, the Petitioner would have been able to sell the aforesaid units at Rs.4.30 per unit to its customers, but because of refusal of the

Respondent No. 4 in signing Supplemental WBA the Petitioner has suffered heavy loss of Rs. 28,79,65,800/-, under these circumstances he has filed the present application for amendment of the pleadings and the prayer column in the petition which is just and necessary for the purpose of final adjudication, and further submitted to allow the application for amendment of the petition as prayed for in the interest of justice and equity.

- b) During the course of arguments, the Counsel for Respondent No. 4 has submitted that the amendment application is filed belatedly and as an afterthought only to claim monetary benefit from the Respondent. Apart from that it is settled law that no amendment can be allowed if it results in introducing a new cause of action, and if this application is allowed, definitely the Respondent will be put to irreparable loss and injury and also it causes prejudice on their defence which is already taken. Thereby the application filed by the Petitioner is not maintainable and the same is liable to be rejected. Accordingly, he prayed to reject the application in the interest of justice and equity.
- c) On perusal of the records, it appears that the Petitioner is the RE Generating Company having operating capacity of about 101.2 MW of wind power in Vijayapur District. The Petitioner has signed Wheeling and Banking Agreements with the respective ESCOM as per (Annexure-A). Thereafter, the KERC in its order dated 09.01.2018 modified its earlier order dated 04.07.2014, reducing the

banking facility period from one year to six months and also made this order applicable to all existing WBAs. Aggrieved by this order the Petitioner approached the Hon'ble ATE in appeal No. 42/2018. The Hon'ble ATE has stayed the operation of the order dated 09.01.2018 until further orders. Further this Commission revised Wheeling and Banking charges from 5% to 25% vide its order dated 14.05.2018. Aggrieved by this order the Petitioner and others have filed Writ Petition before the Hon'ble High Court of Karnataka Bengaluru in WPs No. 23990 to 23995/2018, wherein the Hon'ble High Court was pleased to grant interim relief by staying the order of the Commission dated 14.05.2018. When these both appeal and Writ Petitions were pending for adjudication, at that time the Petitioner has requested the Respondents through a letter dated 06.12.2018 to execute the Supplementary WBA in respect of its WTGS situated in various locations in Basavana Bagewadi Taluk, Vijayapur District after receiving consent from SLDC dated 06.12.2018 (Annexure-G), for wheeling of energy to its open access consumers situated in the jurisdiction of Respondent No. 4. The Fourth Respondent through letter dated 14.01.2019 (Annexure-J) has refused to sign Supplemental WBA on the ground that the Supplemental WBA was in old format whereas, as per the order of KERC dated 09.01.2018 revised banking period is applicable to existing WBAs.

- d) Thereafter the Hon'ble ATE, has passed order on 29.03.2019 in appeal No. 42/2018 and thereby the matter was remitted back to the KERC with a/ direction to pass appropriate orders in the light of the observations made by the Hon'ble ATE, in accordance with Law within a period of six months. In WP No. 7042/2019 (GM-KEB) (Annexure-R1), the Hon'ble High Court was pleased to pass an orders on 10.04.2019 holding that, in view of the orders passed by the Hon'ble ATE, setting aside the orders of KERC dated 09.01.2018, Writ Petition will not survive for consideration thereby, held that the Writ Petition is infructuous. However, the Petitioner is at liberty to move before the Respondent No. 4/GESCOM to consider the Supplemental Wheeling and Banking Agreement dated 07.01.2019, and further directed the Respondent No. 4 to consider the same in the event of such application is filed, in accordance with law in an expedite manner. In none of these orders either the Hon'ble ATE, or Hon'ble High Court have observed that the Petitioner has suffered loss due to the refusal of the Respondent No. 4 in signing Supplemental WBA.
- e) It is not in dispute that the Petitioner has filed this Petition on 07.02.2019, and he claimed compensation towards the loss of energy which the petitioner could not sell to HT consumers during the period from 14.01.2019 to 10.07.2019. It is settled law that an amendment to the pleadings can be considered in so far as it relates to the events occurring before filing of the pleadings. If an

amendment relates to an event occurring subsequent to the filing of the pleadings such amendment need not be allowed. Added this, the proposed amendment should not be prejudiced to the rights of the opponent parties. Of Course, the Commission may at any stage of the proceedings allow either of the parties to alter or amend their pleadings in such a manner and on such terms as may be just and all such amendments shall be made necessary for the purpose of determining the real questions in controversy between the parties keeping in view the principles of natural justice. But in the present case on hand and as per the discussions made herein above the Petitioner is claiming compensation for having suffered losses because it could not supply power to various third parties through open access due to non-execution of supplemental W & BA by Respondents for the period from 14.01.2019 till 10.07.2019.

- f) Under these circumstances, we are of the opinion that the Petitioner has not made out his case to allow the application for amendment as prayed for. If this application is allowed, the proposed amendment dates back to the date of filing of the petition, if it is done so, it definitely changes cause of action and causes prejudice on the Respondent No. 4. Hence, we are of the opinion that the application is devoid of merits thereby, liable to be rejected. With this we answer Issue No. 1 in the Negative.

20. Issue No. 2: Whether the Petitioner is entitled to declaratory relief as sought for?

- a) During the course of arguments on merits, the Learned Counsel for the Petitioner has reiterated the same arguments which were made while arguing on the application for amendment filed under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000. In addition to that, he has submitted and admitted that the Fourth Respondent has executed the Supplementary WBA as per the orders of the Hon'ble High Court of Karnataka in WP No. 7042/2019 and as per the orders of Hon'ble ATE in Appeal No. 42/2019, the first prayer in the petition has become infructuous thereby, he will not press upon it.
- b) Further the Learned Counsel for the Petitioner submitted that on refusal of the Respondent No. 4 in signing the Supplementary WBA as per letter dated 14.01.2019, the Petitioner has undergone heavy loss because he could not wheel the energy to the customers, thereby he was left with an extent of 6,69,68,791 units of energy that remained unsold to open access customers during the period in question. The Petitioner was constrained to sell the said energy to its HT customers within jurisdiction of HESCOM at a much lower price. The price difference suffered by the Petitioner in this regard is Rs. 4.30/- per unit. Further submitted that it is crystal clear that the Petitioner has suffered loss of at least Rs. 4.30/- per unit in respect of 6,69,68,791 units of energy that it could not sell through open

access to available customers. It is solely due to the contumacious and illegal conduct of Respondent No. 4 as well as delay caused by Respondent No. 1 and 5. Hence the Petitioner is entitled for compensation for having suffered loss due to the acts of the Respondents. Further submitted that as per the findings given by Hon'ble Apex Court in Kamaleshwar Kishore Singh Vs. Parasnath Singh and others, AIR 2002 SC 233, the court fee has to be paid on the plaint as framed and not on the plaint as it ought to have been framed. Further as per the findings given by the Hon'ble High Court of Punjab and Haryana in Jaspal Singh Vs. Gurbinder Singh 2015 (152) AIC 844, it is clear that the suit is for unliquidated damages and the amount of Court fees can always be fixed once the Court quantifies the damages and the Plaintiff can be asked to pay the same, in such cases where there is no objective standard and there can never be to assess the amount for which the Plaintiff can value the same, the valuation can be tentative. In view of these principles of law the Petitioner can and ought to be directed to pay the Court fee only on the sum granted as compensation by this Commission and the same cannot act as a bar to the grant of relief sought by the Petitioner. Therefore, considering all these facts and circumstances of the case the Learned Counsel for the Petitioner finally prayed to pass orders awarding compensation to the Petitioner in the interest of justice and equity.

- c) The Learned Counsel for the Respondent No. 4 in addition to his earlier arguments made on the application for amendment filed under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000, has submitted that the Petitioner has not approached the Commission with clean hands thereby, the Petitioner is not entitled for any relief. Further submitted that the Petitioner has indulged in Forum shopping, and also initiated proceedings before the Commission as well as before the Hon'ble High Court of Karnataka in WP No. 7042/2019, seeking similar prayer as in the present petition. Further submitted that only on this ground the present petition has to be dismissed.
- d) The Respondent No. 4 has also submitted that the Hon'ble High Court has disposed off the Writ Petition in WP No. 7042/2019 dated 10.04.2019 by holding that the Respondent No. 4 to consider Supplemental Wheeling and Banking Agreement, as the orders of the Commission dated 09.01.2018 had become infructuous in view of the orders passed by the Hon'ble ATE, in Appeal No. 42/2018. However, the Petitioner was given liberty to approach the Respondents for execution of Supplemental Wheeling and Banking Agreement. Under these circumstances the petition is barred by principles of res judicata. The claim made by the Petitioner for compensation is without any basis and no materials have been placed. With all this the Counsel for the Fourth Respondent pray to dismiss the petition in the interest of justice and equity. In support of

his arguments, he has relied upon the decision reported in AIR 1964 SC 993 held between Arjun Singh Vs. Mohindra Kumar and Others, and also produced the copy of the Supplemental Wheeling and Banking Agreement dated 07.01.2019.

- e) By way of reply the Learned Counsel for the Petitioner submitted that it is settled law that an order of dismissal due to the proceedings having become infructuous will not operate as res judicata. In this regard he relied upon the decision reported in (1) AIR 2009 SC 664 held between Noharlal Verma Vs. District Co-operative Central Bank Limited, Jagadapur and (2) (2009)1 SCC 689 held between State of Uttar Pradesh and Another Vs. Jagdish Sharan Agarwal and Others.
- f) Ongoing through the referred decisions relied by the Learned Counsel for the Petitioner in (2008) 14 SCC 445 held between Noharlal Verma Vs. District Co-operative Central Bank Limited, Jagdalpur, in which the Hon'ble Supreme Court has observed as under: -

"C. Res judicata – Applicability – Earlier application becoming infructuous rather than being decided on merits – Held, did not operate as res judicata."

- g) Further in the decision reported in (2009)1 SCC 689 held between State of Uttar Pradesh and Another Vs. Jagdish Sharan Agarwal and Others in which the Hon'ble Supreme Court held as:

"Civil Procedure Code, 1908 – S. 11 and Or. 9. R 8 – Res judicata – Applicability – Dismissal for default – Previous decision not made on merit – Subsequent

litigation between same parties on same subject-matter – Whether barred – Proceedings by State against unauthorised occupants; dismissed for default/non-prosecution – State initiating proceedings again under the Act – Validity – Held, suit filed by Nagar Palika was dismissed on technical ground and in any case the State was not a party – Suit where the State was a party and amendments were made, the same was dismissed for non-prosecution – But the same was not dismissed under Or. 9 R. 8 – dismissal of the suit for non-prosecution as not decision on merit – Order cannot operate as res judicata.”

- h) On perusal of the decision referred by the Learned Counsel for the Respondent No. 4 reported in AIR 1964 SC 993 held between Arjun Singh Vs. Mohindra Kumar and Others, in which the Hon'ble Apex Court has held that a decision or direction in an interlocutory proceeding of the type provided for under Order IX, Rule 7, is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order IX, Rule 13.
- i) We have perused Section 11 of CPC which reads as follows: -

11. Res judicata. —No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III: The matter above referred to much in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such sit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of

limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]

12. Bar to further suit. —Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

- j) As per the above findings given by the Hon'ble Apex Court, as well the provisions laid under Section 11 of CPC, the principles of res judicata applies when a litigant attempt to file a subsequent law suit on the same matter after having received a judgement in a previous case involving the same parties, but here it is not such situation. On perusal of the petition, it appears that the Petitioner has approached this Commission on 07.02.2019, and as there was no sitting at the Commission next day i.e., on 08.02.2019, the Petitioner filed the writ petition in WP 7042/2019 before the Hon'ble High Court i.e., one day after filing the petition before this Commission. Thereafter, on 10.04.2019 the Hon'ble High Court at the time of preliminary hearing itself, the petition came to be disposed off. Such being the situation the principles of res judicata cannot be applied as per submission made by the Learned Counsel for the Fourth Respondent. Apart from that the judgement relied by the Counsel for the Fourth Respondent is not helpful to the case on hand because the findings given by the Hon'ble Supreme Court in the said case are, in the application made for

restoration of the suit under Order 9 Rule 9 was competent and that the order passed on the application operated as res judicata to maintainability of the application under Order 9 rule 13 of CPC. Thereby the facts and circumstances of that case is entirely different from facts and circumstances of the present case. Hence the decision referred by the Learned Counsel for the Fourth Respondent is not helpful to the case on hand. Though the judgements relied by the Learned Counsel for the Petitioner are applicable to the case on hand but his submissions made before this Commission basing on the referred judgements do not come to his aid for claiming compensation from the Respondents.

- k) Now coming to the next submission of the Learned Counsel for the Petitioner that on refusal of signing of Supplementary W & BA by the Fourth Respondent as per (Annexure-J), the Petitioner was unable to wheel energy to various customers thereby, suffered huge loss. Consequently, the Petitioner has left with an extent 6,69,68,791 units of banked energy that remained unsold to open access customers, hence, he prays the Commission to examine all the relevant factors and determine the rate applicable and award compensation. Further he submitted that the Petitioner is ready to pay court fee on the directions of KERC.
- l) Once again, we have perused entire order passed by the Hon'ble ATE dated 29.03.2019 in Appeal No. 42/2018 in which the Appellants have questioned the legality, validity and propriety of

the Interim orders dated 09.01.2018 passed in petition Nos. 90/2017, 100/2016, 104/2016, 47/2017 and 130/2017 passed by the KERC. As well we have perused the order of Hon'ble High Court of Karnataka in WP 7042/2019 (GM-KEB), in none of these orders either the Hon'ble ATE, New Delhi or Hon'ble High Court of Karnataka have given findings in respect of the alleged damage or loss caused to the Petitioner. Though the Petitioner has made prayer for compensation in WP 7042/2019, but the entire writ petition is preliminarily heard and finally dismissed as it had become infructuous. Hence, the submission of the Petitioner that the issue of payment of compensation is remained undecided by the Hon'ble High Court cannot be accepted. It is seen further that the Petitioner has not sought for modification of the order from the hands of Hon'ble High Court.

- m) Further it is settled law that a prayer for declaration without consequential relief is not maintainable. In the case on hand, as per the discussions made herein above paragraphs, the first prayer of the Petitioner i.e., (a) "to set aside/quash letter dated 14.01.2019 of Respondent No. 4 as illegal and untenable", has become infructuous in view of the order of Hon'ble ATE, in Appeal No. 42/2018 and as well as the orders of Hon'ble High Court of Karnataka in Writ Petition No. 7042/2019, and also on the execution of Supplementary WBA dated 07.01.2019, signed by Respondent No. 4 on 15.03.2019 and finally sent on 10.07.2019 by the

Respondent No. 5 to the Petitioner. When the main relief has become infructuous granting consequential relief would not arise for consideration. We rely upon the decision reported in Muni Lal Vs. Oriental Fire and General Insurance Company Limited (1996)1 SCC 90, in which it has been held as:

“Mere declaration without consequential relief does not provide the needed relief in a Suit; it would be for the Plaintiff to seek both reliefs. The omission thereof mandates the Court to refuse the grant of declaratory relief.”

Therefore, in our view when the Respondent No. 4 has complied the directions of Hon'ble High Court of Karnataka given in WP No. 7042/2019 within a short span of time, the Petitioner cannot be said to have suffered loss as claimed for. However, the Petitioner has liberty to make separate petition to this extent as permitted under the law. Under these circumstances we are of the opinion that the Petitioner is not entitled for any kind of relief as prayed for thereby, the petition has to be dismissed. With this we answer Issue No. 2 in Negative.

21. Issue No. 3: What Order?
22. In view of the foregoing reasons, we pass the following: -

ORDER

The application for the amendment of the Petition dated 28.01.2020 filed by the Petitioner under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations, 2000 is hereby dismissed.

The petition filed by the Petitioner under Section 86 (1)(f) of Electricity Act 2003, read with Regulation 11 of KERC (General and Conduct Proceedings) Regulations 2000, also stands dismissed. However, the Petitioner is having liberty to file a separate petition for adjudication of the damages as permitted under law.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member