

No. N/117/19

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated: 29.05.2020

Present:

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

O.P. No. 40 of 2019

BETWEEN

Golden Hatcheries,
A Sole Proprietorship concern
having its Principal place of business
At No.3, Queens Road Cross,
Bengaluru-560 052.

.... PETITIONER

(Represented by Navayana Law Offices, Advocates)

AND

1. State Load Despatch Centre,
Anand Rao Circle,
Bengaluru-560 001.
(Represented by its Chief Engineer)
2. Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan,
K.G. Road,
Bengaluru-560 009.
(Represented by its Managing Director)
3. Bangalore Electricity Supply Company Limited,
K.R. Road,
Bengaluru-560 001.
(Represented by its Managing Director)

4. Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi-585 101.
(Represented by its Managing Director)

... **RESPONDENTS**

*[Respondents 1, 2 & 3 represented by
Just Law, Advocates; Respondent 4
represented by Sri Shahbaaz Husain, Advocate]*

ORDERS

- 1) This Petition is filed under section 86 (1) (f) of the Electricity Act, 2003,
praying to:

- a) Quash the final demand letter dated 16.05.2019 issued by the Respondent GESCOM produced as Annexure P1.
- b) Direct the Respondent to account for the energy wheeled from the date of the commissioning of the project i.e. 31st March, 2018 and wheel the same to the non-exclusive consumers of the Respondents.
- c) Pass such other and incidental orders including an order as to costs as may be appropriate under the facts and circumstances of the case.

2. The brief facts of the case are:

- a) The Government of Karnataka by its Order No. EN 332 NCE 2017 Bengaluru, dated 20.12. 2017 accorded sanction to the proposal of M/s Golden Hatcheries for installation of a Wind Power Plant of 3.2

MW (4 Nos. x 0.8 MW) capacity of Bellikatte and Nimbhalagere Villages in Kudligi Taluk, Ballari District and the Company owns and operates the above said Wind Energy Power Generating Station, situated within the area of GESCOM.

- b) The Company desired to wheel up to 3.2 MW of the power generated from the project for sale to the third party utilizing the transmission and/or distribution network of the KPTCL, GESCOM and BESCOM and for the said purpose intended to enter into an agreement with the KPTCL, GESCOM & BESCOM.
- c) The Petitioner filed an application for long term open access/wheeling and banking agreement on 14th February, 2018 before the 1st Respondent- Nodal Agency, to wheel the energy to the consumer namely Valdel Extent Outsourcing Private Limited having RR No.S7HT187 connected to voltage class of 11 kV within the jurisdiction of BESCOM (Annexure P-3).
- d) The 1st Respondent neither rejected the application nor requisitioned any additional documents within the time prescribed by the Regulations. However, the 2nd Respondent after the expiry of the statutory period prescribed, wrote a letter dated 01.03.2018 asking for the evacuation approval letter. The Petitioner submitted the evacuation approval vide letter dated 01.03.2018.

- e) Several weeks after the expiry of the statutory period for processing the open access application, the 1st Respondent wrote letters dated 13.03.2018 to BESCO and GESCOM seeking concurrence for open access. BESCO furnished concurrence vide letter dated 24.03.2018 and GESCOM furnished concurrence vide letter dated 17.04.2018.
- f) The Petitioner commissioned the project on 31st March, 2018.
- g) On 11.06.2018, the 1st Respondent granted the approval for open access and requested the Petitioner to submit a draft wheeling and banking agreement (WBA) to GESCOM so as to initiate action to sign the said Agreement (Annexure P-9). On the same day i.e., 11.06.2018, the Petitioner furnished the Security Deposit.
- h) The Petitioner furnished the draft WBA and all supporting documents to GESCOM by letter dated 12th June, 2018 (Annexure P-10).
- i) The 2nd Respondent wrote a letter dated 06.08.2018 (Annexure P-11) enclosing one set of the executed WBA dated 07.07.2018.
- j) The GESCOM asked the Petitioner to furnish an undertaking that the Petitioner shall not claim any charges from KPTCL/GESCOM for energy generated from the date of commissioning to the date of execution of the WBA. GESCOM instructed the Petitioner that unless this undertaking is given, the WBA will not be signed. Therefore, the

Petitioner was compelled to give a letter dated 7th July, 2018, as instructed (Annexure P-12).

k) Subsequent to the execution of the WBA, the BESCOM and GESCOM have been issuing Official Memorandum every month against the 'C' Form submitted by the Petitioner. The Official Memoranda issued by BESCOM from October, 2018 to May 2019 are produced as Annexure P13.

l) The Petitioner on receipt of the communication from the Respondents on 22.10.2018 and 07.12.2018 wrote a letter dated 28.02.2019, requesting for amendment of all the energy calculations made by the Respondent in view of the lack of receipt of timely final concurrences by the Petitioner.

m) A Letter dated 21.03.2019, was issued by the GESCOM closing the balance of energy at the end of January, 2019 as 12,487 units and for the so called excess drawn energy, the GESCOM levied penalty of Rs.1,82,023. Further as per letter dated 27.04.2019 GESCOM levied a sum of Rs.91,20,807 as total excess drawn charges.

n) The Petitioner wrote a detailed letter dated 07.05.2019 explaining in detail as to how the Petitioner was not liable to pay the charges demanded by the Respondent.

- o) On 16.05.2019 the GESCOM wrote another letter reiterating its demand for a sum of Rs.93,16,990 and SLDC charges of Rs.20,012.31. This letter is under challenge in the Petition.

3. The grounds urged by the petitioner are:

- a. The approvals for open access granted by the Respondents are in contravention of the KERC (Terms and conditions for Open Access) Regulations, 2004 with up to date amendments.
- b. The Petitioner had submitted the application on 14.02.2018 and the same was accepted by the Nodal Agency without any demur or protest. Thus, as per Clause 9(2) of the Regulations, the application stands accepted as on 14.02.2018.
- c. The Nodal Agency is required to sign the application within two working days from the receipt of the application. However, the Petitioner's application was forwarded on 13.03.2018 after a lapse of 24 days. Further, GESCOM was required to communicate its concurrence within 15 days from the date of receipt of the application from Nodal Agency that is by 18.03.2018. However, GESCOM gave its concurrence on 17.04.2018 after a delay of one month. The final concurrence by the 1st Respondent on the grant or refusal of open access had to be communicated within 3 (three) working days from the date of receipt of concurrence or otherwise

from the licensee. This was enormously delayed and finally communicated on 11.06.2018.

- d. It is only after the permission letter dated 11.06.2018, the Petitioner could send the WBA to the Respondent. Thus, the dispatch of WBA by the Petitioner was solely caused due to the delays attributable to the Respondents. The GESCOM cannot take advantage of its own delay and the delay of other Respondents and levy the charges purportedly on the ground of excess drawl. If the energy generated/wheeled from the date of commissioning of the project is taken, there will not be any over drawl of energy.
- e. As per the applicable Regulations, the final concurrence from SLDC had to be given before the date of commissioning of the project. Hence the wheeling of the energy has to be reckoned from the date of commissioning of the project i.e., 31.03.2018. If this is considered, there is no excess drawl of energy.
- f. The GESCOM cannot bill so called excess energy by applying twice the charges. The Commission in several cases has held that as when the contract demand of the non-exclusive consumer is not breached, twice the energy charges cannot be imposed.

4. Upon Notice, the Respondents entered appearance through their Counsel. Respondent-4 has filed the Statement of Objections. The gist of the Objections filed by Respondent-4 is as follows:

a) The claim of the petitioner that the Respondents inordinately delayed the conveying of the approval or rejection of the application, is denied as false. The 'Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) (Third Amendment Regulations, 2015' – hereinafter referred to as 'Regulations' prescribe the procedure and timeline for processing of such applications. The application was deemed to be granted if the licensee failed to communicate the concurrence to the nodal agency within 15 days from the date of receipt of such application. Also, if the licensee had communicated to the nodal agency and the nodal agency fails to forward such a communication to the Petitioner within 3 days of its receipt from the licensee, the application would again have deemed to be granted under Clause 9 (6) and 9 (7) of the Regulations. The Petitioner, owing to its negligence, failed to submit the WBA along with a duly notarized undertaking, stating that the nodal agency failed to communicate the approval or rejection of the application for the open access. Thus, even assuming but not accepting that the respondents did cause a delay in communicating the approval or rejection, the Petitioner was provided with sufficient safeguards to protect its

interests and to execute the WBA at the earliest. The delay in executing of the WBA is completely attributable to the negligence of the Petitioner. The Petitioner being solely responsible for the delay, cannot benefit from its fault.

b) Clause 9(7) of the Regulations further provides in explicit terms that *"during the pendency of the application for grant of open access, the applicant shall not inject any energy to the licensee's network and the licensee shall not be liable to pay any charges for the energy injected during such period"*. Thus, the applicant shall not inject any energy before entering into a formal agreement, and if it does so, then it is not eligible to claim any payment from the licensee company.

c) The petitioner has violated Clause 9(7), 9(8) and 9(10) of the Regulations in as much as it did not submit the signed WBA in requisite sets to the Respondents within 5 days of deemed approval of Open Access under Clause 9(7). Clause 9(8) in clear terms provides that in the event of non-submission of the draft WBA by the applicant within 5 days of approval or deemed approval, the application stands rejected. In the instant case, the application is dated 14.02.2018, the deemed approval was deemed to have been accorded on 01.03.2018 and thereafter, the Petitioner ought to have submitted the draft WBA by 06.03.2018, which it didn't and by virtue

of the same, the application stood cancelled. This Commission in *Amplus Power Solutions Pvt Ltd vs SLDC (OP No. 208/2017)* has re-affirmed the position that in light of the amended OA Regulations, non-submission of WBA within 5 days of deemed grant of open access by the Applicant amounts to cancellation of the open access.

- d) With the application of the Petitioner having stood cancelled, it had no authority to inject power into the grid of the Respondents without their consent and such injection of power cannot be accounted for.
- e) The Respondent No.4 going by this settled principle of law that energy injected during the pendency of execution of WBA shall not be accounted for, has treated such injection as nil and has raised a demand on the consumers of the Petitioner for drawing more energy than what was injected by the Petitioner after the execution of WBA.
- f) The Petitioner vide its letter dated 07.07.2018 (Annexure P12 to the Petition) had undertaken not to claim any charges from the Respondents with respect to the energy injected prior to the execution of the WBA. Therefore, the Petitioner is estopped from claiming to adjust such injection of energy prior to the execution of the WBA.

- g) The term of the WBA under Article 10.1 is clear and unequivocal in stating that the Agreement shall become effective upon execution and delivery of the Agreement. Therefore, any injection of the energy prior to the execution of WBA, i.e., 07.07.2018 is not covered under the agreement and shall not be accounted for.
- h) The Respondent has levied twice the tariff on the Petitioner in accordance with the Article 5.4 of the WBA which provides for charges to be levied in the event of over-drawal of energy by the consumers of the Petitioner.
- i) The unscheduled and unauthorized injection and drawal of power under a wheeling arrangement leads to instability of the grid and wastage of energy. Therefore, it is imperative on the generator who has executed a WBA to ensure that the drawal of energy by its customers commensurate with the injection for a period. Unscheduled and unauthorized withdrawal of power by the customers (whether 'exclusive' or 'non-exclusive') at the Petitioner's behest disturbs the grid discipline and causes unjustified disruptions to the scheduled transactions of the Respondent. Therefore, such unscheduled withdrawal shall be duly compensated for by the petitioner under Article 5.4 of the PPA.

j) The respondent has prayed to dismiss the prayers sought in the petition.

5. During arguments, the petitioner filed a Memo dated 10.3.2020, producing the following decisions in support of its plea that twice the tariff levied is improper:

(i) Order of this Commission dated 20th March, 2019 in O.P. No. 95 of 2017-Shilpa Medicare Limited Vs. HESCOM and Another;

(ii) Order of this Commission dated 24th October, 2017 in Complaint No. 5 of 2017 - Bidadi Industries Association (R) Vs. BESCO;

(iii) Order of this Commission dated 2nd August, 2018 in O.P. No. 83 of 2017- C.S. Sunder Raju Vs. Karnataka Power Transmission Corporation Limited and Another;

(iv) Order of this Commission dated 17th December, 2018 in O.P. Nos. 95-96 of 2016 - Prakash Silks and Sarees Private Limited and Another Vs. State Load Despatch Centre and Others;

(v) Judgement of the Hon'ble Appellate Tribunal for Electricity dated 11.07.2006 in Appeal No.1 of 2006 - Indian Aluminum Company Limited (since known as HINDALCO Industries Limited) Vs. WBERC and Others.

6. We have heard the arguments of the learned counsel for the parties. From the facts of the case and the submissions made by the parties, and also on consideration of the Regulation 9 of the Amended KERC

(Terms & Conditions for Open Access) Regulations, 2015, the following Issues would arise, for our consideration:

Issue No.1: Whether the Petitioner is entitled to credit of the energy injected by it into the grid during the period from 31.03.2018 (date of commissioning of the project) to 6.7.2018 (date prior to the date of execution of WBA), on the ground that there was an inordinate delay by the Respondents in granting the Open Access, as alleged by the petitioner?

Issue No.2: Whether the demand dated 16.5.2019 raised against the Petitioner for the energy over drawn by its non-exclusive consumer, is proper?

Issue No.3: What Order?

7. After considering the submissions of the parties and the pleadings and material on record, our findings on the above Issues are as follows:

8. Issue No.(1): Whether the Petitioner is entitled to credit of the energy injected by it into the grid during the period from 31.03.2018 (date of commissioning of the project) to 6.7.2018 (date prior to the date of execution of WBA), on the ground that there was an inordinate delay by the Respondents in granting the Open Access, as alleged by the petitioner?

(a) It is to be noted that the need to issue the amendment to the Open Access Regulations arose, as there were allegations that the SLDC and the ESCOMs caused delay in the execution of the WBAs, causing loss to the Generators, who had applied for open access. The Amended Open

Access Regulations, 2015, have been framed in order to safeguard the interest of the generators when there is any delay in the grant of open access by the licensees/SLDC. For this purpose, the said Regulations stipulate the timeline for each activity and in default, the grant of 'deemed open access', to ensure that the parties to the transaction should act, in all alertness, so that the interest of the open access applicant is protected. Any benefit of credit of the wheeled energy or payment of compensation for the energy injected, could be considered only when the open access applicant strictly follows the amended Regulations, in letter and spirit. The relevant extract of Clause 9 of the Amended KERC (Terms and Conditions for Open Access) Regulations, 2015, reads thus:

"9. Procedure for grant of Open Access other than Day Ahead Transactions:-

- (1) *An application for grant of open access, in the format specified by the Nodal Agency and approved by the Commission, shall be filed before the Nodal Agency with all the required particulars, by an intending open access customer along with, an undertaking that he has not entered into Power Purchase Agreement (PPA) or any other bilateral agreement for the capacity (quantum of power) for which open access is sought and payment of a non-refundable processing fee of five thousand rupees for long-term open access and one thousand rupees for short-term open access.*

.....

- (2) *The nodal agency shall acknowledge the receipt of the application, only if the application is complete and*

accompanied by the relevant documents and fees, by e-mail or fax, in addition to any other usually recognized mode of communication, by the end of working hours of the following working day and where the application is submitted in person, the acknowledgment shall be provided at the time of such submission.

- (3) Where any application is rejected for any deficiency or defect, the same shall be communicated in writing to the applicant within the time specified above, indicating the deficiency or defect and the application fees and Bank Guarantee, if submitted, shall be returned to the applicant and in such cases a fresh application shall be made by the applicant after curing the deficiency or defect.
- (4) The Nodal Agency, in order to ascertain the system availability and subsistence of any PPA for the capacity applied for open access, shall forward an application received on any day to the concerned licensee(s) by e-mail or fax, in addition to any other usually recognized mode of communication, within two working days from the date of receipt of such application.
- (5) The concerned licensee(s) shall acknowledge the receipt of the application by e-mail or fax, by the end of working hours of the following working day.
- (6) Based on the system studies or otherwise, the licensee(s) concerned, after ascertaining the availability of network capacity and the subsistence of any PPA for the capacity applied for open access, shall communicate by e-mail or fax, in addition to any other usually recognized mode of communication, his concurrence or otherwise for the open access to the Nodal Agency within the time schedule:

- (i) Short term open access – Within five working days from the date of receipt of application from Nodal Agency.
- (ii) Long term open access – Within fifteen working days from the date of receipt of application from Nodal Agency.

.....

Provided also that if the licensee concerned fails to communicate his concurrence or otherwise within the time schedule specified above, it shall be deemed that he has given his concurrence for the open access applied for.

- (7) The Nodal Agency shall communicate to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, the grant of open access or otherwise, within three working days following the day of receipt of the concurrence or otherwise from all the licensees concerned and in the absence of any such communication to the applicant from the Nodal Agency within five working days from the date of filing the application in the case of short-term open access and fifteen working days from the date of filing the application in the case of long-term open access, the open access applied for shall be deemed to have been granted, subject to system availability.

.....

Provided further that during the pendency of application for grant of open access, the applicant shall not inject any energy to the licensee's network and the licensee shall not be liable to pay any charges for the energy injected during such period.

Provided also that for any energy injected into the licensee's network from the date of grant of open

access till the date of submission of agreement for wheeling, the applicant shall be entitled for payment of energy charges at Average Pooled Power Purchase cost [APPC] rate.

- (8) *The open access consumer shall execute the agreement for wheeling of electricity in duplicate or triplicate sets, as the case may be, and submit the same to the Nodal Agency and also the concerned licensee(s) within five working days following the day of receipt of the communication for grant of open access or from the date deemed grant of such open access, as the case may be, failing which the open access granted or deemed to have been granted shall stand cancelled.*

Provided that in the case of deemed grant of open access, along with the agreement for wheeling of electricity, the applicant shall submit, an undertaking to the Nodal Agency, duly notarized, stating that the Nodal Agency has failed to communicate approval for open access or otherwise within the time specified in the Regulations and enclose a copy of the acknowledgment, if any, given by the Nodal Agency or any other evidence in support of application having been delivered to the Nodal Agency.

- (9) *On receipt of the aforesaid agreement, the licensee (s) concerned shall execute the agreement for wheeling of electricity by signing his copy of the agreement and forward it to the Nodal Agency within seven working days following the day of receipt of such agreement.*
- (10) *The effective date for commencement of operation of wheeling of electricity by the applicant shall be the date of receipt of the agreement for wheeling specified at Regulation (8) above by the licensees.*

.....”

(b) The above amended Regulation 9 came into force with effect from 08.10.2015. The claim made in the Petition relates to the period subsequent to this period. Therefore, the rights and liabilities of the parties should be decided as per the amended Regulations.

(c) Clause 9(1) of the amended Regulation provides for filing of an application for grant of open access before the Nodal Agency, by furnishing the required particulars and paying the prescribed processing fee and Bank Guarantee. Clause 9(2) provides for issuance of an acknowledgment by SLDC for having received the application. Clause 9(3) provides for consequences of rejection of the application, for any deficiency or defect. Clause 9(4) provides for forwarding the application to the Licensees concerned, for ascertainment of the system availability and the subsistence of any PPA for the capacity applied for open access. Clause 9(5) provides for issuance of an acknowledgment by the concerned Licensee(s) for having received the application from SLDC. Clause 9(6) of the amended Regulation provides for communicating the concurrence or otherwise of the Licensee(s) concerned, for the open access applied for, to the SLDC, within the time schedule stated therein. The last proviso to Clause 9(6) provides that, if the Licensee concerned fails to communicate its concurrence or otherwise, within the time specified, it shall be deemed that concurrence has been given for the open access applied for. Clause 9(7) provides that, the SLDC should communicate to the Applicant, the

grant of open access or otherwise, within 3 (three) working days, following the day of receipt of the concurrence or otherwise of open access from all the Licensees concerned and in the absence of such communication to the Applicant from the SLDC, the open access applied for long term, shall be deemed to have been granted, subject to system availability. Therefore, Clause 9(7) provides for the intimation of grant of open access or otherwise and in the absence of such intimation, the deemed grant of open access.

(d) Clause 9(8) provides that, the open access customer shall execute the agreement for wheeling of electricity, in duplicate or triplicate sets, as the case may be, and submit the same to the SLDC and also the concerned licensee(s) within five working days following the day of receipt of the communication for grant of open access or from the date deemed grant of such open access, as the case may be, failing which the open access granted or deemed to have been granted shall stand cancelled. Clause 9(9) provides that, the licensee(s) concerned shall execute the agreement for wheeling of electricity by signing the agreement and forward it to the SLDC within seven working days following the day of receipt of such agreement.

(e) Clause 9(10) provides that, the effective date for commencement of operation of wheeling of electricity by the applicant shall be the date of receipt of the agreement by the licensee(s) for wheeling specified at

Clause 9(8), stated above. Further, it provides that the effective date shall also be applicable for considering the banking of energy.

(f) In the present case, the open access application relates to long term open access. Therefore, if the Licensee concerned fails to convey concurrence or otherwise, within 15 (fifteen) working days from the date of receipt of the application from the SLDC, it shall be deemed that the concurrence for the long term open access, applied for, has been granted.

(g) The Petitioner had filed an application for long term open access on 14.02.2018. However, the petitioner had not enclosed the Evacuation approval with the application, as can be seen from the list of documents to be enclosed with the application. Therefore, the Respondent sought the said document on 01.03.2018 and the petitioner produced the same on 5.3.2018. Clause 9 (2) of the Regulations provides that the SLDC shall acknowledge the application only if it is complete and accompanied by the relevant documents. Therefore, it can be stated that the application was 'complete' on 5.3.2018. The application should have been forwarded by SLDC to the concerned Licensee, within 2 (two) working days, and thereafter, within 15 (fifteen) working days, the Licensee should have intimated the SLDC about the grant or otherwise of the long term open access. Thereafter, the SLDC should have intimated the grant of open access or otherwise, within 3 (three) working days from the date of receipt of the concurrence or

otherwise for grant of the open access from the Licensee concerned. Therefore, within a period of 20 (twenty) working days from 5.3.2018, the grant or otherwise of the open access should have been intimated to the Petitioner. If the grant or otherwise of the long term open access was not intimated within the specified period, the open access, applied for, is deemed to have been granted. In such a scenario of deemed grant of open access, within 5 (five) working days from the date of the deemed grant of open access, the Petitioner had to submit the required number of signed WBAs, to the SLDC and all the Licensees concerned; in default, the open access, deemed to have been granted, shall stand cancelled. Therefore, there is no question of delay in grant of open access by the utilities after the amended Regulations coming into force.

- (h) The Petitioner does not claim that, it had submitted the required number of the WBAs to each of the Licensees concerned, as required in Clause 9(8) of the Regulations, within the stipulated time, from the date of deemed open access. It does not state that an undertaking was submitted as per the proviso to Clause 9(8) of the Regulations to claim the benefit of deemed grant of open access. Hence, the petitioner has lost the right to claim the benefit of deemed grant of Open Access.
- (i) The petitioner furnished the signed WBA to GESCOM on 12.6.2018, after receipt of the letter dated 11.6.2018 of SLDC granting open access. The WBA was executed by all the parties on 7.7.2018. As per Clause 9(10) of the Regulations, the effective date for commencement of wheeling of

electricity by the petitioner will be 12.6.2018, the date on which the licensee received the WBA. Hence, the delay from 12.6.2018 to 7.7.2018 in execution of the WBA by the Respondents, is of no consequence. It appears that the Respondents have taken into account the quantum of energy injected by the petitioner from 7.7.2018, the date of execution of WBA, which is not correct. Therefore, it would be just and proper if the energy injected into the grid by the petitioner from 12.6.2018 to 6.7.2018 is credited to the account of the petitioner. We accordingly, direct the Respondents to give credit of the energy injected into the grid by the petitioner during the period from 12.06.2018 to 06.07.2018.

(j) For the above reasons, we answer Issue No.(1) in partly in the affirmative.

9. Issue No.2: Whether the demand dated 16.05.2019 raised against the Petitioner for the energy over drawn by its non-exclusive consumer, is proper?

a) We note that the long term open access application dated 14.02.2018 and the WBA dated 07.07.2018 mention the name of open access consumer as Valdel Extent Outsourcing Pvt Ltd. However, the Official Memoranda produced as Annexure P-13 mention the names of other consumers. It can be stated that the petitioner has changed the open access consumers to whom the energy was to be wheeled, from time to time.

b) The petitioner has claimed that the energy injected into the grid from the date of commissioning of the project has to be reckoned and that if all the energy injected is credited, there would be no excess drawal

by its open access consumers. The petitioner has therefore, contended that the levy of twice the tariff by GESCO on the petitioner vide demand dated 16.05.2019 (Annexure P-1) for the reason that the open access consumer has over drawn energy, is improper. We note that in the Annexure to the demand dated 16.05.2019, the period considered for billing is from July 2018 to March 2019.

c) The 4th Respondent has relied upon Article 5.4 of the WBA to justify the levy of twice the tariff against the Petitioner for over-drawal of energy by its open access consumers. The said Article reads thus:

“The ESCOM shall recover from the Exclusive Consumer, twice the energy charges applicable for the relevant category for the overdrawal of power from the grid beyond that contracted under wheeling with the Company.”

d) The petitioner has relied on certain cases decided by the Commission, on this aspect. In all the cases, the Commission has held that an ‘Exclusive consumer’ is a consumer who has no contract demand with the ESCOM and avails power supply only through Open Access. Consumers already having contract demand with the drawal point ESCOM, who avail a part of the power supply through ESCOM and meet a part of the power requirement through Open Access are Non-exclusive consumers. It is noted that Article 5.4 of the WBA applies only to ‘Exclusive consumers’, who have no contract demand with the drawal point ESCOM. In this case, it is not disputed by the Counsel for the Respondents that the open access consumers of the petitioner are

Non-exclusive consumers. Therefore, Article 5.4 of the WBA does not apply to them. We have, in the Order dated 02.08.2018 in OP No. 83/2017 (*Shri C S Sunder Raju vs KPTCL & another*) laid down the methodology of billing in such transactions. The relevant extract of para 9 of the said Order is as follows:

“(c) We note that, admittedly, in the present case, ‘Exora’ the Petitioner’s consumer is a ‘non-exclusive’ consumer, who has a power supply Agreement with the 2nd Respondent. It is also not the case that, the energy consumed by ‘Exora’ exceeds the contract demand with the 2nd Respondent. Thus, we find that, the 2nd Respondent was not right in invoking Article 5.4 of the WBA, to raise the demand in the case. We note that, as per Article 5.4 of the WBA, the liability to pay charges at twice the rate, as applicable to the relevant category of consumers, would apply only in the case of an ‘exclusive consumer’, who is not having any contract demand with Electricity Supply Company (ESCOM), and a provision is made to collect the said amount from the generator, only in case that amount is not recovered from the ‘exclusive consumer’. We further note that, the procedure adopted by the ESCOMs, in a Wheeling and Banking transaction, would show that the quantum of energy indicated in the ‘C’ Form is taken as ‘wheeled’ from the ‘Injection Point’ ESCOM to the ‘Drawal Point’ ESCOM, and the

'Drawal Point' ESCOM allows the Open Access Consumer to draw the quantum of energy indicated in the 'C' Form, without imposing any energy charge. We are of the considered opinion that, this procedure is not contemplated under the terms of the W&BA, entered into between the parties."

"(d) In the matter of dealing with the over-drawal or under-drawal of energy by the Open Access consumers under WBA, we have, in our Order dated 20.03.2018 in OP No.95/2017, at para 9(g), laid down the procedure that could be followed for adjustment of the rights and liabilities of the parties under the WBA. The same reads, thus:

"(i) The particulars of the quantum of energy injected by a Generator and the quantum of energy drawn by an Open Access consumer, during a billing period, are admittedly available with the ESCOM concerned, on the Metering Date. Therefore, the net energy available for wheeling could be ascertained after deducting the wheeling and banking charges.

(ii) The 'Drawal Point' ESCOM concerned has to inform the quantum of energy, consumed by the Open Access consumer, to the 'Injection Point' ESCOM.

(iii) The 'Injection Point' ESCOM shall, in turn, inform the quantum of energy that could be wheeled to the Consumption Point.

(iv) If the net energy injected by the Generator is more than the total quantum of energy consumed by the Open Access consumer, the entire consumption of such Open Access consumer should be treated as 'wheeled energy'. The

balance quantum of energy remaining, after wheeling, has to be treated as 'banked energy'.

(v) If the net energy injected by the Generator plus the banked energy, if any, is less than the total consumption of energy of the Open Access consumer, the excess energy consumed is to be billed as per the tariff applicable to the said 'Non-Exclusive Consumer' or the 'Exclusive Consumer', as the case may be, and such excess energy consumed is deemed to be supplied by the 'Consumption Point' ESCOM.

(vi) The quantum of unutilized banked energy at the end of the year, deemed to have been purchased by the ESCOM where the energy is injected, shall be credited to the account of the 'Injection Point' ESCOM at the time of energy balancing.

(vii) The required entries shall be made at the time of the energy balancing, to reflect the net quantity of energy injected and wheeled."

"(e)In the light of our observations, we hold that, the demand raised by the 2nd Respondent on the Petitioner in the present case, is not tenable. The bills issued to the Petitioner and his Open Access consumer, require re-doing."

e) We do not wish to differ from the view taken in the above case as no new reasons are furnished by the parties to enable us take a different view. Therefore, we hold that the impugned demand raised on the petitioner is not tenable. The bills issued to the petitioner and the open access consumers have to be redone in accordance with the directions given in the Order in OP No. 83/2017 mentioned above, after giving credit of the energy injected by the petitioner into the grid from

12.06.2018 to 06.07.2018. While redoing the bills, the Respondents shall also keep in mind the directions given by the Commission in the Order dated 09.01.2018 in the matter of revision of banking period for wind projects, which applies to the petitioner.

f) For the above reasons, we answer Issue No.(2) in the negative.

10) Issue No.3 : What Order?

For the foregoing reasons, we pass the following:

ORDER

- (a) The petition is allowed. The impugned demand dated 16.05.2019 (Annexure P1) issued by the 4th Respondent is hereby set-aside.
- (b) The petitioner shall be granted credit of energy injected from its wind power plant into the grid during the period from 12.06.2018 to 06.07.2018;
- (c) The calculation of the quantum of energy injected into the grid by the Petitioner from 12.06.2018 to 30.06.2018, shall be on pro-rata basis, taking into account the net energy injected into the grid (i.e., energy available for wheeling);
- (d) The 3rd and 4th Respondents shall redo the energy bills from June 2018 to March 2019 and issue fresh bills to the Petitioner's Open Access consumer(s) taking into account the quantum of net energy injected by the Petitioner (i.e., energy available for wheeling) and the quantum of energy drawn by the open access consumer(s), during the said months, as explained in paragraph 9(d) and 9(e) of this Order;

(e) The rights and liabilities of the parties shall be adjusted as per the directions mentioned above, taking into account the amount already paid, if any, by the petitioner or the open access consumer(s).

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member