

**In the Appellate Tribunal for Electricity,**  
**New Delhi**  
**(Appellate Jurisdiction)**

**Appeal no. 123 of 2015 and IA No 196 of 2015**

**Dated: 12<sup>th</sup> May, 2016**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**  
**Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of**

1. **Hubli Electricity Supply Company  
Ltd (HESCOM)  
P.B. Road, Navanagar  
Hubli - 580 025** **... Appellant No 1**
  
2. **Bangalore Electricity Supply Company  
Ltd (BESCOM)  
K.R. Circle  
Bangalore - 560 001** **... Appellant No 2**

**Versus**

1. **Fortune Five Hydel Projects Private Ltd.  
No. 173, 3rd Main, 11th Cross,  
Dollors colony, RMV 2nd Stage  
Bangalore- 560 094** **...Respondent No 1**
  
2. **Karnataka Electricity Regulatory Commission  
6th & 7th Floor, Mahalaxmi Chambers,  
No. 9/2,M.G. Road ,  
Bangalore - 560 001** **...Respondent No 2**

**Counsel for the Appellant(s):** **Mr. V. Srinivas Raghavan**  
**Mr Mohit Chadha**  
**Mr Ishwar Upneja**  
**Mr Pankhuri Bhardwaj**  
**Ms Trisha Ray Chaudhuri**

**Counsel for the Respondent(s):** **Mr. Shridhar Prabhu**  
**Mr Anantha Narayana M.G. for R-1**

## **JUDGMENT**

### **PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER**

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 15.10.2014 passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in O.P. No. 18 of 2014 which was filed by the Respondent No 1 whereby the State Commission has directed Appellant No 1 and Appellant No 2 to pay for the energy injected into the grid by the Respondent No 1 from its wind power project from 09.11.2013 (date of commissioning of Project) till 20.02.2014 {date of execution of Wheeling and Banking Agreement (W&B Agreement)} at the rate of generic tariff for wind power projects.
2. The Appellant No 1 and Appellant No 2 are distribution licensees operating in the State of Karnataka and are Government of Karnataka undertakings.
3. The Respondent No 1 is a company engaged in generation of electricity and owns and operates a 51.2 MW wind power project at Basavana Bagewadi Taluk of Bijapur District in Karnataka ('Project'). The Respondent No 2 is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. Aggrieved by the Impugned Order dated 15.10.2014 passed by the State Commission, the Appellants have preferred the present appeal on following grounds:
- a) State Commission ought not to have directed payments to be made by the Appellants when the petition filed by Respondent No 1 was for seeking credit for the energy allegedly injected between 09.11.2013 and 20.02.2014.
  - b) If such a request for ex-post facto credit is at all to be considered, the provisions of the Wheeling & Banking Agreement (W&B Agreement) also have to be made applicable to the relevant period in question.
  - c) A pre-condition for executing a W&B Agreement is that the company is generating electricity. The Respondent No 1 could not have requested State Load Despatch Centre ("**SLDC**") for its approval for facilitating a W&B Agreement to sell power at a time when its project had not been commissioned.
  - d) The Respondent No 1 made its application to SLDC on 21.09.2013 however, the actual date of commissioning of the project, i.e. 09.11.2013 ought to be considered as date of the application.
  - e) The conduct of the Respondent No 1 in time and again changing its stand from asking for credit for energy injected at one time and asking for payment at generic rate at another; in not submitting the C-Form, etc.

- f) The KERC (Terms and Conditions for Open Access) Regulations 2004 do not prescribe any time limit for execution of the W&B Agreement. The State Commission in the Impugned Order erred in holding that under said Regulations; SLDC is required to grant approval for execution of W&B Agreement within 30 days from date of application.
- g) The Appellants' cannot be held liable to indemnify the Respondent No 1, for commercial risks that it voluntarily undertook or the delay, if any, on part of SLDC, in granting approval for execution of the W&B Agreement.

**5. Facts of the present Appeal:**

- I. The Respondent No 1 requested SLDC, on 21.09.2013 for its approval for facilitating a Wheeling and Banking Agreement ('W&B Agreement') to sell power to Welcast Steel Ltd. The Respondent No 1's project was not commissioned at this time.
- II. The Respondent No 1's project was commissioned on 09.11.2013. In this regard, the Commissioning certificate was issued by Appellant No 2 on 29.12.2013.
- III. The Wheeling and Banking Agreement was signed on 20.02.2014 amongst Karnataka Power Transmission Company Ltd (KPTCL), Appellant No 1, Appellant No 2 and Respondent No 1.
- IV. On 21.02.2014, the Respondent No 1 sought permission from KPTCL to wheel the allegedly banked energy before 31.03.2014. KPTCL accepted the request on 10.03.2014 and communicated its approval

to Appellants No 1 to give credit for the energy pumped into the grid between 09.11.2013 and 20.02.2014.

- V. The Respondent No 1 failed to submit C-Form for the energy pumped between 09.11.2013 and 20.02.2014, It instead filed a C-Form seeking to wheel 6,900,000 kwh of energy to be generated in March 2014 to consumers listed thereunder.
- VI. The Respondent No 1 repeatedly wrote to KPTCL stating that it ought to be paid at the generic tariff rate, on the basis of the order dated 13.03.2014 passed by the State Commission in the case of Renew Power, for the energy pumped by it between 09.11.2013 and 20.02.2014. As per Clause 6.2.3 of the W&B Agreement, with the end of the Wind Year on 31.03.2014, the banked energy became zero as on 01.04.2014.
- VII. As requested by the Respondent No 1, and since the wind year had ended on 31.03.2014, KPTCL vide letter dated 21.05.2014, superseded its earlier letter dated 10.03.2014 and also stated that payment towards the accounted energy shall be based on the outcome of the Review Petition filed by it in the case of Renew Power.
- VIII. The Respondent No 1 filed the petition being OP No. 18/2014 before the State Commission seeking credit for energy allegedly pumped into the grid between 09.11.2013 and 20.02.2014.
- IX. Vide Impugned Order dated 15.10.2014, the State Commission allowed the petition and directed the Appellants to pay for the energy

injected into the grid by the Respondent No 1 between 09.11.2013 and 20.02.2014, at the rate of generic tariff applicable to Wind Power Projects, within thirty days from the date of the order.

6. For deciding this Appeal, the following issues need to be examined carefully:-
- A. Whether Respondent No. 1 is entitled to the credit of energy allegedly injected into the State grid between 09.11.2013 and 20.02.2014?**
  - B. Whether the Respondent No. 1 is entitled for payment at the generic tariff rate for the energy allegedly injected into the State grid between 09.11.2013 and 20.02.2014?**
  - C. Whether the State Commission erred in directing the Appellants to pay for the energy injected into the grid at the generic tariff applicable to wind power projects since the Respondent No 1 had not even prayed for the said relief and had in fact filed the petition seeking credit for the energy allegedly injected between 09.11.2013 and 20.02.2014?**
  - D. Whether the State Commission erred in holding that under the KERC (Terms and Conditions for Open Access) Regulations, 2004, SLDC is required to grant approval for execution of W&B Agreement within 30 days from the date of application, when in fact the Regulations do not prescribe any time limit for execution of the W&B Agreement?**

- E. Whether State Commission erred in rejecting the Appellants' contention that since the Respondent No 1 had not complied with the terms of the W&B Agreement, it cannot seek credit for the energy injected?**
- F. Whether the State Commission erred in imposing liability on the Appellants for the delay on part of SLDC?**
7. We have heard at length Mr V. Srinivas Raghavan, the learned counsel for the Appellants and Mr Shridhar Prabhu, the learned counsel for Respondent No 1 and considered the arguments put forth by the rival parties and their written submissions. The issues thus emerged for our consideration are discussed below:
8. On the specific issues raised in the present Appeal, the learned counsel for the Appellants has made the following submissions for our consideration
- a) On 21.09.2013, the Respondent No 1 wrote a letter to the State Load Despatch Centre (SLDC) requesting it for its approval for facilitating a Wheeling and Banking Agreement 'W&B Agreement') to sell power to Welcast Steel Ltd. The Respondent No 1's power project was commissioned only on 09.11.2013. The Respondent No 1 could not have requested SLDC for its approval for facilitating a W&B Agreement to sell power at a time when it had not been issued the Commissioning Certificate for its project. A pre condition for executing a W&B Agreement is that the company is generating electricity. Therefore the actual date of commissioning of the project, i.e. 09.11.2013 ought to be considered as the date of the application.

- b) W&B Agreement was executed by the Appellants, the Respondent No 1 and the Karnataka Power Transmission Corporation Ltd ('KPTCL') on 20.02.2014. Immediately thereafter, vide letter dated 21.02.2014, the Respondent No 1 sought permission to wheel the allegedly banked energy before 31.03.2014. Although the W&B Agreement did not mandate such a condition, the Respondent No 1's request was accepted by KPTCL vide letter dated 10.03.2014. The relevant paragraph is as below:

*"Considering their request, I am directed to communicate approval to account & credit the energy pumped into the grid from the date of commissioning of the plant 09.11.2013 to the date of signing of W&B Agreement i.e. 20.02.2014 and permit to wheel the accounted energy duly taking into account Transmission loss, Wheeling and Banking charges to their captive installation as indicated in the W&B agreement subject to the terms / conditions as per KERC order."*

- c) Clause 6.1 of the W&B Agreement stipulates that the Respondent No 1 is required to submit a C-Form containing the list of 'Exclusive Consumers' and 'Partly Exclusive Consumers' to whom it proposes to wheel power using the Utility Transmission and Distribution Network. This C-Form contains details of the list of consumers to whom energy is to be wheeled and the quantum of energy sought to be wheeled to each consumer.
- d) Despite KPTCL having agreed to provide credit for the energy, and despite being aware that the energy injected ought to be wheeled



in the same wind year, the Respondent No 1 failed to submit C-Form for the energy pumped into the grid between 09.11.2013 and 20.02.2014. It instead filed a C-Form seeking to wheel 6,900,000 kWh of energy to be generated in March 2014 to consumers listed thereunder. In absence of C-Form as required to be furnished by the Respondent No. 1, no relief whatsoever could be provided to the Respondent No. 1.

- e) Further, Clause 6.2.3 of the W&B Agreement clearly states that the energy lapses at the end of the Wind Year, viz on 31<sup>st</sup> March of every year and the banked energy becomes zero at the commencement of the next Wind Year, i.e. on 1<sup>st</sup> April. It is perhaps for this reason that vide letter dated 21.02.2014, the Respondent No 1 sought permission to wheel the allegedly banked energy before 31.03.2014.
- f) The Impugned Order erroneously proceeds on the basis that the provisions of the W&B Agreement would be binding only after it has been executed while ignoring that the Respondent No 1 is seeking an ex-post facto credit for the energy allegedly pumped in prior to execution of the W&B Agreement. Therefore, if such a request for ex-post facto credit is at all to be considered, the provisions of the W&B Agreement also have to be made applicable to the relevant period in question.
- g) Subsequently, contrary to its request seeking credit for the energy allegedly injected into the grid, the Respondent No 1 repeatedly wrote to KPTCL, vide letters dated 21.03.2014, 01.04.2014 & 09.05.2014, stating that it ought to be paid at the generic tariff rate,

on the basis of the order dated 13.03.2014 passed by State Commission in the case of Renew Power, for the energy pumped by it between 09.11.2013 and 20.02.2014. KPTCL superseded its letter dated 10.03.2014 vide letter dated 21.05.2014, and stated that payment towards the accounted energy shall be based on the outcome of the Review Petition filed by KPTCL in the case of Renew Power.

- h) The conduct of the Respondent No 1 in time and again changing its stand from asking for credit for energy injected at one time and asking for payment at generic rate at another; in not submitting the C-Form; in suppressing the fact that prior to filing the petition before State Commission for credit of energy, it had made repeated requests for payments being made at generic rates; all amount to waiver of the right, if it ever existed, to be compensated for the alleged injection of the energy.
- i) The State Commission failed to appreciate the Appellants' case and vide impugned order dated 15.10.2014, allowed the petition and directed the Appellants to pay to Respondent No 1 for the energy injected into the grid between 09.11.2013 and 20.02.2014, at the rate of generic tariff applicable to Wind Power Projects, within thirty days from the date of the order, thereby granting a relief not prayed for in the petition. Such an order is contrary to the fundamental principles of law that a court has no power to grant to a party that which he does not claim.
- j) The State Commission erred in holding that under the KERC (Terms and Conditions for Open Access) Regulations, 2004, SLDC

is required to grant approval for execution of W&B Agreement within 30 days from the date of application, as the said Regulations do not prescribe any time limit for execution of the W&B Agreement.

- k) Even assuming that SLDC delayed in communicating its response to the Respondent No 1's application for executing the W&B Agreement, the Appellants cannot be made liable to compensate for delay caused by SLDC.
- l) The State Utilities are responsible for maintaining the State's supply and demand and are statutorily required to look into the merits of any application for which a period of 30 days is provided. There can therefore be no obligation on the authorities to pay for energy injected during this period of processing of the Application.
- m) The decision to inject power to the grid prior to execution of the W&B Agreement is a commercial decision unilaterally taken by the Respondent No 1, being fully aware of the risks involved. After having pumped in power, the Respondent No 1 sought ex-post facto permission vide letter dated 21.02.2014 to wheel the allegedly banked energy before 31.03.2014. There is neither anything in law nor in the W&B Agreement executed on 20.02.2014 mandating the Appellants to grant such permission.
- n) The Appellants cannot be held liable to pay for energy injected prior to execution of the W&B Agreement since it is unscheduled power. There is no statute Regulation that creates an obligation to pay for unscheduled energy. There was no consent available with

the Respondent No. 1 when the power was injected. This issue has been considered by this Hon'ble Tribunal in Indo Rama Synthetics Ltd v. MERC (Appeal No. 123 of 2010) where it was held that there could be no question of payment for energy injected without any contract/ schedule or knowledge of SLDC and the distribution licensee and if such a transaction is permitted, it will result in setting a wrong precedent. A requirement to pay for unscheduled energy will open Pandora's box since generators will be incentivized to inject energy without obtaining the necessary approvals, thereby creating havoc in management of the distribution system, energy load and will compromise the grid security and the finances of the distribution and supply licensee.

- o) The Respondent No 1's action of injecting energy between 09.11.2013 and 20.02.2014 is gratuitous and thus, Section 70 of the Indian Contract Act, 1872 is inapplicable.
- p) That the Respondent No 1's request for payment at generic tariff, though misplaced, is based on the order passed by KERC in Renew Power's case. The Renew Power case has no precedent value, in spite of which the Appellants fairly considered the Respondent No 1's request and responded that they would make payments in consonance with the order passed by the State Commission in the pending review petition which has been filed by the Appellants. Thereafter the Respondent No 1 filed the petition before State Commission contending that Renew Power is not applicable to it and sought credit of energy.
- q) The review petition in the case of Renew Power has been disposed

of. This was the case pertaining to delay in granting open access and was not a case of delay in execution of the W&B Agreement. Regulations do not specify any time period for execution of a W&B Agreement.

- r) The latest format of the Standard Wheeling and Banking Agreement, the State Commission has ordered that banked energy unutilized at the end of the wind year shall be deemed to have been purchased by the distribution licensee and shall be paid for at 85% of the general tariff. Should this Tribunal come to the conclusion that any part of the energy pumped in between 09.11.2013 and 20.02.2014 ought to be considered as banked energy, payment should be made as per the latest practices adopted by the State Commission.
9. The learned counsel for the Respondent No 1 has made following arguments for our consideration;
- a) The Appellants received the power as certified by them on month to month basis, and agreed on 21.05.2014 to pay as per directions of State Commission, sought submission of invoices on 2<sup>nd</sup> December 2014 and then reversed their stand. They consumed the power, sold it and collected the money from its consumers at a price as high as Rs 7.25 per unit during Dec'13, January, February and March 2014.
- b) In past in the State of Karnataka there were huge unexplained delays in signing the W&B Agreements and providing Wheeling and Banking facility to the generating companies and intra state open access consumers. The State Commission in March 2014 initiated suo-motu

proceedings in Case 01/2014. The case was disposed of with the direction to the nodal agency – KPTCL that payment at the generic tariff be made by the ESCOMs for the power injected till the signing of W&B Agreement vide order dated 12.03.2014.

- c) Appellants have obeyed the order dated 12.03.2014 and made payments for the energy delivered. The Review petition filed by some of the Discoms against the order dated 12.03.2014 has been rejected by State Commission.

In the Impugned Order it is clearly recorded in Para 6(d) as follows:

*“In the statement of objections, the Respondent have indicated that they are not averse to making payment for the energy injected into the grid and have suggested that the Commission may direct payments to be made to the Petitioner at 85% of the generic tariff, in terms of the Order of the Commission dtd 8.7.2014”.*

- d) Even this contention was rejected by the State Commission because said condition of 85% applied to the current wind year related projects and not the old cases such as the case involved in this Appeal. Since the Appellants were ready and willing to pay 85% of the generic tariff, they should have at least paid the same before filing of the present Appeal.
- e) The Appellants have paid the entire generic tariff cost to Renew, and applied this principle of payment of 100% generic tariff in almost all cases. Only in the present case they are challenging the same on untenable grounds. They cannot be allowed to grossly discriminate and unjustify the legitimate payment to Respondent No 1.

- f) Karnataka Power Transmission Corporation Limited (KPTCL) has always been willing to sign the W&B Agreement. KPTCL, which was a party in the original proceedings before the State Commission, has not preferred to challenge the Impugned Order. Therefore, the Appellants should have arrayed KPTCL as a party Respondent to the present proceedings. This becomes even more crucial because KPTCL is a Nodal Agency for grant of long term Open Access. Therefore, the Appeal is liable to be dismissed on the preliminary ground of non joinder of parties.
  
- g) If Appellants have a grievance against the nodal agency and feel that they should not be penalised for the delay caused by the nodal agency, the Appellants should have arrayed the Nodal Agency as party Respondents in the present proceedings.
  
- h) Commissioning of the project is not a pre condition for making an application. The State Commission has already issued several clarifications that Application for Wheeling and Banking can be made at any stage before or after Commissioning and even the Standard Wheeling and Banking Agreement format approved by the State Commission contains these provisions in clear terms.
  
- i) Even though as per governing regulations i.e. KEREC terms and conditions for open access, regulations 2004, the nodal agency is responsible to accept or reject the application within 30 Days from the date of making the application, the application of the respondent was kept pending for several months.

- j) The Appellants unnecessarily did not sign the W&B Agreement. While it is true that banked energy, as per W&B Agreement has to be wheeled within the same financial year, it is not the Respondents' fault because Appellants did not process its application within time. The Appellants have not urged in the original proceedings or even in the present proceedings as to why they did not sign the W&B Agreement in time and why the application for Wheeling & Banking was not processed in time.
  - k) A Court or Tribunal has the right to mould the relief in any manner, it deems appropriate. If the Appellants were not willing to pay for the energy delivered to their grid system, they should have timely signed the W&B Agreement as per law. The Appellants want best of both the worlds – not signing the W&B Agreement and utilise the energy commercially, gain from the sale of the same energy and not pay for it.
  - l) Regarding time period for execution of the W&B Agreement, the regulations provide for the processing time of 30 days for the Application. The signing of the W&B Agreement is simultaneous with the grant of Wheeling and Banking.
  - m) The State Commission by merely ordering for payment of the generic tariff helped the Appellants by not penalising for violating its Regulations and defeating the salutary objective of Open Access guaranteed under the Electricity Act 2003.
10. After having a careful examination of all the issues brought before us for our consideration, our observations are as follows:-



**A. On the first issue regarding entitlement of the Respondent No 1 to the credit of energy injected into the State grid between date of commissioning of the project to the date of execution of Wheeling and Banking Agreement i.e. from 09.11.2013 to 20.02.2014:**

- a. As per Appellants, on 21.09.2013, the Respondent No 1 wrote a letter to the SLDC requesting for its approval for facilitating a Wheeling and Banking Agreement ('W&B Agreement') in order to utilize the power generated from its Project. However as per the Respondent No 1, an application for grant of Open Access was filed by them to on 21.09.2013. The KERK (Terms & Conditions for Open Access) Regulations, 2004, provide that the Nodal Agency (SLDC) is required to assess the available capacity and communicate to the applicant within thirty days from the date of receipt of the application. On examination of records, it was found that the Respondent No 1 filed an application for execution of W&B Agreement with SLDC.
- b. The Terms "Wheeling" and "Open Access" as defined in State Commission's Open Access Regulations 2004 are :
  - i. "Wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by the another person for the conveyance of electricity on payment of charges to be determined under Sec-62 of the Act.
  - ii. "Open Access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person

engaged in generation in accordance with the regulations specified by the Appropriate Commission.

Keeping in view the above, we shall now deal with the issue whether grant of Open Access and execution of W&B Agreement are of the same nature.

- c. State Commission has not gone into issue that whether the Respondent No 1's application with SLDC was for Open Access or for execution of W&B Agreement, however, State Commission has held that there was delay on part of SLDC to inform the Respondent No 1 within the time frame provided in the Open Access Regulations. After going through the provisions of W&B Agreement and Open Access Regulations, we find that the basic nature of the seeking grant of open access by a consumer and execution of W&B Agreement with Distribution licensee remains same, hence we tend to agree with the observation of State Commission that there was delay on part of SLDC to act within the time frame provided in the Open Access Regulations, considering seeking grant of open access and execution of W&B Agreement are basically of the same nature.
- d. Regulation 9 of the State Commission's (Terms & Conditions of Open Access) Regulations, 2004 describes the procedure for applying for Open Access and the same is reproduced below,

**“Regulation 9. Procedure for applying for Open Access**

- (1) An application for open access shall be filed to the respective nodal agency by the intending open access customer, with a copy marked to the distribution licensee of the area,*

- (2) *The application shall contain such details as capacity needed, point of injection, point of drawal, voltage level, phase arrangement, duration of availing open access, peak load/time, average load and any other additional information that may be specified by the nodal agency.*
- (3) *The Nodal Agency shall host on its website the details of application received and the status of application on a continuous basis which shall be made available to the public.*
- (4) *The nodal agency shall issue necessary guidelines, procedure and application forms within 30 days of publication of these regulations in the official gazette.*
- (5) *The application shall be accompanied by a non-refundable processing fee of Rs 5,000/- for long-term customers and Rs. 1000/- for short-term customers.*
- (6) *The nodal agency, based on the system studies by the concerned licensee or otherwise assess the capacity available and communicate the same to the applicant within the time schedule indicated below:*
  - a. *Short term open access - Within 7 days from the date of receipt of application*
  - b. *Long term open access - within 30 days from the date of receipt of application.*
- (7) *Where the nodal agency is of the opinion that open access cannot be allowed without system strengthening, it shall identify the scope of work for system strengthening and the probable date from which the open access can be allowed and the applicant shall be informed accordingly within 30 days.”*

We observe from the above Regulations of the State Commission

that for the Long term Open Access customers, the SLDC was required to act within 30 days of the receipt of application, which it failed to do, in this case.

- e. KERC Open Access Regulations 2004, section 9(6) and 9(7) clearly specify the time limit for communication of grant of open access. There are no difficulties on record which justify the delay of more than three months on behalf of SLDC for communicating this to the Respondent No 1.
- f. The W&B Agreement was executed between the KPTCL, Appellant No 1 to 2 and Respondent No 1 on 20.02.2014. **Hence we are of the opinion that the Respondent No 1 is entitled to the credit of energy injected into the State grid from date of commissioning of the project i.e. from 9.11.2013 to the date of execution of W&B Agreement i.e. 20.02.2014** as per Impugned Order of State Commission.

We order accordingly.

- B. On the second issue regarding entitlement of the Respondent No 1 for payment at the generic tariff rate for the credit of energy injected into the State grid between date of commissioning of the project to the date of execution of Wheeling and Banking agreement i.e. from 09.11.2013 to 20.02.2014, we would like to refer to the observations of the State Commission in its Impugned Order which have been recorded in para 6 which we are reproducing below:**

*“d. Now, coming to the point as to whether the Petitioner is entitled to the credit of the energy, we note that the Petitioner has been changing his stance in this regard. In its letters dated 21.3.2014, 1.4.2014 and 9.5.2014, in this regard. In its letters dated 21.3.2014, 1.4.2014 and 9.5.2014, the Petitioner has sought payment at the rate of generic tariff for the unscheduled energy injected into the grid, whereas, in the earlier letter dated 21.2.2014, it had sought credit of the energy wheeled. In the Petition also, the Petitioner has sought for credit of the energy wheeled. We are not inclined to direct the Respondents to give credit of the energy wheeled by the Petitioner, as the Wind Year 2013-14 has already come to an end on 31.3.2014, well before the Petition was filed.*

*(d) Admittedly, the Petitioner has been allowed to inject energy into the grid and the energy injected by the Petitioner has been utilized by the Respondents. In the Statement of Objections, the Respondents have indicated that they are not averse to making payment for the energy injected into the grid and have suggested that the Commission may direct payments to be made to the Petitioner at 85% of the generic tariff, in terms of the Order of the Commission dated 8.7.2014. This submission of the Respondents cannot be accepted, as the said Order dated 8.7.2014 is applicable from the current Wind Year onwards, and not for the period in question in the present case.*

*(e) While considering the similar cases in the past, wherein there was delay in granting ‘NOC’ for open access, this Commission had taken a consistent view that the generator was required to be compensated for the energy injected into the grid and utilized by*

*the distribution licensees, under the principles of Section 70 of the Indian Contract Act, 1872. In such cases, this Commission had directed the distribution licensees to make payments to the generator at the rate of generic tariff applicable. Applying the same principles, we deem it appropriate to direct the Respondents (ESCOMs) to pay for the energy injected into the grid, from 9.11.2013 to 20.2.2014, at the rate of generic tariff applicable to the Wind Power Projects that was prevailing at the relevant point of time.”*

We are not going into the issue of frequent change of stance on the part of the Respondent No. 1 while filing its claims for the energy injected during the period under dispute. However, we have noted that the Appellants have indicated that they are not averse to making payment for the energy injected into the grid before signing of the W&B Agreement. The only issue was the rate at which payment has to be made. We are in agreement with the observation of the State Commission in its Impugned Order that the payment has to be made at the rate of generic tariff applicable to the Wind Power Projects that was prevailing at the relevant point of time. Hence, we are in agreement with the State Commission on this issue.

Hence on this issue regarding entitlement of the Respondent No 1 at the generic rate for the energy injected into the grid before signing of Wheeling and Banking Agreement, we don't find any shortcomings in the Impugned Order passed by State Commission. Hence, we are in agreement with the State Commission on this issue.

This issue is decided accordingly.

**C. On third issue regarding direction of State Commission to the Appellants to pay for the energy injected into the grid at the generic tariff applicable to wind power projects since the Respondent No 1 had not even prayed for the said relief and had in fact filed the petition seeking credit for the energy allegedly injected between 09.11.2013 and 20.02.2014,**

- a. We have observed that the prayer in the petition of Respondent No 1 before the State Commission was for accounting and credit of the energy generated from its project for the period specified from date of commissioning of the Project till date of signing of Wheeling and Banking Agreement.
- b. Further, observations of the State Commission which have been recorded in para 6 of the Impugned Order as extracted hereunder;

*“..... (d) Admittedly, the Petitioner has been allowed to inject energy into the grid and the energy injected by the Petitioner has been utilized by the Respondents.....”*

- (e)....., *this Commission had taken a consistent view that the generator was required to be compensated for the energy injected into the grid and utilized by the distribution licensees, under the principles of Section 70 of the Indian Contract Act, 1872. In such cases, this Commission had directed the distribution licensees to make payments to the generator at the rate of generic tariff applicable.....”.*

- c. We find that State Commission has consistently taken a view in earlier cases of similar nature to allow for the energy injected into the grid and utilized by the Appellants is to be paid.
- d. The State Commission has in its Impugned Order specified the rate at which such energy is to be paid to Respondent No 1.
- e. It is to be noted that the State Commission in its Impugned Order has ordered for the payment of energy charges at generic tariff rate from 9<sup>th</sup> November 2013, the date on which the project was commissioned and not from the date of application.
- f. Hence on this issue we do not find any short coming in the Impugned Order and are in agreement with findings of the State Commission.

We order accordingly.

**D. The fourth issue is regarding the State Commission holding that under the KERC (Terms and Conditions for Open Access) Regulations, 2004, SLDC is required to grant execution of W&B Agreement within 30 days from the date of application, when in fact the Regulations do not prescribe any time limit for execution of the W&B Agreement?**

As per Appellants, the application made by the Respondent No 1 was for execution of a Wheeling & Banking Agreement. The Appellants have contested that the Respondent No 1 could not have requested the SLDC for its approval for facilitating a W&B Agreement to sell power (vide letter dated 21.09.2013) at a time when it had not been



issued the Commissioning Certificate for its project. A pre-condition for executing a W&B Agreement is that the company is generating electricity. Therefore, the actual date of commissioning of the project, viz. 09.11.2013 ought to be considered as the date of the application. Consequently, the State Commission's finding in the Impugned Order that there was a more than five month delay by the SLDC is erroneous.

We have already expressed our views as mentioned above that the grant of Open Access and execution of W&B Agreement are of the same nature, hence SLDC must have acted promptly considering the time line specified in the Open Access Regulations, 2004 of the State Commission. The contentions made by Appellants are hereby rejected.

We order accordingly.

**E. The fifth issue is regarding State Commission rejecting the Appellants' contention that since the Respondent No 1 had not complied with the terms of the W&B Agreement, it cannot seek credit for the energy injected?**

The period under consideration is before signing of the W&B Agreement. The State Commission in its Impugned Order has stated that the terms of the W&B Agreement would be binding on the parties only after they execute the same.

We are in agreement with the findings of the State Commission in this regard. Therefore, the contention of the Appellants that, as the Respondent No 1 has not complied with the terms of the W&B

Agreement (as regards to C-Form), it cannot seek credit of the energy, cannot be accepted.

We order accordingly.

**F. The last issue is regarding imposition of liability by the State Commission on the Appellants for the delay on part of the SLDC?**

- a) Appellants have stated that the time period of 30-day ought to be calculated from 09.11.2013 and not from 21.09.2013. Further, there can be no obligation on the authorities to pay for energy injected during delay in processing of the Application by SLDC.

Further, Appellants stated that they cannot be held liable to pay for energy injected prior to execution of the W&B Agreement since it is unscheduled power. There is no statute / Regulation that creates an obligation to pay for unscheduled energy. In the present case, it is nobody's case that there was an approved schedule for injecting power or that there was any consent when the power was injected.

This issue has been considered by this Tribunal in Indo Rama Synthetics Ltd v/s MERC (Appeal No. 123 of 2010) where it was held that there could be no question of payment for energy injected without any contract / schedule or knowledge of SLDC and the distribution licensee and if such a transaction is permitted, it will result in setting a wrong precedent.

- b) As per Respondent No 1, regarding the commissioning of the project and application being made prior to the date of commissioning, the Respondent No 1 had made an application for grant of Open Access

on 21<sup>st</sup> September, 2013. This application was not processed for more than five months by the Appellants. The project was commissioned on 9<sup>th</sup> November 2013. The State Commission in its Impugned Order has ordered for the payment of energy charges at generic tariff from 9<sup>th</sup> November 2013, the date on which the project was commissioned and not from the date of application.

b) In the Impugned Order, the State Commission has held that ,

*“... SLDC has to process the application for Open Access within thirty days from the date of receipt of the application. We had held that for the energy injected into the grid by the generating company when there is delay in granting NoC for Open Access, the generating company has to be compensated under the principles of Section 70 of the Contract Act, 1872, and we had therefore directed payment of generic tariff applicable.*

c) The Sections 70 of the Indian Contracts Act, 1872 is reproduced below:

*“70. Obligation of person enjoying benefit of nongratuitous act Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”*

The earlier judgment of this Tribunal in Indo Rama Synthetics Ltd v/s MERC (Appeal No. 123 of 2010) where it was held that there could

be no question of payment for energy injected without any contract / schedule or knowledge of SLDC and the distribution licensee, pertains to Captive Power plant based on Diesel and Coal as fuel for power generation. The current case under consideration is of Wind based Captive Power Plant which is a renewable energy based plant, hence it is not applicable in the present case. On this issue also, we do not find any shortcomings in the Impugned Order passed by State Commission.

We order accordingly.

**ORDER**

We are of the considered opinion that there is no merit in the present Appeal and IA and the Appeal is hereby dismissed.

The Impugned Order dated 15.10.2014 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **12<sup>th</sup> May, 2016.**

**(I.J. Kapoor)**  
**Technical Member**

**(Mrs. Justice Ranjana P. Desai)**  
**Chairperson**

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**REPORTABLE/NON-REPORTABLE**  
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