

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

Appeal No. 117 of 2016

Dated: 13th September, 2017

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

In the matter of :-

**Renew Wind Energy (AP) Private Limited
Tower 4A, 6th Floor, DLF Corporate Park
M.G. Road, Gurgaon – 122 002**

... Appellant

Versus

- 1. Karnataka Electricity Regulatory
Commission (KERC)
912, 6 & 7th Floor, Mahalakshmi
Chambers, Mahatma Gandhi Road
Bengaluru, Karnataka – 560 001** **...Respondent No. 1**
- 2. State Load Despatch Centre (SLDC)
Karnataka Power Transmission
Corporation Ltd. (KPTCL)
28, Race Course Road
Bangalore – 560 009** **...Respondent No. 2**
- 3. Hubli Electricity Supply Company
Limited (HESCOM)
P.B. Road, Navanagar
Hubli – 580 025** **...Respondent No. 3**
- 4. Bangalore Electricity Supply Company
Limited (BESCOM)
K.R. Circle,
Bangalore – 560 001** **...Respondent No. 4**

Counsel for the Appellant(s): Mr. S. Venkatesh
Mr. Varun Singh
Mr. Pratyush Singh
Mr. N. Bhattacharya
Ms. Aditi Mohapatra
Mr. Shashank Khurana
Mr. Natabrata Bhattacharya
Mr. Anuj P. Agarwala

Counsel for the Respondent(s): Mr. Sandeep Grover
Mr. Pankhuri Bhardwaj for R-2 to 4

JUDGMENT

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

1. The present Appeal is being filed by M/s. Renew Wind Energy (AP) Private Limited (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the ‘**Act**’) against the Order dated 10.03.2016 (“**Impugned Order**”) passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in O.P. No. 1 of 2015 on the issue of disallowance of compensation for the energy injected into the grid by the Appellant from the date of commissioning i.e. 29.06.2013 upto 08.08.2013, being the 30 days period available with SLDC from the date of the Long Term Open Access (LTOA) application made by the Appellant to SLDC for its processing.
2. The Appellant i.e. M/s. Renew Wind Energy (AP) Private Limited is operating 18 MW wind energy based generating company in the State of Karnataka within the meaning of Section 2 (28) of the Act.

3. The Respondent No.1 i.e. Karnataka Electricity Regulatory Commission (KEREC) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Act.
4. The Respondent No. 2 is the State Load Despatch Centre (SLDC) discharging functions in terms of the Act.
5. The Respondent No. 3 i.e. Hubli Electricity Supply Company Ltd (HESCOM) is one of the Distribution Licensee in the State of Karnataka.
6. The Respondent No. 4 i.e. Bangalore Electricity Supply Company Ltd (BESCOM) is one of the Distribution Licensee in the State of Karnataka.
7. Facts of the present Appeal:
 - a) On 27.05.2013, Government of Karnataka (GoK) transferred 18 MW wind power project in favour of the Appellant. On 29.06.2013, the Appellant commissioned the said wind power project. The Appellant had also obtained the provisional interconnection to the grid on 28.06.2013.
 - b) The Appellant vide letter dated 08.07.2013 applied to SLDC for grant of Intra-State Open Access by way of a Wheeling and Banking Agreement (WBA). SLDC received the said letter on 10.07.2013. SLDC even after a lapse of more than five months from the date of receipt of the Appellant's application for grant of Open Access (OA) did not communicate about the fate of its OA

application. As per Regulation 9 (7) of the KERC (Terms and Conditions of Open Access) Regulations, 2004 (hereinafter referred to as the "Open Access Regulations, 2004), SLDC was required to communicate the decision on a LTOA Application within 30 days of its receipt.

- c) The Appellant on 20.12.2013, wrote a letter to the State Commission regarding non-processing of its OA application. This letter was converted into a suomotu petition as suo-motu Case No. 1 of 2014 by the State Commission.
- d) On 20.01.2014, the Appellant sent a letter to the SLDC seeking concurrence for execution of WBA for wheeling of power to a consumer namely JK Cements. On 27.01.2014, SLDC replied to the said letter and requested the Appellant to submit a draft WBA to initiate action to sign the agreement. The WBA was signed on 31.01.2014 between the Appellant and SLDC.
- e) On 12.03.2014, Karnataka Power Transmission Corporation Ltd. (KPTCL), as an operator of SLDC filed an affidavit in the suo-motu Case No. 1 of 2014 before the State Commission. In the said affidavit, it explained the reasons behind the delay in processing the LTOA application of the Appellant. It also made an oral statement thereby undertaking to have payments made by Electricity Supply Companies (ESCOMs) for the power injected by the Appellant till the signing of WBA at the applicable generic tariff. The same was recorded by the State Commission in its order in Case No. 1 of 2014.

- f) SLDC, on 19.3.2014 sent a letter to the Respondent No. 3 and 4 stating that in the light of the order passed by the State Commission in suo-motu Case No. 1 of 2014, the ESCOMs shall pay for energy injected by the Appellant at the Generic Tariff, and set out a table along with calculations based upon accounting and allotments undertaken ESCOM-wise. Further, it was stated that the payment towards electricity injected prior to the date of Application and the 30 day time period as per Regulation 9 of the Open Access Regulations, 2004 would be considered as per the outcome of the proposed Review Petition.
- g) On 11.04.2014 the Respondents 2 to 4 filed a Review Petition before the State Commission, being R.P. No. 2 of 2014. The Respondent 2 to 4 in the said Review Petition agitated the issue of applicable tariff for the power injected by the Appellant from the date of its commissioning upto 08.08.2013.
- h) On 15.10.2014, the Review Petition was disposed of by the State Commission granting liberty to the Appellant to initiate separate proceedings on the aspect of compensation arising out of the thirty days' time limit within which WBA is required to be processed by the Nodal Agency i.e. SLDC. Accordingly, in the light of the order passed by the State Commission on 15.10.2014, the Appellant filed another petition, being OP No. 1 of 2015, claiming the relief. On 27.04.2015, the Respondent No. 2 to 4 filed their reply in OP No.1 of 2015.
- i) The State Commission vide its Impugned Order dated 10.03.2016 dismissed the said petition and denied any relief to the Appellant

by holding that the Appellant is not entitled to the compensation for the energy injected into the grid, from the date of commissioning i.e. 29.06.2013 upto 08.08.2013 being the 30 days from the date of the Application before SLDC.

j) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present Appeal before this Tribunal.

8. Questions of law

The Appellant has raised the following questions of law in the present Appeal:

- a) Whether the Respondent No. 1, the State Commission was correct in holding that the provisions of Section 70 of the Indian Contract Act do not apply in the facts of the present case?
- b) Whether the State Commission failed in holding that despite voluntarily accepting and using the power injected by the Appellant in the grid, the Respondents would not be liable to pay charges towards the same?
- c) Whether the Regulation 9(6) of the KERC OA Regulations which provide for thirty days' time from the date of receipt of the long term open access application, to communicate the grant of open access or otherwise, preclude the Respondents from making payments towards the electricity supplied in that period?

- d) Whether the State Commission failed to appreciate that allowing the Distribution Companies to utilize the said energy without having to make payments against the same amounted to unjust enrichment on the part of the Respondents?
- e) Whether the State Commission erred in allowing an alleged benefit upon the Respondents with regard to Regulation 9 (6) of the KERC OA Regulations, when the Respondents themselves are admittedly in contravention of Regulation 9 (7) thereof?
- f) Whether the State Commission has failed to direct the payment towards supply of power in the light of settled law that where the Respondents have enjoyed the benefit of the energy that has been injected into the grid and recovered tariff in respect of the same, then in such a case the claim of the Appellant for payment of charges for the power injected into the grid cannot be said to be illegal?

9. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.

10. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:

- a) The State Commission has erred in denying the compensation or credit of the energy injected by the Appellant from the date of commissioning of its project i.e. 29.06.2013 upto 08.08.2013, being the 30 day period available with the Respondent No. 2/ SLDC as

per Regulation No. 9(6) of the Open Access Regulations, 2004 to process the Open Access Application of the Appellant.

- b) That the State Commission has erred in law by holding that the Appellant has thrust its energy upon the Respondents, and that there was no obligation on the Respondents, to whom delivery had been made, to pay compensation to the Appellant. The facts of the case clearly show that the energy so generated by the Appellant has been allocated and utilized by the Respondents appropriately.
- c) The State Commission has erred in not appreciating that it is settled law that a renewable generator is entitled to be compensated for the energy injected into the grid, which had been consumed by the beneficiaries, even without having any valid PPA or WBA as has been held by this Tribunal in teeth of its judgment dated 24.01.2013 passed in Appeal No. 170 of 2012 in the case of M/s. BESCO Vs. Reliance Infrastructure Ltd. & Anr.
- d) The State Commission failed to appreciate that the Respondents have knowingly received and enjoyed the benefit of the energy which has been injected into the grid by the Appellant and the Respondents have also recovered tariff in respect of energy utilized. Therefore the claim of the Appellant for payment of charges for the power injected into the grid cannot be considered as untenable.
- e) The State Commission has failed to appreciate that wind energy is a renewable source of energy, which cannot be stored and cannot also be scheduled by SLDC. Therefore, shutting down of the wind

energy generation when generation is conducive would tantamount to wastage of green and renewable energy which is contrary to mandate of Article 48 A read with 51 A (g) of the Constitution of India, scheme of the Electricity Act, 2003 and the various policies thereunder. In such circumstances, the Appellant had no option but to inject energy from its wind generator into the grid. The said energy injected into the grid was accounted and allotted (Discom-wise) by the Respondents. Therefore, the State Commission ought to have invoked Section 70 of the Indian Contract Act, 1872 and granted the prayer sought by the Appellant.

- f) On 12.03.2014, KPTCL filed an affidavit in the suo-motu Case No. 1 of 2014 before the State Commission. In the said affidavit, the Respondent No. 2 explained the reasons behind the delay, and further made an oral statement regarding payments to be made by ESCOMs for the power injected by the Appellant till the signing of WBA at the generic tariff applicable. The said undertaking was recorded by the State Commission and the case was disposed of by the State Commission with the following order:-

“Case called. Counsel for both parties present. Affidavit filed on behalf of KPTCL by Dy. G.M (Tech) explaining the delay in giving consent for W & B agreement and the correspondence with the complainant firm. Affidavit also affirms that there are no other cases of delay beyond the period allowed by Regulations pending with KPTCL. Explanation accepted with the direction that KPTCL shall strictly adhere to time schedule and avoid delays. KPTCL also offers to have payments made by ESCOMs for the

power injected by the complainant till the signing of W & B Agreement at the generic tariff applicable.”

- g) On 11.04.2014, the Respondents filed a Review Petition in the above case. On 15.10.2014, the said Review Petition filed by the Respondents was disposed of by the State Commission with the following direction:-

“In view of the averments made in the Review Petition that the learned counsel for the Review Petitioners had only made a submission offering to have payments made for the power injected by the generating company for the period subsequent to the thirty (30) days time limit within which Wheeling and Banking Agreements are required to be processed by the Nodal Agency, as per Regulation No.9(6) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, the Commission considers it appropriate to record this submission of the Respondents, invoking the power under Order LXVII Rule 1 of Code of Civil Procedure. Accordingly, we accept this submission of the learned counsel and take it on record. However, we leave it open to the generating company to initiate separate proceedings, if it so desires, in the matter of any claims it may choose to prefer with regard to the power injected during the thirty days period specified in the Regulation No.9(6) of the KERC (Terms and Conditions for Open Access) Regulations, 2004.”

- h) In the light of the order passed by the State Commission on 15.10.2014, the Appellant filed another petition, being OP No. 1 of 2015. The State Commission vide its Impugned Order dated

10.03.2016 dismissed the said petition and denied any relief to the Appellant.

- i) The State Commission in the Impugned Order has erred in allowing a benefit upon the Respondents with regard to Regulation 9(6) of the KERC OA Regulations, when the Respondents themselves are admittedly in contravention of Regulation 9 (7) thereof.
- j) The 30 day period prescribed under Regulation 9 (6) of the KERC Open Access Regulations, 2004 only provides for an upper limit as to the time available to the Nodal Agency to process the Application, and the same cannot be treated as a mandatory waiting period. Hence, when the SLDC itself has delayed the process of grant of open access, it cannot now be allowed to take advantage of its own wrong by denying to pay compensation towards the electricity supplied during the said 30 day period.
- k) The State Commission has erred in holding that the electrical energy injected into the grid cannot be stored and it would be consumed instantly and there would be no option for the Respondents either to accept or reject the said energy or having the option of refusing the energy injected.
- l) The State Commission has erred in relying upon the decision of this Tribunal in Appeal Nos. 123 and 124 of 2007 decided on 08.05.2008 in the case of Hyderabad Chemicals Limited Vs. Andhra Pradesh Electricity Regulatory Commission and others, in as much as the same is clearly distinguishable on facts. The

generator in that case had itself given an undertaking that it would not seek compensation for supply of power prior to the signing of the Agreement making such supply of power gratuitous, which is the only exception to Section 70 of the Contract Act.

m) The Impugned Order passed by the State Commission is in the teeth of the decision of this Tribunal in Appeal No. 170 of 2012 titled as Bangalore Electricity Supply Company Limited Vs. Reliance Infrastructure Ltd. & Ors. wherein it has been clearly held as under:-

“It is an admitted fact that the Appellant has enjoyed the benefit of energy that has gone into the system and which could not be regulated. It is also an admitted fact that the Appellant has derived benefit from the same and recovered tariff in respect of the same. Therefore, the claim of the Rlnfra for the required charges for the power injected into the Grid cannot be said to be illegal.”

n) In a case where the Respondents have clearly enjoyed the benefit of the energy, as is evident from the letter of Respondent No. 2 dated 19.03.2014, the claim of the Appellant for seeking charges cannot be said to be illegal.

o) The State Commission erred in relying upon the provisional interconnection approval dated 28.06.2013 to hold that the Respondent No. 2 specifically instructed the Appellant not to inject the energy till banking arrangement is entered into, without appreciating that wind energy being a renewable source of energy can neither be stored nor scheduled by the Respondent No. 2 and

that non supply of the same to the grid would result in gross wastage.

p) The provisions of the Act, National Electricity Policy and the Tariff Policy mandate for promotion of renewable energy. The wind power is an important avenue for promotion of renewable sources of energy. The relevant provisions of the Act, National Electricity Policy and the Tariff Policy are produced below:-

- i. Section 61 of the Act provides that the State Commission has to specify the terms and conditions for determination of tariff and in doing so is to be guided by inter alia promotion of co-generation and generation of electricity from renewable sources of energy.
- ii. Section 86(1) of the Act provides that the State Commission has to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity to the grid and sale of electricity to any person, and also specify for purchase of electricity for such sources, a percentage of total consumption of electricity in the area of Distribution Licensee.
- iii. Clause 5.12.1 & 5.12.2 of the National Electricity Policy clearly indicate that the emphasis on the intention behind Section 86 (1) (e) is to promote generation and co-generation from non-conventional and renewable sources of energy.
- iv. Further Clause 6.4 of the Tariff Policy mandates the State Commission to fix a purchase obligation for procurement of energy from non-conventional sources thereby promoting generation and procurement of non-conventional sources of energy.

- q) In light of the above it is unequivocal that the primary objective of the State Commission is to promote establishment of renewable energy sources and promote generation of electricity based on such sources of energy.
- r) The Constitution of India has, by way of Article 48 A and 51 A(g), cast a fundamental duty upon the state as well as the citizens of India to protect, improve and preserve the environment. A critical aspect towards such preservation of environment is to generate energy from renewable sources, which has a much smaller environmental footprint than energy generated from fossil fuel and other resources. Further, the Supreme Court, in the matter of Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611, has held as under:-

“It has been rightly contended by the learned senior counsel for the respondents that Para 4.2.2 of the National Action Plan on Climate Change and Preamble of the Act of 2003 emphasise upon promotion of efficient and environmentally benign policies to encourage generation and consumption of green energy to sub-serve the mandate of Article 21 read with Article 48A of the Directive Principles of the State Policy and Article 51A(g) of the Fundamental Duties enlisted under Chapter IVA of the Constitution of India.”

- s) Thus, it is imperative and essential for the State Commission to take such measures, which promote renewable energy generators such as the Appellant, and allow them to remain in business by

being adequately compensated for the generation of renewable energy.

- t) The same issue came up before this Tribunal in Appeal No. 123 of 2015 titled Hubli Electricity Supply Company Vs. Fortune Five Hydel Projects wherein this Tribunal was dealing with identical facts as in the present case. In the said case, this Tribunal after observing that there was delay on part of SLDC to act within the time frame provided in the Open Access Regulations, 2004 with regard to grant of Open Access and execution of WBA held that the wind energy generator was entitled for the credit of energy injected into the grid from the date of the commissioning of the project till the date of the execution of WBA.
- u) The contention of the Respondent that energy injected by the Appellant during 29.06.2013 to 08.08.2013 based on conditions of Interconnection Approval was done gratuitously and hence Section 70 of the Contract Act is not applicable is erroneous. The word 'gratuitous' means without expectation of compensation and depends upon the intention of the person at the time of doing the thing. Clause 11 of the provisional Interconnection Approval was unilateral condition imposed by the Respondent. The Appellant never gave wilful declaration that the energy injected before signing of WBA will be free of cost.

The said condition in the Interconnection Agreement is a 'standard condition' applicable to all generators. The Respondent earlier had never put on record that the same condition was not stipulated in the Hubli case. Further, if the argument of the Respondent that

pumping power without contractual agreement is accepted then why they have paid compensation for the power injected just thereafter and they should have not paid for the power injected during 09.09.2013 to 31.01.2014. Thus, the contention of the Respondent is untenable. The Appellant has also submitted that Hon'ble Patna High Court in case of Babu Bhagwati Saran Singh v. Maiyan Murat Mati Kuer 931 SCC while interpreting Section 70 of the Contract Act held that the words 'not intending to do gratuitously' indicate that there must be an element of self interest also in the act performed by the claimant. The Appellant has also submitted that the Privy Council vide its judgment in case of A V Palanivelu Mudaliar v. Neelavathi Ammal AIR 1937 PC 50 has also held that where a person was under the impression that he would receive remuneration for the services, it cannot be predicated that he intended to act gratuitously. The Appellant in this regard has also relied on the judgments in case of Union of India v. Sita Ram Jaisawal (1976) 4 SCC 505, State of W.B. v. B.K. Mondal and Sons 1962 Supp (1) SCR 876 : AIR 1962 SC 779 and Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd. (2007) 13 SCC 544.

11. The learned counsel for the Respondents 2 to 4 has made following arguments/submissions for our consideration on the issues raised in the Appeal:

a) Many of these issues were not raised by the Appellant in the original petition i.e. O.P. No. 01 of 2015, against the order of which the present Appeal has been filed. The Appellant has raised several additional grounds which were not even raised before the

State Commission for adjudication. As such the present Appeal is not at all maintainable.

- b) The Appellant has sought for the intervention of the State Commission in the matter and a suo moto action was initiated in suo-motu Case No. 01 of 2014. Due to peculiar circumstances of the case, there was a delay in the execution of the WBA. The Respondents Nos. 2 to 4 explained the reasons for the delay before the State Commission. However, the State Commission was pleased to pass an order on 12.03.2014 directing the Respondents to make payments. The Respondent Nos. 3 & 4 have made payments for the energy injected into the grid for the period between 09.08.2013 to 31.01.2014. In suo moto Case No. 01 of 2014, the State Commission did not specify the date from which the payments has to be made and only specified that the payment had to be made till the signing of the WBA. Hence, the Respondents filed a Review Petition, R.P. No. 02 of 2014 to clarify the State Commission's order in suo moto Case No. 01 of 2014.
- c) The period to which the review petition refers is 30 days period i.e. beginning from the date of application for wheeling and banking facility between 10.07.2013 to 08.08.013. Moreover the State Commission has made no remark on the maintainability or validity of any such claim but merely stated that the Appellant can file separate proceedings if it so desires. This clearly shows that the Appellant is not entitled to payment for the statutory 30 days' period as a right.

- d) Regulations do not prescribe that SLDC is required to grant approval for execution of WBA within 30 days from the date of application. Further, the said Regulations also do not prescribe any time limit for execution of the WBA.
- e) The Respondents are responsible for maintaining the supply and demand in the State of Karnataka and are statutorily required to properly consider 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 since it is unscheduled power injected into the grid without any approvals. It is the duty of the generator to ensure that energy is injected only after obtaining all necessary approvals. It is submitted that since Appellant was well aware of this fact, all energy injected prior to getting all approvals was entirely at their risk.
- f) Provisional interconnection approval granted to the Appellant also clearly mentioned that 'pumping of power without contract is not permitted and for any claim in this regards, KPTCL is not responsible' and that they have to 'obtain prior approval of SLDC for injection of power to the grid'. It is submitted that the State Commission has rightly noted terms mentioned in the provisional interconnection approval granted to the Appellant and that the Appellant was well aware of the same which the Appellant itself has produced before this Tribunal. Further, the State Commission has rightly pointed out that the Appellant injected power into the grid contrary to the terms of the provisional interconnection

approval and such injection of power without the knowledge of the Respondent No.2 i.e. SLDC would lead to grid insecurity.

- g) The State Commission has rightly observed that in the present case Section 70 of the Indian Contract Act, 1872 will not be applicable as the said energy pumped into the grid was not voluntarily taken by the Respondents, so that they can be made liable for having enjoyed the so-called benefit, as alleged by the Appellant. The energy pumped into the grid was only energy forced or thrust upon the Respondents by the Appellant.
- h) Under the Open Access Regulations, 2004 the obligation of the nodal agency is to communicate within 30 days of the receipt of application of long term open access regarding the capacity available or otherwise for open access. Further, the State Commission, has rightly observed that the said 30 days period provided to the nodal agency under Regulation 9 (6) of the said Regulations is to be taken as a "reasonable period". Further, the State Commission has observed clearly that when the Regulations itself provide for 30 days' time period for disposal of the application and therefore, the question of negligence on part of the Respondents would arise only after the expiry of the said 30 days period, for making the Respondents liable for compensation.
- i) All the judgments relied upon by the Appellant are misplaced and misleading. It is submitted that all the judgments can be distinguished on facts and as also pointed out by the State Commission, none of the decisions are binding precedents in respect of the said issue involved herein.

- j) The allegations to the effect that while a statement to offer payments upto the date of signing of the WBA was earlier expressly made in suo-moto Case No. 01 of 2014, there was a complete turn around by the Respondents on the aspect of compensation arising out of the 30 days limit, is denied as false and baseless. There was no clarity in the order of suo-moto Case No. 01 of 2014 and hence the review petition was filed by the Respondents. There was no express direction against the Respondent Nos. 2 to 4 at any point of time to pay during the 30 days' statutory period.
- k) There was no unjust enrichment to the Respondents and the Appellant's allegations that the Respondents are admittedly in violation of Regulation 9 (7) of the Regulations are denied.
- l) The allegations to the effect that the State Commission failed to appreciate that the Appellant is generating renewable source of energy and has to be encouraged, that there will be a complete wastage of energy if the same is not generated and injected, that the 30 day period cannot be considered as a mandatory wait period under the Regulations, are denied as false and baseless. These statements are unnecessary and misleading. The Respondents being statutory bodies are well aware of their responsibilities and cannot be made liable for the Appellant's faults.
- m) The reliance of the Appellant on this Tribunal's judgment in case of Hyderabad Chemicals Ltd. Vs. APERC in Appeal Nos. 123 and

124 of 2007 is misplaced as in the said case there was a written understanding between the parties that there will be no liability in case of any injection of energy without contractual agreement between the parties. In the present case the provisional Interconnection Agreement expressly prohibited any claim for injection of energy without contractual agreement.

The reliance of the Appellant on Hubli case judgment of this Tribunal is also misplaced as the facts in that case and present case are entirely different. In Hubli case the Interconnection Approval did not contain any stipulation for injection of power without contractual agreement. In the said case application for WBA was made 40 days prior to the commissioning of the project.

12. After having a careful examination of all the arguments and submissions of the rival parties on various issues raised in the present Appeal, our observations are as follows:-

- a) The present case pertains to disallowance of compensation for the energy injected into the grid by the Appellant from the date of commissioning i.e. 29.06.2013 upto 08.08.2013 being the 30 days period from the date of the Long Term Open Access (LTOA) application made by the Appellant to SLDC. Now we take questions of law raised by the Appellant.
- b) On Question No. 8 b) i.e. Whether the State Commission failed in holding that despite voluntarily accepting and using the power injected by the Appellant in the grid, the Respondents would not be liable to pay charges towards the same?, on Question No. 8 c) i.e.

Whether the Regulation 9(6) of the KERC OA Regulations which provide for thirty days' time from the date of receipt of the long term open access application, to communicate the grant of open access or otherwise, preclude the Respondents from making payments towards the electricity supplied in that period? and on Question No. 8 e) i.e. Whether the State Commission erred in allowing an alleged benefit upon the Respondents with regard to Regulation 9 (6) of the KERC OA Regulations, when the Respondents themselves are admittedly in contravention of Regulation 9 (7) thereof?, we observe as below:

- i. It is a fact that the Respondent No. 3 & 4 have made the payment for the energy injected by the Appellant beyond 8.8.2013 till signing of the WBA. The only issue is whether the Respondent No. 3 & 4 are liable to pay for the energy injected by the Appellant during 29.6.2013 to 8.8.2013. In this regard, emphasis has been placed by the parties on letter dated 28.6.2013 regarding provisional interconnection to the grid, Open Access Regulations, 2004 and various judgements of this Tribunal.

- ii. Let us first analyse the conditions of the grant of provisional interconnection to the grid vide letter dated 28.6.2013. The relevant portion of the same is reproduced below:

“.....This provisional interconnection approval is subject to following general conditions.

.....
.....

11) *It is to be noted that pumping of power without any contractual agreement is not permitted & for any claim in this regard KPTCL is not responsible. However you have to obtain prior approval of SLDC for injection of power to the grid.*

This provisional interconnection approval will only provide technical connectivity of the subject project with the Grid.”

From the above, it is very clear that the Appellant has to obtain prior approval of SLDC for injection of power to the grid and pumping of power was not permitted without any contractual agreement. This approval was only to provide technical connectivity of the project of the Appellant with the grid.

The relevant portion of the Open Access Regulations, 2004 is reproduced below:

“8. Nodal Agency

(1) The nodal agency for arranging the long-term open access shall be the state transmission utility if its system is used; otherwise the nodal agency shall be the respective distribution licensee, within whose area the point of drawal is situated.

(2) For short term open access the nodal agency shall be the state load dispatch center.

(3) The transmission Licensee/s, distribution licensee/s and the SLDC shall ensure proper coordination while arranging for open access.

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.*

.....

.....

(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.”

From the above Regulation it can be seen that the nodal agency i.e. KPTCL/SLDC after assessing the OA capacity has to communicate its decision to the Appellant within 30 days from

the date of receipt of the LTOA application. Further, KPTCL/SLDC is required to intimate the Appellant the probable date from which OA can be allowed to it after identifying scope of work in case system strengthening is required, within 30 days.

Now, we shall look into the impugned findings on this issue. The relevant portion of the Impugned Order is reproduced below:

“6 (c) Whenever there were unexplained and inordinate delay in granting of Open Access and execution of W&BA by the Utilities, this Commission had allowed compensation to the generator for the energy injected into the Grid during the delayed period. While supporting the grant of compensation in such cases, Section 70 of the Contract Act was also referred to. The analysis of the present case shows that the principles stated in Section 70 of the Contract Act cannot be applied to the present case. During the course of the arguments, the learned counsel for the Petitioner referred to the decision of this Commission rendered in the Green Infra case, wherein the compensation was allowed, for the energy injected into the Grid, from the date of interconnection till the date of execution of the W&BA. The question of allowing compensation on the ground of negligence depends on the facts of each case. Assuming that, rightly or wrongly, in that case, the compensation was allowed for the energy injected into the Grid from the date of interconnection, without taking into account the time allowed for consideration of the open access application as specified in the Regulations, that

decision is not a binding precedent for disposal of the present case. We are of the considered opinion that, in OP No.32/2014, this question has been examined by this Commission, in detail and from all angles. For the above reasons, we answer Issue No.(2) in negative.”

From the above, it can be seen that the State Commission on one hand has denied the payment of power injected into the grid by the Appellant for the period from commissioning till 8.8.2013 i.e. the day when 30 days are completed after receipt of OA application by the SLDC while on the other hand it has allowed payment of power injected from 9.8.2013 till the signing of the WBA as compensation due to delay in granting the OA by KPTCL/SLDC.

The Appellant has also referred to the judgments of this Tribunal dated 24.01.2013 passed in Appeal No. 170 of 2012 in the case of M/s. BESCO Vs. Reliance Infrastructure Ltd. & Anr. and judgement dated 12.5.2016 in Appeal No. 123 of 2015 in case of Hubli Electricity Supply Company Vs. Fortune Five Hydel Projects in support of its claim. We have gone through the said judgements of this Tribunal. We find that the judgement in Appeal No. 170 of 2012 was related to compensation for energy injected from wind plant of RInfra for the period between expiry of the PPA and the date of execution of WBA. In this case even before the expiry of the PPA i.e. on 29.9.2009, inprinciple approval for Wheeling and Banking of energy was already given by KPTCL on 17.9.2009 subject to entering into a tripartite agreement i.e. WBA. Further, the fact that the energy

pumped by the Rlnfra into the Grid and the same was received and consumed by the BESCO was not disputed. As such, the BESCO was the beneficiary in using the energy injected by the Rlnfra. In the present case the Appellant was aware of the terms and conditions of the provisional interconnection and despite that it injected power into the grid without contractual agreement and without prior permission from SLDC. Further, the provisional interconnection was only for technical connectivity with the grid. Accordingly, the facts and circumstances of the current Appeal and Appeal No. 170 of 2012 are entirely different and cannot be compared. Hence the present Appeal and Appeal No. 170 of 2012 are distinguished.

Further, this Tribunal vide judgement dated 12.5.2016 in Appeal No. 123 of 2015 after observing that there was delay on part of SLDC to act within the time frame provided in the Open Access Regulations, 2014 with regard to grant of Open Access and execution of WBA has held that the wind energy generator was entitled for the credit of energy injected into the grid from the date of the commissioning of the project till the date of the execution of WBA. On perusal of the judgement we observe that there was no such pre-condition of injection of power into the grid by the wind generator with prior approval of SLDC or only with contractual agreement. We observe that the present case is different from the case in the said appeal as in the present Appeal, the Appellant had to obtain prior permission for injection of power into the grid from SLDC and also there was requirement of contractual agreement for injection of any power to the grid. Furthermore, the State Commission has also

compensated the Appellant for power injected by it beyond 8.8.2013 i.e. for the period beyond 30 days from the receipt of OA application to the signing of WBA.

- iii. From the combined reading of the above provisions and decision of the State Commission, it is clear that the Appellant was not supposed to inject power into the grid without commercial agreement and without prior consent of SLDC. Injection of power without prior permission of SLDC tantamounts to grid indiscipline due to which grid security may be compromised. Although in present case the quantum of power injected is low but it is a matter of grid discipline if violated by the many generators at a time may result in insecure grid operation. Grid indiscipline cannot be allowed whether it is renewable power or conventional power. SLDC was supposed to communicate to the Appellant about the outcome of its LTOA application within 30 days from its receipt. The same was not done by SLDC. However, the State Commission has accepted the reasons for delay in processing the LTOA application of the Appellant based on submissions made by KPTCL. The State Commission has also compensated the Appellant for power injected by it beyond 8.8.2013 and the Respondent Nos. 3 & 4 have paid the requisite amount.

In view of the above, we are of the considered opinion that there is no infirmity in the decision of the State Commission.

- iv. Hence, these issues are decided against the Appellant.

c) On Question No. 8d) i.e. Whether the State Commission failed to appreciate that allowing the Distribution Companies to utilize the said energy without having to make payments against the same amounted to unjust enrichment on the part of the Respondents?, we observe as below:

i. In view of our decision at 12. b) above, the contention of the Appellant related to unjust enrichment on the part of the Respondents is misplaced since this act on the part of the Appellant to inject power into the grid during the disputed period is detrimental to the grid discipline.

ii. This issue is decided against the Appellant.

d) On Question No. 8 (a) i.e. Whether the Respondent No. 1, the State Commission was correct in holding that the provisions of Section 70 of the Indian Contract Act do not apply in the facts of the present case? and on Question No. 8 f) i.e. Whether the State Commission has failed to direct the payment towards supply of power in the light of settled law that where the Respondents have enjoyed the benefit of the energy that has been injected into the grid and recovered tariff in respect of the same, then in such a case the claim of the Appellant for payment of charges for the power injected into the grid cannot be said to be illegal?, we observe as below:

i. Let us examine the relevant portion of Section 70 of the Indian Contract Act, 1872 which is reproduced below:

“70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other 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.”

This provision speaks about doing an act lawfully/ delivering anything non-gratuitously by one person to another person and the other person has enjoyed the benefits of the same is liable to compensate the former. In the present case the Appellant in spite of knowing the restrictions / conditions in provisional interconnection injected power into the grid. The Respondents have no other choice but to absorb the power so pumped by the Appellant into the grid. This act of the Appellant can't be termed as lawful and also the Respondents were forced to absorb the injected power unwillingly, as there was no choice before them. The power so injected without the knowledge of the Respondents has to be absorbed instantly and cannot be rejected. Accordingly, Section 70 of the Indian Contracts Act, 1872 does not apply to the present case.

- ii. Now let us examine the findings of the State Commission on this issue. The relevant portion of the State Commission is reproduced below:

*“5. **ISSUE No.(1)** : Whether the Petitioner is entitled to any compensation for the energy injected into the Grid, from the*

date of provisional interconnection upto 8.8.2013, on the principles stated in Section 70 of the Indian Contract Act, 1872?

(a) In OP No.32/2014, in the case of Lalpur Wind Energy Pvt. Ltd. –Vs- KPTCL and others, this issue has been discussed, in detail. The facts of that case and the facts of the present case are almost similar. This Commission has noted in that case thus:

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.....

(b) In the present case, the provisional interconnection approval dated 28.6.2013 (ANNEXURE–R1) specifically states that the pumping of power without any contractual agreement is not permitted, and for any claim in this regard, KPTCL is not responsible. Further, it states that, for injection of power into the Grid, prior approval of the SLDC should be obtained. It also states that the provisional interconnection approval would only provide the technical connectivity of the subject Project with the Grid. Contrary to these terms, the Petitioner has injected power into the Grid, without the approval of the SLDC or without there being any contracting agreement to inject power into the Grid. The injection of power into the Grid without the knowledge of the SLDC might lead to Grid insecurity. It is not the case of the Petitioner that it was not aware of such conditions imposed in the provisional interconnection approval. In fact, the Petitioner has produced only the first page of the provisional interconnection approval dated 28.6.2013 (produced at Page-67 of the Petition), without producing the remaining two pages of the said document, which contain the terms and conditions of the provisional interconnection approval. This itself shows that,

knowing such conditions incorporated in the provisional interconnection approval, it seems the Petitioner has omitted to produce the remaining two page of the said document.

(c) It can also be noted that the electrical energy injected into the Grid cannot be stored, and it would be consumed instantly and there would be no option for the Respondents, either to accept or reject the said energy. Therefore, it is not a case of enjoying the benefit voluntarily by the utilities, but it amounts to thrusting the same upon them, without having the option of refusing the energy injected.

(d) In this connection, the decision of the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal Nos.123 and 124 of 2007, decided on 8.5.2008, in the case of Hyderabad Chemicals Limited –Vs- Andhra Pradesh Electricity Regulatory Commission and others can be usefully referred to. In the said case, the Generating Company approached the APTRANSCO by means of a letter, stating that, in case the generator pumps the energy into the Grid of APTRANSCO before commissioning of the Project and entering into a PPA or necessary Banking-cum-Wheeling Agreement, APTRANSCO will not be required to pay any consideration for the same. After giving such a letter, the Generating Company pumped certain quantity of power into the Grid, and subsequently, made a claim for the quantity of power injected before the date of entering into the PPA. The Hon'ble ATE has held that the principles under section 70 of the Contract Act cannot be applied in the facts and circumstances of that case, stating that the Appellant intended to deliver the energy gratuitously and there was no obligation on the person, to whom delivery had been made, to pay compensation to the

former. In the present case, the first Respondent specifically instructed the Petitioner not to inject the energy till banking arrangement is entered into and that it would not make any payment for the energy injected in the meanwhile. Therefore, the decision of the Hon'ble ATE stated above would clearly apply to the present case. For the reasons stated above, we answer Issue No.(1) in the negative."

From the Impugned findings of the State Commission, it is clear that the Appellant was aware of the fact that it cannot inject power into the grid without contractual agreement and without the consent of SLDC. In fact the Appellant has violated the terms and conditions of the provisional grant for interconnection. The State Commission while dealing the issue has also referred to this Tribunal's judgement dated 8.5.2008 in Appeal Nos. 123 & 124 of 2007. We have gone through the said judgement and we are in agreement with the conclusions drawn the State Commission in the Impugned Order. Accordingly, we are of the considered opinion that there is no infirmity in the decision of the State Commission on these issues.

- iii. The Appellant has also relied on various judgments of Hon'ble Supreme Court, Patna High Court, Privy Council etc. on the issue of non-gratuitous injection of power into the grid as per the provisions of Section 70 of the Contract Act. We have already held that the Appellant being aware of the conditions of the provisional Interconnection Agreement chose to inject power into the grid and accordingly is not liable to be compensated for injection of power into the grid for the period

from 29.06.2013 to 08.08.2013. Accordingly, the reliance of the Appellant on the said judgments is misplaced.

- iv. In view of our discussions as above, these issues are also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present Appeal have no merit as discussed above. The Appeal is hereby dismissed.

The Impugned Order dated 10.03.2016 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **13th day of September, 2017.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Mrs. Justice Ranjana P. Desai)
Chairperson