

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

**Appeal no. 120 of 2015 and IA No 193 of 2015**  
**& IA No 40 of 2016**

**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**
  
3. **Chamundeshwari Electricity Supply**  
**Corporation (CESC)**  
**927, L.J. Avenue,**  
**New Kantharaj Urs Road, Saraswathipuram,**  
**Mysuru - 570 009** **... Appellant No 3**
  
4. **State Load Despatch Centre (SLDC)**  
**Ananda Rao Circle, Race Course Road,**  
**Bangalore - 560 001** **... Appellant No 4**

**Versus**

1. **Green Infra Wind Power Generation Limited**  
Tower II, 2nd Floor, NBCC Plaza  
Pushp Vihar Sec V Saket,  
New Delhi - 110 017 ...Respondent No 1
  
2. **Karnataka Electricity Regulatory Commission**  
7th Floor, Mahalaxmi Chambers No. 9/2,  
M.G. Road ,  
Bangalore - 110 001 ...Respondent No 2

**Counsel for the Appellant:** 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 28.01.2015 passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the '**State Commission**') in O.P. No. 22 of 2014 which was filed by M/s Green Infra Wind Power Generation Limited ( herein after referred to as Respondent No 1) whereby the State Commission has

directed Appellants (No 1 to 3 ) to pay for the energy injected into the grid by the Respondent No 1 from its wind power project from 09.01.2014 (date of commissioning of Project) till 17.03.2014 (date of execution of Wheeling and Banking Agreement) at the rate of generic tariff for wind power projects.

2. The Appellant No 1 to 3 are distribution licensees operating in the State of Karnataka and are Government of Karnataka undertakings. The Appellant No 4 is the State Load Despatch Centre in the State of Karnataka.
3. The Respondent No 1 is a company engaged in generation of electricity and owns and operates a 20 MW wind power project at Ramdurga Taluk in Belgaum 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 Order dated 28.01.2015 passed by the State Commission, the Appellants have preferred the present appeal on

following grounds:

- a) The State commission has failed to appreciate that without the Respondent No 1 even having commissioned the project, there could be no question of approving a Wheeling and Banking (W&B) facility.
- b) The State Commission has failed to appreciate that installing ABT compliance meters at both the injection and drawl points are mandatory under the prevailing rules and delay caused in such installation is solely attributable to the Generator.
- c) The State Commission failed to appreciate that the date of commissioning should have been deemed to have been the date of the application for wheeling and banking facility.
- d) The State Commission failed to appreciate that there are no regulations prescribing the time limit for execution of the W&B Agreement and erroneously held that the same has to be executed in 30 days.
- e) The State Commission failed to note that the Appellants cannot be held liable to pay for energy injected prior to execution of the W&B Agreement since no statute/ Regulation creates an obligation to pay for unscheduled energy.

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

- i) On 16.09.2013, the Respondent No 1 wrote a letter to the Appellant No 4 requesting it for its approval for facilitating a Wheeling and Banking Agreement ('W&B Agreement') in order to utilize the power generated from its Project for captive consumption. At this time, the Respondent No 1's project was not commissioned; it was expected to be commissioned in the month of October 2013.
- ii) The Respondent No 1's project was however not commissioned in October 2013. On 23.12.2013, the Appellant No 4 wrote to Respondent No 1 stating that in order to consider its Wheeling & Banking Application, the Respondent No 1 would have to install Availability Based Tariff ("ABT") compliance meters at the point of injection and at the point of drawl from the grid. This is mandatory as per the KERC (Terms and Conditions for Open Access) Regulations 2004 which at clause 15 (7) provides that the metering code prevailing in the state shall be applicable to the Open Access customers also.
- iii) The Respondent No 1's project was commissioned on 09.01.2014. Subsequent to commissioning, the Respondent No 1 installed the ABT meters at the installations within the jurisdiction of the Appellant

No 2 as required and communicated the same to the Appellant No 4 as well as the Appellant No 2 on 06.02.2014.

- iv) Immediately after the Respondent No 1 had complied with the requirements of considering wheeling & banking facility, the Appellant No 4 wrote a letter to the Respondent No 1 on 11.02.2014 according consent for a wheeling & banking facility and requesting the Respondent No 1 to submit a draft W&B Agreement for execution. Subsequent to this, on 20.02.2014, the Respondent No 1 once more wrote to the Appellant No 4 to confirm that even the installation within the jurisdiction of the Appellant No 3 was now ABT compliant and also requested adding of an additional installation for the purposes of the W&B Agreement. Consent was accorded immediately on 22.02.2014 for adding the additional installation. Therefore any alleged delay for this period is entirely attributable to the Respondent No 1 and absolutely no payment can be claimed by them.
- v) The Wheeling and Banking Agreement was signed on 17.03.2014 between Karnataka Power transmission Company Ltd (KPTCL), Appellant No 1 to 3 and Respondent No 1.
- vi) The Respondent No 1 then wrote to the Appellant No.1 on

21.03.2014 and to KPTCL on 26.03.2014 requesting that in pursuance of the order of the Respondent No 2 dated 12.03.2014 in Suo Moto Case No. 1 of 2014, in the matter of M/s Renew Power Ventures Pvt. Ltd. ("Renew Order"), they are willing to sell the energy injected from 09.01.2014 (date of commissioning) till 17.03.2014 (date of signing of W&B Agreement) to the 1<sup>st</sup> Appellant at the generic tariff applicable to wind energy. Accordingly they enclosed an invoice for the alleged 44,63,460 units of energy exported and sought for payment of Rs 1,87,43,532 (Rupees one crore eighty seven lakhs forty three thousand five hundred and thirty-two). This request was rejected by the Appellant No 1 on the ground that the Renew Order was case specific. The Appellant No 4 had also clarified to the Respondent No 1 vide letter dated 21.08.2014 that a review petition had been filed against the Renew Order and payment would be considered on the basis of the outcome of the review petition. The Renew Order has subsequently been clarified to note that payment for energy is to be made only for the period after the period of 30 days from filing of the application seeking for Wheeling and Banking facility.

vii) Being aggrieved, the Respondent No 1 had filed the petition with

State Commission, being OP No 22 of 2014, praying for credit of the energy generated from its project from 09.01.2014 till 17.03.2014.

- viii) State Commission passed the order on 28.01.2015 and has directed Appellants (No 1 to 3 ) to pay for the energy injected into the grid by the Respondent No 1 from its wind power project during 09.01.2014 to 17.03.2014 at the rate of generic tariff for wind power projects.

3. For deciding this Appeal, the following issues need to be examined carefully:-

**A. Whether the Respondent No 1 is entitled to the credit of energy allegedly injected into the State grid between 09.01.2014 and 17.03.2014?**

**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 09.01.2014 and 17.03.2014?**

**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 09.01.2014 and 17.03.2014?**

**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 the State Commission erred in imposing liability on the Appellants for the delay on part of the 1st Respondent?**

4. 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:

5. On the specific issues raised in the present Appeal, the learned counsel for the Appellants has made the following submissions for our consideration
- a) That State Commission has failed to appreciate that the Respondent No 1 filed the petition for a direction to account for and credit the energy generated from the Respondent No 1's project to its captive consumers after the expiry of the wind year. Clause 6.2.2 of W&B Agreement specifies that the energy generated at the plant shall be banked on wind year basis and will be permitted to be carried forward from month to month within the same wind year, No carry forward of Banked energy is permitted from wind year to wind year. Hence the Respondent No 1 is not entitled to a credit of energy wheeled, since the wind year 2013-14 had already come to an end on 31.03.2014.
- b) The State Commission has wrongly noted that the Respondent No 1 has made an application for open access whereas the Respondent No 1 had actually written seeking for approval for wheeling & banking facility. The State Commission also erred in holding that under the

KERC (Terms and Conditions for Open Access) Regulations, 2004, Appellant No 4 is required to grant approval for execution of W&B Agreement within 30 days from the date of application. The said Regulations do not prescribe any time limit for execution of the W&B Agreement.

- 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 the Appellant No 4 for its approval for facilitating a W&B Agreement to sell power (vide letter dated 16.09.2013) at a time when it had not been issued the Commissioning Certificate for its project. Therefore the actual date of commissioning of the project, viz. 09.01.2014 ought to be considered as the date of the application and the 30-day period ought to be calculated from 09.01.2014 and not from 16.09.2013. As such the State Commission's finding in the Impugned Order that there was a three month's delay on the part of the Appellant No.4 is erroneous.
- d) The State Commission failed to note that the application made by the Respondent No 1 was for execution of a Wheeling & Banking

Agreement and wrongly concluded that the Regulations do not provide that an application for Open Access has to be made only after commissioning of the plant.

- e) 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.
- f) The decision to inject power to the grid prior to execution of the W&B Agreement was a commercial decision unilaterally taken by the Respondent No 1, being fully aware of the risks involved.
- g) Further 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. 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. 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.

- h) The Respondent No 1's action of injecting energy between 09.01.2014 and 17.03.2014 is gratuitous and thus, Section 70 of the Indian Contract Act, 1872 is inapplicable.
  
- i) The Respondent No 1's request for payment at generic tariff is based on the order passed by the State Commission 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 review petition which has been filed by the Appellants herein. The said case pertained to delay in granting open access and was not a case of delay in execution of the W&B Agreement. It is reiterated that the

Regulations do not specify any time period for execution of a W&B Agreement.

- j) The State Commission rightly noted that the Respondent No 1 cannot belatedly state that they were coerced into installing ABT meters and that there was absolutely no material to show such harassment or coercion. Having come to this conclusion, the State Commission failed to note that therefore the delay caused in installation of the mandatory ABT meters is attributable solely to the Respondent No 1 and therefore had to necessarily be excluded.
- k) The State Commission while noting that the Appellants were agreeable to pay the generic tariff failed to note that it was not an unconditional agreement to pay for any and all energy injected between 09.01.2014 to 17.03.2014 but subject to the various legal and factual objections raised by the Appellants in their statement. There can be no question of directing the Appellants to pay for energy that they have no legal liability to pay for unscheduled energy injected into the grid due to defaults/delays by the Respondent No 1.

- l) In 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 generic tariff. If it is decided that payment is to be made for any part of the energy pumped in between 09.01.2014 and 17.03.2014 ought to be considered as banked energy, payment should be made as per the latest practices adopted by the Commission.
6. The learned counsel for the Respondent No 1 has made following arguments for our consideration
- a) Karnataka Power Transmission Corporation Limited (KPTCL) , which was second Respondent 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.

- b) While it is true that the Respondent No 1's prayer in the petition before the State Commission was for accounting and credit of the energy generated from its project, the Appellants herein volunteered to pay for the energy for the period under dispute at generic tariff rate. Therefore, with the consent of the parties, the State Commission agreed for the relief as desired by both the parties. Thus the Appellants now cannot go back on their own consent accorded before the State Commission.
- c) The State Commission in its Impugned Order has clearly recorded the consent of ESCOMs, including the Appellant No 1 herein, that they are prepared to pay for the energy injected on a sharing basis as per the share of the respective Distribution Companies at the generic tariff applicable to the Wind Projects in the State of Karnataka. It is settled principle in law that an order obtained by consent cannot be challenged under any circumstances. In this case ,the consent to pay for the energy charges at generic tariff rates existed not just in the original proceedings before the State Commission but even prior to that.

- d) As regards 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 16<sup>th</sup> September, 2013. This application was not processed for more than three months by the Appellants. The project was commissioned on 9<sup>th</sup> January, 2014. The State Commission in its Impugned Order has very rightly ordered for the payment of energy charges at generic tariff rate from 9<sup>th</sup> January 2014, the date on which the project was commissioned .
- e) There is no stipulation in the Electricity Grid Code of the State Commission nor in the Open Access Regulations that ABT Meter should be installed by Open Access Consumers.
- f) In the Wheeling and Banking Agreement signed by the parties the entire Chapter on ABT Metering has been made inapplicable to Wind Projects.
- g) There is no requirement under any law to seek signing of a Wheeling and Banking Agreement or seek Open Access approval prior to the

commissioning of the project. Even as regards the PPA, the same is signed prior to the commissioning date of the project.

- h) The State Commission merely distinguished the unique fact of the present case, in so far as it held that 85% of the generic tariff was payable in case the Wheeling and Banking Agreement was signed after 8<sup>th</sup> July, 2014. However, the Wheeling and Banking Agreement of the Respondent No 1 was signed prior to 8<sup>th</sup> July, 2014 hence the Respondent No 1 is entitled to 100% of the generic tariff.
- i) Further, the State Commission has now revised the tariff from a retrospective date of the current tariff applicable to the Wind Project @ Rs 4.50 per unit for the projects established during the Control Period of 5 years commencing from 10<sup>th</sup> October, 2013. This order is in modification of the earlier order dated 10<sup>th</sup> October, 2013 passed as per the directions issued by this Tribunal in the Appeal No.82/2014 and connected cases by its judgment dated 25.11.2014. In view of the above said Order made applicable from retrospective effect, the Appellants have to pay to the Respondent No 1 @ Rs 4.50 per unit for the energy delivered from 9<sup>th</sup> January, 2014 to 17<sup>th</sup> March,

2014 (from the date of the Commissioning to the date of signing of Wheeling and Banking Agreement).

7) After having a careful examination of all the issues brought before us for our consideration, our observations are as follows:-

**8) 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 09.01.2014 to 17.03.2014:**

a) As per Appellants, on 16.09.2013, the Respondent No 1 wrote a letter to the Appellant No 4 requesting for its approval for facilitating a Wheeling and Banking Agreement ('W&B Agreement') in order to utilize the power generated from its Project for captive consumption. However as per the Respondent No 1, an application for grant of Open Access was filed by them on 16.09.2013. The KERC (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 Appellant No 4. On 23<sup>rd</sup> December 2013, the Appellant No 4 communicated to the Respondent No 1 about the requirement of installation of mandatory ABT Meters for captive/ non-captive consumers requesting therein that the same to be provided by Respondent No 1 for considering wheeling and banking application.

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 Appellant No 4 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 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.

- 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 Appellant No 4 was required to act within 30 days of the receipt of application, which it failed to do.

- e) On Metering requirements, Clause 7.5 of the Karnataka Electricity Grid Code 2005 provides that :-

**“7.5 METERING REQUIREMENTS**

*7.5.1 The provision of meters, their installation and operation in respect of the generating companies and licensees who are engaged in the business of generation / transmission / trading / distribution / supply of electricity shall comply with the Regulations issued by the Central Electricity Authority in accordance with the provisions under Sections 177 and 55 of the Electricity Act 2003.”*

As per Karnataka Electricity Grid Code 2005, Sections 6.12 requires ABT meters to be installed at all interconnection points. The same has been reproduced as,

**“6.12 METERING.**

*6.12.1 ABT compliant energy meters shall be installed by the Transmission Licensee at all interconnection points between the*

*system and the systems of different constituents. Readings of such special energy meters connected to the Distribution system shall be communicated to the concerned Area Load Despatch Centres of the Distribution Licensee and the SLDC for computation of the actual net drawl by them for each 15 minute time block.”*

Further as per Karnataka Electricity Grid Code 2005, Sections 12.1.1(b), the requirement of ABT meters for Billing purposes has been specified.

*“12.1.1 This section specifies the minimum requirements of communication and Data Acquisition to be provided to SLDC by:*

- a) Generating Stations of capacity 50 MW and above and all sub stations of Transmission and Distribution Licensees to facilitate satisfactory operation and control of the Grid.*
- b) All interface points with regard to Tariff metering data for intra-state ABT requirements for billing purposes.”*

It is evident from the above Regulations that the ABT meters need to be installed essentially from billing point of view.

- f) KERC Open Access Regulations 2004, section 9(6) and 9(7) clearly specify the time limit for communication of grant of open access. In this case, after a lapse of more than three months, the Appellant No 4 (SLDC) addressed a letter dated 23.12.2013 informing the Respondent No 1 to install ABT meters at the injection and drawl points.

- g) As per the Grid Code the responsibility of installation of the ABT Meters vests with the Transmission Licensee and ABT Metering to be provided as part of the communication system is mandated for only projects above 50 MW.
- h) There are no difficulties on record which explain the delay of more than three months on behalf of Appellant No 4, in communicating this aspect of installation of ABT meters to the Respondent No 1.
- i) The Respondent No 1 had also not raised any objections to installing ABT compliance meters. The Respondent No 1 has installed ABT meters and submitted compliance to the Appellants on 06.02.2014, without raising any dispute that it was not required under law to install the meters.
- ii) It is noted that as per Karnataka Electricity Grid Code 2005, Sections 12.1.1(b), the requirement of ABT meters for Billing purposes has been specified. The Respondent No 1 had complied with the installation of ABT Meters on 6.2.2014. Soon after compliance of installing ABT meters, the consent to

execute the W&B Agreement was given by Appellant No 4 on 11.02.2014. The W&B Agreement was executed between the KPTCL, Appellant No 1 to 3 and Respondent No 1 on 17.03.2014. 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 installation of ABT Meters i.e. from 6.2.2014 to the date of execution of W&B Agreement i.e. 17.03.2014 and not from the date of commissioning of the project to the date of execution of W&B Agreement i.e. from 09.01.2014 to 17.03.2014 as per Impugned Order of State Commission.

We order accordingly.

- 9. On the second issue regarding entitlement of the Respondent No 1 for payment at the generic tariff rate 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 09.01.2014 to 17.03.2014, we would like to refer to the observations of the State Commission in its Impugned Order which have been recorded in para 11 , 12 and para 13 which we are reproducing below:**

*“11. In response to these letters, HESCOM (third respondent) replied vide letter dated 28.03.2014 (Annexure P-11) as follows :*

*“This is with reference to your letter dated 21.03.2014. The KERC order is case specific. However for any difficulties arising in Wheeling & Banking, you are hereby requested to approach the KPTCL, being the nodal Agency.*

*Hence, your invoices for banked energy of around 44 lakhs is returned herewith.*

*F  
urther this is again to inform you that the unscheduled energy to be shared by all ESCOMs and payable on specific approvals/orders”.*

*12. A perusal of the above letters reveals that the petitioner had sought for generic tariff and there is no denial by the respondents to pay the same. The third respondent HESCOM has stated that the injected unscheduled energy has to be shared by all ESCOMs and payable on specific approval/order and has requested the petitioner to approach the Nodal Agency. Even during the arguments, the Counsel for the respondents submitted that the power would be apportioned between ESCOMs and paid for. Admittedly the petitioner was allowed to inject energy into the grid and such energy has been utilized by ESCOMs. The Commission had decided cases in the past holding that generic tariff has to be paid by ESCOMs for compensating the generating company. The ESCOMs can set off the energy so paid for, against their Renewable Purchase Obligation.*

*13. We note that the petition is filed on 27.06.2014 after the lapse of the Wind Year on 31.03.2014. We are not therefore inclined to direct credit of energy to the petitioner. With regard to the proposal of the respondent that payment at 85% of the generic tariff will be made as per the Order of the Commission dated 12.09.2014, we note that the Order is applicable for the*

*WBAs executed after 08.07.2014 and does not apply to the present case.”*

We are in agreement with the observation of the State Commission in its Impugned Order. The Appellants, therefore, should not now contest that their consent to pay at the generic tariff for the wheeled energy was wrongly recorded in the original proceedings with the State Commission.

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.

This issue is decided accordingly.

- 10. 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 09.01.2014 and 17.03.2014.**

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 11 and para 12 of the Impugned Order and reproduced above at para 9 of this judgment are as –

*“11.....Further this is again to inform you that the unscheduled energy to be shared by all ESCOMs and payable on specific approvals/orders.”*

*12. “A perusal of the above letters reveals that the petitioner had sought for generic tariff and there is no denial by the respondents to pay the same.....”*

c) We find that Appellants were agreed to pay for the unscheduled energy, to be shared by all ESCOMs and payable on specific approvals/orders.

- 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> January 2014, the date on which the project was commissioned and not from the date of application. We have ordered for this issue in Para 8 above about applicability of generic tariff from 06.02.2014 (the date of ABT meters installation).
- f) Hence on this issue we do not find any short coming in the Impugned Order except for the applicability of the generic tariff from 06.02.2014 and not from 09.01.2014.

**11. 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?**

- a) 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 Appellant No 4 for its approval for facilitating a W&B Agreement to sell power (vide letter dated 16.09.2013) 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, it is of no consequence that the Respondent No 1 made its application to SLDC on 16.09.2013; the actual date of commissioning of the project, viz. 09.01.2014 ought to be considered as the date of the application. Consequently, the State Commission's finding in the Impugned Order that there was a three month delay by the Appellant No 4 is erroneous.

We have expressed our views in Para 8 (a), (b), and (c) above. Hence SLDC must have acted promptly considering the time line specified in the Open Access Regulations. The contention made by Appellant is hereby rejected.

**12. The last issue is regarding imposition of liability by the State Commission on the Appellants for the delay on part of the 1<sup>st</sup> Respondent?**

- a) Appellants have stated that the time period of 30-day ought to be calculated from 09.01.2014 and not from 16.09.2013. Further periods of delay attributable solely to the Applicant (i.e. Respondent No 1) have to be excluded from this time period. There can be no obligation on the authorities to pay for energy injected during this period of processing of the Application.

Further, 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. 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 16<sup>th</sup> September, 2013. This application was not processed for more than three months by the Appellants. The project was commissioned on 9<sup>th</sup> January, 2014. The State Commission in its Impugned Order has ordered for the payment of energy charges at generic tariff from 9<sup>th</sup> January 2014, the date on which the project was commissioned and not from the date of application.

- c) In the Impugned Order, the State Commission has held that ,

*“We had an occasion to deal with a similar issue in case in OP No.18 of 2014 (Fortune Five Hydel Projects Pvt. Ltd - vs - KPTCL & others). We had held in that case 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.*

- d) 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 excepting that the Respondent No 1 is entitled to the credit of energy injected into the State grid from date of installation of ABT Meters i.e. from 6.2.2014 to the date of execution of W&B Agreement i.e. 17.03.2014 and it is hereby dismissed. The Impugned Order dated 28.01.2015 passed by the State Commission is hereby upheld with the modification as stated in paragraph 8 hereinabove.

No order as to costs.

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

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

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

✓  
**REPORTABLE/~~NON-REPORTABLE~~**  
mk