APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 37 of 2016

Dated : 8th February, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF:

Lalpur Wind Energy Private Limited
Through Mr. Dipan Bhuptani,
Authorized signatory
The IL&FS Financial Centre,
First Floor,
Plot No. C -22, G Block,
Bandra Kurla Complex,
Mumbai 400051 ...**Appellant**

Versus

1. **Karnataka Power Transmission Corporation Ltd**.
   State Load Dispatch Centre
   Through Chief Engineer (Electricity),
   28, Racecourse Road
   Bangalore – 560 009

2. **Hubli Electricity Supply Company Ltd. (HESCOM)**
   Through Managing Director
   P.B Road, Navanagar,
   Hubli – 580 025

3. **Bangalore Electricity Supply Company Ltd. (BESCOM)**
   Through Managing Director
   2nd Floor, K.R. Circle
   Bangalore 560 001

4. **Karnataka Electricity Regulatory Commission**
   No. 9/2, 6th & 7th Floor,
   Mahalaxmi Chambers,
   M.G.Road, Bangalore,
   Karnataka - 560 001 …**Respondents**

Counsel for the Appellant(s) : Ms. Shikha Ohri,
Mr. Hemant Singh
Ms. Jyotsna K.
Mr. Tushar Shrivastava

Counsel for the Respondent(s) : Mr. Sandeep Grover
Mr. Pankaj Grover
Ms. Pankhuri Bhardwaj
for R-1 to R-3

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by Lalpur Wind Energy Private Limited (hereinafter referred to as the "Appellant") under Section 111 of the Electricity Act, 2003 challenging the Order dated 26.11.2015 ("Impugned Order") passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the 'State Commission') in OP No.32 of 2014.

1.1 The Appellant, Lalpur Wind Energy Private Limited, has set up a 44 MW wind farm at Haveri and Dharwad Districts in the State of Karnataka (hereinafter referred to as the "Project").This Project consists of 55 Wind Energy Generators (WEGs) divided into five groups, viz., Groups A, B, C, D and E of different capacities. The Project was envisaged as a Renewable Energy Project, for sale of

power to third parties under open access, by utilizing the existing transmission and distribution network of the Respondent-Utilities. The State Commission, by the impugned order, denied the Appellant's claim of banked energy for the period from the date of commissioning of the power plant till the date of execution of the Wheeling and Banking Agreement. The State Commission further refused to allow roll over / carry forward of such banked power for a period of one year. Instead, the State Commission held that the Respondent licensees are liable to only pay Average Pooled Power Purchase Cost for the average energy injected into the grid for a period of 15 (fifteen) days in respect of Groups A, C, D and E of the Projects and of 5 (five) days in respect of Group B. It is alleged by the the Appellant that the State Commission while passing the impugned order has erred in ignoring the fact the Respondent Nos.1-3 delayed the execution of the wheeling and banking agreement and have unduly benefitted/enriched from the energy generated by a renewable energy generator.

1.2 The Appellant is aggrieved by the Impugned Order as stated above and has preferred the present Appeal.

2. Brief Facts of the Case:

2.1 The Appellant, is a company incorporated under the provision of the Company's Act, 1956. It is a wind power generator and has set up

various renewable energy based Wind Power Generating Stations in the State of Karnataka.

2.2 Respondent No. 1 herein, Karnataka Power Transmission Corporation Limited (“KPTCL”), a company incorporated under the Companies Act, 1956, is the electricity transmission company in the State of Karnataka and is also entrusted with the role and responsibility of the State Load Dispatch Centre ("SLDC**"**).

2.3 Respondent No. 2, i.e. Hubli Electricity Supply Company Limited, ("HESCOM**"**) and Respondent No. 3, i.e. Bangalore Electricity Supply Company Ltd., ("BESCOM**"**), are distribution Licensees in the State of Karnataka, under Section 14 of the Electricity Act, 2003. They are responsible for purchase of power, distribution and retail supply of electricity to their consumers and also providing infrastructure for open access, wheeling and banking in their respective areas of supply in the State of Karnataka.

2.4 Respondent No. 4, Karnataka Electricity Regulatory Commission, is the Electricity Regulatory Commission in the State of Karnataka, discharging functions and obligations under the Electricity Act, 2003.

2.5 The Appellant has preferred the present appeal as the State Commission by the impugned order has denied the Appellant’s claim

of banked energy for the energy injected into the grid from the date of commissioning of the power plant till the date of execution of the Wheeling and Banking Agreement. The State Commission has also refused to allow roll over / carry forward of such banked power for a period of one year. Instead, the State Commission by the impugned order has held that the Respondent licensees are liable to only pay Average Pooled Power Purchase Cost for the average energy injected into the grid for a period of 15 (fifteen) days in respect of Groups A, C, D and E of the Projects and of 5 (five) days in respect of Group B.

2.6 The Appellant has alleged that the State Commission erred in ignoring the fact the Respondent Nos.1-3 delayed the execution of the wheeling and banking agreement and have unduly benefitted/enriched from the energy generated by a renewable energy generator. The impugned order has been passed by the State Commission in contravention of the provisions of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 and is also arbitrary and discriminatory in as much as the State Commission in similar cases namely; Fortune Five Hydel Projects Pvt. Ltd. vs. KPTCL & Ors. (OP No. 18/2014 by an order dated 15.10.2014) and Green Infra Wind Power Generation Limited vs.

SLDC & Ors (OP. No. 22/2014 by an order dated 28.01.2015) has held that the ESCOM(s) are liable to pay generic tariff for the energy injected into the grid by the generator from the date of commissioning of the Project to the date of signing of the W&BA.

3. Questions of Law:-

The following questions of law have been raised in the present appeal for consideration-

A. Whether the Commission erroneously passed the impugned order in contravention of the provisions of the Electricity Act, 2003 and the regulations framed thereunder?

B. Whether the Commission erroneously passed the impugned order in contravention of the provisions of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004, particularly Regulation 9(6)?

C. Whether the Commission erred in passing the impugned order in an arbitrary and discriminatory manner?

D. Whether the Commission fell into error by not following its previous orders as in the case of Fortune Five Hydel Projects Pvt. Ltd. vs.

KPTCL & Ors. (OP No. 18/2014) and Green Infra Wind Power Generation Limited vs. SLDC & Ors (OP. No. 22/2014)?

E. Whether the Commission erred in ignoring the mandate under the Electricity Act, 2003 for promotion of renewable energy sources?

F. Whether the Commission erred in permitting the Respondent licensees to be unjustly enriched by the power generated by a renewable energy developer?

G. Whether the Commission erred in ignoring the discriminatory practices being followed by the Respondent Nos.1-3 in the State?

H. Whether the Commission fell into error by ignoring the different and unjust benchmarks being adopted by Respondent Nos.1-3 for the Appellant, on the same issue of energy injected into the grid from the date of commissioning of the project to the date of execution of the wheeling and banking agreement?

I. Whether the impugned order has been passed by the Commission in violation of Section 70 of the Indian Contract Act, 1872?

4. Learned counsel, Ms. Shikha Ohri, appearing for the Appellant has filed written submissions as under:-

4.1 The Appellant is aggrieved by the impugned order, as the Respondent Commission, has:

a. denied the Appellant's claim of banked energy of around 12.79 MUs for the period from the date of commissioning of the power plant till the date of execution of the Wheeling and Banking Agreement (WBA);

b. further refused to allow roll over / carry forward of such banked power for a period of one year; and

c. held that the Respondent licensees are liable to pay Average Pooled Power Purchase Cost (APPC) for the average energy injected into the grid for a reduced period of 15 days in respect of Groups A, C, D and E of the Projects and 5 days in respect of Group B Projects. Whereas, the actual period of injection of power, between the date of commissioning of the power plant and the date of execution of WBA is over three months.

4.2 The aforesaid findings of the Respondent Commission have been arrived in ignorance of the following factual and legal aspect:

a. The Project was sanctioned to M/s. Wish Wind Infrastructure Ltd. and subsequently transferred to the Appellant, as per the order of the Government of Karnataka dated 16.09.2013, with a clear understanding that the project would be implemented before

31.03.2014 and the power generated would be sold to third parties through PPA/wheeling and banking;

b. Despite repeated reminders by the Appellant on 03.12.2013, 10.01.2014, 24.01.2014 and 27.02.2014, the Respondents delayed the execution of the WBAs;

c. The energy injected into the grid was duly accepted and recorded by Respondent No. 2, without protest. The discoms benefitted out of such energy, at the cost of a renewable energy generator;

d. KPTCL by a letter dated 29.04.2014 requested Respondent No. 2, for the quantum of energy injected by the Project from the date of commissioning till the execution of the WBA, for being considered as banked energy. This clearly evidences that the understanding between the parties was clear from the outset that the energy injected from the date of commissioning till the date of execution of the WBA, will be banked.

e. Banking is a feature of generation/ injection of electricity. While, open access may commence from a particular date, banking of energy starts immediately with the injection of power into the Grid. For this precise reason, "billing period" is defined in the standard wheeling and

banking agreement, approved by the State Commission by its order dated 11.07.2008, to commence from 00:00 hrs of the COD of the project.

f. The Respondents enjoyed the benefit of the electricity generated by the Project, for the period from the date of commissioning of the project till the execution of the WBA, without compensating the Appellant for the same. This is violative of Section 70 of the Indian Contract Act, 1972.

4.3 Immediately, after the transfer of the project, the Appellant executed MoU/ LoTs with all its customers in the months of September, 2013 to November, 2013. This was done with a view to wheel/sell the banked power generated from the project from the date of Commissioning. However, the Respondents delayed the execution of the WBA for more than 3 months and refused to permit the carry forward/roll over of the banked energy.

4.4 There was a delay of around three and half months in execution of the wheeling and banking agreement by the Respondents. Around 37.6 MW of capacity was commissioned by the Appellant on 13.11.2013 and the remaining 6.4 MW capacity was commissioned only on 27.11.2013. However, the wheeling and banking agreement could

only be executed subsequently on 17.03.2014, despite repeated reminders from the Appellant as mentioned hereinabove.

4.5 In the State of Karnataka, open access is regulated by the KERC (Terms and Conditions for Open Access) Regulations 2004. These regulations provide the procedure for application and grant of open access, the transmission and wheeling charges payable for such grant of open access etc. However, these regulations did not deal with-the facility of banking until 05.10.2015 by way of the Third Amendment. This amendment has come into force with effect from 05.10.2015, that is, after the relevant period in question, and is inapplicable to the case of the Appellant.

4.6 Banking, in the State of Karnataka, was permitted by the State Commission by its order dated 09.06.2005, for wind and mini- hydel power plants on payment of banking charges @ 2% of the input energy. Thereafter, the State Commission by its order dated11.07.2008 approved the standard wheeling and banking agreement Certain relevant clauses of the Standard WBA are reproduced hereunder for convenience:

> "**Wheeling**" means the operation where by the distribution system and associated facility of a transmission and/or distribution licensee as the case may be, are used by the

company for the conveyance of electricity on payment of charges to be determined under section 62 of the Act.

…

6.2 BANKING (Applicable For Wind and Mini hydel only)

…

6.2.2 Energy generated at the plant shall be banked on Water/Wind year basis and will be permitted to be carried forward from month to month within the same water/wind year. No carry forward of Banked energy is permitted from Water/Wind year to Water/Wind year. 6.2.3 Banked energy will become ZERO at the commencement of next Water/Wind year and utilities are not liable to pay any amount for the energy lapsed on account of expiry of the year.

…

6.2.5 The Banking charges are payable as specified in the orders of KERC dated 09.06.2005 and 11.07.2008."

4.7 Thereafter, the State Commission by its orders dated 09.10.2013 and 04.07.2014 held that for captive generating stations which availed the REC scheme, the banking facility was only made available on a monthly basis. While, annual banking facility will be continued for Non-REC wind, mini hydel and solar energy projects and the banked energy unutilized at the end of the wind year, water year or financial year, as the case may be, shall be deemed to have been purchased

by the distribution licensee of the area where the generator is located and shall be paid for at 85°/o of the generic tariff determined by the Commission in its latest orders in case of wind, mini hydel and solar projects.

4.8 Apart from the aforesaid, in another case, namely; BESCOM vs. M/s. Reliance Infrastructure Ltd. &Anr. (Appeal No. 170 of 2012), this Hon'ble Tribunal, while considering a similar case, held that wind energy is a renewable source of energy. It cannot be stored. The generation wind energy is also not scheduled by the SLDC and shutting down the wind energy generator when wind is blowing would mean wastage of green energy. Thus, the wind energy generator is entitled for compensation for the energy injected from its plant between the date of expiry of the period of the PPA and the date of execution of the wheeling and banking agreement by the discom. The relevant extracts of the judgment are reproduced hereunder for convenience:

> **"29. Summary of Our Findings**
>
> *(a) RInfra is entitled for compensation for the energy injected from its Wind Energy Generator from 30.9.2009 to 10.1.2010 i.e. between the date of expiry of the period of the PPA and the date of execution of the Wheel and Banking Agreement by the Appellant at the rate*

determined by the State Commission which is the rate of energy fixed by the State Commission for supply of energy by Wind Energy Generators to the Appellant."

4.9 The following ingredients have to be fulfilled for applicability for Section 70 which squarely applies to the instant case:

a. the goods have to be delivered lawfully or anything has to be done for another person lawfully;

b. the thing done or goods delivered is so done or delivered "not intending to do so gratuitously;

c. the person to whom the good are delivered "enjoys the benefit thereof".

4.10 The Appellant has lawfully generated and injected power into the grid. The Appellant, repeatedly followed up the issue with the Respondents regarding execution of the WBA and treatment of the energy injected as banked energy. The Respondents chose not to respond to any of the letters of the Appellant. In fact, the energy injected into the grid was duly accounted for by Respondent No. 2, without any protest. Thus, the Appellant ought to be compensated for the electricity generated by it which has been enjoyed by the Respondent discom by earning tariff for the same. ***The Hon'ble Supreme Court in the constitutional bench judgment in State of W.B. v. B.K. Mondal and Sons, 1962 Supp (1) SCR 876 : AIR 1962 SC 779*** held that:

"14. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it".

4.11 In the present case, the Respondents chose not to reply to any of the letters of the Appellant and instead participated in the joint meter readings and preparation of Form B, certifying the energy injected into the grid. However, Hon'ble State Commission lost sight of the aforesaid facts.

4.12 The State Commission erroneously placed reliance upon the provisional interconnection approval to hold that the utility did not enjoy the benefit of the generation of 12.79MUs and the same was thrust upon it. The said argument is without substance or merit. Thus, the State Commission erred in placing reliance upon the provisional interconnection approval and the judgment passed in the Hyderabad Chemicals Ltd.'s case, without appreciating all the facts of the Appellant's case.

4.13 In view of the aforesaid legal and factual matrix, the Appellant most respectfully submits that (a) banking is an incident to generation/injection of power by the wind energy generator (and not grant of open access), (b) generation by Wind Energy Generators cannot be regulated and it's a must to run a project/ station, as it solely depends upon availability of wind at particular velocity, (c) having accepted the power, and taken benefit thereof, the Respondent No. 2 cannot deny payment of the same, (d) the parties from the inception, as far back as September' 2013, were aware that the developer will sell the electricity generated by the project through wheeling/banking, (e) despite repeated reminders Respondent No. 1 and 2 delayed the execution of the wheeling and banking agreement for more than 3 months, (f) Energy injected during the period in issue was duly accounted for, without any protest, by Respondent No. 2, (g) Respondent No. 2 benefitted by the energy injected by the Appellant during the relevant period. Thus, the discom which has derived benefit of such power and recovered tariff in respect of the same, ought to compensate the generator for such generation.

4.14 The Respondents, before the State Commission, submitted certain chronology of events to allege that the execution of the WBA was

delayed on account of delay in installation of ABT meters at the drawal points and any such period is to be added to the period within which the WBA was to be executed. This contention is incorrect.

4.15 Wind projects are exempted from application of Intra State ABT as per the order of the State Commission dated 20.6.2006. In any event, requirement of ABT is only for levying UI charges. In fact, the metering arrangement existent at the relevant point was accurate for recording the energy injected. Further, as per Clause 6.3 of the Wheeling and Banking agreement executed by the Appellant and the Respondents, on installation of intra-state ABT meters was applicable for Renewable projects other than Wind and Mini Hydel. However, at the insistence of the Respondents on various occasions, the Appellant arranged for installation of ABT meters at various drawal points.

4.16 This Tribunal in the case of BESCOM vs Reliance Infrastructure Ltd. (Appeal No. 170 of 2012) also observed that:

> *"22. Admittedly, ABT meters are not used to measure electricity at any point of time even after its installation. The undertaking given by the RInfra was as per the discussion with an Officer of the Appellant who is a General Manager of the Appellant with an assurance that the Agreement would be signed soon after the same is furnished. This shows that even the Appellant was aware of the fact that there was no such requirement for installation of meters and as such the absence of the compliance of the said requirement cannot be said to be detrimental to the Appellant."*
>
> ***Emphasis Supplied***

4.17 The impugned order is discriminatory in as much as the Respondent Commission in two other cases namely; the case of Fortune Five Hyde! Projects Pvt. Ltd. and Green Infra Wind Power Generation Ltd., directed the Respondents to pay at APPC rate for the period between the commissioning of the plant and the execution of WBA. In fact, in the case of Fortune Five Hydel Projects Pvt. Ltd., Respondent No. 1 by a letter dated 10.03.2014 directed HESCOM to account and credit the energy pumped into the grid from the date of commissioning of the 51.2MW power plant of M/s. Fortune Five Hyde! Projects Pvt. Ltd., till the date of execution of the WBA (please refer page 416 of the appeal paperbook). The orders passed by the State Commission in the cases of Fortune Five Hyde! Projects Pvt. Ltd. and Green Infra Wind Power Generation Ltd have been upheld by this Tribunal in Appeal Nos. 120 of 2015 and 123 of 2015.

4.18 In another case of, Renew Power Ventures Pvt. Ltd., Respondents offered to pay the power plant for the power injected till the signing of the WBA, at the generic tariff applicable. However, similar relief has not been afforded to the Appellant. It is most respectfully submitted that neither the Electricity Act, 2003, nor the Commission's order dated 09.06.2005 (under which Banking was permitted) prescribes any differential treatment between captive and non-captive power

plants for the purposes of banking, Generation of electricity by both captive as well as non- captive power plants is regulated in the same manner and if a captive power plant is allowed to be compensated for the energy generated and injected into the grid prior to the execution of WBA, there can be no reason in law or otherwise to deny the same benefit to a non-captive power plant.

In view of the aforesaid facts and submissions, it is most humbly prayed that this Tribunal may graciously be pleased to set aside the impugned order and allow the present appeal.

5. Learned counsel, Mr. Sandeep Grover, appearing for the Respondent Nos.1 to 3 has filed written submissions as under:-

5.1 The State Commission has correctly come to a conclusion, after considering the material placed before it, that mere injection of energy by the Appellant, without there being any wheeling of such energy to the 'Exclusive' or 'Partly Exclusive' consumers, does not amount to banking energy, as defined in the WBA and that the energy injected into the grid by the Appellant cannot be termed as 'banked' energy. In this regard, Articles 6.2.2 and 6.2.3 of the WBA are quite relevant. This is further buttressed by the office order dated 16.09.2013 issued by the Government of Karnataka wherein it has been clearly stated that the power generated would be sold to third parties through

PPA/wheeling and banking agreement. In fact, the Commission has very clearly recorded its findings on the contentions raised by the Appellant with regard to 'banking facility' in the Impugned Order. The relevant excerpt of the Impugned Order in this behalf reads as under:

> "*.. Article 6.2.4 pertains to calculation of the quantum of energy banked at the end of a month. The Petitioner has produced the W&BAs dated 17.03.2014 at ANNEXURE – P-11 of the Petition. Considering the various provisions relating to the banking of energy stated in the W&BA, it is clear that the banking of power starts only after the W&BA comes into operation. Unless the 'Exclusive' and 'Partly Exclusive' consumers are identified and the energy is wheeled to the said consumers, there is no question of calculating the banked energy. Mere injection of energy from the Wind Power Projects, there being no wheeling of energy to the 'Exclusive' or 'Partly Exclusive' consumers, does not amount to banking energy, as defined in the definition of 'banking' given in the W&BA approved by this commission as per Order dated 11.07.2008. The facility of banking, as contended by the Petitioner, is not contemplated under the approved banking facility. The said banking facility is provided to Mini Hydel and Wind Power Projects as a promotional measure, though in certain respects, it puts the distribution licensee into a disadvantageous position, even after collecting the banking charges. Therefore, the facility of banking, as proposed by the Petitioner, has no approval of the Commission or any law and such self-proclaimed arrangement cannot be accepted to fasten the liability on the Respondents. Therefore, we answer the Issue No. (1) in the negative."*
>
> *(emphasis supplied)*

5.2 In addition to the aforesaid, the Commission, whilst differentiating commercial operation date from the commissioning of Project has rightly held [at para 7(a) @] as under:

> *'A Project can become available for Commercial Operation, only when a Commercial Agreement, like PPA with ESCOMs or third*

parties, is entered into for sale of energy generated by the Project. The issuance of Commissioning Certificate only implies that the Project is connected to the transmission system, enabling the Project to inject the power generated into the Grid. Hence, the issuance of Commissioning Certificates does not expressly or impliedly certify that the Project was available for Commercial Operation and it could start injecting power into the Grid.'

(emphasis supplied)

5.3 The Appellant is not entitled to any compensation or credit for energy, either on account of delay in executing the WBA or otherwise, as no contractual agreement was entered into by and between the parties. Further, commissioning certificates issued to the Appellant were subject to the terms and conditions of the Provisional Interconnection Approval dated 26.11.2013 which has deliberately not been placed on record by the Appellant. The Provisional Interconnection Approval issued by Respondent No. 1 to Appellant dated 26.11.2013 clearly states that in the absence of necessary approvals/permissions for banking of energy by the developer, Respondent No. 1 will not be responsible for any pumping of power without contractual agreement. The relevant condition in that behalf reads as follows:

'(2) *the Developer /Customer has to obtain necessary approval for banking/accounting of the generated power from the concern and it is to be noted that pumping of power without any contractual agreement is not permitted and for any claim in this regard KPTCL is not responsible.'*

(emphasis supplied)

5.4 In view of the above, it is manifest that the Appellant indisputably was aware that the energy being injected into the grid, in absence of WBA or any other contractual arrangement, would be unscheduled energy against which no claim, whatsoever, could lie qua the answering Respondents. Further, the failure of Appellant to place on record the terms of Provisional Interconnection Approval, in itself, shows that the Appellant has deliberately suppressed material facts in order to claim reliefs, which it was otherwise not entitled to.

5.5 Consequently, the applicability of Section 70 of the Contract Act, 1872, in the instant case, is misplaced and the question to compensate the Appellant, therefore does not arise. The Commission whilst relying on the decision passed by this Tribunal in *Hyderabad Chemicals v. Andhra Pradesh Electricity Regulatory Commission*, decided on 08.05.2008, has rightly held that since the Appellant intended to inject the energy gratuitously, therefore the obligation to pay compensation by the answering Respondents to the Appellant will not arise.

5.6 Without prejudice to the above, the prayer sought by the Appellant seeking rolling over/carry forward of banked energy to the next year is without any basis and is contrary to the terms of the WBA. Articles

6.2.2 and 6.2.3 of the standard wheeling and banking agreement have been approved by the Commission vide Order dated 11.07.2008 as well the WBA executed in the present case, clearly provide for the banked energy to become zero at the commencement of next water/wind year, without permitting the same to be carried forward from the current year to the next year. Thus, the claim of the Appellant is clearly dehors the terms of the WBA.

5.7 The allegation of delay in executing the WBAs by the answering Respondent is misplaced and without merits. Regulation 9(6) of Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 (the "**2004 Regulations**") merely casts a duty on the Nodal Agency to communicate the capacity available or otherwise for open access to the applicant, without prescribing any time limit for executing wheeling and banking agreement.

5.8 Further, there was no delay in executing the WBAs on part of the answering Respondents, and even if there was any delay in executing the WBAs, the same was attributable to the Appellant. Indisputably, the Appellant itself had requested for additional installations and took time to install ABT meters to obtain concurrence on the open access

from the answering Respondents. Further, a perusal of the chronological order of events in the Impugned Order shows that the answering Respondents had acted in terms of regulation 9(6) of the 2004 Regulations, without resulting in any delay in granting open access to the appellant.

5.9 Considering the absence of any reasonable period provided for grant of open access, the Commission whilst taking the Regulation 9 of the 2004 Regulations to be taken as 'reasonable period' held one week to be a reasonable period to furnish the wheeling and banking agreement, and 3 days therefrom for the Nodal Agency to intimate the date from which the open access would be available. Applying the same yardstick in the instant case, the Commission whilst holding 15 days' delay in respect of groups A, C, D and E of the Project, and 5 days' delay in respect of Group 'B' of the Project, in commencement of wheeling of energy, directing the answering Respondents to pay compensation for the ascertained quantum of energy, at the Average Pooled Cost of Power Purchase [in terms of Regulation 7(c) of KERC (Procurement of Energy from Renewable Sources) Regulations, 2011] prevailing during the financial year 2013-2014.

5.10 Reliance placed by the Appellant on decisions in *Fortune Five Hydel Projects v. KPTCL & Ors.* and *Green Infra Wind Power Generation v. SLDC &Ors.* is incorrect and erroneous inasmuch as the said judgments have no application to the facts of the present case. In Fortune Five and Green Infra, the application for wheeling and banking of energy was made prior to the commissioning of the respective projects and admittedly there was a delay in executing the wheeling and banking agreements, which is not the case herein. Further, the present case is inter alia also distinguishable in terms of the Provisional Interconnection Approval granted on 26.11.2013 to the Appellant, by which the generators including the Appellant were well informed that in the absence of any contractual agreement qua the banking of energy, the Respondent No. 1 will not have any liability/responsibility, for the energy been pumped into the grid, in that period.

5.11 Further, reliance placed by the Appellant on the decision dated 15.10.2014 rendered in *Renew Wind Energy (AP) Private Ltd. v. KERC &Ors.* is misplaced, and baseless. Further the order dated 15.10.2014 is a subject matter of appeal before this Tribunal. Without prejudice, the Ld. Commission vide the Impugned Order has rightly drawn out the difference between commercial operation date and date

of commissioning of projects in general, wherein whilst the issuance of commissioning certificate implies that the project is connected to the transmission system, enabling the project to inject the power into the grid, the latter, however, will only come into operation when a commercial agreement like PPA with the supply companies/third parties is entered into for sale of energy.

5.12 The Commission has rightly placed reliance on the decision of this Tribunal in *Indo Rama Synthesis (I) Ltd. v. MERC [(2011) APTEL 77],* wherein it was in principle, held that injection of energy, without any contractual arrangement could lead to damaging consequences and therefore it should be discouraged. The relevant excerpt of the said judgment reads as follows:

> '8. ….
>
> *The generators and the licensees are expected to follow the schedule given by SLDC in the interest of grid security and economic operation. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid.'*
>
> (emphasis supplied)

5.13 The judgments in (i) *Tamil Nadu State Electricity Board vs TNERC &Ors, (ii) BESCOM vs M/s Reliance Infrastructure Limited & Anr. and*

(iii) State of West Bengal vs B.K. Mondal and Sons are factually distinguishable and hence have no application, whatsoever, to the present case.

5.14 Additionally, the case of *BESCOM vs M/s Reliance Infrastructure Limited & Anr.* can be very well differentiated on facts. In the said case, the generator was already injecting power under a power purchase agreement with BESCOM and had sought permission for execution of a wheeling and banking agreement after the expiry of the same. The Respondents were well aware of such injection of power and the Respondents had also issued a no-objection certificate for execution of wheeling and banking agreement. The Appellate Tribunal in its decision of Appeal No.123/2010 between *Indo Rama Synthetics (I) Limited* v. *MERC* had previously held that a generator is not entitled to be paid for the energy pumped into the grid without scheduling the same. However, the Appellate Tribunal in the case of *BESCOM vs M/s Reliance Infrastructure Limited & Anr .*relied upon by the Appellant specifically differentiated the above case in the light of its peculiar facts and dismissed the appeal. In the present case at hand, there was no initial power purchase agreement, nor was there any no-objection certificate issued by the KPTCL/SLDC. On the contrary, the inter-connection approval had unequivocally stated that

KPTCL will not be responsible for any pumping of power without contractual agreement. Hence, the eliance of the Appellant on the case of *BESCOM vs M/s Reliance Infrastructure Limited & Anr.* is misplaced and irrelevant.

5.15 Further, the Appellant has malafidely stated only certain portions of the judgment in *State of West Bengal vs B.K. Mondal and Sons* and misled this Hon'ble Forum. It is submitted that the Hon'ble Supreme Court in the above judgment clearly states that

> "*Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them*.
> …..
> …*the acceptance and enjoyment of the benefit of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary*".

In the above case, the Hon'ble Supreme Court has held that when services are imposed on, Section 70 is not applicable. As rightly also observed by the State Commission, the Respondents did not have an option either to accept or reject the energy injected into the grid and hence it was not a case of enjoying the benefit voluntarily by the Utilities, but amounted to thrusting it upon them, without having the option of refusing it. And thus, Section 70 was not applicable to the present case.

5.16 In light of the facts of the instant case as well as in view of the foregoing submissions, it is respectfully submitted that instant appeal is liable to be dismissed.

6. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at consideration length of time and considered the written submissions carefully and evaluated the entire relevant material available on record. The following two issues emerge out of the Appeal for our consideration:

Issue No.1:- Whether the State Commission has passed the impugned order in an arbitrary and discriminatory manner in contravention of the provisions of the Electricity Act, 2003 as well as Karnataka Electricity Regulatory Commission Regulations, 2004?

Issue No.2:- Whether the State Commission has rightly held that the respondent licensees are liable to pay only average pool power purchase cost for the energy injected into the grid and that too for part of the total delay period in execution of Wheeling & Banking Agreement?

Our Finding & Consideration:-

7. Issue No.1 -

7.1 Learned counsel for the Appellant submitted that after commissioning of its wind projects, it injected about 12.79 MUs of energy into the grid which was to be considered as banned energy. Learned counsel further submitted that 37.6 MW of capacity was commissioned on 13.11.2013 and the remaining 6.4 MW capacity was commissioned only on 27.11.2013 but the wheeling and banking agreement (WBA)

could only be executed on 17.03.2014 causing a delay of more than 3 ½ months. It is the case of the Appellant that despite causing considerable delay in execution of WBM by the Respondents, the State Commission allowed only 15 days' delay in respect of Group A C D & E of the projects and only 5 days in respect of Group B projects for making compensations. Learned counsel vehemently submitted that the State Commission not only denied the Appellant's claim of banked energy of about 12.79 MUs but also refused to allow carry forward of such banked energy for a period of one year. Learned counsel for the Appellant further submitted that banking is a feature of generation/ injection of electricity from renewable resources and from the very beginning the Appellant was made to assume that the quantum of energy injected by the Project from the date of commissioning till the execution of the WBA shall be considered as banked energy. Advancing his arguments further, learned counsel contended that the energy injected into the grid were duly accounted for by the Respondent No.2 without any protest and thus the Appellant ought to have been compensated for the entire electricity injected by it which has been enjoyed by the Respondent – DISCOM by earning tariff for the same. To substantiate his arguments, he placed reliance on the constitutional bench judgment of the Hon'ble Supreme Court in

the case ***State of W.B. v. B.K. Mondal and Sons, 1962 Supp (1) SCR 876 : AIR 1962 SC 779*** held that:

> *"14. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it".*

7.2 Learned counsel further submitted that the actions of the Respondent utilities are in violation of Section 70 of the Indian Contract Act, 1872 as well as various provisions of the Electricity Act, 2003 besides being in contravention of the relevant regulations of the State Commission. It is further emphasised by the learned counsel that the generation by wind energy generators cannot be regulated and it is must run project due to fact that the wind generation solely depends on availability of wind at particular velocity. Referring to the contentions of the Respondents that the execution of WBA was delayed on account of delay in installation of ABT meters by the Appellant, learned counsel alleged that the Respondents are searching ways and means to justify their defaults as the installation of intra-state ABT meters was applicable for RE projects other than Wind and Mini Hydel. Learned counsel placed reliance on the judgment of this Tribunal in case of

BESCOM Vs. Reliance Infrastructure Limited in A.No. 170 of 2012 which held that

"22. Admittedly, ABT meters are not used to measure electricity at any point of time even after its installation. The undertaking given by the RInfra was as per the discussion with an Officer of the Appellant who is a General Manager of the Appellant with an assurance that the Agreement would be signed soon after the same is furnished. This shows that even the Appellant was aware of the fact that there was no such requirement for installation of meters and as such the absence of the compliance of the said requirement cannot be said to be detrimental to the Appellant."

Emphasis Supplied

7.3 ***Per contra,*** learned counsel for Respondent Nos. 1 to 3 submitted that mere injection of energy by the Appellant, without there being any WBA does not amount to banking energy, as stipulated in Articles 6.2.2 and 6.2.3 of the WBA. The learned counsel further submitted that the Commission has very clearly recorded its finding on the contentions raised by the Appellant with regard to 'banking facility' in the Impugned Order. *"Therefore, the facility of banking, as proposed by the Petitioner, has no approval of the Commission or any law and such self-proclaimed arrangement cannot be accepted to fasten the liability on the Respondents. Therefore, we answer the Issue No. (1) in the negative."* Further the State Commission while differentiating commercial operation from the commissioning of project also held as under:-

'A Project can become available for Commercial Operation, only when a Commercial Agreement, like PPA with ESCOMs or third parties, is entered into for sale of energy generated by the Project. The issuance of Commissioning Certificate only implies that the Project is connected to the transmission system, enabling the Project to inject the power generated into the Grid. Hence, the issuance of Commissioning Certificates does not expressly or impliedly certify that the Project was available for Commercial Operation and it could start injecting power into the Grid.'

(emphasis supplied)

7.4 Learned counsel for the Respondents further contended that the Appellant is not entitled to any compensation or credit for energy, either on account of delay in executing the WBA or otherwise, as no contractual agreement was entered into by and between the parties. In fact, the commissioning certificates issued to the Appellant were subject to the terms and conditions of the Provisional Interconnection Approval dated 26.11.2013 which clearly stated that in the absence of necessary approvals/permissions for banking of energy by the developer, Respondent No. 1 will not be responsible for any pumping of power without contractual agreement. Learned counsel further submitted that in view of these facts, it is manifest that the Appellant indisputably was fully aware that in absence of WBA, the energy whatsoever being injected into the grid shall be unscheduled energy against which there will be no claim. Consequently, the applicability of Section 70 of the Contract Act, 1872, in the instant case, is not relevant. The State Commission also relied on the judgment passed

by this Tribunal in *Hyderabad Chemicals v. Andhra Pradesh Electricity Regulatory Commission*, dated 08.05.2008 in which this Tribunal held that since the Appellant intended to inject the energy gratuitously, therefore the obligation to pay compensation by the answering Respondents to the Appellant will not arise. Learned counsel for the Respondents contended that the allegations of the Appellant regarding delay in execution of WBA by the answering Respondent is misplaced as Regulation 9(6) of Karnataka Electricity Regulatory Commission Regulations, 2004 merely casts a duty on the Nodal Agency to communicate the capacity available or otherwise for open access without prescribing any time limit for executing WBA.

7.5 Learned counsel contended that, there was no delay in executing the WBAs on part of the answering Respondents, and a bare perusal of the chronological order of events in the Impugned Order would show that the Respondents had acted strictly in terms of KERC Regulations. Considering the absence of any reasonable period provided for grant of open access, the State Commission applying the yardstick in the instant case, held 15 days' delay in respect of groups A, C, D and E Projects, and 5 days' delay in respect of Group 'B' Projects, in commencement of wheeling of energy and directed the Respondents to pay compensation for the same. Learned counsel

was quick to point out that the compensation at the APPC in terms of KERC Regulations, 2011 prevailing during the financial year 2013-2014 was paid to the Appellant without any violation of the Electricity Act, Contract Act or State Commissions' Regulations etc..

Our findings:-

7.6 We have considered the submissions made by learned counsel for the Appellant and learned counsel for the Respondents and also took note of various judgments relied upon by the parties in their submissions. It is not in dispute that the Appellant after commissioning of its wind generators started injecting the power into the Grid without WBA being in place. The WBA could be executed only after about 3 ½ months for which both the parties blamed each other for the said delay. As a result of non-execution of WBA, the Appellant was denied the banking facilities, carry forward of the banked energy, payment of agreed tariff etc.. While the Appellant claims that it has lawfully generated and injected power into the grid and also repeatedly followed up by with the Respondents for execution of the WBA but Respondents delayed the signing of WBA considerably causing financial injury to it. Learned counsel for the Appellant vehemently contended that the Respondents enjoyed the benefit of the electricity generated by the project with full recovery of

revenue from the consumers but deprived the Appellant from its legitimate claim which is in utter violation of Section 70 of the Indian Contract Act, 1872. On the other hand, learned counsel for the Respondents has submitted that the Appellant on its own started injecting power into the gird without a valid WBA and the Respondents have acted in close adherence to the provisions of the WBA as well as the applicable KERC Regulations. Having regard to the contentions of both the parties and facts and circumstances of the case in hand, we find that the provisional inter connection approval issued by Respondent No.1 to Appellant dated 26.11.2013 clearly stated that in the absence of necessary approvals/permissions for banking of energy by the developer, Respondent No.1 will not be responsible for any pumping of power without contractual agreement. It is the contentions of the Respondents that the Appellant was well aware of the fact since beginning that the energy being injected into the grid without WBA or any other contractual agreement would be unscheduled energy against which no claim whatsoever would be admissible. As such, the claim of the Appellant under Contract Act is not relevant. In a catena of judgments, this Tribunal has held that injection of energy without any contractual agreement could lead to damaging consequences and, therefore, the same should be `

discouraged. In its judgment in *Indo Rama Synthesis (I) Ltd. v. MERC [(2011) APTEL 77],* the Tribunal clearly held as under:

> '8. ….
>
> *The generators and the licensees are expected to follow the schedule given by SLDC in the interest of grid security and economic operation. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid.'*
>
> (emphasis supplied)

Even, Hon'ble Supreme Court in the case of *State of West Bengal vs B.K. Mondal and Sons* held that when services are imposed on, the Section 70 of the Contract Act is not applicable and based on decisions of various judgments, the State Commission also recorded same view in the impugned order. In the light of these facts, we are of the considered opinion that the State Commission has passed the impugned order in accordance with law considering various decisions of the apex court as well as this Tribunal and has assigned cogent reasoning. We do not notice any infirmity or perversity in the order of the State Commission and thus, any interference of this Tribunal is not called for.

8. Issue No.2 -

8.1 We have carefully gone through the submission of the learned counsel for the Appellant and Respondents and also took note of various judgments and relevant material on record. Learned counsel for the Appellant submitted that despite commissioning of its project in all respects by 27.11.2013, the WBA could only be executed on 17.03.2014 causing a delay of more than 3 & ½ months. As a result of such delay, the Appellant has been denied the claim of banked energy of around 12.79 MUs, carry forward of such banked power and realisation of its full revenue for the energy injected into the grid. Learned counsel for the Appellant contended that the State Commission did not hold the Respondents responsible for the entire inaction causing such a delay in execution of WBA and instead, penalised the Appellant with the mere compensation with payment of APPC of 15 days in respect of Groups A, C, D and E of the Projects and only 5 days in Group B projects whereas, the actual period of injection of power, between the date of commissioning of the power plant and the date of execution of WBA is over 3 ½ months. Learned counsel further submitted that the Respondents have delayed the execution of WBA on one or the other reason solely attributable to them and have enjoyed the benefit of electricity generated by the project without compensating the Appellant for the same.

8.2 ***Per contra*****,** learned counsel for the answering Respondents refuted the allegations of the learned counsel for the Appellant and cited the various clauses of the WBA which clearly indicated that injection of power into the grid without a valid contractual arrangement will be at the risk and cost of the Appellant and the Respondents are not responsible for any claim for loss to that account. It was further indicated by the learned counsel for Respondents that the delay in execution of WBA was entirely on account of the Appellant and the Respondents have taken proper action in time in accordance with the Regulations of KERC in this regard. Further, for the genuine delay which were attributable to the Respondents, the Appellant has been compensated by the State Commission. Regarding the allegations of the Appellant, for discrimination in adopting different yardsticks, as compared to other wind generators, learned counsel for the Respondents pointed out that the facts in the referred cases were entirely different and hence the question of any alleged discrimination does not arise.

Our Findings:-

8.3 We have carefully considered the submissions of both the parties and also took note of other cases for which learned counsel for the Appellant has questioned the matching parity and alleged

discrimination. The reliance placed by the learned counsel for the Appellant on decisions in *Fortune Five Hydel Projects v. KPTCL & Ors.* and *Green Infra Wind Power Generation v. SLDC & Ors.* is uncalled for as the application for wheeling and banking of energy in these cases was made prior to the commissioning of the respective projects and admittedly, there was a delay in executing the WBA, which is not the case herein. Additionally, learned counsel for the Respondents pointed out that the reliance of the Appellant on other judgments of this Tribunal is totally irrelevant as the same were passed in different facts and circumstances having no matching similarity with the case in hand. After critical analysis of the facts in cited cases and the case in hand, it is relevant to note that there is no force in the arguments of the learned counsel for the Appellant regarding discrimination whatsoever. Consequentially, we opine that the State Commission has carefully analyzed the records and material placed before it and has passed the impugned order in a judicious manner without being prejudice to any developer and without any discrimination to the Appellant. Thus, any interference from this Tribunal on this ground is not required.

ORDER

For foregoing reasons, as stated supra, we are of the considered view that the issues raised in the instant appeal No.37 of 2016 are devoid of merits. Hence, the appeal is dismissed as devoid of merits.

The Impugned Order dated 26.11.2015 passed by the Karnataka Electricity Regulatory Commission in O.P.No.32 of 2014 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **8th day of February, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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