Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.170 of 2012

Dated:24th Jan, 2013

Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

M/s. Bangalore Electricity Supply Company Limited.,
K.R./Circle,
Bangalore-575 001

…Appellant

Versus

1. **M/s. Reliance Infrastructure Ltd.,**
   No.H Block, 1 Floor,
   Dhirubhai Ambani Knowledge City (DACK)
   Thane, Belapur Road,
   Navi Mumbai-400 710

2. **Karnataka Electricity Regulatory Commission**
   6th & 7th Floor,
   Mahalaxmi Chambers,
   No.9/2, M.G. Road,
   Bangalore-560 091

…..Respondent(s)

Counsel for the Appellant : Mr. Raghavendra S Srivatsa
Mr. Sriranga S
Mr. Sumana Naganand

Counsel for the Respondent(s): Ms. Anjali M Chandurkar
Mr. Hasan Murtaza

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Banglalore Electricity Supply Company Limited (BESCOM), is the Appellant herein. The Reliance Infrastructure Ltd (RInfra), is the Respondent.

2. BESCOM, the Appellant, is aggrieved by the order dated 29.3.2012 passed by the Karnataka State Commission allowing the original petition filed by M/s. Reliance Infrastructure Ltd (RInfra) and issuing directions to the Appellant to pay for the energy injected into the Grid which has been consumed by the Appellant at the rate of Rs.3.40 per unit. Hence the Appellant has presented this Appeal.

3. The short facts are as follows:-

   i) The Reliance Infrastructure Ltd (RInfra), the 1st Respondent, set-up a Wind Energy based Power Station of 7.59 MW in Chitradurga, Karnataka on 1.6.1999.

   ii) The Karnataka Power Distribution Company Limited (KPTCL) executed a PPA

with the Respondent, RInfra on 5.4.2002 for the purchase of power from Wind Energy Generator of RInfra. The PPA was to expire on 29.9.2009.

iii) KPTCL by its letter dated 9.6.2005 intimated to RInfra (R-1) that under the PPA, the RInfra has to make supply to the Appellant BESCOM as the same was transferred to the Appellant by the Government of Karnataka.

iv) During the currency of the PPA, the RInfra approached the Appellant and the State Load Dispatch Centre seeking permission to enter into a Wheeling and Banking Agreement.

v) On 20.3.2009, the Appellant replied to RInfra that Wheeling and Banking Agreement facilities could be considered only after the expiry of the PPA (i.e. on 29.9.2009).

vi) On 7.7.2009, the RInfra, sought no objection certificate from SLDC i.e. KPTCL for execution of the Wheeling and Banking Agreement. Accordingly, the SLDC on 22.8.2009 granted no objection certificate for

execution of the Wheeling and the Banking agreement.

vii) On that basis on 24.8.2009, the RInfra wrote to the Appellant seeking their approval for execution of the Wheeling and banking agreement and requested for approval as early as possible since the PPA would expire on 29.9.2009.

viii) On 15.9.2009 and again on 22.9.2009, RInfra sent letters to SLDC requesting to permit the Wheeling of power from 30th September, 2009 till the Wheeling and Banking Agreement is executed. In response to the letter, the SLDC sought for some clarifications. In the meantime on 29.9.2009, period of the PPA came to an end. On the same date, the RInfra made a request to the KPTCL and sought its permission to wheel the power till the execution of the Wheeling and Banking Agreement. The Appellant informed RInfra that the pumping of power in the absence of any agreement was an issue between the SLDC and RInfra and therefore, the Appellant will not have any liability towards any energy pumped by RInfra

into the Grid after 29.9.2009. However, RInfra pumped the energy into the Grid of the Appellant from 30.9.2009 despite the expiry of the PPA. On the same day, RInfra requested the SLDC to expedite the execution of the agreement.

ix) On 6.10.2009, the SLDC wrote a letter to RInfra giving approval for entering into Wheeling and Banking Agreement with RInfra to wheel the energy. Accordingly, on 14.10.2009, the Wheeling and Banking Agreement was executed between the SLDC i.e. KPTCL and the RInfra.

x) Thereupon, on 11.1.2010, the Appellant signed Wheeling and Banking Agreement which was already entered into between the KPTCL and RInfra on 14.10.2009.

xi) Then the RInfra wrote letters to the Appellant as well as SLDC on 15.1.2010 and 6.2.2010 respectively and also on subsequent dates requesting to seek the credit for the energy pumped into the Grid from 30.9.2009 to 10.1.2010.

xii) On 28.9.2010, the Appellant wrote a letter to RInfra requesting to review the PPA @ Rs.4.66 per kWhr without any annual escalation. On this letter, the RInfra sent a reply on 2.11.2010 requesting to renew the PPA till the Wheeling and Banking Agreement was executed.

xiii) On 3.12.2010, the Appellant rejected the request of the RInfra to renew a PPA for the period between 30.9.2009 and 10.1.2010 on the ground that the term of the tariff quoted in the PPA was completed on 29.9.2009 itself.

xiv) In view of the rejection of the Appellant, the RInfra filed a petition before the State Commission (R-2) in OP No.11 of 2011 claiming compensation at the PPA rate, for the power injected by RInfra during the period between 30.9.2009 and 10.1.2010 i.e. between the date of the expiry of the period of the PPA and the date of the execution of the Wheeling and Banking Agreement.

xv) After hearing the parties, the State Commission by the impugned order dated 29.3.2012 directed the Appellant to pay RInfra

@ Rs.3.40 per unit for the electricity pumped into the Grid from the date of the expiry of the PPA till the date of signing of the Wheeling and Banking Agreement.

xvi) On being aggrieved, the Appellant has filed his Appeal.

4. The Learned Counsel for the Appellant has made the following submissions:-

i) The Tribunal has already held in Appeal No.123 of 2010 that in case of injection of electricity without the consent of the Distribution Licensee, without any schedule or agreement, the Generating Company is not entitled to the payment for the same. The State Commission in spite of referring to the said judgment and concurring with the reasonings in the said judgment, has given a direction to the Appellant to pay the compensation. While on the one hand the State Commission has expressed its concurrence with the findings of this Tribunal that no demand can be made for payment after the expiry of the PPA but, on the other hand, gave a direction to the Appellant to make the

payment which in effect is contrary to the dictum laid down by this Tribunal.

ii) In the present case, the power injected by RInfra was without the knowledge or consent of the Appellant. If a generator connected to the Grid injects the power into the Grid without a schedule, the same will be consumed by the Grid even without the knowledge or consent of the Distribution Licensee. Such injection of power is to be discouraged in the interest of secured and economic operation of the Grid. If the same is allowed, it will result in more such cases. Consequently, number of Open Access Generators who are unable to sell that power to third parties will supply such power without any schedule and demand compensation for it.

iii) The impugned order has recorded a clear finding that there was no delay whatsoever on the part of the Appellant in executing the Wheeling and Banking Agreement. It is also recorded in the impugned order that within 3 days of the compliance of the requirements, the Wheeling and Banking

Agreement had been executed. Having given such a finding, the State Commission ought to have come to the conclusion that there is no obligation for the Appellant Distribution Licensee to pay for the energy supplied to the Grid after expiry of the PPA and till the Wheeling and Banking Agreement was executed. In fact, contrary to the dictum laid down by this Tribunal in the case referred to above, the State Commission has come to the erroneous conclusion that the Appellant has to pay tariff of Rs.3.40 per unit which is the tariff applicable to only new projects. As such, this finding is wrong.

iv) It is an undisputed fact that the compliance with Article 8 of the Standard Agreement was completed only on 6.1.2010 and this was intimated on 7.1.2010. Immediately thereafter, i.e. within a few days, the arrangements were made for executing the said agreement on 11.1.2010. Therefore, the question of making any payments up to 7.1.2010 would not arise at all because directing payment for energy supply would amount to placing a premium on the conduct of

the RInfra in dumping the energy into the Grid without any PPA or Wheeling and Banking arrangement, in spite of non compliance with the metering requirements.

v) It is arbitrary to consider the project to be a new project and burden the utility by applying the same tariff which is applicable to a new project. If at all, there was any tariff payable for the illegal dumping of power into the Grid by the RInfra, it has to be only on a nominal charge fixed components for which the RInfra has already paid the tariff under the PPA. Grant of tariff @ Rs.3.40/- would amount to allowing the RInfra to make a super profit by taking advantage of its illegal acts.

5. The learned counsel for the Appellant has cited the following judgments in support of his contentions:

(a) (2011) 8 SCC 647 Sharma Transport V. State of Maharashtra and Others;

(b) (1919) 1 AC 1 New Zealand Shipping Co. Ltd. V Societe Des Ateliers Et Chantiers De France;

(c) AIR 2005 SC 1 Friends Colony Development Committee Vs State of Orissa

(d) 1992 Suppl (1) 443 Union of India and Others Vs. Kamlakshi Finance Corporation ltd.,

(e) (2000) 1 SCC 644 S.I. Rooplal And Anr Vs. Lt Governor of Delhi and Ors

(f) (1982) 1 SCC 271 A K Roy vs. Union of India

6. In reply to the above submissions, the learned Counsel for the RInfra, has made the following submissions:-

i) The decision in the Indorama case cited by the Appellant is clearly distinguishable and does not apply to the present case. In the present case, though the contract between the KPTCL and RInfra was signed on 14.10.2009, the KPTCL has granted no objection certificate as early as on 22.8.2009 i.e. prior to the date of expiry of the PPA on 29.9.2009. Thus, there is an agreement which was executed between the RInfra and KPTCL (SLDC) which was in fact to be a tripartite agreement. As a matter of fact, even prior to the expiry of the PPA i.e. on 29.9.2009 in principle approval was given by the Appellant on 17.9.2009 itself to wheel energy to the intending consumer.

ii) While in the case of Indorama (Appeal No.123 of 2012), the SLDC and the Distribution Licensee had no knowledge, in the present case, the SLDC as well as the Distribution Licensee, the Appellant had knowledge and had signed the accounting of the energy injected into the Grid. Such signatures on Form B by the respective authorised officers of the Appellant were without any protest. Thus, it is clear that the Appellant had the knowledge of the same. The accounting of energy that is the quantum is not at all disputed. It is also not in dispute that the beneficiary is the Appellant. Therefore, the ground of the Appeal urged by the Appellant is not legally sustainable.

iii) The State Commission has clearly held that that Intra-State ABT is not applicable and accordingly the installation of meters is required only after signing of the wheeling and banking agreement. The insistence in the submissions made by the RInfra was clearly to provide for a future eventuality in the event of ABT being applicable. Admittedly, no case has been made out that banking of power

would be a requirement since it has been clearly stated in the correspondence that RCOM would be a partly exclusive consumer getting its balance supply from the Appellant.

iv) While there is a finding that no undue delay could be attributed to the Appellant, the State Commission has however given similar finding to the effect that the RInfra also was willing to comply with the condition once the agreement was signed and the installation of the meters was held to be required only after the signing of the Wheeling and Banking Agreement. Thus, it has been held by the State Commission that RInfra was also not found at fault.

v) The findings of the State Commission with regard to the ABT meters that such delay cannot be a ground for denying the RInfra the charges entirely is by reason of the fact that ABT regime was not all applicable to wind projects such as that of the RInfra.

vi) Admittedly, the Appellant has enjoyed the benefit of energy that has gone in the system which cannot be regulated. This is

clear from Forms B signed by both the parties i.e. SLDC as well as the Appellant. That apart, the flow of power into the Grid cannot be said to be unlawful as it was not intended to be done gratuitously. It cannot be debated that the Appellant in fact has derived the benefit from the power injected into the Grid and recovered tariff in respect of the same. Therefore, the RInfra is entitled to be compensated as per the Section 70 of the Indian Contract Act, 1872.

vii) The State Commission has given clear reasonings in the impugned order while passing the order which is just and appropriate taking into consideration of both the dictum laid down by this Tribunal as well as the present facts. There is no infirmity in this order. Therefore, the Appeal has no merits.

7. The learned counsel for the Respondent has cited the following judgments in support of his contentions:

(a) AIR 1968 SC 1218 Mulamchand vs State of Madhya Pradesh;

(b) (2007) 13 SCC 544 Food Corporation of India and Others vs Vikas Majdoor Kamdar Sahakari Mandli Limited

8. The crux of the contentions urged by the rival parties is as follows:-

(a) According to the Appellant, once the PPA expires, there is no obligation on the part of the Appellant, Distribution Licensee to purchase the electricity from the Generator (R-1) as per the PPA or to give credit for the same in view of the specific statement made by the Appellant to the RInfra that it was not liable to pay any amount for the energy pumped after the date of expiry of the PPA and therefore, the State Commission's directions to the Appellant to make the payment for the energy pumped is not legally valid.

(b) On the other hand, the Learned Counsel for the Respondent in justification of the impugned order submitted that even before the expiry of the PPA, the RInfra followed up with the Appellant for execution of the wheeling and banking agreement but the Appellant did not act promptly and while the process for execution of agreement was going on, the

RInfra was constrained to pump or inject the energy from its Wind Energy Generator into the Grid and that therefore, the Appellant is liable to give credit to the electricity generated through the interregnum period and consequently, the RInfra is entitled to payment of compensation.

9. In the context of these rival contentions, the following question would arise for consideration:

"Whether RInfra who had injected the power from its Wind Energy Generator into the Grid which had been consumed by the Appellant without having any valid PPA or Wheeling and Banking Agreement during the said period in the light of the present facts of the case, is entitled for any compensation from the Appellant?

10. At the outset, it has to be pointed out that the impugned order has been passed by two Members of the State Commission namely Chairman and other Member in favour of the RInfra and one Member differing from the view of the majority opinion gave a finding in favour of the Appellant holding that the RInfra was not entitled to get any

payment. Ultimately, majority view expressed by the Chairman and Member has been declared to be the impugned order.

11. Let us first see the impugned order passed by the Chairman and the Member. The relevant portion is as under:

> *7. The question that arises for consideration is whether the petitioner in the facts of this case is entitled to seek credit for the energy pumped into the grid or in the alternative entitled to be paid for at the PPA rates for the energy pumped during the period from 30.9.2009 to 10.1.2010.*
>
> *8. We have gone through the list of dates and events produced by the petitioner at Page A, B, C, D & E. Going by the said dates and letters exchanged, we do not find any undue delay caused by the respondents in executing the Wheeling and Banking Agreement. The correspondence between the parties is in the normal course of commercial transaction. There is no dispute that the requirement of the conditions specified in Article 8.1, 8.2 and 8.7 of the Wheeling and Banking Agreement has to be fulfilled by the petitioner for commencement of Wheeling and Banking and admittedly, it fulfilled them only on 6th January 2010 (the same was intimated to BESCOM on 7th January 2010) and BESCOM has executed the Wheeling and Banking Agreement on 11.1.2010, i.e., within three (3) days thereafter. Therefore no undue delay can be attributed to*

the respondents in executing the Wheeling Agreement.

9. There is no dispute that the Power Purchase Agreement between the parties expired on 29.9.2009 and BESCOM was not under the obligation to buy the power generated by the Petitioner's plant. It is also not disputed that BESCOM had made it clear that it will be under no obligation to purchase the power of the Petitioner from 29.9.2009 and onwards.

10. In a recent case of M/s. Indo Rama Synthetics (I) Limited Vs. MERC in Appeal No. 123 of 2010, the Hon'ble Appellate Tribunal for Electricity (ATE) while upholding the MERC's Order that generator is not entitled to be paid for the energy pumped into the grid without scheduling the same.

……
……..

12. As per the above Order of the Hon'ble ATE, the generator, who pumps the power without scheduling or without having an agreement or without being asked for, cannot as a matter of right demand charges for the energy pumped in. Duly following the above judgment of the Hon'ble ATE, we hold that the petitioner, in this case also, cannot demand payment for the electricity pumped into the grid after the expiry of agreement at the rates of the PPA.

13. The next question is whether petitioner shall be totally denied of payment for the energy pumped in and utilized by the respondents in view of the above judgment. The Hon'ble ATE in the above case has denied the total payment considering the peculiar facts of that case such as, the generator was pumping power only during off peak hours to get the maximum rates, the electricity generated was too expensive and was generated from oil-based Power Plant and could therefore have been regulated by reducing generation when it did not need power.

14. In the present case, admittedly the petitioner is a small Wind Generator of 7.59 MW. As is well known, Wind generation cannot be regulated, as generation depends on wind, which will not be constant and dependent on the weather, and the Generator has virtually no control over generation, like on the generation by a thermal power plant using oil or gas. Further, as of now, wind projects are exempted from application of Intra State ABT as per the orders of this Commission dated 20.6.2006, and installation of the Meters is required only after signing of the Wheeling and Banking Agreement to account for banked energy. Further, the terms of the Wheeling and Banking Agreement comes into operation only after signing the same, i.e., on 11.1.2010. Therefore, delay in putting up of ABT meters cannot be a ground for denying the Petitioner of the charges entirely. Further the Group Company, to which the petitioner sought to supply on Open Access basis during the

period in question, has already paid at HT 2(b) tariff for the power consumed from the BESCOM's network.

15. As observed above, the Petitioner was in the process of entering into a Wheeling and Banking Agreement with the Respondents and was willing to comply with the condition of metering once the Agreement is signed, and utilization of Meters will mainly arise only when banking facility is availed. In our view, depriving the Petitioner of the energy charges totally, on the ground that Respondent No.1 had informed that it will not pay for the electricity pumped into the grid till the Agreement is signed, will not be fair and proper, as the Generator incurs cost for generation and utility has made use of the same. Therefore, it will be equitable if we direct Respondent No.1 to pay for the energy pumped in at the rate of Rs.3.40 per unit, which is the rate determined by this Commission at the relevant point of time for wind energy projects. Accordingly, we direct Respondent No.1 to account the energy fed into the grid, at Rs.3.40 per unit minus the applicable Wheeling and Banking charges, payable towards the future Bill payments to be made by Reliance Communication Ltd., to whom power is being supplied by the Petitioner. The payment to the petitioner shall be made within a period of three (3) months from the date of this Order. Ordered accordingly.

12. The crux of the findings given in the impugned order is as follows:

(a) There is no dispute that the requirement of the conditions specified in the Wheeling and Banking Agreement has to be fulfilled by the RInfra before the commencement of the Wheeling and Banking. In the present case, the said conditions were fulfilled by the RInfra only on 6.1.2010. Within a few days, BESCOM executed the Wheeling and Banking Agreement on 11.1.2010. Therefore, no undue delay can be attributed to BESCOM in executing the Wheeling Agreement.

(b) The Power Purchase Agreement was executed on 5.4.2002. This Agreement had expired on 29.9.2009. For this period, BESCOM was liable to buy the power from the RInfra. Subsequently, after the expiry of PPA, BESCOM was not obliged to buy power from the RInfra.

(c) The Tribunal in the recent case of M/s. Indo Rama Synthetics (I) Limited Vs. MERC in Appeal No.123 of 2010 held that the generator is not entitled to be paid for the energy pumped into the Grid without scheduling the same. In view of the said decision we hold that the

RInfra cannot demand for the electricity pumped into the Grid after the expiry of the Agreement at the rate of the PPA.

(d) However, we have to decide another question as to whether the RInfra shall be totally denied of payment for the energy pumped and utilised by the BESCOM in view of the above judgment. In the said case, this Tribunal has denied the total payment considering the peculiar facts of that case. In that case, the generator was pumping power only during off peak hours to get maximum rate. The electricity generated was too expensive and was generated from oil based power plant. It could have been regulated by reducing the generation when it did not need power.

(e) The facts of the present case are different. RInfra is a small Wind Generator of 7.59 MW. The Wind Generation cannot be regulated as generation depends on wind which will not be constant. It is entirely dependant upon the weather. Wind Generator has no control over the generation. But the

generation by a thermal power plant using oil or gas can be regulated and controlled.

(f) Further the wind projects are exempted from application of Intra State ABT as per the orders of the State Commission. The installation of the meters is required only after signing of the Wheeling and Banking agreement to account for banked energy. Further, the terms of the wheeling and banking agreement come into operation only after signing of the same i.e. on 11.1.2010. Therefore the delay in putting up ABT meters cannot be a ground for denying the RInfra of charges entirely. As a matter of fact, the RInfra was in the process of entering into a wheeling and banking agreement with BESCOM. It was willing to comply with the condition of metering once the agreement is signed. Therefore, depriving the RInfra of the energy charges totally will not be fair and proper as the RInfra, the Generator has incurred cost for generation and BESCOM has consumed and made use of the same.

(g) Therefore, it would be equitable to direct the BESCOM to pay for the energy pumped in at the rate of Rs.3.40 per unit which is the rate determined by the Commission at the relevant point of time for wind energy project. Accordingly, the BESCOM is being directed.

13. Now, we will refer to the minority view of the Member of the Commission through his order. The relevant portion is this:

" MY VIEWS :

The Petitioner is not entitled either to credit for the energy pumped into the grid or entitled to be paid at PPA rates for injecting power during the period from 30.9.2009 to 10.1.2010, for the following reasons :

(a) It is seen that as early as in March, 2009, Respondent No.1-BESCOM, by making a reference to the Petitioner-Reliance Infrastructure's communication, have intimated to the Petitioner that after the expiry of the PPA, the Wheeling and Banking Agreement has to be entered into for the required transfer of electricity to the Petitioner's Group Company. Nothing could have prevented the Generator (Petitioner) to study the relevant requirements as per the Standard Wheeling and Banking Agreement, at that time itself, and in preparing itself for meeting the requirements as per the relevant provisions under Article 8, like SCADA, Metering. It is

settled that ignorance of law is not an excuse and cannot claim benefits for one's own deficiencies. At the time of expiry of the PPA in September, 2009, the Petitioner has admitted that it would require additional three months' time to fulfil the requirements as per Article 8 of the Standard Wheeling and Banking Agreement (WBA);

(b) BESCOM had, vide its letter dated 25.11.2009, conveyed to the Petitioner-Reliance Infrastructure that fixing of ABT Meters was mandatory and that the signing of the WBA will be done only after fixing of ABT Meters. Although, both the Petitioner and Respondent No.1 (BESCOM) have used the term 'ABT Meters' in a casual way, the necessity is for meeting with the requirements as per Article 8.1, 8.2 and 8.7 of the Standard Wheeling and Banking Agreement Format approved by the Commission, which details parameters like specification of the Meters to be fixed at the sending and receiving ends and also the SCADA requirement to be implemented by the Petitioner;

(c) The Hon'ble Appellate Tribunal for Electricity in ***Appeal No.123/2010*** *in the case of Indo Rama Synthetics (I) Limited –Vs- MERC has upheld MERC's Order, wherein it has been held that Generator is not entitled to be paid for the energy pumped into the grid without scheduling the same. Duly following the above Judgment, I hold that the Petitioner in this case cannot demand payment for the electricity pumped into the grid after the expiry of the PPA without a valid WBA; also that the*

Hon'ble ATE in the above case has denied total payment considering the facts of that case, such as Generator was pumping power only during off-peak hours, electricity generated was too expensive and the generation could have been regulated, etc. The Petitioner, should have satisfied the requirements of Article 8 of the Standard Wheeling and Banking Agreement, approved by the Commission, before injecting power into the grid;

(d) Facts like electricity generated is by Wind Mill, the Petitioner was making correspondence with the Respondents, was in the process of entering into a WBA much before the expiry of the PPA, and that the 1st Respondent has collected charges for the power supplied to the Company, for whose consumption the Petitioner had intended to supply the energy during the period in question, do not entitle the Petitioner for any payment, because the Petitioner did not possess either a valid PPA or WBA on the dates of energy injection into the grid. It is incumbent upon Reliance /communication to pay as a HT 2(b) Consumer till such time WBA is finally entered into;

(e) It is my view that even in the case on hand, though it is not a costly power that has been injected, though it is not injected during off-peak hours, though there is no Schedule by the State Load Despatch Centre (SLDC), the Generator in this case is not entitled for any payment in view of the following :

(1) In the case of infirm power sources, like that of Wind Generator in the case of the Petitioner, instead of Scheduling by SLDC, the Wheeling and Banking Agreement (WBA) has been authorized by the Commission to be entered into and has to be entered into before any injection of power into the grid, if there is no PPA, which is the position in the case of the Petitioner. Without any form of Agreement, in terms of WBA or PPA, injecting power into the grid even after being warned accordingly, amounts to defiance of law and taking it into one's hand ;

(2) The question is not about the costly power in this case, but it is about which ESCOM is the recipient of the power in the absence of a PPA or a WBA. If any payment were to be allowed to the Generator, it will be a pass through to the consumer, who will be unduly burdened for energy not planned to be received, which does not effectively go to meet consumer load. Such injection of power goes only to improve System frequency, which is not the job entrusted to the Petitioner. This is also the spirit and purpose of Hon'ble ATE's Order;

(3) Application or otherwise of Intra-State ABT to Wind Generation has no relevance to that of the dispute in this case, like providing Meters as per Article

8.2, absence of WBA and others. ABT is only for levying UI charges; whereas Meter requirement as per Article 8.2 is for accuracy of measurement of energy injected. Petitioner itself conceded its obligation to satisfy Article 8.2 requirement and around September, 2009 pleaded for three months' time. One cannot be allowed to take advantage of its own deficiencies;

(4) The additional question is about the Generator taking law into its hands, injecting power without a proper Agreement – knowing full-well that the cause of delay in execution of the WBA was entirely on him for being ignorant and having not fulfilled the required conditions under Article 8 of the Standard WBA Format in time;

(5) In the operation of the Power System, the Generator or the Electricity Supply Company (ESCOM) have always a remedy to seek under the Electricity Act, 2003 and the Regulations framed there under, and have no right to take law into their hands, since whatever compensation, due to them, could always be obtained through a proper recourse to legal remedies;

(6) The receiving end Company, viz., Reliance Communications, has the

obligation to pay the tariff [HT 2(b)] till such time the WBA is formally entered.

5. Summarizing the above, I hold that, for the reasons stated above, the Generator being not entitled to inject power without a valid Agreement, either by way of a PPA or WBA, the Petitioner in this case is not entitled to any charges for the energy pumped in on account of self-inflicted deficiencies and delays. It is well known that in case the payment for the energy is ordered on the ESCOM, it will be a pass-through to the unsuspecting consumer, inflicting injustice to its interest, imposing an undue burden on it.

14. The crux of the findings given by the minority member is as under:

(a) The Appellate Tribunal in the case of Indorama case in Appeal No.123 of 2010 while upholding the MERC orders has held that the generator is not entitled to be paid for the energy pumped into the Grid without scheduling the same. Duly following the above judgment, it has to be held that the RInfra cannot demand payment for the electricity pumped into the grid after the expiry of the PPA without a valid wheeling and banking agreement.

(b) Facts like electricity generated is by Wind Mill, the RInfra was making correspondence with the BESCOM in the process of entering into a Wheeling and Banking Agreement much before the expiry of the PPA would not entitle, the RInfra for any payment because the RInfra did not possess either a valid PPA or Wheeling and Banking Agreement on the dates of energy injected into the Grid. Therefore, the RInfra in this case is not entitled to any charges for the energy pumped into the Grid on account of self-inflicted deficiencies and delays. In case the payment is ordered it will be a pass through to the consumer inflicting their interest and imposing an undue burden on it.

15. Bearing this majority view as well as the minority view in mind, we would now deal with the question framed above.

16. The main ground that has been urged by the Appellant, in this Appeal that the State Commission has not followed the ratio decided in the judgment of this Tribunal in Appeal No.123 of 2010 in case of Indo Rama Synthetics (I) Private Limited Vs MERC and others. Let us deal with that aspect first.

17. As far as the applicability of the Indorama case is concerned, we have to take note of the following factors:

(a) The main relief sought by the RInfra before the State Commission would relate to the directions for payment of electricity pumped into the Grid after expiry of the PPA at the rate set out in the PPA. Admittedly, this has been denied by the State Commission based on the findings given in the judgment rendered by this Tribunal in Indorama case.

(b) However, the State Commission in the impugned order has distinguished the judgment of this Tribunal in so far as entitlement of RInfra for charge is concerned to the effect that in Indorama case, the generator was pumping power only during off peak hours to get maximum rate and the electricity generated was too expensive from oil based power plant and therefore, it could have been regulated by reducing generation when it did not need power. We also find that in Indo Rama case, the Generator did not have any PPA either during the disputed period or prior to that with

the Distribution Licensee as it was earlier supplying power to third party outside the State through a Trading Licensee. Further, the Distribution Licensee as well as SLDC had no knowledge of injection of power by the Generator.

(c) In the present case, though the Agreement between the KPTCL/SLDC and RInfra was signed on 14.10.2009, the KPTCL/SLDC issued no objection certificate for execution of Wheeling and Banking Agreement on 22.8.2009 itself i.e. prior to the expiry of the PPA i.e. on 29.9.2009. Therefore, the agreement which was executed between the RInfra and KPTCL on 14.10.2009 is to be construed to be a tripartite agreement which was signed by the Appellant later.

(d) Even before the expiry of the PPA i.e. on 29.9.2009, in principle approval for Wheeling and Banking of energy was already given by the Appellant on 17.9.2009 subject to entering into a tripartite agreement.

(e) Unlike in the case of Indorama, no UI charges were applicable to the present case.

Further this is not a case of over generation. In this case the RInfra did not inject powers only in off peak hour and such generation was not controllable. Wind Energy Generation of the Appellant was also not to be scheduled.

(f) In the case of Indorama neither SLDC nor the licensee had any knowledge but in the present case KPTCL (SLDC) as well as the Appellant had knowledge and had signed the accounting of the energy injected into the Grid. Such signatures on Form B by the respective authorized officers of the Appellant were without any protest.

(g) The fact that the energy pumped by the RInfra into the Grid and the same was received and consumed by the Appellant is not disputed. As such, the Appellant was the beneficiary in using the energy injected by the RInfra.

(h) RInfra on 12.1.2009 and 25.2.2009 had approached KPTCL and the Appellant respectively for entering into Wheeling and Banking Agreement for supply of power from its Wind Generator to one of its group companies requesting for terms and conditions of the

Wheeling & Banking Agreement and providing the draft for the Agreement. However, the Appellant vide its letter dated 20.3.2009, informed RInfra that the Wheeling & Banking Agreement could be considered only after the expiry of the present PPA which was in force till September, 2009. RInfra was also advised by the Appellant to approach KPTCL which is the Nodal Agency for Open Access Wheeling & Banking applications after the expiry of the PPA. Thus, even though the RInfra had approached for entering into Wheeling & Banking Agreement, the Appellant more than six months prior to the expiry of the PPA between the Appellant and RInfra, the Appellant replied to consider the same on expiry of the PPA. Therefore, RInfra cannot now be blamed and penalised by not compensating them for the energy injected for its Wind Generator into the State Grid from the date of expiry of the PPA to the approval of Wheeling & Banking Agreement.

(i) Wind Energy is a renewable source of energy. It cannot be stored. The generation from Wind Energy is also not scheduled by the

SLDC. Shutting down the wind energy Generator when wind is blowing would mean wastage of green energy. Thus, RInfra had no option but to inject energy from its Wind Generator into the Grid of KPTCL. Thus, we feel that the findings of the Tribunal in Indorama case will not be applicable in this case in view of the circumstances of the present case.

18. As stated above, the State Commission while dealing with regard to the claim for payment for energy pumped into the Grid after the expiry of the PPA at the rate set out in the PPA has in fact denied the said claim by following the dictum laid down in the Indo Rama case. But the State Commission has distinguished the said judgment in respect of some other aspect by holding that the quantum of claim entirely cannot be denied to the RInfra mainly due to the fact that even during that period, the process of preparing the wheeling and banking agreement had started and that too when the power injected by the RInfra was received and consumed by the Appellant. Therefore, the State Commission has concluded that the RInfra is entitled to make payment not as per the PPA rate but at the rate

fixed by the Commission for wind energy earlier during that period. Under these circumstances the decision in 1992 Supp (1) 443 and (2000) 1 SCC 644 wherein it is held that lower forum is bound by the decision of the higher forum would not apply to this case.

19. Now the question is whether the RInfra would be entitled to get that amount in the light of the admitted facts even though during that period there was no schedule or there was no agreement between the parties.

20. The Wheeling and Banking Agreement was standard format prescribed by the State Commission. The requirement with regard to ABT meters and UI charges relating to partially exclusive consumers is clarified in the prescribed format. It shows that the conditions applicable for renewable energy project other than wind and mini hydel. These conditions are set out by the reason of the agreement being in the prescribed format which such of the clauses being applicable at the relevant time.

21. The State Commission has specifically found that the delay in putting up of meters cannot be a ground

for denying the claim for the charges for RInfra entirely and that they were willing to comply with the metering once the agreement is signed and that utilization of meters would arise only in case of banking.

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.

23. It is an admitted fact that the Appellant has enjoyed the benefit of energy that has gone into the system and which could not be regulated. It is also an admitted fact that the Appellant has derived benefit from the same and recovered tariff in respect of the same. Therefore, the claim of the RInfra for the

required charges for the power injected into the Grid cannot be said to be illegal.

24. In this case the main reliance placed by the Appellant is on the Indorama Case. The State Commission has given detailed reasons for distinguishing the said judgment in respect of certain aspects for deciding the quantum of compensation. We have also examined the issue in detail and we concluded that the findings of the Tribunal in Indo Rama case would not apply to the present case in view of the facts and circumstances of the case narrated earlier.

25. As indicated above, in the said decision mentioned above, the expired PPA rate as claimed by the RInfra in fact has been denied. The Appellant has cited 2011 (8) SCC 647 to show that when something has to be done in the manner prescribed, it has to be done in that manner. This principle cannot be disputed. But this decision in the present case would be of no help to the Appellant.

26. According to the Appellant, the State Commission has erred in fixing the tariff of Rs.3.40 per unit for Wind Generation which related to the new projects. But it is noticed that till the expiry of the PPA,

RInfra's tariff was R.4.66 per unit which was much higher than the rate fixed i.e. Rs.3.40 per unit. In fact, the quantum awarded by the State Commission at the rate of Rs.3.40 per unit was not at all challenged in this Appeal. By the impugned order, the Appellant has been directed on equitable grounds to pay energy pumped at the rate of Rs.3.40 per unit which is the rate determined by the State Commission at the relevant point of time for wind energy projects. The rate awarded was minus wheeling and banking charges. This rate has been fixed by the State Commission as a reasonable amount being the rate prevailing at the relevant point of time for the Wind Energy projects.

27. As mentioned above, even during that period, RInfra's group Company (M/s. Reliance Communications) for whom the Open Access was sought, had already paid HT2(b) tariff for power consumed from the network of the Appellant. Clearly, the rate at which the payment was made by the Appellant under the PPA, was much higher than the amount of compensation fixed by the State Commission. As mentioned earlier, even though, the RInfra claimed the PPA rate for this period, the State Commission rejected the said claim on the

strength of Indorama case and fixed only equitable tariff i.e. at the rate of Rs.3.40 per unit being the rate prevailing at the relevant point of time.

28. Therefore, the State Commission through the majority view has correctly distinguished the judgment of this Tribunal in certain aspects and gave a limited relief to the RInfra by giving its valid reasons which do not suffer from any infirmity. Consequently, we accept the majority view.

29. <u>Summary of Our Findings</u>

(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.**

(b) **The findings of the Tribunal in the judgment dated 16.5.2011 in Appeal No.123 of 2010 in**

the matter of Indo Rama Synthetics (I) Ltd Vs Maharashtra Electricity Regulatory Commission & Others would not apply to the present case in view of the facts and circumstances of the case. We have distinguished the present case from the Indo Rama case.

30. The Appeal is dismissed. No order as to cost.

31. Pronounced in the Open Court on 22nd January, 2013.

(Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Chairperson

Dated: 24th Jan, 2013

√REPORTABLE/~~NON-REPORTABALE~~