Before the Karnataka Electricity Regulatory Commission, Bangalore

Dated this the 22nd day of January, 2004

Present

1. Sri. Philipose Matthai - Chairman
2. Sri. H.S. Subramanya - Member
3. Sri. S.D.Ukkali - Member

Case No: OP 34/2003

Between

M/s Hotel Leelaventure Limited,
The Leela Palace,
#23, Airport Road,
Bangalore - 560 008
Represented by Maj. General Hiremath VSM(Retd.) **Petitioner**
(By Ms Rashmi Deshpande, Adv.)

and

1. Managing Director,
BESCOM
K.R.Circle,
Bangalore -560 001.

2. Chief Engineer,(Elec)
BMAZ, Bangalore. **Respondents**
(By Sri S.S.Nagananda, Sr.Adv.)

The Petitioner owns and runs The Leela Palace Hotel in Bangalore, and is a registered consumer of the Respondents under R.R.No.6EHT29. The Petitioner intends to draw power from an Independent Power Producer by name M/s Bhoruka Power Corporation Ltd by using the distribution network of the Respondents. He had approached the Respondent No.1 for permission to wheel energy from M/s Bhoruka Power Corporation. The Respondent No.1 informed the Petitioner that wheeling is permitted to HT industries covered under Tariff category HT - 2(a) and that the tariff category of the Petitioner being HT - 2(b), it

would not be feasible to consider the request for wheeling. The Petitioner, therefore, has sought the intervention of the Commission through this petition.

2. The Petitioner has urged the following points in his petition:

i) Tariff schedule HT 2(a) is applicable to industries and HT 2(b) is applicable to hotels, boarding and lodgings etc. and this differentiation is for the limited purpose of levy of tariff and should not be a ground for wheeling power from IPPs.

ii) The Government of Karnataka has recognized hotels as industry by its order dated 26.11.1988. Mere classification of hotels under HT 2(b) should not be an excuse to deny permission for wheeling energy requirements of this industry.

iii) The Government of Karnataka have revised the Tourism Policy and issued fresh orders on 4.7.1997declaring that tourism units shall be charged electricity tariff applicable to industrial undertakings. Thus, the hotels are treated on par with the industrial undertakings.

iv) Denial of permission to wheel green power for the Hotel premises by the Respondents is illegal, unjustified and arbitrary.

v) The Electricity Act 2003 provides free access to the grid of the Respondent and therefore any provision in any contract between the Respondent and M/s Bhoruka Power Corporation Ltd., restricting free access would be void under section 23 of the Contracts Act.

3. The Respondents have put in appearance through their counsel and have resisted the petition. The following points are canvassed in their statement of objections:

i) The Petitioner has sought relief under S.21 of the Karnataka Electricity Reforms Act 1999, which deals with general duties and powers of a licensee and that the said provision is wholly inapplicable and no relief can be granted under the same. The petition is misconceived, not maintainable and liable to be dismissed.

ii) The term 'industry' is not defined in the Electricity Act, 2003 or in the acts which are repealed by the Electricity Act, 2003.

iii) The Hon. High Court of Karnataka in its order in Writ Appeal No. 1230 of 1991, in the case of M/s Maccharles (India) Ltd., vs KEB has held that Hotel is not an industry.

iv) The State Government orders granting incentives to the tourism industry cannot be construed as definition of industry and they are not applicable in the present case.

v) The concept of 'open access' under the Electricity Act, 2003, is premature since no regulations have been framed by the commission to avail this facility.

vi) The wheeling agreement between the KPTCL and M/s Bhoruka Power Company bars wheeling power to non-industrial units, and therefore the prayer of the Petitioner cannot be granted.

4. We have heard the Counsels for the Petitioner and Respondents in full and also examined the documents produced by both the parties. The arguments advanced by both the parties are summarized as under:

Ms Rashmi Deshpande, learned Counsel for the Petitioner contended that the stand of the Respondents that it is not feasible to wheel energy from IPP is not rational, and that they have not explained as to whether the feasibility relates to financial or technical matters. She further stated that the classification made for the sake of tariff is redundant in her case and that the wheeling of power is only relevant. She canvassed that the wheeling cannot be denied on the basis of the tariff classification. She further added that the cross subsidy cannot be the deciding factor as the industries heavily subsidize other categories of consumers and they are permitted to wheel power by the Respondent. She further pointed out that S.42 of the Electricity Act, 2003 facilitates the use of the transmission and distribution lines of the licensees for the purpose of drawing power from other generating plants. The Counsel also mentioned that the Petitioner has spent huge amount for getting the land required for conversion of overhead transmission lines to underground cables and also to build substation as per the requirement of the Respondents.

5. Sri Nagananda, learned Counsel for the Respondents contended that there is no definition of the term 'industry' in the Electrical laws and that the State Government orders relied upon by the Petitioner are for granting incentives to the tourism institutions and no further inference can be drawn from them. He argued that a bunch of hotels had earlier taken up this issue to the Hon. High Court of Karnataka and the Hon. High Court has categorically held that the hotel is not an industry in writ petition No.22738 of 1990 and others, in the case M/s Mac Charles (India) Ltd. vs KEB and others, dated 20.12.1990. He further

pointed out that the Wheeling and Banking Agreements between M/s Bhoruka Power Company and KPTCL are meant for supplying energy for industrial units. He contended that M/s Bhoruka Power Co. cannot wheel and supply energy to the Petitioner under the present agreements. He further pointed out that the Commission is yet to formulate regulations under S.42 of the Electricity Act, 2003, and the request of the petitioner for open access is premature.

6. We have carefully considered the various issues canvassed before us. The Hon High Court of Karnataka, in the case of M/s Mac Charles (India) Ltd. vs KEB, has held that Hotel is not an industry. The Hon. High Court has observed as follows:

> "2. Petitioners contend that the notification fixing the tariff on 5thSeptember 1990 in so far as the hotels included in the category of Tariff Schedule HT 2 (b) is wrong and violative of Article 14 of the Constitution. It is submitted that petitioners' establishments fall within the classification of "industry" having regard to the declarations made by the Union and State Governments and also on general law that wherever manufacturing activity is carried on becomes an industry and in an economic sense should be understood to be an industry and cannot be classed in any category other than industry. - - - - - -"
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> "10. - - - - - - - - - - -
> The dominant activity of a hotel is to render service to its guests and hence cannot be classed as an industry in a general sense. Supply of foodstuffs must be regarded as ministering to a bodily want of satisfaction of human need and the service is concomitant of hospitality as held in AIR 1978 SC 1591. Hence, I find no merit in the first contention of the learned counsel for the petitioners."

The above decision squarely applies to the facts of the present case and categorically negates the point raised by the Petitioner that Hotel is an industry and therefore they ought to have been classified under HT 2(a) and not HT 2(b). The Respondents have denied permission to wheel energy to the hotels being commercial units, as a matter of policy. The commercial units going away from the grid would make a great impact on the cross-subsidy designed which is inbuilt in the tariff and the Licensee would suffer financially. It is true that the Electricity Act, 2003, has facilitated open access to the transmission and distribution networks of the Licensees. Such open access can be granted after the Commission frames the modalities of seeking such access by framing regulations under the section for making suitable allowances to the cross subsidy.

Though the absence of Rules and Regulations do not constitute a vacuum in implementing the provisions of the Act, we feel that S.42 cannot be implemented in the absence of Regulations. M/s Bhoruka has entered into wheeling agreements with KPTCL to supply power to only industrial units and therefore it is barred under the present agreements, from wheeling energy to supply to the Petitioner. We are unable to appreciate as to why the Petitioner has approached the Commission instead of the Supplying Company, which has better cause of action. At any rate, we do not find any merit in the case of the Petitioner.

7. In view of the above discussions, we have no hesitation in dismissing the case before us. The Petition is **dismissed**. No Costs. Ordered accordingly.

(Philipose Matthai) **(H.S.Subramanya)** **(S.D.Ukkali)**