

**No.: N/102/13**

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
BENGALURU**

**Dated : 7<sup>th</sup> January, 2016**

**Present:**

Sri M.K. Shankaralinge Gowda	Chairman
Sri H.D. Arun Kumar	Member
Sri D.B. Manival Raju	Member

**Complaint No.13 / 2013**

**BETWEEN:**

Cauvery Hydro Energy Limited,  
No.67, "Lavina Courts", First Floor,  
No.102, 8<sup>th</sup> Main, 7<sup>th</sup> Cross,  
RMV Extension,  
BENGALURU – 560 080

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**PETITIONER**

*[Represented by Navayana Law Offices, Advocates]*

**AND:**

1) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan, K.G. Road,  
BENGALURU – 560 009

2) The State Load Despatch Centre Karnataka,  
KPTCL, No.26, Race Course Road,  
BENGALURU – 560 009

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**RESPONDENTS**

*[Represented by Just Law, Advocates]*

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**ORDERS**

1) In the above Complaint, filed under Section 142 read with Sections 129 and 146 of the Electricity Act, 2003 (hereinafter referred to as the 'Act') against the Respondents, alleging non-compliance of the Order dated 2.6.2011 passed in OP No.47/2010 by this Commission, the Complainant has prayed for the following reliefs :

- (a) *To initiate appropriate enquiry and proceedings against the Respondents, jointly and severally, under Sections 142 and 146 of the Electricity Act, 2003 for their willful disobedience of the Order of this Commission dated 2<sup>nd</sup> June, 2011 in OP No.47/2010 (Annexure-C1);*
- (b) *To issue a direction under Section 129 of the Electricity Act, 2003 to secure compliance directing the Respondents to honour the orders of the Commission (Annexure-C1) and to make payment as per the statement (Annexure-C14) and to order payments of such pendent lite sums that may accrue during the pendency of this Complaint with the same interest rate (Annexure-C14) from the date they fell due up to the date of payment in full;*
- (c) *To impose penalty on the Respondents, jointly and severally, of a sum of Rs.1,00,000/- (Rupees One Lakh Only) for having contravened the Order (Annexure-C1) of this Commission and also to levy a penalty of Rs.6,000/- (Rupees Six Thousand Only) for every day of default in payment of interest from the date of the Order dated 2<sup>nd</sup> June, 2011 till the payment made in full, for denigrating the direction of this Commission;*

- (d) *To grant the cost of the Complaint; and,*
- (e) *To pass any other order as this Commission deems fit.*

2) At the outset, it may be stated that Sections 129 and 146 of the Act are not relevant or incidental to the present proceedings under Section 142 of the Act for the alleged non-compliance of the Order dated 2.6.2011 passed by this Commission in OP No.47/2010 (hereinafter referred to as the 'Order in OP No.47/2010'). Therefore, it is to be seen whether the Respondents have contravened the Order in OP No.47/2010, as contemplated under Section 142 of the Act.

3) The operative portion of the Order in OP No.47/2010 is as follows :

*"15. Consequently we pass the following order :*

- (1) The petition is allowed.*
- (2) It is declared that the order of KPTCL dated 30.8.2000 impugned in the petition is not enforceable against the petitioner and petitioner is liable to pay only 5% of the energy as wheeling charges for the first ten years period as provided in the contract. Consequently, the order No.CEE/SLDC/SEE/TBC/1042, dated 1.7.2010 of the Chief Engineer, LDC, is set aside.*
- (3) Respondent is directed to re-calculate the charges payable by the petitioner considering the above observations made in this order and make necessary claims after making due adjustments to the charges already paid by the petitioner."*

**Complaint No.13 / 2013**

- 4) The Order in OP No.47/2010 is being interpreted by the Complainant and the Respondents, differently. The Complainant contends that the Order has not been complied with and on the other hand, the Respondents contend that they have complied with the Order and there is no violation of the Order on their part.
- 5) For a better understanding of the different interpretations of the Order in OP No.47/2010, placed by the parties, the prayers made in OP No.47/2010, which are as follows, may be noted :

*"WHEREFORE, it is most respectfully prayed that this Hon'ble Commission may be pleased to :*

- a) Quash the First Respondent's order bearing No.KPTCL/B-28/B-13/558/85-86 dated 30<sup>th</sup> August, 2000, produced at ANNEXURE P-3.*
- b) Direct the respondents, jointly and severally to refund the charges collected in cash and kind from the Petitioner as per ANNEXURE P-14 together with an interest of 2% per month.*
- c) Pass any other order/s in the interest of justice and equity."*

ANNEXURE P-14 produced in OP No.47/2010 states the details of the quantum of energy to be returned to the Complainant, amounting to 51,21,835 Units, and also refund of the amount of Rs.1,34,82,889/- towards the Transmission and Network charges, alleged to have been collected from the Complainant in excess of the charges greed in the Wheeling and Banking Agreement (W&BA) dated 17.8.1998.

- 6) According to the Complainant, the entire claim including interest, as prayed for in OP No.47/2010, has been allowed. Therefore, the Complainant claims return of the energy as well as refund of the amount, with interest at 2% per month. There is no dispute that the Order bearing No.KPTCL/D-28/B-13/558/85-96, dated 30.8.2000 has been declared to be void and not enforceable as against the Complainant. The said Order dated 30.8.2000 passed by the first Respondent-Karnataka Power Transmission Corporation Limited (KPTCL) was purporting to accord approval to enhance Wheeling Charges at 20% of the energy wheeled in respect of all categories of Generation Projects. Earlier to this Order, the Complainant-Generating Company was liable to pay 5% of the energy wheeled towards the Wheeling Charges as per the W&BA executed between the parties on 17.8.1998. The Order dated 1.7.2010 of the Chief Engineer, Load Despatch Centre, referred to in OP No.47/2010, is an Order passed rejecting the request of the Complainant to return the energy and the amount claimed by the Complainant prior to filing of the said Petition.
- 7) The Respondents have interpreted the final Order dated 2.6.2011 in OP No.47/2010, contending that the Complainant was not entitled to refund of any cash towards the Network Charges collected and also to any interest as claimed, as there was no such direction in the final Order and that the Respondents were entitled to collect those charges under the

subsequent Tariff Order of 2003, and further that the Respondents were directed to recalculate the charges payable by the Complainant towards the wheeling charges, in view of the declaration that the Order dated 30.8.2000 impugned in the Petition was not enforceable as against the Complainant, and according to them, the excess energy, if any, returnable to the Complainant, was to be adjusted towards the charges payable by the Complainant for wheeling and banking of the energy to third parties, in future. The Respondents further contended that they passed the subsequent Order for adjusting the energy returnable to the Complainant out of the future charges payable by the Complainant for wheeling and banking of energy to third parties.

- 8) On perusal of the Order in OP No.47/2010 and the contentions raised by the respective parties regarding its compliance or non-compliance, we are of the considered opinion that the Order in OP No.47/2010 may give room for different interpretations, which requires further investigation to ascertain its proper meaning and true effect. For this purpose, the Commission has to consider the pleadings of the parties in OP No.47/2010, as well as the facts leading to filing of OP No.47/2010. The decision of the Hon'ble Supreme Court, reported in **(1973) 2 SCC 40**, in the case of *Bhavan Vaja and others –Vs- Solanki Hanuji Khodaji Mansang and another* supports the above view of the Commission, for further investigation of the Order in OP No.47/2010. The principle stated in the said decision reads thus :

*“Held, it is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. The jurisdiction of execution court does not begin and end with merely looking at the decree as it is finally drafted.”*

- 9) The material facts leading to filing of OP No.47/2010 may be stated thus:
- (a) The Complainant had set-up a 3 Mega Watts (MW) Mini Hydel Power Station (a NCE Project) at Shivasamudram in Mandya District and had entered into a W&BA dated 17.8.1998 with the erstwhile Karnataka Electricity Board (Board) for wheeling the energy generated from the Mini Hydel Power Station to third parties, as per the terms and conditions mentioned in the W&BA. Article 4.04 of the W&BA provided for payment of 'banking fee' of 2% per month in terms of the energy banked at the end of the month, to the Board. It also provided the method for calculating the banking fee. Article 4.05 of the W&BA provided for the formula for ascertaining the energy banked at the end of the month. Article 5.03 of the W&BA provided for payment of 'wheeling charges' in the form of energy at 5% of the energy actually wheeled to third parties.

**Complaint No.13 / 2013**

- The said Article further provided that the wheeling charges specified therein were subject to change from time-to-time as notified by the Board.
- (b) After coming into force of the Karnataka Electricity Reforms Act, 1999, the erstwhile Board, which was holding certain Generating Companies apart from doing the transmission and distribution of electricity was unbundled in September, 1999, in pursuance of the said Reforms Act and the business of transmission and distribution of electricity was entrusted to the first Respondent-KPTCL and the holding of Generating Companies was entrusted to some other entity. Thereafter, on 30.8.2000, the first Respondent-KPTCL, in exercise of its power to revise the Wheeling Charges, accorded approval to fix a uniform Wheeling Charge of 20% of the energy wheeled, in terms of energy, to all the categories of Generation Projects, with effect from 1.9.2000. The Banking Charge was kept intact at 2% at the existing rate. Therefore, from 1.9.2000, the Wheeling Charge was levied at 20% of the energy wheeled, instead of 5% as earlier agreed upon under the W&BA.
- (c) The Complainant filed Writ Petition No.690/2003 on 6.1.2003 before the Hon'ble High Court of Karnataka, contending that the enhancement of Wheeling Charge from 5% to 20% under the Oder dated 30.8.2000 of the first Respondent-KPTCL was illegal and void. Ultimately, the said Writ Petition came to be disposed of by the Hon Hon'ble High Court on



**Complaint No.13 / 2013**

13.4.2007, holding that, *'since nothing is shown to have stated as to the compliance of the principles of natural justice before enhancement of wheeling charges, the Respondent-Authority has to consider the request of the Petitioner in accordance with law and pass appropriate orders.'* Subsequent to disposal of the said Writ Petition, the Complainant made representations for refund of the excess wheeling charges collected and also certain network charges collected by the first Respondent-KPTCL and the Bangalore Electricity Supply Company Limited (BESCOM), as against the 5% Wheeling Charge agreed in the W&BA. The Complainant's request was ultimately rejected by the Chief Engineer (Electy.), State Load Despstch Centre (SLDC), KPTCL, Bengaluru, vide letter / order No.CEE/SLDC/ SEE/TBC/1042, dated 1.7.2010. Subsequently, the Complainant filed OP No.47/2010 before this Commission.

- (d) After coming into force of the Reforms Act, Karnataka Electricity Regulatory Commission (Commission) was constituted and the Commission was issuing Tariff Orders, and in the Tariff Order dated 10.3.2003, which came into effect from 1.4.2003, the Commission, for the first time, determined the Wheeling Charges for the use of transmission and distribution system by third parties. Subsequently, the Commission has also passed the Order dated 9.6.2005, *"In the matter of Determination of Transmission Charge, Wheeling Charge and Cross-Subsidy Surcharge under Open Access"*. Under this Order dated 9.6.2005, the Cross-Subsidy Surcharge determined by the Commission

**Complaint No.13 / 2013**

- was Rs.1.15 per unit and so far as the Wheeling Charges for the NCE Projects are concerned, the Commission determined the overall Wheeling Charge payable at 5% of the energy injected into system.
- (e) Subsequently, the Commission had issued the Tariff Order of 2005, dated 27.9.2005, with effect from 10.10.2005. In this Tariff Order, so far as the NCE Projects are concerned, the Banking Charge and Wheeling Charge and Cross-Subsidy Surcharge payable under Open Access, as determined in the Order dated 9.6.2005, was adopted.
- (f) Subsequently, the Commission issued the Order determining the Cross-Subsidy Surcharge at different rates for different years. So far as the Wheeling and Banking Charges for the NCE Projects are concerned, in the subsequent Tariff Orders, the said charges as determined in the Commission's Order dated 9.6.2005 were continued without any alteration.
- (g) The claim for refund of energy and certain amount, made by the Complainant in OP No.47/2010, relates to the period from September, 2000 to August, 2008.
- 10) The respective contentions of the parties in OP No.47/2010 may be stated as follows :

- (a) The Complainant has pleaded in OP No.47/2010 that, for the whole period of ten years of the W&BA dated 17.8.1998, it was liable to pay the Banking Charge and the Wheeling Charge as agreed in the said W&BA and that the revision of Wheeling Charge at 20% as against the existing 5% with effect from 1.9.2000, was illegal. It also further contended that the subsequent Tariff Order dated 10.3.2003 determining the Wheeling and Banking Charges was not applicable to it, as Writ Petition No.690/2003 filed by it before the Hon'ble High Court of Karnataka was pending and further that the W&BA dated 17.8.998 was a 'concluded contract' and that the first Respondent-KPTCL had not made any specific proposal in respect of such a 'concluded contract' for re-determination of the Wheeling Charge.
- (b) The Respondents have contended in OP No.47/2010 that the first-Respondent-KPTCL had the power to enhance the Wheeling Charge as per the Order dated 30.8.2000 and the Complainant was liable to pay the enhanced Wheeling Charge as per the said Order dated 30.8.2000. It is further contended that the Tariff Order dated 10.3.2003 was applicable to the Complainant and it was liable to pay the wheeling Charge as determined in the said Tariff Order, in kind as well as in cash. It has contended that the Respondents collected the charges as stipulated in the Tariff Order dated 10.3.2003 till the expiry of the W&BA.

**Complaint No.13 / 2013**

(c) The Respondents have denied that the pendency of Writ Petition No.690/2003 was a ground for the non-applicability of the Tariff Order of 2003 and have further contended that, at any rate, the Complainant was liable to pay the enhanced Wheeling Charge as per the first Respondent-KPTCL's Order dated 30.8.2000, as the power of the first Respondent-KPTCL for enhancement of the Wheeling Charge as provided in the W&B was saved after coming into force of the Reforms Act. Further, the Respondents have contended that, the Petitioner's contention that the W&BA entered into between the parties was a 'concluded contract', was untenable, as the said Agreement itself provided for the revision of the Wheeling Charges from time-to-time. Therefore, the Respondents had prayed for dismissal of the Petition. Therefore, the Respondents had contended that the Tariff Order of 2003 was applicable to the Complainant.

11) After hearing the parties, the final Order in OP No.47/2010 was passed by this Commission on 2.6.2011. After noticing the respective contentions, the only issue framed at paragraph-8 of the said Order reads thus :

*"The issue that arises for consideration is whether the decision communicated by the Chief Engineer, Load Despatch Centre (CE, LDC), KPTCL is legal and valid, and if not, what will be the orders of this Commission."*

12) The communication of the Chief Engineer, Load Despatch Centre, referred to in the above issue, relates to the rejection of the claim of the

Complainant for the refund of the energy and the amount. During the course of the Order in OP No.47/2010, after considering the rival contentions, this Commission has arrived at the conclusion, at the end of paragraph-14 of the Order, as follows :

*"... In our opinion, the Wheeling Charges as fixed in the contract and which have not been modified by this Commission continue to apply during such period of the agreement. We are therefore in agreement with the contention of the Petitioner that after coming into force of the provisions of the Karnataka Electricity Reforms Act, 1999, and the Electricity Act, 2003, it is the Commission which alone is empowered to determine the Wheeling and other Charges and the contention of the Respondent that under Clause 5.3 of the Agreement it is entitled to determine the Wheeling Charges from time to time has to be rejected. Both the parties have to abide by the Charges, including payment of Surcharge determined by the Commission from time to time in exercise of its statutory power whenever applicable."*

The above findings show that, both the parties have to abide by the Wheeling and Banking Charges, including the payment of Surcharge as determined by this Commission from time-to-time. Admittedly, after the Reforms Act and the Electricity Act, 2003 came into force, this Commission has passed various Tariff Orders which dealt with the Wheeling and Banking Charges. Therefore, if any of these Tariff Orders had the effect of varying or amending the Wheeling Charges fixed under the W&BA, the parties are bound by such variations and

amendments. Here itself, we may note the third relief granted in OP No.47/2010, which reads thus :

*“Respondent is directed to re-calculate the charges payable by the petitioner considering the above observations made in this order and make necessary claims after making due adjustments to the charges already paid by the petitioner.”*

Therefore, the inescapable conclusion that could be drawn from the above is that, while recalculating the charges payable by the Complainant, one has to consider whether any of the subsequent Tariff Orders passed by this Commission had the effect of varying the Wheeling and Banking Charges fixed in the W&BA between the parties.

- 13) In the Tariff Order of 2003, dated 10.3.2003, Paragraph-13.24 deals with determination of the 'Wheeling Charges'. Considering the proposals of the first Respondent-KPTCL and the Electricity Supply Companies (ESCOMs), for enhancement of the charges for use of the transmission and distribution system by third parties, and also after considering the objections of the stakeholders, the Wheeling Charges have been determined, which are payable in cash and in kind. Some of the stakeholders had contended that they had already entered into W&BAs with the first Respondent-KPTCL, with a specific term that the Wheeling Charges for a particular period under the said Agreement would not be varied or revised, therefore in such cases, the Wheeling Charges could

not be varied, to the detriment of such stakeholders, on the principles of *promissory estoppel* and *legitimate expectation*. Further, some of the stakeholders had also contended that the unilateral enhancement of Wheeling Charges by the first Respondent-KPTCL was challenged by them before the Hon'ble High Court of Karnataka by filing writ Petitions and they had also obtained Interim Orders of Stay against the enhancement of the Wheeling Charges. Therefore, the stakeholders had contended that the Wheeling Charges cannot be enhanced by this Commission. The first Respondent-KPTCL / ESCOMs contended that the issue being in the Hon'ble High Court of Karnataka was no bar for determination of the Wheeling Charges by this Commission, since the Commission alone had the statutory powers and there was no stay granted by the Hon'ble High Court against the Commission to exercise the powers vested in it, for determination of tariff. Further, it was contended that the principle of *promissory estoppel* and *legitimate expectation* did not apply for determination of tariff. The Commission had observed that it had carefully considered the objections and the issues raised by the parties and held that it was not prevented from exercising its statutory powers. Thereafter, the Commission has determined the wheeling Charges, payable in kind and in cash, and regarding its applicability, the Commission's orders in Paragraph-13.24.2)(7)((iii) reads thus:

*"The Commission is aware that some of the Generating Companies have challenged the orders of KPTCL in respect of Wheeling Charges and the Hon'ble High Court had passed Interim Orders. This Order of the Commission is not applicable to such cases and also cases of concluded contract where specific provisions in respect of Wheeling Charges are made. However, KPTCL may make specific proposal in respect of such contracts, in case it is considered justifiable and legal for the consideration of the Commission and appropriate orders."*

In the beginning of Paragraph-14 of the Order in OP No.47/2010, this Commission has noted the applicability of the Tariff Order of 2003, dated 10.3.2003, as laid down in the said Tariff Order, and has observed as follows :

*"Admittedly, till date KPTCL has not made any application for fixation of wheeling Charges in those cases which are covered by concluded contracts even though such a right was reserved in its favour."*

This one sentence gave room to the parties to interpret the applicability of the Tariff Order of 2003 differently, viz., whether the Tariff Order of 2003 was applicable to the Complainant or not. The Complainant contended that the Tariff Order of 2003 is not made applicable to it. On the other hand, the Respondents contended that subsequent to the Tariff Order of 2003, they collected the Wheeling Charges from 1.4.2003 as per the said Order, which implies that the said Order was made applicable to the Complainant.



- 14) The relevant portion of the Tariff Order of 2003 shows that this Order was not applicable to cases pending before the Hon'ble High Court, where there was an Interim Order passed by the Hon'ble High Court. In the present case, it is not shown that the Complainant had obtained any Interim Order after filing the Writ Petition before the Hon'ble High Court. In the said Tariff Order, it was specifically mentioned that, passing of an Interim Order in the Writ Petition is also essential for the non-applicability of the Tariff Order of 2003. In Sub-Paragraph (8) of the Commission's Tariff Order of 2003, at Page-260, the Commission has also noted that the Wheeling Charges determined under this Order shall not be applicable to the cases before the Hon'ble High Court, pending adjudication on the issue of the Wheeling Charges. The Commission has also noted that, it has not been prevented from exercising its statutory powers for determining the tariffs. Therefore, the non-applicability of the Tariff Order of 2003 in respect of pending Writ Petitions was subject to final outcome of those Writ Petitions. It cannot be said that, merely because a Writ Petition was filed, the jurisdiction of the Commission to levy the tariff on such person would be taken away. Therefore, it only means that the tariff determined under the Tariff Order of 2003 is subject to final results of the Writ Petition, which in the Complainant's case has no implication on the Commission's jurisdiction in determination of the Wheeling Charges, etc.

**Complaint No.13 / 2013**

- 15) The relevant portion of the said Tariff Order of 2003 further stated that the said Order was not applicable to cases of 'concluded contracts', where specific provisions in respect of the Wheeling Charges are made. The Order does not define the words 'concluded contract'. In OP No.47/ 2010, the Complainant contended that the W&BA in question was a 'concluded contract'. On the other hand, the Respondents contended that it was not a 'concluded contract', as understood in the Tariff Order of 2003, as the W&BA itself provided for revision of the Wheeling Chargers from time-to-time. It is not in dispute that the W&BA in question provided for revising the Wheeling Charges from time-to-time, without assuring any fixed Wheeling Charges for any fixed duration. Therefore, at the time of the proceedings in OP No.47/2010, there was no consensus between the parties as to whether the W&BA in question was a 'concluded contract' or not, as understood in the Tariff Order of 2003. On this controversy, there is no specific finding in the Order in OP No.47/2010. There was no issue framed in that case as to whether the Tariff Order of 2003 was applicable to the Complainant or not. The observation made in this Order, as noted above, that, "*Admittedly, till date KPTCL has not made any application for fixation of wheeling Charges in those cases which are covered by concluded contracts even though such a right was reserved in its favour*", is only a statement of fact that the first Respondent-KPTCL had not made any application in such cases. This statement of fact does not even amount to an implied finding that there was a 'concluded contract'. Such an implication

cannot be drawn, because the Commission, in the last sentence of paragraph-14 of its Order in OP No.47/2010, has observed that both the parties have to abide by the charges, including payment of Surcharge determined by the Commission from time-to-time in the exercise of its statutory power wherever applicable. The principles laid down in the above-referred decision of the Hon'ble Supreme Court in the *Bhavan Vaja* case would equally apply to ascertain the true meaning and effect of the ambiguous words of the Tariff Order of 2003. We are, therefore, of the considered view that 'concluded contract' referred to in the Tariff order of 2003, relates to a contract where a fixed Wheeling Charge for a particular number of years was agreed to be levied, without there being a right to vary the same, in the meantime. The alteration of such a 'concluded contract' may lead a party affected to plead in defence the *promissory estoppel* and *legitimate expectation*. For the above reasons, we hold that there is no finding by this Commission in its Order in OP No.47/2010, that the W&BA in question was a 'concluded contract', insofar as it relates to the levying of the Wheeling Charges. Therefore, the Tariff Order of 2003 is applicable to the Complainant and its contention that the said Order was not applicable is to be rejected.

- 16) One of the prayers made in OP No.47/2010 was to charge interest at 2% per month on the energy to be returned and the amount to be refunded by the Respondents. On this point, no issue was framed and no discussion has taken place in the Order in OP No.47/2010. There was no

specific averment in OP No.47/2010 supporting the claim for interest. The W&BA entered into between the parties does not provide for payment of interest on return of energy or on refund of the amount by the Respondents to the Complainant, if such contingency should arise for any reason. The awarding of interest is at the discretion of the Commission and unless it is specifically granted in the Order, the presumption is that the request for award of interest was rejected.

- 17) From the above discussions, we note that the interpretation of the Order in OP No.47/2010, as made by both the parties, is not acceptable. We hold that the Wheeling and Banking Charges as mentioned in the W&BA is applicable till 31.3.2003 and the Wheeling and Banking Charges as determined in the Tariff Order of 2003 is applicable from 1.4.2003 to 9.6.2005. The Wheeling and Banking Charges for the subsequent period shall be as determined in the Order dated 9.6.2005. Further, we hold that, apart from the Wheeling and Banking Charges, the Cross-Subsidy Surcharge is also applicable from 10.6.2005 at different rates for different periods, as per the periodical Orders of the Commission determining the Cross-Subsidy Surcharge.
- 18) Considering the above findings and reasons, we now have to find out the true effect of the Commission's Order in OP No.47/2010 and the reliefs granted or the directions given to the parties therein. We are of the considered view that the Commission's Order in OP No.47/2010

declared that the Order dated 30.8.2000 of the first Respondent-KPTCL was not enforceable and consequently, the Order dated 1.7.2010 of the Chief Engineer, Load Despatch Centre was set aside. Further, the Respondents were directed to recalculate the charges payable by the Complainant, taking into account the subsequent Tariff Orders passed by this Commission relating to the Wheeling and Banking Charges, as well as Surcharge and to raise necessary claims, after effecting due adjustments of the Wheeling and Banking Charges, in kind and/or cash, already collected from the Complainant, and/or to refund the excess Wheeling and Banking Charges, in kind and/or cash, if any, collected from the Complainant.

- 19) We can justify the view taken in the Order in OP No.47/2010, that the Complainant has to abide by the Surcharge determined by the Commission from time to time, in exercise of its statutory powers. The Complainant had availed Open Access as per the W&BA dated 17.8.1988 prior to coming into force of the Reforms Act or the Electricity Act, 2003. The first proviso to Regulation 5(2) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004, provides that, in respect of Generating Companies, who had already availed the Open Access under the existing Agreements on the date of coming into force of these Regulations and were selling power to third parties with the consent of the Competent Government under Clause (c) of Sub-Section (1) of Section 43A of the

Electricity (Supply) Act, 1948, the Cross-Subsidy Surcharge was not applicable to them. In the present case, the Complainant-Generating Company has not produced any material to show that it had obtained the consent of the Competent Government under Clause (c) of Sub-Section (1) of Section 43A of the Electricity (Supply ) Act, 1948, for sale of power to third parties. This can be inferred from the recitals mentioned in the W&BA. Therefore, the Complainant is liable to pay the Cross-Subsidy Surcharge as per the Order dated 9.6.2005, wherein, for the first time, Cross-Subsidy Surcharge was determined and also as per the subsequent Orders of the Commission.

20) In view of the above findings, we deem it proper to pass the following :

### **ORDER**

- (a) For the present, the Respondents cannot be held to have contravened the directions issued in the Order dated 2.6.2011 in OP No.47/2010;
- (b) The Commission holds that the true effect and meaning of the directions issued in the Order dated 2.6.2011 in OP No.47/2010 shall be as explained in this Order, particularly in Paragraphs-16 to 18 thereof; and,

**Complaint No.13 / 2013**

(c) The Respondents are now directed to recalculate the charges payable by the Complainant as explained in Paragraphs-16 to 18 of this Order and to raise necessary claims, after effecting due adjustments of the Wheeling and Banking Charges, in kind and/or cash, already collected from the Complainant, and/or to refund the excess Wheeling and Banking Charges, in kind and/or cash, if any, collected from the Complainant, within 02 (two) months from the date of this Order.

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER