

No.N/76/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 2nd June 2011

- | | |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

Case No. OP 47/2010

Between

M/s. Cauvery Hydro Energy Limited
No.67, 'Lavina Courts', First Floor
No.102, 8th Main, 7th Cross, RMV Extension
B A N G A L O R E – 560 080
(Represented by its Advocate Sri Shridhar Prabhu)

.... **Petitioner**

And

1. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, Kempegowda Road
Bangalore – 560 009

2. State Load Dispatch Centre – Karnataka
Kaveri Bhavan, Kempegowda Road
Bangalore – 560 009

.... **Respondents**

(Represented by M/s. Just Law Advocates)

1. In this petition, the petitioner has prayed for quashing the 1st Respondent's Order dated 30.8.2000 revising banking and wheeling charges and to issue a direction to refund the charges collected in cash and in kind in excess of 5 % + 2 % from the petitioner along with interest at 2 % per month.

2. The respondents have put in appearance and have filed through their counsel their statement of objections on 3.2.2011.

3. It is the case of the petitioner that it had a wheeling and banking agreement with the 1st Respondent dated 17.8.1998 and this was in operation for a period of ten years from the said date. On 30.8.2000, the 1st Respondent increased the wheeling charges fixed in the agreement from 5 % to 20 %. The petitioner therefore had to challenge the same before the Hon'ble High Court in WP 690/2003. The Hon'ble High Court on 13.4.2007 has directed the 1st Respondent to consider the request of the petitioner in accordance with law and then pass appropriate orders. As the 1st Respondent has failed to consider its request as per the directions of the Hon'ble High Court the petitioner has filed the present petition.

4. It is contended by the petitioner that the order enhancing the wheeling charges issued by the 1st Respondent on 30.8.2000 is illegal. After the enactment of the Electricity Act, 2003 and Karnataka Electricity Reforms Act, 1999, KPTCL has no authority to determine the wheeling charges and it is this Commission which has the authority. KERC has not fixed the wheeling charges in case of generators who had existing agreements. Further, it is contended that the order of enhancement of wheeling charges has been made by the respondent without hearing the petitioner and without assigning any valid reasons. Therefore the same is contrary to law.

Further, it is also urged that the Hon'ble High Court in a similar case of M/s. Bhoruka Power Corporation Limited in WP 9366/2001 has considered the validity of the very order impugned in the writ petition of the petitioner in the present petition, and had set aside the same. The said order of the Hon'ble High Court

equally applies to the case of the petitioner. Therefore it is liable only to be charged as per the agreement and not at 20 % during the period of agreement. Consequently the charges collected in excess of 5 % of energy wheeled and the Network Charges collected from the petitioner have to be refunded.

5. The petitioner has further stated that after the order of the Hon'ble High Court in WP 690/2003 passed on 13.4.2007, the claim of the petitioner for refund of excess charges paid has elicited a negative response from the Chief Engineer, Load Despatch Centre (LDC). The Chief Engineer, LDC has informed on 1.7.2010 that as per the directions of the corporate authorities (the respondent), no refund can be made at this stage with retrospective effect.

6. Aggrieved by this communication, the petitioner has filed the present petition.

7. In reply, it is contended on behalf of respondents that the order dated 30.8.2000 challenged by the petitioner is in accordance with the terms of the contract. Clause 5.3 of the contract itself confers power of modification of the rate of wheeling charges on the 1st Respondent during the period of the agreement. Further it is contended that the agreement between the present parties is deemed to be approved by the Commission under the proviso to Section 27(2) of the Karnataka Electricity Reforms Act, 1999. The question of the Commission again determining the wheeling charges during the subsistence of the said agreement did not arise and the revision of charges made by KPTCL is legal and binding on the petitioner. It is also contended that since the petitioner did not contest the order of the 1st Respondent for over two years it cannot now

be saying that the impugned order is illegal. As regards the orders passed by the Hon'ble High Court in M/s. Bhoruka Power Corporation Limited it is submitted by the respondents that the same do not apply to the case of the petitioner as the petitioner's case is covered by a separate order passed in its writ petition and as per the said order the 1st Respondent has only to consider the request of the petitioner and pass orders in accordance with law.

8. 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.

9. There is no dispute that the petitioner had filed a Writ Petition No. 690/2003 questioning the validity of the order impugned in the present petition dated 30.8.2000 before the Hon'ble High Court of Karnataka. It is also undisputed that the Hon'ble High Court of Karnataka, after considering the arguments placed by the petitioner and the respondent, had directed the first respondent to consider the request of the petitioner in accordance with law and pass appropriate orders. It seems that the respondent has not passed any orders in the matter other than the impugned communication from the Chief Engineer, LDC,

10. It is the contention of the petitioner that the 5 % wheeling charges fixed in the agreement cannot be changed by the respondents unilaterally and on its own as the agreement is a bilateral agreement and the respondent has to have the consent of the petitioner before modifying the same. Per contra, it is contended on behalf of the respondents that the words "these wheeling charges specified above are subject to change from time to time as notified by

the Board" empowers the KPTCL which succeeded the Karnataka Electricity Board to change the wheeling charges and while doing so there is no need to hear the petitioner.

11. No doubt it is true that Clause 5.3 states that the wheeling charges specified in the agreement are subject to change from time to time as notified by the Board. But, in our view it does not confer any unilateral power on the respondent. It is well settled law that any action of a 'state' authority like the respondent which results in civil consequences has to be taken only after hearing the party which will be affected. Admittedly, the respondents before issuing the impugned order dated 30.8.2000 did not give any notice nor any opportunity of hearing to the petitioner. The Hon'ble High Court in the petitioner's writ petition has also held the same.

12. It is contended by the petitioner that explanation to Section 19(4) of the Karnataka Electricity Reform Act, 1999 specifically protects the contract concluded by the Board with the generating companies and KPTCL is bound to carryout such contracts. As Clause 5.3 of the wheeling agreement fixes 5 % as wheeling charges, the respondents have to collect the wheeling charges only at that rate. Further it is contended that even if the wheeling charges fixed in the agreement could be modified it is only the Commission which can modify the rates after the enactment of the Karnataka Electricity Reforms Act, 1999 and the Electricity Act, 2003 and not by KPTCL.

13. It is settled law that the statute overrides a contract. The determination of wheeling and other charges under Section 27 of the Karnataka Electricity Reform

Act, 1999 and Section 62 of the Electricity Act, 2003 is within the statutory powers conferred on the Commission and this overrides the contractual rights of the parties to determine the wheeling and other charges from time to time as provided in the agreement with the petitioner. The Hon'ble Supreme Court in the case of M/s. PTC India Limited Vs. CERC 2010 (4) SCC 603 has also held that the Regulatory Commissions are entitled to intervene and overwrite the existing contracts under Section 178 as a part of the regulatory framework.

14. This Commission while passing the Tariff Order dated 10.3.2003 had observed that "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 Court has 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". Admittedly, till date KPTCL has not made any application for the fixation of wheeling charges in those cases which are covered by concluded contracts even though such a right was reserved in its favour. In our opinion, the wheeling charges as fixed in the contract and which have not been modified by this Commission continue to apply during the 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 wherever applicable.

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.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER