

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION, BANGALORE

Dated this 20th day of April 2006

Present

**Sri H.S.Subramanya - Member
Sri S.D.Ukkali - Member**

Case No. OP 33/2003

In the matter of: Application dated 7.8.2003 filed by KPTCL/ESCOMs for approval for enhancement of Bulk Supply Tariff (BST) and retail supply tariff consequent on allowing US \$ 0.04 per kwh towards fixed charges payable to Tanir Bavi Power Company Ltd. (TBPCL) as per the Arbitral Award.

- 1) Karnataka Power Transmission Corporation Ltd (KPTCL)
- 2) Bangalore Electricity Supply Company Ltd }
- 3) Mangalore Electricity Supply Company Ltd } (ESCOMs)
- 4) Hubli Electricity Supply Company Ltd }
- 5) Gulbarga Electricity Supply Company Ltd }

Applicants

(MD, KPTCL, MDs, ESCOMs)

Date of hearing: 27.2.2006

ORDER

At the outset, the Commission wishes to clarify that Sri K.P.Pandey, Chairman, KERC has stated that he is disabled to take part in the present proceedings since he had dealt with this matter extensively when he was Principal Secretary to Energy Department/GoK, and he was a party to the decision in the Govt. when the Govt. advised the KPTCL to pay \$ 0.04 per Kwh to TBPCL. Therefore, the above Members of the Commission have held the present proceedings.

2. KPTCL had filed an application before the Commission on 07.08.2003 for approval for enhancement of BST and retail supply tariff consequent on allowing US \$ 0.04 per kwh towards fixed charges payable to Tanir Bavi Power Company Ltd. (TBPCL) as per the Arbitral Award dated 19.05.2003. The Commission had disposed of the said application, along with three other applications seeking tariff revision, by a detailed order vide Tariff Amendment Order 2003 issued on 15.12.2003. In the matter of additional fixed charges of TBPCL, the Commission had held in the said order, in conclusion, that it did not consider it prudent to pass on this burden to the consumers and as such the Commission had decided not to allow the additional fixed charges of TBPCL as a pass through in the Tariff.

3. KPTCL and ESCOMs had filed an appeal in the Hon'ble High Court of Karnataka against the above order in MFA No.481 of 2004. The Hon'ble High Court accepted the appeal and vide its judgment dated 22.12.2005, set aside the impugned order passed by the Commission and has remitted the matter for re-decision by the Commission. The Hon'ble High Court has also reserved liberty to the parties to file additional pleadings / additional documents before the Commission and has directed the Commission to come to its own conclusions in accordance with law, however, after providing reasonable opportunity to the parties and to complete the proceedings within four months from the date of the order.

Other than the matter of additional fixed charges of TBPCL, several other matters were also raised by KPTCL/ESCOMs before the Hon'ble High Court in the said MFA. However KPTCL has not pressed such other matters before the Hon'ble High Court or before the Commission in the present proceedings. Hence this order is limited to additional fixed charges of TBPCL only.

4. Background to the present proceedings

A brief summary of the case under consideration by the Commission is as detailed hereunder:

- 4.1 KPTCL had entered into an agreement with Tanirbavi Power Company Ltd.¹ (TBPCL) for purchase of power on 15.12.1997. The Power Purchase Agreement (PPA) was amended through supplementary agreements dated 29.05.1999, 30.09.1999 and 25.01.2001.
- 4.2 Soon after the TBPCL started its commercial operation and raised invoices on the KPTCL for the power supply, KPTCL had raised a dispute relating to the computation of fixed charges. In this regard, the CMD, KPTCL, in his letter dated 27.09.2001 to the Principal Secretary, Energy Dept, GoK, had clearly stated that:

“If the contention of the Company is accepted, KPTCL would be incurring excess fixed charges of Rs.1040.80 crores over a period of seven years without any justification.

The position maintained by the Company on charging the ceiling amount of \$ 0.04 per kWh would imply, as per their own figure, collecting at least Rs.2503 crores in fixed cost on an investment of Rs.934 crores. This would mean a profit of Rs.1299.20 crores on Dollar denominated investment of Rs.275 crores. The RoE in such a situation would be greater than 65 % year on year”.

(Vide para 8.5.15 of the Tariff Order 2002).

¹ Now known as GMR Energy Ltd

- 4.3 A dispute arose between KPTCL and TBPCL regarding the amount of fixed charges (FC). While TBPCL claimed US \$0.04 FC, KPTCL differed from it. The dispute was referred to GoK. The GoK directed KPTCL to pay FC at the rate of US \$ 0.04 per kWh.
- 4.4 Consequently, KPTCL had filed revised ERC for FY02 and FY03 with the Commission, by including the revised FC payable to TBPCL. The Commission in its Tariff Order 2002 issued on 8.5.02, had decided that additional fixed charges of Rs.121.79 crores for FY02 and Rs.163.81 crores for FY03 payable to TBPCL are disallowed, for inclusion in the ERC, for the respective years and the Commission had directed KPTCL not to take any further action on the claim of the TBPCL, without following the dispute resolution mechanisms provided in the PPA. It had also directed KPTCL to take all necessary steps to protect the interest of the consumers.
- 4.5 The matter was referred by KPTCL and TBPCL to an Arbitral Tribunal for arbitration. The Tribunal passed order on 19.05.2003 upholding the claim of TBPCL for payment of FC at the rate of US \$ 0.04 along with interest. It has been submitted that KPTCL as well as the State Government have accepted this award.
- 4.6 Consequent to passing of orders by the Arbitral Tribunal, the additional cost towards payment of FC, is as hereunder according to KPTCL's application dated 07.08.2003:

	Rs. In Crores
For FY02-Actuals	113.50
For FY03-Actuals	158.10
For FY04 (estimated)	147.34
Interest	34.10
Total	453.04

- 4.7 The Commission had examined the KPTCL's application dated 07.08.2003 in detail duly considering various contentions raised by the objectors and the response of the KPTCL thereto vide para 11.1 to 11.28 of the Tariff

Amendment Order 2003 dated 15.12.2003 and decided as follows:

" For all these reasons, the Commission does not consider prudent to pass on this burden to the consumers and as such, the Commission decides not to allow the additional fixed charges as a pass through in the tariff." (para 11.29 of Tariff Amendment Order 2003).

4.8 KPTCL and ESCOMs had filed an appeal in the Hon'ble High Court of Karnataka against the above order dated 15.12.2003 in MFA No.481 of 2004. Several contentions were made both by KPTCL and the Commission before the Hon'ble High Court in the said proceedings. KPTCL's main contentions before the Hon'ble High Court included the following, amongst others:

- (i) The respondent Commission is wrong in not accepting the contentions advanced by it. According to KPTCL, there existed a 'concluded contract' between the parties for the purpose of tariff fixation in terms of proviso to section 27(2) of the Karnataka Electricity Reform Act 1999.
- (ii) Regarding findings of the Commission on the decision of KPTCL not to challenge the Arbitral Award, KPTCL had contended that the findings of the Commission are contradictory in nature and there can be no compulsion in the matter of challenge to Arbitral Award in the circumstances.
- (iii) The matter requires consideration particularly in the light of large sums of money having been made over to TBPCL after legal proceedings in terms of judicial decisions by the Hon'ble High Court and in terms of the Award at the hands of three eminent retired judges of the Supreme Court.

The main contentions of the Commission before the Hon'ble High Court included the following, amongst others:

- (i) There is one principal agreement dated 15.12.1997 and three supplemental agreements dated 29.05.1999, 30.09.1999 and 25.01.2001. All these agreements have to be read together for the purpose of understanding of the case. In the Arbitral Award also the Tribunal has ordered that TBPCL is entitled to the fixed charge at the rate of US \$ 0.04 per kwh for the electricity supplied by it to KPTCL in terms of power purchase agreement dated 15.12.1997 and its subsequent amendments. The Commission has come into existence on 01.06.1999 on enactment of the Karnataka Electricity Reforms Act 1999 and no approval was taken by KPTCL in terms of section 27(2) of the said Act, and therefore, proviso to section 27(2) is not applicable.
 - (ii) In so far as the Arbitral Award is concerned, the Award has come into force only after three months in terms of section 34, 35 and 36 of the Arbitration and Conciliation Act 1996 and before the award could be enforced, the Electricity Act 2003 has taken its birth on 10.06.2003. In the said Act no saving provision exists as in the case of proviso to section 27(2) of Karnataka Electricity Reform Act 1999. Therefore, it cannot be said that a fixed cost made over in terms of the KER Act has sanction of law. Reference was made to section 185(3) of 2003 Act and also to section 61 in support of the submissions.
 - (iii) The Commission was justified in not taking into consideration the fixed cost made over to TBPCL in the interest of consumers.
- 4.9 The Hon'ble High Court has accepted the appeal filed by KPTCL/ESCOMs in MFA 481/2004 and vide its judgment dated 22.12.2005, set aside the impugned order passed by the Commission and remitted the matter for re-decision by the Commission. The Hon'ble High Court, in the said

judgment has directed the Commission to hear the parties in the light of the facts referred thereto in the judgment without in any way being influenced by the earlier order of the Commission or by the said judgment and come to its own conclusions in accordance with law, however, after providing reasonable opportunity to the parties.

5.0 **Publication of Notice**

5.1 In accordance with the judgment dated 22.12.2005 of the Hon'ble High Court, the Commission had issued a notification dated 16.01.2006 calling for objections from the stakeholders on the KPTCL's earlier application in the matter, duly notifying a time schedule for making the KPTCL's application available to the public, date by which objections have to be received, date by which KPTCL has to respond to the objections and the date of public hearing by the Commission. The Commission had also informed the KPTCL and all the 5 ESCOMS to make available their application dated 07.08.2003 along with its enclosures to all the interested parties latest by 27.01.2006 at their Corporate Offices/Circle offices and also publish the application on their website. The Commission had also informed in the notification that it would hold a public hearing in the matter on 27.02.2006 at 11 AM at the Commission's Court hall.

5.2 It was also indicated in the said notification dated 16.01.2006 that objections received in the matter by the Commission in 2003 would also be examined by the Commission in the present proceedings and such objectors are at liberty to file fresh objections if considered necessary and may also file additional pleadings/additional documents. The Commission had sent copies of the said notification to all the 91 objectors who had raised objections on the issue in 2003.

5.3 The said notification was issued by the Commission in the following Newspapers:

1. Times of India	18.01.2006
2. Deccan Herald	18.01.2006
3. Kannada Prabha	18.01.2006
4. Udayavani	18.01.2006
5. Prajavani	24.01.2006
6. Vijaya Karnataka	24.01.2006
7. Samyuktha Karnataka	24.01.2006

5.4 The notification was also sent to the following TV channels for telecast: Bangalore Doordarshan, ETV Kannada and Udaya TV

5.5 The Hon'ble High Court in the said judgment dated 22.12.2005 has also stated that the Commission, in its discretion, may issue notice to the State Government since the Appellant is a Government company and Government's interest is involved to a certain extent in the matter. Accordingly, the Commission had informed the Principal Secretary, Energy Department/GoK vide letter dated 20.01.2006 to present the Govt's views, if any, before the Commission.

5.6 A copy of the High Court Order dated 22.12.2005, KPTCL's application dated 07.08.2003 and Commission's notification dated 16.01.2006 were also made available on the Commission's website.

A copy of the notification dated 16.01.2006 is placed at Annexe-1 to this order.

6.0 **Objections Received**

6.1 In response to the Commission's notification dated 16.01.2006, 64 objections were received from the public in proper form (with affidavit) and one objection received was not in proper form (received without affidavit) and another objection which was also not in proper form was received very late after the last date for filing the objections. In addition, one Application was also received from M/s Consumer Care society, Bangalore on 25.02.2006 pleading to stay all the present proceedings in the matter, which would be discussed later in this order. A list of objections received is furnished in Annexe-2 to this order.

6.2 KPTCL filed before the Commission, a common response to seven objections (Response to objection No. TA1 to TA5, TA7 and TA64) on 24.02.2006 and response to objections No TA6 on 13.03.2006. The Commission notes that objections No TA8 to TA63 are merely copies of the objection No TA7.

7.0 **Public Hearing, Objections and Response**

7.1 In addition to the Commission's notification dated 16.01.2006, the Commission had issued a press note to all the Newspapers on 21.02.2006 notifying the date of the hearing for wide publicity. Individual notices were also issued by the Commission to all the Objectors informing them the date of the hearing and also to appear before the Commission in person, if they so desire, and make their submission in the public hearing.

7.2 The Commission held the Public hearing in the matter on 27.02.2006 at Bangalore as scheduled. Sri Naganand, Senior Counsel represented KPTCL. To a specific query by the Commission, Sri Naganand clarified that he is representing the ESCOMs also and added that In the proceedings before the Commission in 2003, the ESCOMs had authorised

KPTCL in the matter and also that the ESCOMs were joint Appellants with KPTCL in MFA 481 before the Hon'ble High Court.

- 7.3 The Commission pointed out during the hearing that the High court, in its judgment dated 22.12.2005, had reserved liberty to the parties to file additional pleadings/ additional documents within one month from the date of the Court Order, but, KPTCL/ESCOMs have not filed any additional pleadings/documents.
- 7.4 At the beginning of the hearing, Sri Aswathanarayana representing M/s Consumer Care society, Bangalore raised a point of order requesting the Commission to give its ruling on their petition dated 25.02.2006 in which the said Society has stated that since the Chairman/KERC is not taking part in the present proceedings, all further proceedings before the Commission in the matter be stayed till adequate arrangements are made for appointment of a Chairman who is not disqualified to hold the proceedings. The Commission clarified that although the Chairman/KERC is not participating in the proceedings in the matter for the reasons already stated, there is quorum for the Commission to proceed with the hearing as per the provisions of the KER Act, 1999 read with Electricity Act 2003 and KERC (Conduct of Meetings) Regulations and hence the demand to stay the proceedings does not merit consideration.
- 7.5 During the hearing, Sri A.V.Amaranath, Advocate representing FKCCI stated that although FKCCI has already filed its objections on 15.02.2006, due to oversight, some detailed objections could not be filed and sought permission to place additional objections. He stated that KPTCL & Others have challenged the Tariff Amendment Order issued by the Commission on 15.12.2003 before the Hon'ble High Court in MFA 481 under the provisions of section 41 of the Electricity Regulatory Commission Act (ERC Act), 1998. He further stated that ERC Act 1998 itself has since been repealed in the Electricity Act 2003, which came into effect from

10.06.2003. He argued that since the ERC Act had been repealed from 10.06.2003, and that Electricity Act 2003 provides for Appeal before the Appellate Tribunal for Electricity, KPTCL & Others should have challenged the said Tariff Amendment order issued by the Commission before the Appellate Tribunal. According to him, since the Appeal was filed by the petitioners under the old ERC Act, the order passed by the Hon'ble High Court in MFA 481/2004 is a nullity and therefore the said order of the Hon'ble High Court cannot be enforced.

7.6 KPTCL submitted that as on the date of filing the appeal before the High Court in MFA 481/2004, the Tribunal had not been constituted and was not in existence. Therefore, there is no legal infirmity in the order passed by the Hon'ble High Court. The Commission permitted FKCCI to file its written objections in this regard.

7.7 During the hearing, KPTCL's counsel briefly explained the facts of the case chronologically and also informed that the cumulative amount to be passed on to the consumers as per the Arbitral Award would amount to about Rs.720 crores. He requested the Commission to allow the amount as per the Arbitral Award for pass through to the consumers through tariff since the amount has already been incurred by KPTCL/ESCOMs and further stated that the exact modality of pass through, whether in one year or over a period, could be discussed.

7.8 After a brief presentation of the case by KPTCL, the following Objectors expressed their views:

- (i) Sri R.K. Rangrej, Chairman, Gadag District Chamber of Commerce, Gadag.
- (ii) Sri Aswathanarayana, Consumer Care Society, Bangalore.
- (iii) Sri Sathyanarayana Udupa, Bharatiya Kissan Sangha, Udupi.

- (iv) Sri Vijayakrishna, General Secretary, Bharatiya Kissan Sangha, Dakshina Kannada.
- (v) Sri A.V. Amaranath, Counsel for FKCCI, Bangalore.
- (vi) Sri S.G. Prabhakar, Chairman, Energy Committee, FKCCI, Bangalore
- (vii) Sri Y.G.Muralidharan, Consultant (Consumer Advocacy), KERC, Bangalore.

7.9 During the hearing, many Objectors highlighted the objections filed by them earlier in writing and also brought out many new points. Some Objectors objected to the quality of reply provided by KPTCL and stated that KPTCL has responded to the objections in a very casual way. Mr.R.K.Rangrej, Chairman, Chamber of Commerce Gadag Dist. submitted during the hearing that KPTCL has blindly termed their objections as untenable & devoid of merit, without assigning any reasons etc. A few other objectors also endorsed this view during the hearing. Many Objectors have raised several serious questions in their written objections as well during the oral hearing.

7.10 KPTCL has responded in writing to the various objections received in writing and raised during the hearing. KPTCL's Counsel also responded to various objections at the end of the hearing and requested the Commission to allow the amount as per the Arbitral Award for pass through to the consumers.

7.11 The Commission drew the attention of Sri Naganand to the High Court's order dated 22.12.2005, more particularly to para 7, 11,12 &13 of the Order and asked KPTCL to file its written arguments before the Commission on or before 06.03.2006 and accordingly KPTCL filed its written submissions on 10.03.2006.

7.12 In response to the Commission's letter dated 20.01.2006 (referred to earlier) addressed to the Energy Department/GoK requesting the Govt. to

communicate its views in the matter, the Joint Secretary to Govt., Energy Department, GoK, has stated in his letter dated 02.03.2006 that the State Govt endorses the views of KPTCL as far as the Application dated 07.08.2003 filed by KPTCL/ESCOMs in the subject matter.

7.13 An abstract of various objections raised by the Objectors in writing as well as during the public hearing and response of KPTCL thereto is given in Annexe-3. The major objections raised and the responses of KPTCL thereon are discussed here below.

7.14 Certain primary objections have been raised by the Objectors on the procedural aspects, which are discussed below:

(i) Regarding the appeal filed by KPTCL & ESCOMs in MFA 481 in the Hon'ble High Court against the Tariff Amendment Order 2003, FKCCI filed written objections before the Commission on 03.03.2006 in which they have reiterated the submissions made during the hearing. FKCCI has also referred to decision of the Hon'ble Supreme Court in the case reported in AIR 1954 sc 340 KIRAN Smgn & Others V/s Chaman Paswan & others and have stated that as per the said decision of the Supreme Court, the order passed by the Hon'ble High Court in MFA 481 is a nullity. They have urged the Commission to reject the plea of the petitioners as the said plea of the petitioner has already been examined by this Commission twice. Many other Objectors have also stated that the petitioners should have appealed to the Tribunal under the provisions of EA 2003 and not to the High Court.

The Commission notes that the appeal filed by the petitioners before the Hon'ble High Court in MFA 481/2004 is under section 41 of the Karnataka Electricity Reform Act 1999 and not under section 41 of the ERC Act 1998 as contended by FKCCI. It is to be clarified that while the ERC Act 1998 has been repealed in the Electricity Act 2003, KER

Act 1999 has not been repealed and the same would continue to be applicable to the extent it is not inconsistent with the provisions of Electricity Act 2003 according to section 185 (3) of Electricity Act 2003.

The Commission observes that the objection in this regard now sought to be raised before the Commission could have been raised by the Objectors before the Hon'ble High Court, if they so desired, for appropriate remedy when the matter was pending before the High Court. After issue of the judgment by the Hon'ble High Court in the said MFA remitting the matter back to the Commission for re-decision, the Commission is now bound to act according to the orders of the Hon'ble High Court.

- (ii) Bharatiya Kissan Sangha, Mangalore and D.K. stated that a single application filed by KPTCL on behalf of all ESCOMs cannot be considered as ESCOMs are separate legal entities and not subsidiaries of KPTCL. The application is not maintainable for non-rejoinder of necessary parties.

KPTCL in their rejoinder has responded stating that the application has been filed jointly by KPTCL and ESCOMs and they were the joint Appellants before the High Court also and that the Application has been filed by the person authorized by the Board of Directors and there is no need for any power of attorney.

The Commission notes that when the original application dated 7.8.03 was filed before the Commission, KPTCL was a proper party to the PPA and it was purchasing power in bulk from all the sources including TBPCL and selling in bulk to the ESCOMs. KPTCL was a Bulk Supply Licensee at that time and ESCOMs were retail supply licensees. Now that the application is before the Commission for re-decision in the

matter, the Commission agrees with the view expressed by KPTCL in this regard.

7.15 A summary of various objections raised by the Objectors is given below:

- a. The PPA between KPTCL and TBPCL entered into in 1997 is not a concluded contract under section 27(2) of the KER Act as this contract has been amended several times after the KER Act has come into force from 1.6.1999.
- b. To the principal agreement dated 15.12.1997 between KPTCL and TBPCL, there are three supplemental agreements dated 29.5.1999, 30.9.1999 and 25.1.2001. The amendments dated 30.9.1999 and 25.1.2001 are clearly amendments effected after the KER Act 1999 came into force. These two amendments are not covered under the deeming proviso under section 27(2) of KER Act, 1999 and therefore the Amendments have no legal sanction. Since the Agreement is incomplete without these amendments, the PPA cannot be given effect to.
- c. One amendment to the contract dated 29.5.1999 has been entered into in a great hurry just two days before the KER Act, 1999 came into force, which needs to be thoroughly examined. Since the PPA cannot be given effect to, the power purchase from this project has no legal sanction.
- d. Many Objectors have argued that the consumers are not a party to the Contract and their rights have not been adequately protected by KPTCL. Constitution of the Arbitral Tribunal was not notified to the Consumers. Had it been notified, the Consumers could have impleaded themselves before the Arbitration proceedings and effectively protected the interest of the

consumers. There was nobody to protect the interest of the consumers before the Tribunal. Legally, the Arbitral Award is only binding on the parties to the dispute and the liability cannot be transferred to the consumers. Since KPTCL has not bothered to protect the interest of the consumers, the amount should not be factored into the tariff, which will burden the mute consumers.

- e. Govt/KPTCL has acted in haste in accepting the Award and has not taken due care to protect the interest of the consumers. KPTCL Board has accepted the views of GoK contrary to its earlier stand without assigning any reason. KPTCL Board has not applied its mind to this vital factor. When a decision has been taken by the Govt/KPTCL to accept the Award without challenging it and also without taking into confidence the hidden third party, the "consumers", the consumers can not be made liable for the consequences.
- f. When petty cases are being challenged by KPTCL/ESCOMs in the Courts, what prevented them from challenging the Arbitral Award in the Court to protect its own interest and that of the consumers is not known. Hence the additional liability should not be passed on to the consumers and should be borne by the KPTCL itself/ Govt.
- g. Govt/KPTCL had all the expertise at its command both technical, commercial and legal. Had adequate care been taken by it before entering into the contract, this situation would not have arisen. Nor adequate care has been taken by KPTCL to defend the case before the Tribunal to protect the interest of the consumers. Consumers should not be made to pay for the mistakes committed by KPTCL. KERC should get response from the Government and reject the petition of KPTCL.

- h. The contract entered into by KPTCL for power purchase from private sources in 1996-1997 including from TBPCL itself is not in the interest of the consumers. There was no necessity to purchase power from such high cost sources considering the demand and supply scenario at that time.
- i. Determination of tariff of TBPCL is not in accordance with provisions of Electricity (Supply) Act, 1948, notification of Gol dated 30.3.1992 as amended from time to time, and Gol guidelines dated 3.6.1997 regarding Tariff based bids.
- j. The shares of M/s Chicago Power Inc., (Company involved at the time of bidding) have been purchased by M/s GMR Group. GMR is an Indian company. Further, capital for the project was borrowed from domestic banks. Therefore, the question of paying in US dollars or paying any exchange rate variation is funny.
- k. PPA with TBPCL should have been terminated by KPTCL when it realized that the cost of power purchase from this source is very high. The share of power being drawn from TBPCL is less than 2 % of total input to the state, while the average power purchase cost from this source is almost two times the average cost of supply in the state. Thus the power purchase cost from TBPCL is unreasonable and such unreasonable cost shall not be allowed by the Commission for pass through to the consumers as specifically stated in the Tariff Policy issued by Gol under the EA 2003.
- l. When PPA has been terminated in case of Co-Generation Plants and other high cost sources, KPTCL should have terminated the PPA with TBPCL, also.

- m. KPTCL has not placed any fresh grounds before the Commission for consideration and hence there is no case for the KPTCL and the earlier order of the Commission should be reiterated.
- n. FKCCI stated that the health of the industrial sector in the State is very bad because of the already existing high tariff and the industrial sector should not be further burdened by passing on the award to the consumers.
- o. Since KPTCL has failed to protect the interest of the consumers, KERC should come to the rescue and the additional burden should not be passed on to the consumers.
- p. FKCCI has pointed out that conclusion of PPA at the time of financial closure is the vital point at which decision to accept the payment at US\$ 0.04 per KWH as fixed charges was taken. This should have been approved by KERC. Since this approval has not been accorded by KERC, passing on the burden to the consumers has no legal validity.
- q. FKCCI has further contended that in the original PPA of 1997, the dispute resolution clause 14.3 (c) says that the dispute is to be resolved under UNCITRAL or International Act. But the award now obtained by TBPCL/KPTCL is under the Indian Arbitration and Conciliation Act. Therefore the Award is not binding on the Commission. Hence the Commission should not pass on the charges to the consumers.
- r. Many objectors have reiterated the contentions made by the Commission before the Hon'ble High Court.

7.16 The Commission had also indicated that it would examine the objections received in the matter in the proceedings before the Commission in 2003. A summary of the objections as indicated in the Tariff Amendment Order 2003 are extracted below (without repetition) for reference:

- 1) Tariff fixed on the principles of competition and the PPA is unethical. The Arbitral Tribunal has failed to examine the process of bidding.
- 2) Fixed Charge is not fixed price and is not "fixed" in the PPA. The PPA being a statutory contract for tariff purposes, the meaning of fixed charge cannot be inferred from either the context of competition or from Lexicon, but can be only extracted from Annexure III of the 'Guidelines for inviting tariff based bids' issued by the Ministry of Power (MoP).
- 3) Considering the fixed charge as settled price, without reference to cost, the Company is ensured excess profit which is against public policy and hence the award is to be set aside.
- 4) PPA is unenforceable and \$ 0.04 is not tenable under any interpretation.
- 5) The PPA being a statutory contract is not a concluded contract and hence subject to review by KERC.
- 6) It results in high return on equity allowed to TBPCCL and defective tendering process.
- 7) The Arbitral Tribunal did not have expert advice.
- 8) Electricity Act 2003 was promulgated to be effective from 10.06.2003. The Arbitral award was issued on 19.05.2003. Hence, the validity of the award will be only up to 10.06.2003.

- 9) Objectors have cited a decision of the Hon'ble Supreme Court (ONGC v/s Saw Pipes Ltd.) wherein it has been stated that the court may set aside Arbitral Award, if it is in conflict with the public policy of India.
- 10) The PPA should be reopened in the interest of the public and tariff for TBPCL should be determined by the Commission under the provisions of Electricity Act 2003.
- 11) The Commission should direct the petitioners to challenge the Arbitral Award in the court of law instead of asking the consumers to file a PIL.
- 12) The Tariff of this project is not reflective of the actual costs incurred. They quoted the CAG report and pointed out that the FC is 2.05 cents for single cycle operation and therefore FC should be less than 2.05 cents for combined cycle operation.
- 13) As a result of arbitral award, KPTCL will be paying excess amount of Rs.1050 crores for a period of seven years which would be around Rs.750 crores in terms of NPV and thus the ROE thereon, will be far more than the 16%, as per the Gol norms.
- 14) The original bids were called for 150 MW and the capacity has been modified to 220 MW subsequently stating that the earlier capacity was unviable. Considering the economies of scale the fixed cost per unit should have come down which has not been properly negotiated.

7.17 KPTCL has provided its response to the various objections. The Petitioner's counsel Sri Naganand also responded to the objections during the hearing and reiterated the contentions of KPTCL and also filed further written submissions on 10.03.2006. KPTCL has pleaded that the cost of purchase of power from TBPCL has crystallized and therefore the same should be allowed to be passed on to the consumers. An abstract of the response provided by KPTCL to the various objections is given below:

- 1) The reference to supplemental agreements is misconceived as the supplemental agreements did not alter the provisions with regard to the issue in question before the arbitral tribunal as well as this Hon'ble Commission.
- 2) The Electricity Act 2003 does not nullify the contracts that are entered into before the Act came into force and as such the contract with TBPCL is binding on the parties. The provisions of section 61 & 62 of Electricity Act 2003 would apply to cases where PPAs are yet to be signed and not in cases where PPAs have already been entered into. As per Section 14 (7) of KER Act and Section 131 (6) of Electricity Act 2003, the contracts signed by KEB are binding on KPTCL / ESCOMs.
- 3) The contention that by virtue of Electricity Act 2003 the liability to pay additional amounts as stipulated under the Arbitral award was only up to 10.6.2003 is untenable. The question of filing fresh application for determination of tariff in case of subsisting PPAs does not arise.
- 4) The question before the Arbitration Tribunal was interpretation of the clauses in the contract. Hence the question of impleading the consumer bodies would not arise. At the stage of entering into PPA in the year 1997, the question of notifying the public did not arise. The award has been accepted pursuant to the opinion of the State Government.
- 5) The contention that KPTCL has not taken any steps to put forth its case properly before the Tribunal is false. KPTCL has taken all steps to put forth its case through an eminent Sr. Advocate and former Solicitor General of India. KPTCL had placed all the materials relating to the PPA before the Arbitral Tribunal.

- 6) The contention that there was no consensus ad idem between the parties with regard to clauses and hence there was no concluded contract as on the date of coming into force of KER Act is absurd. The contention that interest of consumer has not been protected is false.
- 7) The grounds on which an arbitral award can be challenged under Section 34 are limited and the grounds mentioned therein are not available. The contention that consumers are not bound by the award is wholly misconceived and untenable. The objection filed in this regard does not hold any water and is liable to be rejected.
- 8) The contract relating to fixed charges was a concluded contract prior to 01.06.1999 and the arbitrator had only interpreted the clauses of this concluded contract and there was no scope for challenging the award. Further, the Hon'ble Supreme Court in the following cases has held that court cannot substitute its own interpretation to that of arbitrator so long as the interpretation of the arbitrator is a possible one.
 1. (1990) 4 SCC 647 – AIR 1991 SC 945 – S. Harcharan Singh V/s Union of India.
 2. (1992) 4 SCC 217 – AIR 1992 SC 2192 - Hindustan Construction Co. Ltd., V/s state of J & K.
 3. (1988) 3 SCC 82 – Continental Construction Co. Ltd., V/s State of MP.

In Sudarshan Trading Co. V/s Government of Kerala AIR 1989 SC 89, the Hon'ble Supreme Court has held that "it is for the arbitrator to interpret the terms of the contract and that if the view taken by the arbitrator is a possible view; then the court would not interfere". These judgments have been reiterated in the latest judgment of the Hon'ble

Supreme Court in (2006) 1 SCC 86 the case of State of Rajasthan V/s New Bharat Construction Co.

Since the award of the Arbitral Tribunal was in accordance with the views expressed already by GoK which was communicated to the applicant after obtaining an opinion from the Advocate General and by a Tribunal consisting of three former judges of the Hon'ble Supreme Court including a former Chief Justice and the scope for challenging the same was not there as per law laid down by the Hon'ble Supreme Court referred to above, the applicant has accepted the award.

- 9) Before entering into PPA, the same was examined at every level of the Board and the Government and the PPA has been entered into after examining every aspect including the cost.
- 10) The PPA including amendments were placed before the Commission when it issued direction to the parties to refer the dispute relating to fixed charges to arbitration.
- 11) When KPTCL approached the Hon'ble High Court against the Tariff Amendment Order 2003, the Appellate Tribunal was not constituted.
- 12) Having accepted the PPA as one protected under section 27 (2) of KER Act, the question of going into ROE at this stage would not arise. The other contentions are wholly irrelevant in the facts of the present case.
- 13) It is incorrect to state that Electricity Act 2003 has no saving provision. Section 131(6) of 2003 Act specifically states that all contracts signed by the Electricity Board etc. shall be deemed to have been entered into by the successor bodies. Section 185(2) (a) also states that any document or instrument executed under the repealed Act in so far as

it is not inconsistent with the provisions of this Act be deemed to have been executed under the Electricity Act 2003. Sec 185(3) also states that the provisions of KER Act shall continue to apply to Karnataka state except those provisions, which are inconsistent. The PPA as modified or Section 27(2) of KER Act are in no way inconsistent with the provisions of Electricity Act 2003. On the contrary, they are consistent with Section 131 of the new Act.

- 14) The parties in the present case referred the dispute as per the directions issued by the Commission and hence Section 86 (1) (f) does not apply and even if it applies reference to arbitration is in accordance with Section 86 (1) (f).

7.18 On the objections received by the Commission in the proceedings before it in 2003, KPTCL has not provided any further replies although it was indicated that, those objections would also be examined by the Commission in the present proceedings nor has it placed any additional material in support of its plea other than what was stated earlier.

8.00 The Hon'ble High Court, in the judgment dated 22.12.2005 while remitting the matter for re-decision by the Commission has directed it to hear the parties in the light of the facts referred thereto in the judgment without in any way being influenced by the earlier order of the Commission or by the said judgment of the Hon'ble High Court and come to its own conclusions in accordance with Law. The contentions raised by KPTCL and by the Commission before the Hon'ble High Court have been highlighted in para 4.8 above. The Commission would proceed to examine these contentions, keeping in view the objections raised by the Objectors and the response provided by KPTCL.

8.01 The Power Purchase Agreement between KPTCL and TBPCL was entered into on 15.12.1997. Admittedly, the PPA was amended through three

Supplementary Agreements dated 29.05.1999, 30.09.1999 and 25.01.2001. While it may be true that the PPA dated 15.12.1997 was entered into before the coming into force of the Karnataka Electricity Reform Act, 1999, the issue for consideration is whether such PPA with its amendments and Supplementary Agreements falls outside the pale of review by the Commission due to the proviso to Section 27(2) of the Act.

The Objectors have stated that the subject PPA is not a concluded contract under section 27(2) of the KER Act since the principal contract has been amended thrice out of which two amendments have taken place after coming into force of KER Act 1999 and that KPTCL has not obtained approval of the Commission for the amendments made after 01.06.1999 and as such the amendments have no legal sanction and that the Agreement is incomplete without these amendments and cannot be given effect to. KPTCL has responded stating that the amendments have no financial impact on the tariff and that reference to supplemental agreements is misconceived as the supplemental agreements did not alter the provisions with regard to issue in question before the arbitral tribunal as well before the Commission. The objectors have pointed out that the amendments made, especially the amendment dated 25.1.01 which introduces the definition of 'financial closure' in the PPA is significant and without this amendment the PPA could not be given effect to. One other Objector has also stated that in the amendment dated 25.01.2001, clause 14.3(c) of the contract has been amended to change the arbitration clause from UNCITRAL or International Act to Arbitration under Indian Arbitration and Conciliation Act and that the award now obtained from the Tribunal is under the Indian Arbitration and Conciliation Act and therefore the Award is not binding and the additional cost should not be passed on to the consumers. The objectors have further contended that whether or not there is financial impact on the tariff because of the amendments, KPTCL ought to have obtained the

approval of the Commission for the amendments effected after 01.06.1999.

We find sufficient merit and force in the arguments advanced by the objectors. In this context, we advert to the submissions made by the parties and the findings given by the Hon'ble Arbitral Tribunal. The relevant discussion and findings of the Arbitral Award dated 19.05.2003 are extracted hereunder:

“Subsequent to the execution of Power Purchase Agreement two Supplemental Agreements were entered into between the parties on 29th May, 1999 and 30th September, 1999 amending certain paragraphs of PPA.”

“The matters in issues center round the interpretation of Article 7.4 of the Power Purchase Agreement (PPA) dated 15th December 1997, as amended by Supplemental Agreements dated 29th May, 1999 and 30th September, 1999.”

“The original Power Purchase Agreement is dated 15th December, 1997. That underwent three amendments, one dated 29th May, 1999, then on 30th September, 1999 and the third on 25th January, 2001.”

“Financial Closing is defined in the Third Amendment dated 25.01.2001 ‘Financial Closing means signing of all the financial documents... Financial documents’ are defined at page 7 of the PPA as including loan agreements and equity participation agreement.... That is only at the time of Financial Closing that the protected part of the Fixed Charge i.e. (a) and (b) can be and is required to be determined. This is an additional reason why the words ‘Fixed Charge shall be determined’ must

necessarily mean, 'the protected part of the Fixed Charge shall be determined'. This submission is sound."

“FINAL ORDER”

In the result there shall be an award as under –

1. The Claimant is entitled to the Fixed Charge, at the rate of US\$ 0.04 per Kwh, for the electricity supplied by it to the Respondent as per the terms of the Power Purchase Agreement dated 16.07.1997 (sic) and the subsequent amendments."

From the above discussion and conclusion arrived at by the Arbitral Tribunal, it is very clear that the liability of KPTCL to TBPCL arises not only under the PPA entered into before 01.06.1999, i.e., before the commencement of the Karnataka Electricity Reforms Act, 1999, but also under the Supplementary Agreements dated 29.05.1999, 30.09.1999 and 25.01.2001 as noted by the Hon'ble Arbitral Tribunal itself.

It was incumbent on the part of KPTCL to show that its liability to TBPCL arose under the PPA dated 15.12.1997 and the amendment dated 29.05.1999 and under that PPA and the said amendment alone. KPTCL has not discharged this burden and has not established this point, except by making a bald statement that the supplementary agreements were irrelevant for the purposes of these proceedings. This argument is not available to the KPTCL for the reason that the Arbitral Tribunal thought it fit to rely upon not only the PPA dated 15.12.1997 but on all the amendments.

On the other hand, from the discussion in the Arbitral Award dated 19.05.2003 itself cited *supra*, it is amply clear that the liability of KPTCL to TBPCL arises not only under the Power Purchase Agreement dated

15.12.1997 but also the subsequent amendments thereto dated 29.05.1999, 30.09.1999 and 25.01.2001. Due to this admitted factual position, it cannot be stated that the Power Purchase Agreement dated 15.12.1997 read with these subsequent amendments / Supplementary Agreements amounted to a contract that was concluded before the commencement of the Karnataka Electricity Reforms Act, 1999 thereby attracting the operation of the proviso to Section 27(2) of the Act.

Since the proviso to Section 27(2) of the KER Act 1999 does not squarely apply to the facts and circumstances of the present case, KPTCL cannot contend that the entire financial burden arising as a result of the Arbitral Award dated 19.05.2003 had to be automatically passed on to the consumers insofar as it relates to the subject matter of Arbitral proceedings which is the basis of the application dated 07.08.2003 filed by KPTCL before this Commission.

It has to be reiterated here that the Arbitral Award and its financial implications constitute just one of the many aspects that will have to be considered and factored in by the Commission during the process of tariff fixation. It is incumbent on KPTCL to place sufficient evidence to justify the passing through of the financial implication arising out of the Arbitral Award dated 19.05.2003 to the consumers.

8.02 The Commission had contended before the Hon'ble High Court that In so far as the Arbitral Award dated 19.05.2003 is concerned, the Award has come into force only after three months in terms of section 34, 35 and 36 of the Arbitration and Conciliation Act 1996 and before the Award could be enforced, the Electricity Act 2003 has taken its birth on 10.06.2003. In the said Act no saving provision exists as in the case of proviso to section 27(2) of Karnataka Electricity Reform Act 1999. Therefore, it cannot be said that a fixed cost made over in terms of the KER Act has sanction of law.

Reference was made in this regard to section 185(3) and also to section 61 of 2003 Act in support of the submissions.

Many Objectors have contended that since concluded contracts have not been specifically saved in the Electricity Act 2003 as in the KER Act, the saving proviso in the KER Act would no longer apply from 10.06.2003 since the same would be inconsistent with the provision of Electricity Act 2003 in accordance with section 185(3) of the Electricity Act 2003. They have urged that the Commission should determine the tariff for TBPCL as per the provisions of Section 61 & 62 of Electricity Act 2003 and such tariff should be effective from 10.06.2003.

KPTCL has contended that the Electricity Act 2003 does not nullify the contracts that are entered into before the Act came into force and as such the contract with TBPCL is binding on the parties. They have further stated that the provisions of section 61 & 62 of Electricity Act 2003 would apply to cases where PPAs are yet to be signed and not in cases where PPAs have already been entered into. They have further argued that as per Section 14 (7) of KER Act and Section 131 (6) of Electricity Act 2003, the contracts signed by KEB are binding on KPTCL / ESCOMs.

The Commission has already found that the claim which is the subject matter of application of KPTCL emanates from the Arbitral Award which is based upon not only the PPA dated 15.12.1997 and the amendment dated 29.05.1999 entered into before the KER Act 1999 came into force but also on supplemental Agreements entered into after the enactment of the KER Act 1999. In view of this admitted position, the aforesaid contentions regarding applicability of section 61 and 62 of the Electricity Act 2003 are only academic and the Commission does not find it necessary to record its findings.

As regards section 14(7) of KER Act referred to by KPTCL with regard to continuation of the contracts consequent to reorganization of the Karnataka Electricity Board, the same would not be applicable to the amendments effected to the contract in the instant case after 01.06.1999. With regard to section 131(6) of the Electricity Act 2003 referred to by KPTCL, it is to be noted that there is no transfer scheme effected under 2003 Act and hence Section 131(6) is not attracted.

It is a fact that by the time the Arbitral Award became enforceable, the Electricity Act 2003 had come into force and this is an additional fact that we have kept in mind in reaching the final conclusion in this order.

8.03 The Objectors have further contended that KPTCL has failed to protect the interest of the consumers stating, amongst others, that KPTCL has not effectively argued the case before the Arbitral Tribunal and that KPTCL has simply accepted the Award in haste without applying its mind and against its own earlier view simply based on the opinion given by the Govt. and without challenging the Award. They have stated that KPTCL has denied the consumers an opportunity to voice their viewpoint before the Arbitral Tribunal. The objectors have urged not to pass on this additional burden to the consumers on account of the said award. KPTCL, on the other hand, has contended that it has effectively argued the case before the Arbitral Tribunal, the award was accepted since the award was in accordance with the views expressed already by the Govt of Karnataka which was communicated to KPTCL after obtaining an opinion from the Advocate General and that the scope for challenging the award was not there as per the decisions of the Hon'ble Supreme Court in the cases referred to in para 7.17 (8) above. The Commission notes that the opinion of the Advocate General referred to by KPTCL in the rejoinder to the objectors is the opinion that was taken by the Govt before the matter was referred to arbitration by KPTCL and not on the arbitration award itself and the GoK's opinion to pay fixed charges of

\$ 0.04 as per the claim of TBPCL was also prior to referral of the matter to the Arbitral Tribunal. The Commission had also contended before the Hon'ble High Court that it was justified in not taking into consideration the fixed cost made over to TBPCL in the interest of consumers.

For determination of tariff, the Commission is required to be guided by various factors set out in section 27(2) (a) to (g) and Section 61 of the Electricity Act, 2003. Section 27(2)(e) of KER Act as well as section 61(d) of Electricity Act 2003 require that the interest of the consumers are safeguarded. Great emphasis has been laid on safeguarding the interest of the consumers in both these Acts. Both the Acts impose a duty upon the licensees to maintain an economical system of electrical supply, as they are discharging public duty and hence their activities must be motivated to promote consumer interest.

The Hon'ble High Court has also observed in its judgment dated 22.12.2005 that consumers' interest is paramount.

It is relevant to mention here that the Commission shall also be guided by the National Electricity policy and Tariff policy according to section 61(i) of Electricity Act 2003. Gol has notified the Tariff Policy under the provisions of the Electricity Act 2003 on 06.01.2006 and it is worthwhile to highlight a few important points on the power purchase aspects. The policy states that it is essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources are incapable of providing the requisite funds and it is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in living standards of the people and that balancing the requirement of attracting adequate investments to the sector and that of ensuring reasonability of user charges for the consumers is the critical challenge for the regulatory

process... (section 1.3 and 1.4 of the policy). The policy further states that all power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates (section 8.2 of tariff policy) (emphasis supplied). One may argue that the present tariff policy dated 06.01.2006 was not in place when the subject contract was entered into and hence not applicable, but one should not forget that these are universal principles that are applicable and are relevant while determining the tariffs at all times. The Objectors have also pointed out how the tariff being paid for power purchase from this project is unreasonable.

Considering the arguments put forth by the KPTCL, and the objections raised by the Objectors, the Commission is also not satisfied that consumer interest has been adequately protected by KPTCL in the case on hand. The Commission also holds that the decision of the KPTCL not to challenge the Arbitral Award is not transparent.

- 8.04 In the facts and circumstances of the case and for the reasons discussed above, the Commission does not consider it prudent to pass on the additional burden to the consumers. Such a burden would have adverse impact on all fields of economy in the State, particularly agriculture, industry, commerce, etc. Thus, the Commission decides not to allow the additional fixed charges of TBPCL for pass through to the consumers in the tariff. Hence the subject application stands rejected.

The order is signed, dated and issued by the Karnataka Electricity Regulatory Commission.

(H.S.Subramanya)
Member

(S.D.Ukkali)
Member