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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

Dated: 24.10.2019

Present:

Sri Shambhu Dayal Meena	..	Chairman
Sri H.M. Manjunatha	..	Member
Sri M.D. Ravi	..	Member

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BETWEEN:

Bhoruka Power Corporation Limited,
Having Regd. Office at Kitchenanda Building,
Lavelle Road, Opp. Navnit Motors, Ashok Nagar,
Bengaluru-560 001.
[Represented by its Sr. Vice President &
Company Secretary Mr. M.S. Sreenivas]
[Represented by Veritas Legis Advocates]

... PETITIONER

AND:

1. The Government of Karnataka
Department of Energy,
Through the Additional Chief Secretary,
Vikasa Soudha,
Bengaluru-560 001.
[Represented by Sri G.S. Kannur, Advocate]
2. Bangalore Electricity Supply Company Limited,
Through its Managing Director,
K.R. Circle,
Bengaluru- 560 001.

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3. Karnataka Power Transmission Corporation Limited,
Through its Chief Engineer (Electricity),
Race Course Road,
Bengaluru-560 001. ...
[R2 & R3 are Represented by JUST LAW Advocates]

RESPONDENTS

ORDERS

The present petition is filed on 23.07.2019 before this Commission under Section 86 (1) (f) of the Electricity Act, 2003 praying for the following reliefs:-

- a) To pass appropriate order or direction declaring that the action of the Respondent No.2 and 3 in not performing its obligations under the Electricity Act, 2003 as well as the Government of Karnataka Policy dated 08.06.1992 and the Wheeling and Banking Agreement (WBA) dated 25.11.1992 is illegal, arbitrary and without the authority of law;
 - b) to pass an order setting aside the communication dated 15.04.2019 issued by the Respondent No.2.
 - c) to grant cost of the proceedings; and
 - d) to pass any other appropriate writ, order or direction as this Hon'ble Commission deems fit to grant, under the circumstances of the case, in the interest of justice.
2. Before filing the petition, the petitioner had approached the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No.21479/2019 (GM-KEB) against the present respondents, claiming the same nature

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of reliefs as claimed in this petition. The Hon'ble High Court of Karnataka by its order dated 17.07.2019 directed the petitioner to approach this Commission for resolving the dispute between Petitioner and Respondents.

3. The material facts in brief stated by the petitioner in its petition may be narrated as follows:

- a) The petitioner is a Company registered under the provisions of the Companies Act, 1956 engaged in generation of electricity.
- b) M/s Bhoruka Steel Limited, Bengaluru was permitted to set up a captive mini hydel plant at Shivapur in Haralalpur village of Koppal taluk and district, Karnataka by Government Order No.30.05.1985 with installed capacity of 18 MW subject to the terms and conditions annexed to the said order. One of the terms stated in the Annexure was that the ownership of the captive unit would vest with the company for the period of 25 years from the date of commissioning of the mini hydel project and the site on which the captive unit would be located was to be leased to the company for a period of 25 years at a nominal rent of Rs.1,000/- per annum and that after the expiry of the lease period the said mini hydel project should vest in Government without payment of any compensation to the petitioner.

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- c) Considering the request of M/s Bhoruka Steel Limited Bengaluru to incorporate a separate Company named as Bhoruka Power Corporation Limited (the present petitioner), for setting up of captive mini hydel plant at Shivapur, the Government by its order dated 16.12.1985 accorded approval to the request of M/s Bhoruka Steels Limited, Bengaluru to incorporate a separate company named as Bhoruka Power Corporation Limited to implement the Shivapur mini hydel plant and to supply energy so generated to the firms Bhoruka Steel Limited, Bangalore; Wire Road Mill; Karnataka Aluminium Limited; Bhoruka Textiles Limited; Karnataka Oxygen Limited; Bhoruka Engineering Industries Limited; and such other Companies which may be formed within the group subject to the condition that all these firms should be situated within the State of Karnataka and also subject to the stipulations of Indian Electricity Act, 1910. Further, it is stated in the said order that the other terms and conditions specified in the Annexure to the Government Order dated 30.05.1985 shall remain unaltered.
- d) The Government of Karnataka (GoK) vide its Order dated 19.10.1991 extended lease period of 25 years to 40 years on executing a fresh agreement to that effect.

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- e) The GoK with a view to encourage private participation in power generation issued a Government Order dated 08.06.1992 (Annexure E) wherein steps were taken to offer incentives for establishing different capacity of power plants both conventional and non-conventional. According to the petitioner, this Government Order extending the various incentives to the different power plants set up in private sector, opened the door for third party sale of electricity produced by the private power generators.
- f) The petitioner established and completed the construction of 2x9 MW mini hydel power plant at Shivapur, by 27.11.1992, the date on which the said power plant started its commercial operation (Annexure-F).
- g) Two days earlier to commercial operation of the plant, the petitioner entered into Wheeling and Banking Agreement (WBA) dated 25.11.1992 with erstwhile KEB, for wheeling the energy generated by the said plant through grid to Bhoruka Group companies and its nominees. The petitioner points out that this WBA, nowhere states that the mini hydel plant at Shivapur is a captive power generating plant and thus can supply only to its group of companies. The petitioner also points out that, had the intention of the parties being supply of the electricity to group companies only, there was no need to insert the word "Nominees"

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in the WBA. Therefore, the petitioner contended that the reason for introducing the word "Nominees" was to include third party sales. It also contended that the third party sale is manifested by the subsequent conduct of the parties as third party sale of the energy generated from mini hydel power plant at Shivapur was allowed from 1992 to 2019 till issuing the impugned communication dated 15.04.2019 by the 2nd respondent as per Annexure A.

- h) The petitioner furnished the information on 10.05.2000 stating the names of the third parties to whom it was effecting sales from its mini hydel power plant, in response to a public notice issued by this Commission in Deccan Herald on 11.04.2000 requiring the power generators to furnish the details of the power plant etc., including the sales effected to third parties.
- i) The KPTCL vide its communication dated 04.01.2018 (Annexure M) to BESCOM sought concurrence for wheeling of energy generated from the mini hydel power plant of the petitioner to certain third parties. In the said communication, the petitioner was addressed as a IPP i.e., Independent Power Producer but not as a Captive Power Producer.

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- j) The GoK issued Order dated 22.02.2019 (Annexure Q) confirming the extension of the duration of ownership of mini hydel power plant to 40 years subject to the terms and conditions of Government Order dated 30.05.1985.
- k) BESCO issued a communication dated 15.04.2019 (Annexure A) impugned herein to the GoK where-under the BESCO concluded that contrary to the terms and conditions agreed in the GoK orders dated 30.05.1985 and 19.10.1991 and the WBA dated 25.11.1992, consents were inadvertently being issued earlier, to wheel the power to non-captive users within BESCO jurisdiction and thereby the consent for wheeling energy to additional 12 nos. of third party HT consumers cannot be considered and that the consent already given to 32 nos. of HT consumers in BESCO jurisdiction was to be withdrawn and acted accordingly.
- l) The petitioner filed a writ petition before the Hon'ble High Court of Karnataka challenging the communication dated 15.04.2019 (Annexure A) and ultimately the Hon'ble High Court of Karnataka referred the parties to appear before this Commission for resolving their disputes.

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4. Upon issuance of notice to the respondents, they appeared through their counsels. The 2nd respondent filed its statement of objections on 08.08.2019 and the 1st respondent filed its statement of objections on 26.09.2019 almost adopting the objections filed by the 2nd respondent. The 3rd respondent had not filed the written objections. However, the 3rd respondent is also represented by the learned counsel who appeared for 2nd respondent. The gist of the objections of Respondents 1 and 2 may be stated as follows:

- a) That the various Government Orders including the terms and conditions contained in the WBA, would clearly point out that the mini hydel power plant of the petitioner was allowed to be established as a captive power plant permitting the use of power generated from it only by the persons specifically named in the said Government Order dated 16.12.1985 (Annexure C) i.e., captive users.
- b) That the WBA dated 25.11.1992 (Annexure F) authorises the wheeling of energy from the captive power plant of the petitioner only to the captive users stated in the Government Order dated 16.12.1985 (Annexure C) and such other companies which might be formed within that group and that the word "Nominees" in the WBA refers only to such companies which might be formed within the said group but not to third party consumers. It is also contended

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that the said WBA prescribes that the excess energy generated after meeting the requirement of captive users should be sold to KEB at a rate to be fixed by the GoK.

- c) That the wheeling of energies to third parties were previously allowed due to inadvertence and the same mistake cannot be perpetuated for the future period. The petitioner is not entitled to wheel the energies to third parties as per the terms and conditions of the various Government Orders and the terms of WBA.
- d) The other contentions raised by the petitioner in support of its claim are specifically denied by these respondents.
- e) The learned counsel for the 3rd respondent submitted that the grounds alleged in the petition do not call for any specific reply by the 3rd respondent, thereby the 3rd respondent had not filed any written objections. He submitted that the 3rd respondent adopts the objections filed by the other respondents.
5. We have heard the learned counsel for the parties. They have also filed written arguments. The respondents also filed the agreement dated 03.02.1986 executed between the petitioner and the GoK while setting up of mini hydel power plant at Shivapur, referred in WBA dated 25.11.1992 (Annexure F). Subsequently, the petitioner has also produced the copy of the said agreement dated 03.02.1986 (Annexure W).

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6. From the rival contentions raised by the parties during the arguments and from their pleadings, the following issues arise for our considerations:-

- i) Whether the petitioner was permitted by the GoK for sale of energy generated from its captive mini hydel power plant at Shivapur to third parties, apart from captive users of energy viz., M/s Bhoruka Steel Limited, Bengaluru and others named in the Government Order dated 16.12.1985 (Annexure C)?
- ii) Whether the Respondents 2 and 3 have failed to perform their obligations under the WBA dated 25.11.1992 (Annexure F) being party to the said agreement by not allowing the petitioner to wheel the energies to the third parties?
- iii) Whether the communication dated 15.04.2019 (Annexure A) issued by Respondent 2 and addressed to Government is to be set aside?
- iv) To which reliefs the petitioner is entitled to?
- v) What Order?

7) After considering the submissions made by the parties and on perusal of the pleadings and the records our findings on the above issues are as follows:

8) ISSUE No.(1): Whether the petitioner was permitted by the GoK for sale of energy generated from its captive mini hydel power plant at Shivapur to

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third parties, apart from captive users of energy viz., M/s Bhoruka Steel Limited, Bengaluru and others named in the Government Order dated 16.12.1985 (Annexure C).

9) Before considering Issue No.1, the relevant provisions as it existed before coming into force The Karnataka Electricity Reforms Act, 1999, governing the rights of Generating Company for sale of energy directly to a consumer may be examined.

a) The relevant provisions in this regard were Section 3 and Section 28 of The Indian Electricity Act, 1910. A generator intending to supply energy to the consumer of an area could have taken license as provided under Section 3 or at least it should have obtained prior sanction of State Government required by non licensees as provided in Section 28 of the said Act. Section 28 envisages that no person other than a licensee, shall engage in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such conditions as the State Government may fix in this behalf and any agreement to the contrary shall be void.

b) In this regard, one may also refer Section 43-A of The Electricity (Supply) Act, 1948. The said section reads thus:

“43-A. Terms, conditions and tariff for sale of electricity by Generating Company – (1) A generating Company may enter into a contract for the sale of electricity generated by it-

(a) With the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;

(b) With the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of Section 15-A; and

(c) With any other person with consent of the competent government or governments.

It appears clause (c) of sub-section (1) of Section 43-A of The Electricity (Supply) Act, 1948 was wrongly interpreted previously as the said clause authorised sale of energy by generating company to a third party. In the decision cited in (2004) 10 Supreme Court Cases 511 between AP Gas Power Corporation Vs. AP State Electricity Regulatory Commission and Another, it is made clear that the said clause (c) does not authorise a generating company to sell electricity to a third party consumer but it applies only to the entities like State Electricity Boards. In the said

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judgment of the Hon'ble Supreme Court of India at the end of para 55, it is concluded as follows:

"In this view of the matter, it can well be said that the meaning of the expression "any person" as used in clause (c) of sub-section (1) of Section 43-A denotes such bodies or entities which would further the purpose for which the Electricity Boards have been constituted. It is for the Board to coordinate different activities in discharge whereof to make available the electricity to the licensees, distributors or those who transmit the electricity. It would be reasonable to infer that the consent of the State Government may be necessary to have a contract of sale of electricity generated by it with any of such bodies discharging any of such functions like that of the Board indicated above or any other body or entity established for similar purpose."

Therefore, it is clear that a generating company cannot enter into a contract for sale of electricity generated by it directly with a consumer even with the consent of the competent Government under this clause (c) of Sub-Section (1) of Section 43-A of The Electricity (Supply) Act, 1948.

- c) As already noted above, a generating company can sell energy directly to a consumer by obtaining the license under Section 3 or obtaining a sanction by the State Government under Section 28 of The Electricity Act, 1910. Therefore, in the present case had the State Government given the consent or approval which even

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with some misconception of clause (c) of Sub-Section (1) of Section 43-A of The Electricity (Supply) Act, 1948, the said consent or approval could be treated as sanction granted by the State Government under Section 28 of The Electricity Act, 1910.

d) The petitioner has not produced any consent or approval that might have been given/granted under clause (c) of Sub-Section (1) of Section 43-A of The Electricity (Supply) Act, 1948 or sanction granted by the State Government under Section 28 of The Electricity Act, 1910.

10) Now we shall consider Issue No.1: The petitioner in support of its contention, that it was permitted by the GoK for sale of energy generated from its captive unit to third parties relied upon the following documents and circumstances:-

- (i) The GoK Order dated 08.06.1992 (Annexure E) to contend that the said order opened the door for third party sale of electricity produced by the private power generators.
- (ii) The WBA dated 25.11.1992 (Annexure F) entered between KEB and the petitioner allowed to supply the electricity to group companies and also to its "nominees". It is contended that the reason for introducing "nominees" was to include third party sales.

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(iii) The subsequent conduct of the KEB and its successors viz., BESCOM and KPTCL in allowing third party sales would show that the parties had always interpreted or understood the word "nominees" as third parties.

(iv) The Commission vide its order dated 27.05.2002 (Annexure K) held that where the generating company has been permitted to sell electricity to third parties in terms of the agreement entered into with the GoK prior to the coming into force of Karnataka Electricity Reforms Act of 1999, fresh permission from the Commission need not be insisted upon, as the permission given by the GoK earlier would continue to hold good. That this Commission accepted the reply of the petitioner that it had permission to sell electricity to third parties obtained from the GoK.

11) We may first consider the effect of the GO dated 16.12.1985 (Annexure C) and the representation dated 23.06.1992 (Annexure Y) produced by the petitioner.

a) Annexure C, the Government Order dated 16.12.1985 specifically states as follows:

"In partial modification of the Government Order No.PWD 49 PPC 83 dated 30.05.1985, approval of the Government is accorded to the request of M/s Boruka Steel Limited, Bangalore to incorporate a separate Company named as Boruka Power Corporation Limited to implement the Shivapur

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Mini Hydel Plant and supply the energy so generated to the firms Boruka Steel Limited, Bangalore; Wire Rod Mill; Karnataka Aluminum Limited; Boruka Textiles Limited; Karnataka Oxygen Limited; Boruka Engineering Industries Limited and such other companies which may be formed within the group subject to the condition that all these firms are situated within the state of Karnataka and also subject to the stipulations of Indian Electricity Act.

The other terms and conditions specified in the Annexure to Government Order No.PWD 49 PPC 83 dated 30.05.1985 remain unaltered.”

- b) Therefore, one can say that this Government Order dated 16.12.1985 allows supply of energy only to M/s Boruka Steel Limited, Bangalore and its group of companies and such other companies which may be formed within the group. It is clear from this Government Order that the sale of energy to third parties is not at all contemplated.
- c) The petitioner has produced during the closure of the argument his representation dated 23.06.1992 (Annexure Y) addressed to the GoK, to contend that the Government had permitted to sell the energy to third parties. The said representation reads as follows:-

“As per the order of Government of Karnataka No.PWD 49 PPC 83 dated 30th May 1985, the Shivapur 18 MW Power Station was allotted to Boruka Power Corporation Limited for

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implementation and operation. An agreement was entered into with the Government on 3rd February 1986. As per clause 13 of this agreement Bhoruka Power Corporation Limited is permitted to supply power/energy to its sister concerns namely Bhoruka Steel Limited, Bangalore Wire Rod Mill, Bhoruka Aluminum Limited, Bhoruka Textiles Limited, Bhoruka Oxygen Limited, Bhoruka Engineering Industries Limited and such other companies which may be formed within the group subject to the condition that all these firms are situated within the state of Karnataka.

The recent amendments to the Electricity Supply Act, however, permit sales of energy to not only the companies within the promoters' group but also to such other firms that may be nominated by the generating company. Relevant notification to this effect was published by the Ministry of Power and Non-Conventional Energy Sources on 30th March 1992.

In line with the above amendments, we request that clause 13 of the agreement of 3rd February 1986 may please be suitably modified to include the sale of power/energy apart from group companies to any other firm/firms nominated by Bhoruka Power Corporation Limited."

- d) The petitioner has not pleaded in his petition as made out in this letter dated 23.06.1992 (Annexure Y) that as per the recent amendments to the Electricity (Supply) Act, 1948, the sale of energy to third parties is allowed but not merely to the companies within the

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promoters group. The petitioner has also not produced the notification alleged to have been published by the Ministry of Power and Non-Conventional Energy Sources on 30th March, 1992 as claimed in the said letter dated 23.06.1992. There is no evidence produced by the petitioner that on the basis of this letter, the GoK granted approval for sale of the energy of the third parties.

e) If really there was an approval by the GoK permitting the petitioner to sell the energy to third parties, the petitioner should have produced the said approval, in the absence of it the contention of the petitioner that there was an approval by the GoK for sale of energy to third parties cannot be accepted. On the other hand, it leads to the inference that State Government, had rejected such request or was not inclined to grant such approval.

f) We have secured the GO dated 30th March 1992 issued by the Ministry of Power, Government of India. The relevant portion of this GO concerning this case is at the end of this GO which reads thus:-

“ Para 4.8: In case a Generating Company is permitted by the competent Government supply electricity direct to a consumer in terms of clause (c), sub-section (1), section 43-A of the said Act, such sale shall be mutually negotiated rates, agreed upon between the generating company and the other person, subject to the approval of the competent Government.

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g) It can be said that the Central Government has also wrongly interpreted the Section 43-A (1) (c) of The Electricity (Supply) Act, 1948.

12) Regarding the Government Order dated 08.06.1992 (Annexure E):-

(a) In this Government Order while dealing with the subject of private participation in power generation and grant of concessions/incentives to private entrepreneurs, the GoK has issued the present order, to give a boost to the power generation particularly in private sector and for harnessing non-conventional energy sources. This order contains several clauses. The petitioner has relied upon clauses 4, 5 and 6 of this order which reads as follows:

“4) Large, medium, mini and... Hydel Projects shall be promote in private sector for utilising the best hydel potential.

5) The facility of wheeling and banking arrangements shall be permitted for private sector power units, which will be operated by making use of Terms & Conditions system of KEB on payment of wheeling and banking charges covering the existing and new thermal, hydel, wind, solar, Diesel, agro-waste based or any other type of power generating units.

6) the wheeling and banking charges payable to KEB in the cases of mini/micro hydels upto one MW and of wind and solar energy projects shall be 2% of the energy generated and transmitted. In the case of mini/micro hydels with a

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generating capacity between 1 and 3 MW, the wheeling and banking charges shall be 5% of the energy generated and transmitted. In other cases, the wheeling and banking charges shall be fixed at 10% of the energy generated and transmitted”.

The petitioner contended that this Government Order opened the door for sale of electricity generated by the private power producers to the third parties.

- b) The above clauses relied upon by the petitioner or any other clauses in the said Government Order dated 08.06.1992, do not expressly or impliedly amount to grant of permission or consent by the Government for sale of energy to third parties.
- c) The above said Government Order dated 08.06.1992 simply explains the circumstances under which the grant of concessions/incentives are allowed to private power producers and permits use of transmission and distribution system of the KEB on payment of certain charges.
- d) It is true that no approval or sanction of Government is necessary for captive use of energy from a captive power plant. In this regard, the decision cited in (2004) 10 SCC 511 between AP Gas Power Corporation Limited Vs. AP State Regulatory Commission and Another. In this decision it is held that:

“No licence is necessary for utilisation of energy generated by A.P. GPCL and utilised by the participating industries and the concerns holding shares of A.P. GPCL transferred to them by

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the participating industries to the extent of value of the shares so transferred. It would, however, be necessary to have a licence for supply of energy to the sister concerns"

e) Therefore, the contention of the petitioner that the Government Order dated 08.06.1992 opened the door for sale of electricity produced by the private power generators to third parties cannot be accepted. A private power generator could have sold the electricity to individual consumer only by obtaining licence or previous sanction by the State Government as provided under Section 3 or Section 28 of the Electricity Act, 1910, as the case may be.

13) Regarding Wheeling and Banking Agreement dated 25.11.1992 (Annexure F):

a) This WBA was entered into between the petitioner and KEB on 25.11.1992. The preamble of the agreement reads as follows:

(i) Whereas, Bhoruka Power Corporation has entered into an Agreement with the Government of Karnataka on 03.02.1986 for setting up a (2x9MW) Hydro Electric Power Station at Shivapur Canal drop on 16th KM Tungabhadra Left Bank Canal (TLBC) (hereinafter called as SHEPS).

(ii) Whereas, M/s Bhoruka Power Corporation Limited as per the above agreement has now set up the 2x9 MW power station and

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- the power will be fed into the 110 KV KEB Munirabad-Sindhaur Transmission Line through a loop-in and loop-out arrangement.
- (iii) Whereas, BPCL have requested the KEB for banking and wheeling of the energy generated by SHEPS through its grid in order to enable it to supply energy to such of the industries of Bhoruka Group/its Nominees (hereinafter called as USERS').
- (iv) Whereas, KEB has agreed for Banking and Wheeling of the energy generated at SHEPS, subject to the conditions mentioned in letter No.T/CEG/AE-4/36092-36403 dated 16.02.1987 of the Chief Engineer, Electricity (General).
- b) The petitioner mainly relies on the phrase "to enable it to supply energy to such of the industries of Bhoruka group/its nominees (hereinafter called the USERS)" and contended that, had the intention of the parties been to supply the electricity to the group companies only, there was no need to insert the word "nominees" in the WBA and that the reason for introducing the word "nominees" was to include third party sales. That contention of the petitioner cannot be accepted. Here the word "nominees" clearly refers to such of the industries that might be formed within the group as stated in the GO dated 16.12.1985 (Annexure C). Any interpretation as suggested by the petitioner would lead to a result contrary to the view taken in the above said decision of the Hon'ble Supreme Court

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of India, holding that the sale to a third party requires license or sanction under Section 3 or Section 28 of The Electricity Act, 1910. Any interpretation leading to invalidity of a clause is to be avoided. Therefore, the contention of the petitioner in this regard cannot be accepted.

14. The subsequent conduct of the KEB and its successors:-

- a) It is an admitted fact that subsequent to execution of the WBA dated 25.11.1992 (Annexure-F), the erstwhile KEB and its successors BESCO and KPTCL have allowed third party sales till issue of the communication dated 15.04.2019 (Annexure A). This would only establish that the erstwhile KEB and its successors who are under the impression that third party sale was allowed for one or other reason, probably due to the wrong interpretation of clause (c) of sub-section 1 of Section 43-A of The Electricity (Supply) Act, 1948. The Commission notes that such subsequent conduct does not cure the absence of a consent/approval or sanction by the State Government.
- b) The learned counsel for the petitioner relied upon certain observations made by the Hon'ble High Court of Karnataka in the case reported in ILR 1994 KAR 205 between Boruka Power Corporation Limited and Another Vs. the State of Karnataka and Another. Considering the several correspondences between the

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parties. The Hon'ble High Court of Karnataka has observed that the power generated from the mini hydel plant of the petitioner was allowed to be sold to third parties apart from the group companies. Such observations by the Hon'ble High Court of Karnataka cannot support the contention of the petitioner that it had approval by the Government for sale of energy to third parties. In the said judgement, nowhere it has stated that the State Government had granted approval or sanction permitting the petitioner to sale the power to third party consumers. It may be noted that the dispute in that case was whether Demand Charge should be reduced or not. The Hon'ble High Court of Karnataka has rejected the contention of the petitioner for reduction of Demand Charge on the ground of Promissory Estoppel. The reasons for rejection of the claim of the petitioner for reduction of Demand Charge are stated in para 14 of the said judgment which read thus:

“ 14. When the assurance held out, ultimately stood merged in a contract, there is no scope to apply the Doctrine of Promissory Estoppel. If any particular assurance was held out earlier but the same was not incorporated in the written agreement, it cannot be held that the said assurance could be enforced independently of the terms of the written agreement or independently of all the terms and conditions under which the earlier assurance was held out. The normal

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rule is that the agreement incorporates “all the terms and conditions governing the relationship between the parties”.

15.Regarding the Commission's communication dated 27.05.2002 (Annexure-K).....

- a) In the said communication dated 27.05.2002, the Commission observed that Section 43-A (1) (c) of The Electricity (Supply) Act, 1948 provided that a generating company could sell power to customers other than Electricity Boards with the consent of the competent Government and with such transaction between the generating companies and the customers would not actually amount to “Supply” as envisaged under Section 17 of the Karnataka Electricity Reforms Act, 1999. Further, the Commission also observed that where the generating companies had been granted such permission by GoK prior to coming into force the Karnataka Electricity Reforms Act, 1999, fresh permission of the Commission need not be insisted upon, as the permission given by the Government earlier would continue to hold good. After such observation, the Commission had withdrawn the notice issued to the petitioner. As already noted, the assumption made by this Commission regarding the interpretation of Section 43 –A (1) (c) of The Electricity (Supply)

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Act, 1948 is not correct, in view of the Supreme Court decision noted above of AP Gas Power Corporation Limited.

- b) This communication does not specifically refer to any of the consent or approval issued by the State Government. Therefore, this communication does not further improve the case of the petitioner in contending that GoK had permitted sale of energy to third parties.
- c) From the above discussion, it is clear that the petitioner had not obtained consent of the State Government either under Section 43-A (1) (c) of The Electricity (Supply) Act, 1948 or any license or sanction under Section 3 or 28 of The Electricity Act, 1910. The Commission is of the considered view that when a statute requires consent or approval or sanction by a Government, the same cannot be implied from the conduct of the Government or its officials or any other surrounding circumstances. What is required is the written approval, consent or the sanction by the Government itself. If such consent or sanction is allowed to be inferred from the surrounding circumstances, it would be against the public interest.

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d) For the above reasons, we held Issue No.1 in negative.

16. Issue No.2: Whether the Respondents 2 and 3 have failed to perform their obligations under the WBA dated 25.11.1992 (Annexure F) being party to the said agreement by not allowing the petitioner to wheel the energies to the third parties?

a) The WBA dated 25.11.1992 (Annexure F) would be in force for a period of 30 years from the date of the said agreement. The rights and liabilities arising from this WBA are saved even after the repeal of the earlier Acts. Clause (1) of this WBA dated 25.11.1992 (Annexure F) states that the energy generated from the mini hydel plant of the petitioner would be used for meeting/supplementing the energy requirements of USERS AND ALSO FOR Banking and after that in case the excess energy is generated after meeting the above requirements, the sale should be sold to KEB at the rates fixed by the GoK from time to time. The Commission is of the considered view that this right and liabilities should continue till the expiry of the WBA period. However, subsequent to coming into force of The Electricity Act, 2003, the GoK cannot fix the rate for the energy that would be sold to State Grid and the rate for supply of such energy is to be determined by the Commission. As already held in Issue No.1, the petitioner is not entitled to sell the energy to third party

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consumers. For the above reasons, we hold Issue No.2 in negative.

17. Issue No.3: Whether the communication dated 15.04.2019 (Annexure A) issued by Respondent 2 and addressed to Government is to be set aside?

a) As Issue No.1 is held in negative, Issue No.3 should also be answered in negative.

18. Issue No.4: To which reliefs the petitioner is entitled to?

The petitioner is not entitled to any of the reliefs claimed in the petition.

19. Issue No.5: What Order?

For the foregoing reasons we pass the following:

ORDER

The petition is dismissed holding that the petitioner is not entitled to any of the reliefs claimed by it.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER