



**THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION  
CHENNAI**

**PRESENT :**

**Thiru S. Kabilan** - **Chairman**

**Thiru B. Jeyaraman** - **Member**

**And**

**Thiru R. Rajupandi** - **Member**

**D.R.P.No. 7 of 2007**

M/s. Astro Energy and Bio System Ltd.  
Rep. By its Director,  
No.5, Josmans Complex,  
MC Nichols Road, Chetpet,  
Chennai – 600 031.

..... Petitioner

**Vs.**

1. Tamil Nadu Electricity Board,  
Rep. By its Chairman  
800 Anna Salai  
Chennai – 600 002.

2. Member (Generation)  
Tamil Nadu Electricity Board,  
800 Anna Salai  
Chennai – 600 002.

..... Respondent

The above petition viz. D.R.P.No. 7 of 2007 came up for final hearing before the Commission on the 25<sup>th</sup> October 2007, the Commission upon perusing the petition and the counter affidavit and all records connected with the case and upon hearing the arguments of Learned Counsels of both sides and having stood over for the consideration of the Commission till this day, passes the following

## **ORDER**

### **1. Prayer of the petitioner**

The prayer of the petition is to set aside letter No. CE/NCES/SE/EE/WCB/A1/F.Astro Energy D.O. 66 / 07 dated 20.04.2007 ( hereinafter referred to as the impugned proceedings ) and direct the respondent to honour the PPA dated 16.09.2004.

### **2. Contentions of the petitioner**

The Contentions of the petitioner are briefly as follows:

(a) The respondent Board entered into a Power Purchase Agreement with the petitioners on 16.9.2004, whereby it was agreed that the petitioners shall feed the surplus power from the bio mass power plant into the Board's grid and that the Board draw the power and pay therefor.

(b) The petitioners have got approval from T.E.D.A to increase the generation capacity from 7.5 MW to 10 MW. Accordingly the petitioners had made a request to the respondent Board to amend the P.P.A for exporting 10 MW power instead of 7.5 MW power without altering any of the mutually agreed conditions in the P.P.A dated 16.09.2004.

(c ) To the shock and surprise of the petitioners, the respondent Board has issued an order bearing letter No. CE/NCES/SE/EE/WCB/A1/F.Astro Energy D.O. 66 / 07 dated 20.04.2007, cancelling the proceedings dated 07.08.2004 and also the P.P.A dated 16.09.2004 and by the said proceedings the respondent Board has noted for record the proposal of the petitioners for establishing 10 MW bio mass power plant instead of 7.5 MW plant subject to the conditions mentioned in the said proceedings.

(d) By the said letter, the petitioners have been informed that the P.P.A executed on 16.09.2004 would become invalid and fresh P.P.A will have to be executed after observing the necessary procedure.

(e) Immediately on receipt of the said proceedings, the petitioners addressed a letter dated 09.05.2007 to Tamil Nadu Electricity Board, expressing shock and requesting to amend / delete the clauses 1,5,7, to 10, 15 and 16 mentioned in the said proceedings. There is no response from the respondent Board till date. So the petitioners also addressed a letter on 08.06.2007 expressing the need to restore the terms and contained in the existing P.P.A and the justification for amending or deleting the various clauses contained in the proceedings dated 20.04.2007.

### **3. Contentions of the respondents**

The contentions of the respondents are briefly as follows:

(a) TNERC Order No.3 dated 15.05.2006 is yet to be implemented by the Board, since TNERC Order No.3, dated 15.05.2006 has been challenged by the Indian Wind Energy Association before the Appellate Tribunal for Electricity, New Delhi. The said appeal is pending disposal.

(b) In order to have secure and economic operation of the grid as per section 32 (2) (e) of Electricity Act, 2003 and to avoid loss incurred by the respondent Board due to low rate of realization under the Available Based Tariff regime and to avoid the system getting aggravated further due to pumping of energy during the period of surplus power available in the grid, the condition of shut down of plants during pooja, festival holidays, monsoon months and the period, when grid is operated at high frequency has been imposed.

(c) As per Electricity Act, 2003 the respondent Board has got power to maintain and distribute power at stipulated rate, which is influenced by various parameters. Hence, the contention of the petitioner that entire power generated have to be purchased at all time is neither technically feasible nor justifiable. Due to the reasons explained above, conditions imposed, would not be detrimental to the viability of the project.

(d) The PPA has been executed on 16.09.2004 between the petitioner and respondent Board by agreeing the conditions stipulated in respondent's order dated

07.08.2004. At the request of the petitioner only, the respondent has issued order dated 20.04.2007 after cancelling the earlier order dated 07.08.2004. On cancellation of order dated 07.08.2004, the PPA executed on 16.09.2004 for the above order gets automatically cancelled.

(e) The question of cancellation of PPA dated 16.09.2004 unilaterally by the respondent Board does not arise, as the new PPA has become necessary only due to enhancement of capacity at the instance of the petitioner.

#### **4. Issues**

There are two issues which arise for consideration of the Commission. They are as follows.

1. Whether the impugned proceedings dated 20.04.2007 is contrary to Order No.3 dated 15.05.2006.
2. Whether the respondent Board has got the power to unilaterally alter or cancel the PPA dated 16.09.2004.

#### **5. Findings of the Commission with reference to First Point in issue**

With reference to first point in issue the petitioner in ground No. G at para 6 of the petition has stated that impugned proceedings dated 20.04.2007 is contrary to Order No.3 dated 15.05.2006 passed by this Commission. The Learned Senior Counsel Mr. R. Muthukumarasamy appearing for the petitioner contended that conditions No.1 & 5 of the impugned proceedings are violative of Order No.3.

Condition No.1 of the Impugned proceedings reads as follows.

“Prosopis Julia Flora, Coconut Fornts / Husk shall be utilized for power generation.”

Condition No.5 of the Impugned proceedings reads as follows.

“The generated power from the Bio-mass power plant will be purchased at the rate of Rs.3.15 per unit for a period of three years without any escalation from May 2006 and such price shall not exceed 90% of the prevailing H.T.Industrial Tariff. This purchase rate is provisional and will be subject to modification as and when tariff orders is revised by the regulating authorities concerned or by TNEB as the case may be.”

Order No.3 dated 15.05.2006 does not seek to impose any restriction in regard to the raw material to be used for generation of electricity. As per section 7 of the Electricity Act 2003 ( Act 36 of 2003 ) a generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid. As per Section 10(2) of the Act a generating company may supply electricity to any licensee in accordance with the Act and the rules and regulations made thereunder. From the above provisions of the Act, it would be seen that a generating company is free to use any raw material for the generation of the electricity. Condition No. 1 is contrary to the Act as well Order No.3. Condition No.5 stipulates that the price shall not exceed 90% of the prevailing HT Industrial Tariff and the purchase price is provisional and will be subject to modification. But as per the Order No.3 the purchase price which is fixed as 3.15 is not subject to any modification by the respondent Board. In the counter the respondent Board in para 4 has stated that Order No. 3 dated 15.05.2006 has been challenged by Indian Wind Energy Association before the Appellate Tribunal for Electricity and the appeal is pending. Regarding the above contention it is to be noted that the Appellate Tribunal for Electricity in the case of Tamil Nadu News Print and Paper Ltd Versus TNERC ( Appeal Nos. 106,120,121,123 & 124 of 2006 has upheld Order No.3 dated 15.05.2006. The following observations of the Appellate Tribunal at para 6 would be relevant.

“ .....We are of the view that a very fair approach was adopted by the TNERC. The impugned order was passed after much deliberations and deep consideration.”

As of the above order no.3 dated 15.05.2006 has been upheld by the Tribunal it has to be complied with by the respondent Board. The impugned proceedings is contrary to Order No.3 dated 15.05.2006 as rightly contended by the learned counsel for petitioner.

## **6. Findings of the Commission with reference to Second Point in issue**

With reference to Second Point in issue, the petitioner in ground A at para 6 of the petition has contended that the respondent Board does not have jurisdiction to unilaterally cancel the bilateral PPA entered into by the petitioner and respondent Board. This point has already been considered by the Commission in the Order dated

23<sup>rd</sup> August 2005. In the above order this Commission has held that the Board cannot alter the PPA unilaterally. The above Order of the Commission has been upheld by the Appellate Tribunal for Electricity in its order dated 07.07.2006 passed in Appeal No.163 / 2005 while referring to Supreme Court decisions the Tribunal in para 32 held as follows:

“..... We do not find any reason to differ with the view of the Commission that the Board does not have the power to vary the PPA.” Further as per clause 13 of PPA, the agreement can be terminated by the Board if any of the contentions laid down by TNEB / CEIG / TNERC is not complied with by petitioner or for any other reasons. The petitioner company has not committed any breach of the conditions so as to warrant for cancellation of the agreement.

In view of the above position this Commission is of the view that the respondent Board has no power to unilaterally alter or cancel the PPA. The cancellation of the PPA is without jurisdiction.

### **Conclusion**

- 1) Impugned proceedings namely the Letter No. CE/NCES/SE/EE/WCB/A1/F.Astro Energy D.O. 66 / 07 dated 20.04.2007 is set aside. The respondent Board is directed to implement the PPA dated 16.09.2004 without any modification.
- 2) Regarding the plea of the petitioner for the execution of fresh PPA for the enhanced 2.5 MW power to be generated by them, it is directed as follows:
  - i) The petitioner company at its option may either re-negotiate with the Respondent Board for the purchase of 10 MW of power to be generated by the petitioner company and enter into a fresh PPA for the above purpose if the respondent Board agrees in tune with Order No.3 dated 15.05.2006 or in the alternative.
  - ii) Continue the existing power purchase agreement dated 16<sup>th</sup> September 2004 without any modification for the purchase of 7.5 MW power and execute a fresh power purchase agreement for the purchase of the enhanced 2.5 MW power to be generated by the petitioner company in tune with Order No.3 dated 15<sup>th</sup> May 2006.

There would be no cost.

Pronounced in the open court by this Commission on 11<sup>th</sup> December 2007.

(Sd.....)

**(R. RAJUPANDI)**  
**Member**

(Sd.....)

**(B.JEYARAMAN)**  
**Member**

(Sd.....)

**(S.KABILAN)**  
**Chairman**

/ True Copy /

Secretary

Tamil Nadu Electricity  
Regulatory Commission