

BEFORE THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION

PRESENT

Thiru. S. KABILAN

Chairman

Thiru. B. JEYARAMAN

Member

And

Thiru. R. RAJUPANDI

Member

D.R.P.No. 5 of 2007

M/s. Global Polybags Industries (P) Ltd.,
Manufacturers & Exporters of Plastics,
Perali Road,
Virudhunagar – 626 002.
Rep. by its Managing Director

..... Petitioner

Vs

1. The Chairman, TNEB,
800, Anna Salai,
Chennai – 600 002.
2. The Chief Engineer (NCES),
Tamil Nadu Electricity Board,
800, Anna Salai,
Chennai – 600 002.
3. The Superintending Engineer,
Tirunelveli Electricity Distribution Circle,
Tirunelveli – 11.

..... Respondents

The above petition coming up for final hearing on 11th September 2007, the Commission upon perusing the petition and the Counter affidavit of the respondents and all other connected records of the case and upon hearing the

arguments of both sides and having stood over for the consideration of this Commission till this day, hereby pronounces the following

ORDER

1. Prayer of the Petitioner

- (a) The prayer of the petitioner is to quash the impugned letter No. AO / REV / HTS / AS / A.3 / D.1770 / 2006, dated 30-11-2006 issued by the third Respondent.
- (b) To restore the letter No. CE / NCES / EE / WPP / A3 / F Global polybags Industries P.Ltd. / D. 505 / D06 / dated 3-7-2006 which has been cancelled and
- (c) To direct the respondents to implement the letter of the 2nd respondent with effect from 3-7-2006 as if it had not been cancelled by the impugned letter and to pay a sum of Rupees Forty Six Lakhs and Twenty Six Thousand in terms of 321724 units to the petitioner's company which is the loss caused to the petitioner company on account of cancellation of the letter dated 3-7-2006 and non-implementation of the said letter by the respondents.

2. Facts of the Case

The Petitioner Company is a Electricity Generating Company owning two Wind Mills at Radhapuram Taluk, Tirunelveli District which is situated within the territorial jurisdiction of the 3rd respondent herein. The petitioner company has arrangement with the respondent board for selling surplus energy. The petitioner company had set up the Wind Mills primarily for its own use. The 2nd respondent in response to the request made by the company in his letter dated 15-5-2006 accorded approval to the petitioner company to wheel the energy generated by the petitioner Wind Mill to the HTSC SC No. 255 of Virudhunagar EDC with permission to bank the energy if available after adjustment by the Virudhunagar EDC instead of the present arrangement of

selling the entire energy generated to the respondent board. Acting upon the above approval, the petitioner had purchased stamped paper for execution of agreement and approached the 3rd respondent for follow up action with reference to the wheeling approval given by the 2nd respondent. The 3rd respondent after a delay of nearly 4 months in his letter No. AO / REV / HTS / AS / A 3 / D. 1770 / 2006 dated 30-11-2006 (hereinafter referred as the impugned proceeding IP) returned the agreement without execution. In the said IP it has been stated that the wheeling approval is cancelled. Aggrieved by the above IP, the petitioner has filed this petition under Section 86(1) (f) r/w Regulation 54 of TNERC's Conduct of Business Regulations 2004.

3. Contentions of the Petitioner in the Petition

- (a) The IP has affected the legal rights of the petitioner company conferred under Sections 9(2) and 10 of the Act referred to above and the fundamental rights guaranteed to the petitioner company under Article 14 of the Constitution of India. The petitioner states that if the IP was not issued then the petitioner company would not have incurred a loss of Rupees Forty Six Lakhs and Twenty Six Thousand, in terms of 13, 21, 724 units which was made to lapse after 1st April 2007.
- (b) The respondents have completely ignored the statutory provisions contained in Sections 9 and 10 of the Act referred to above according to which the petitioner company is legally entitled to generate energy by its captive generating plant at the wind mills to be carried to HTSC No. 255 of Virudhunagar.
- (c) The action of the respondent's in cancelling the approved letter dated 3-7-2006 is arbitrary and discriminatory and as such it is violative of Article 14 of the Constitution of India.
- (d) The petitioner's right to wheel energy from the captive plant at the wind mills and to carry it to its industry at Virudhunagar is a right to property within the meaning of Article 300-A of the Constitution of India and it cannot be deprived by the impugned letter which is only an executive

instruction and which is not a law within the meaning of the said Article 300-A of the Constitution of India.

4. Contentions of the Respondents in their Counter Affidavit

In the Counter Affidavit, the respondents have contended as follows:

- (a) Based on the request of the petitioner on 21-01-2006, the petitioner was permitted on 30-01-2006 to wheel the energy generated from WF.HT.SC.No.1454 to their group concern M/s. Unique Multifilms virudhunagar Pvt. Ltd., being HT.SC. No. 239 of Virudhunagar EDC with banking arrangement for the surplus energy. The supplemental agreement was executed on 10-02-2006.
- (b) The first change in wind energy utility arrangement is being permitted without any time frame. The next change in wind energy utility arrangement will be permitted after one year from the date of execution of agreement from the first change. The above condition has been incorporated in the approval given to petitioner for the change in utility.
- (c) In the approval given to the petitioner dated 02-01-2006 and 30-01-2006 for WF.HT.SC.No.1369 & WF.HT.SC.No.1454, it was clearly informed that "further request for the revision of above arrangement on charge in utility point will be considered after one year of execution of revised agreement for the above arrangement".
- (d) The non compliance of one year period for change in utility was noticed by the 3rd respondent and raised the clarification in this regard to the 2nd respondent.
- (e) The 2nd respondent realized that the approval was issued erroneously without adopting the one year rule between utility change and hence the approval given on 21-07-2006 was cancelled by the 2nd respondent on 23-09-2006.
- (f) Aggrieved upon the cancellation of the order dated 30-11-2006, the petitioner had filed a writ petition before the Hon'ble High Court of Madras (Madurai Bench) W.P. (M.D) No. 8509 / 2006 in M.P. (M.D) No. 1 / 2006.

- (g) After several hearings of the above case, the petitioner withdrew the petition which was dismissed as withdrawn.
- (h) The above action of withdrawal of petition filed before High Court itself is a clear indication that the petitioner had realized his mistake and preferred not to enter into further complication that may affect the petitioner's company.

5. Issues

The following issues arise for consideration of this Commission namely:-

- (a) The 1st issue is whether the IP is violative of sections 9 & 10 of the Electricity Act 2003.
- (b) The 2nd issue is whether the IP is arbitrary and violative of Article 14 of the Constitution of India.
- (c) The 3rd issue is whether the IP is violative of Article 300-A of the Constitution of India.
- (d) The 4th issue is whether one year rule namely the change of utility by the petitioner will have to be made after 1 year from the date of execution of agreement is legally sustainable.
- (e) The 5th issue is whether the Doctrine of Resjudicata is applicable to the petitioner and whether by virtue of the dismissal of writ petition filed by the petitioner, the petitioner can be said to be precluded from approaching this Commission.

6. Findings of the Commission with reference to the first point in issue

The petitioner in paragraph one of the petition while reproducing Section 9(2) of the Electricity Act 2003, has contended in paragraph 6 of the petition that the impugned letter has affected the legal rights conferred under the said Section 9(2) of the Act. In paragraph 7 of the petition, the petitioner also contended that the respondents have completely ignored the statutory provisions contained in Sections 9 and 10 of the said Act according to which the petitioner company is legally entitled to generate energy by its captive generating plant at the wind mills to be carried to HTSC No. 255 of Virudhunagar. The first point in issue is whether the Impugned letter is violative of Sections 9 and 10 of the said Act as contended

by the petitioner company. The respondent in their counter affidavit did not meet the above contention of the petitioner company. Even in the arguments made at the hearing of the case, the respondent did not meet the above contention. The respondent pleaded only Resjudicata and that the petitioner company is precluded from approaching the Commission for the relief prayed for since the subject matter of the petition had already been considered by the Hon'ble High Court Madras in a Writ Petition filed by petitioner which was dismissed as withdrawn. The impugned letter which cancelled the earlier order of wheeling of energy to the petitioner's industry at virudhunagar is violative of the said Sections 9 and 10 of the said Act.

7. Finding of the Commission with reference to the second point in issue

In paragraph 11 of the petition, the petitioner has contended that the impugned letter is arbitrary and discriminatory and as such it is violative of Article 14 of the Constitution of India. With reference to the above contention, the respondent in paragraph 14.1 of the counter affidavit have stated that wheeling approval had been issued erroneously without adopting the one year rule between utility change and hence it was cancelled by the impugned letter. It is seen that the one year rule is neither based on the policy of TNEB nor in accordance with statutory provision of law. Even the agreement executed between the petitioner and the respondent did not contain any provision for the one year rule. Further the said one year rule is contrary to Sections 9 and 10 of the said Act. As such the impugned letter which did not conform to any rule of law is arbitrary and violative of Article 14 of the Constitution of India.

8. Finding of the Commission with reference to the third point in issue

In paragraph 14 of the petition, the petitioner contended that the impugned letter being an executive instruction is not a law within the meaning of Article 300 – A of the Constitution of India according to which the right to property of a person cannot be deprived except by authority of law. The above contention was not specifically met by the respondents either in the counter affidavit or in the arguments made by Board's counsel at the hearing of the case. The petitioner has got a right to carry the energy generated by them to their industry as per

Section 9 (2) of the Electricity Act 2003. The impugned letter being an executive instruction cannot deprive the said right of the petitioner guaranteed by Section 9 (2) of the Electricity Act 2003.

9. Finding of the Commission with reference to the fourth point in issue

In paragraph 9 of the counter affidavit, the respondents have stated as follows:-

“In the approval given to the petitioner dated 02.01.2006 and 30.01.2006 for WF.HT.SC.No.1369 & WF.HT.SC.No.1454, it was clearly informed that “further request for the revision of above arrangement on charge in utility point will be considered after one year of execution of revised agreement for the above arrangement”. To a question put to the learned counsel for the respondent board as to whether there is policy backing of the said one year rule, the learned counsel for the respondent board could not substantiate. It is seen that in the agreement executed between the petitioner company and the respondents, there is no provision incorporating the said one year rule. Further the said one year rule is not in conformity with the statutory provisions as contained in Sections 9 and 10 of the Electricity Act 2003.

10. Finding of the Commission with reference to the fifth point in issue

The learned counsel for the respondent board strongly contended that as the Writ Petition filed by the petitioner before the Hon’ble High Court of Madras was dismissed, the doctrine of resjudicata will be applicable to the petitioner and as such the petitioner is precluded from raising the same subject matter which was previously decided by the Hon’ble High Court of Madras. The Learned counsel for the petitioner while reading Section 11 of the Civil Procedure Code which relates to the principle of resjudicata contended that the doctrine of resjudicata would not be applicable as the Writ Petition was not dismissed on merits of the case. Basu in his commentary on Constitution of India (Twelfth edition) at page 574 has observed as follows:-

“ Where there has been a decision on the merits the rule of constructive resjudicata will be applicable to bar a second application founded on the same cause of action.....” .

In view of the above observations and in as much as the Writ Petition filed by the petitioner was dismissed not on merits of the case, the doctrine of resjudicata is not applicable.

Conclusion:

The prayer of the petitioner in paragraph one above is allowed and the impugned letter dated 30.11.2006 is quashed. However, the sum of Rs.46,26,000/- (Rupees Forty Six Lakhs and Twenty Six Thousand only) as claimed by the petitioner which has been arrived at in the working sheet furnished by the petitioner at pages 43-49 of the typed set of the petitioner is subject to verification by the respondent board. The respondent board is therefore directed to scrutinize the working sheet furnished by the petitioner and refund the amount due to the petitioner within thirty days. If there is any dispute in this regard it is open to either side to approach this Commission.

With the above observations, the above petition is finally disposed off.

There would be no costs.

Pronounced in the open court by this Commission on 25th October 2007.

(R. RAJUPANDI)

Member

(B.JEYARAMAN)

Member

(S.KABILAN)

Chairman