



**THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION
CHENNAI**

**Constituted under Section 82(1) of the Electricity Act, 2003
(Central Act 36 of 2003)**

PRESENT :

Thiru S. Kabilan - Chairman

Thiru B. Jeyaraman - Member

And

Thiru R. Rajupandi - Member

M.P.No. 4 of 2007

In the matter of Wheeling Order dated 17.02.2006 issued by Tamil Nadu Electricity Board to M/s. Arkay Energy (Rameswaram) Limited treating the Company as Captive Power Plant in violation of Central Electricity Rules 2005.

Power Engineers' Society of Tamil Nadu
No. 4 / 256, S.N. Nagar,
Uyyakondan Thirumalai
Trichy – 620 102.

Rep. by its president Mr.S.Gandhi. Petitioner

Vs

1. Arkay Energy (Rameswaram) Limited
1A, Prince Villa
15, Rajamannar Salai
T.Nagar, Chennai – 600 017.

2. Tamil Nadu Electricity Board
800, Anna Salai
Chennai – 600 002.

..... Respondents

The above M.P.No. 4 of 2007 coming up for final hearing before the Commission on the 11th December 2007, the Commission upon perusing the above petition, the affidavit filed in support thereof and the counter affidavits of the Respondents and all connected records and upon hearing the arguments of the counsels to the parties, hereby pronounces the following

ORDER

1. Prayer of the Petitioner:

The prayer of the petitioner is to cancel the impugned order dated 17.02.2006 of the Tamil Nadu Electricity Board and treat the power supplied by M/s. Arkay Energy (Rameswaram) Limited as IPP and order to recover the loss sustained by TNEB in the larger interest of the consumers in Tamil Nadu.

2. Facts of the Case:

The petitioner herein challenges the impugned wheeling order dated 17.02.2006 issued by the second respondent to the first respondent company granting approval to wheel power from CPP of 65MW of the first respondent company to the 30 Joint Venture Companies who are all captive users. The cause of action for the petitioner arose in their letter dated 25.09.2006 addressed to second Respondent Board. The petitioner has alleged that the first respondent company is no longer a captive unit as per Central Rule GSR 379 (E) dated 08.06.2005.

3. Contentions of the Petitioner:

- a) The annual report of M/s. Ashok Leyland Limited as issued to its share holders for the year 2005-06 says that it acquired only 6,00,000 shares for a value of 60,00,000 and this alters promoter equity as 25.88%.
- b) The first respondent company is no longer a captive unit of 30 listed companies as per Central Rule GSR (379) dated 08.06.2005.

- c) There is a loss of Rs.72.9 crores to the second Respondent Board and it will result in serious rise in cost of energy to be paid by the consumers in the state.
- d) The cause of action arose in the petitioner's letter dated 25.09.2006 addressed to the second Respondent Board. The discussions held with Member (Generation) of the TNEB has no effect on corrective measures.

4. Contentions of the First Respondent Company:

- a) The information furnished along with CA's certificate dated 14.11.2005 to the second Respondent Board by the first respondent company merely shows the initial estimates of cost of project of the first respondent which has been relied upon by the petitioner. Subsequently the composition of equity preference share capital was re-structured. The change of share capital structure was duly filed with the Registrar of Companies A.P. State on 23.11.2005.
- b) The plant of the first respondent company was commissioned during the end of February 2006 and wheeling of power commenced from March 2006 onwards. The first respondent submitted the Audited Capital Structure details on 31.03.2006. The off-taker's equity is much more than the mandatory minimum percentage 26% as stipulated under the clause 3 (1) (a) of the Notification dated 08.06.2005 under the Electricity Rules, 2005 and the second respondent has verified the compliance of the prescribed conditions.
- c) The voting equity held by the captive users including the investment of Rs.60 lakhs by M/s. Ashok Leyland Limited and even after excluding the 187-C arrangement with regard to Ashok Leyland, Ford India etc. works out to 29.67% of the total voting equity of the company which is more than the mandatory minimum percentage stipulated under clause 3(a) of Government of India's Notification dated 08.06.2005.
- d) The petitioner must have been induced by certain rival generating companies, who are jealous of the progress made by the first respondent company and intends to create unwarranted hardships to the first respondent company.

- e) The entire transaction between the First and Second respondent was upheld by the Honourable Appellate Tribunal and the matter has already reached finality. If at all the petitioner is really interested, then it should have impleaded themselves as one of the respondents in the said DRP just like M/s. Sai Regency Power Corporation Limited which had impleaded as one of the respondents in the said DRP.
- f) The subject matter of the dispute as referred to in the petition does not relate to any of the functions of the Commission as set out in Section 86(1) of the Electricity Act, 2003.
- g) The petitioner is neither a licensee nor a generating company so as to invoke Section 86(1)(f) of the Act which relates to the adjudication of dispute between licensee and generating company.

5. Contentions of the Second Respondent Board:

- a) TNEB's Chartered Accountants Thiru. Brahmayya & Co., has opined that the share holding of all captive users after excluding the share holding u/s 187 C of the Companies Act, 1956, is still in excess of the mandatory cut off limit of 26% which conforms to the stipulation under Rule 3 (1) (a) (I) of Electricity Rules, 2005. However this view is based on the facts and taking into consideration that the details filed in Form No.2 are valid and stand any validation in the event TNEB intends to make such exercise.
- b) The rules are not clear as to whether the consumption by the captive users is in proportion to their share holding or its collective consumption to be reckoned for the purpose of determining the compliance of 51% consumption. The rules are very clear in regard to generation activity owned by co-operative society or association of persons and clarity is lacking in regard to generating stations owned by companies be it a special purpose vehicle (SPV) or otherwise.

- c) TNEB has decided to seek a clarification with respect to Rule 3 (1)(a)(I) &(ii) of Electricity Rules, 2005 from the Ministry of Power / Government of India. For that, seeking opinion from the Advocate General / Government of Tamil Nadu is being pursued.

6. Point in issue:

The point in issue is whether the petition is maintainable under the Act and in particular under Section 86 of the Act which enumerates the various functions of the Commission including adjudicatory function as set out in Section 86 (1) (f) of the Act.

7. Arguments of the Learned Counsels of the parties:

- a) The petitioner society has conceded that the petition is not filed under Section 86(1)(f) of the Act. He contended that the opinion of the Learned Advocate General falls outside the ambit of the petition. At para 3 (a) of the written version of the petitioner while referring to Section 86(1)(k) of the Act, it has been stated that the said section has to be read along with Section 142 of the Act which provides punishment for the contravention of the provisions of the Act or the rules or the regulations or directions of the Commission made thereunder. The said Section 86(1)(k) reads as “discharge such other functions as may be assigned to it under this Act”. The petitioner while referring to Section 128 of the Act in para 3 (b) of the written version contended that the Commission if satisfied of the non-compliance of the provisions of the Act or rules or regulations made thereunder by any licensee or generating company can investigate the matter. The petitioner in the said para 3 (b) of the written version contended that the Commission apart from being a regulator has investigating powers for the effective implementation of the Electricity Act and the rules or regulations made thereunder. At para 3 (e) of the written version the petitioner contended that when the respondent fails to be a CPP then the power has to be regulated by the Commission under Section 86(1) (b) of the Act. During the argument, the petitioner has

contended that under Section 129 of the Act the Commission may entertain the petition and give suitable directions to the respondents. While referring to rule 11 (1) of TNERC (CBR) 2004, the petitioner contended that the petition is maintainable.

- b) The learned Senior Counsel Thiru. R. Muthukumarasamy appeared for the first respondent and contended as follows:

The proceeding under section 142 is in the nature of a contempt proceeding and the petition filed by the petitioner is not a complaint in terms of the said section 142. The Commission is called for adjudication of the dispute as to whether the plant of the first respondent is a CGP or not. The Respondent Board has filed a counter denying the petitioner's contentions. The petitioner wants the Commission to ignore all the materials produced by the second Respondent Board. There must be a direct violation of section 142 by the respondents so as to impose the penalty. The punishment for non-compliance of the provisions of the Act or Rules by the respondents cannot be adjudicated under the said section 142. The jurisdiction of the Commission under section 142 is not to cancel the wheeling order of the second respondent which the petitioner has prayed for in their petition. Section 142 does not relate to any function of the Commission but it relates to the power of the Commission to punish the offender. There is a difference between "function" and "power"; they are different. In regard to invoking section 128, he contended that the petitioner being a third party has no role and it is only the Commission which has exclusive jurisdiction to initiate the proceeding under section 128 on the basis of sufficient materials warranting the invoking of the said section 128. In regard to section 129, the Learned Senior Counsel contended that so far as a generating company is concerned, the said section 129 can be invoked only for violation of the provisions of the Act and that it cannot be invoked for a violation of a rule. He pointed out that so far as adjudication is concerned Section 86(1)(f) is the only provision available and that it can be invoked only when there is a dispute between the generating company and the licensee.

- c) The Learned Counsel for the second Respondent Board contended that so far as section 86(1)(f) is concerned he concurs with the opinion of the Advocate General. But in regard to the other sections 142 and 128 of the Act, he contended that the petition is maintainable under the said sections.

8. Findings of the Commission:

The point in issue referred to above has to be examined in the light of the provisions contained in sections 86(1)(k), 86(1)(f), 86(1)(b), section 142, section 128 and section 129 of the Act. In para 3 (e) of the written version of the petitioner, it has been contended by the petitioner that the power distributed by the first respondent need to be regulated under section 86(1)(b) of the Act. As per the said section 86(1)(b) of the Act, the Commission has got the function to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. The said section 86(1)(b) can be invoked only in the case of power purchase by the distribution licensee namely the second Respondent Board in the instant case. In the present case, the petitioner only challenges the wheeling order issued by the second respondent and not any power purchase. In the wheeling order, no power purchase is involved and the wheeling of power is from the CPP of the first respondent to their joint venture companies for their captive use. Hence the said section 86(1)(b) is not attracted in the instant case.

Regarding the application of section 86(1)(f) of the Act, since the petitioner themselves have conceded that they have not filed the petition under section 86(1)(f), the question of invoking the said section will not arise.

The next question is whether section 86(1)(k) of the Act is attracted or not. The said section 86(1)(k) confers upon the Commission to discharge such other functions as may be assigned to it under the Act. The petitioner contended that the said section 86(1)(k) should be read along with sections

142 and 128 and 129 of the Act. The prayer of the petitioner is not to impose any penalty under section 142 or to investigate the affairs of the first Respondent Company under section 128 or to give any directions to the respondents under the said section 129 of the Act. The prayer of the petitioner is to cancel the wheeling order of the second Respondent Board and to recover the loss from the first respondent company. The prayer of the petitioner involves only an adjudication of the matter as to examine whether the wheeling order is in compliance of rule 3 of the Electricity Rules issued by the Central Government. The petitioner has not pleaded for imposing any penalty for any proven offence. There is not even a casual reference to the said section 142 in the petition. As rightly contended by the learned senior counsel Thiru. R. Muthukumarasamy the petition cannot be treated as a complaint. Further, it is to be noted that the element of mensrea namely criminal intention is an essential requisite for invoking the penal provision under the said section 142 of the Act. The petitioner has not substantiated with valid proof so as to prove mensrea on the part of the respondents. Further, it is to be noted that even though the marginal heading of the said section 142 refers to non-compliance of directions by appropriate Commission, in the body of the said section 142 only the word “contravened” is used. There is a difference between “contravention” and “non-compliance.” In the instant case, the petitioner has alleged that the first Respondent Board is no longer a captive unit under the said rule 3 and this allegation can be said to be only a non-compliance of rule 3 and it cannot be said to be contravention of rule 3. In the above circumstances, the said section 142 of the Act is not attracted. The petitioner has not mentioned the rule which is not complied with. However from a reading of para 9 of the petition wherein the petitioner has alleged that M/s. Arkay Energy (Rameswaram) Limited is no longer a captive unit of 30 listed companies as per Central Rule GSR 379 (E) dated 08.06.2005, it is presumed that the petitioner impliedly refers to central rule 3. The said central rule 3(1) (a) which provides for the requirement of captive generating plant is extracted below:

“a) In case of a power plant:

i) not less than twenty six percent of the ownership is held by the captive user(s),
and

ii) not less than fifty one percent of the aggregate electricity generated in such
plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered co-operative
society, the conditions mentioned under paragraphs (I) and (ii) above shall be
satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive users
shall hold not less than twenty six percent of the ownership of the plant in
aggregate and such captive users shall consume not less than fifty one percent
of the electricity generated, determined on an annual basis, in proportion to their
shares in ownership of the power plant within a variation not exceeding ten
percent”.

There is no case for initiating any proceeding under the said section 142. Further
as already stated above, there is no proof of mensrea on the part of the
Respondents which is essential for prosecution of offenders. Moreover since
both the respondents are not natural persons and as both the respondents are
corporate bodies it would be very difficult to prove mensrea.

The next question is whether section 128 (1) of the Act can be invoked. The said
section is reproduced below:

“(1) The Appropriate Commission may, on being satisfied that a licensee has
failed to comply with any of the conditions of licence or a generating company or
a licensee has failed to comply with any of the provisions of this Act or the rules
or regulations made thereunder, at any time, by order in writing, direct any
person (hereafter in this section referred to as “Investigating Authority”) specified
in the order to investigate the affairs of any generating company or licensee and
to report to that Commission on any investigation made by such Investigating
Authority”.

The expression “may on being satisfied” occurring in the said section 128 of the
Act is significant.

The said expression “may” is not mandatory but it is only directory. Further the expression “on being satisfied” would indicate that the satisfaction of the Commission is only subjective satisfaction as there is no norm which is specified in the Act as to how and on what grounds the satisfaction has to be arrived at. In the instant case, the second Respondent Board in paragraph 3 of their counter while referring to the opinion of the Chartered Accountant have concurred with the views of the first respondent that the share holding of all the captive users after excluding the share holding under section 187 C of the Companies Act, 1956 is still in excess of the mandatory cut off limit of 26%. The petitioner has not produced sufficient material to justify invocation of section 128 of the Act. Further, the petitioner cannot compel the Commission to ignore the views of the second Respondent Board.

In view of the above, all the contentions of the petitioner are liable to be rejected and the petition is not maintainable under the Act.

a) **9.Conclusion:**

M.P.No. 4 of 2007 is dismissed as it is not maintainable under any of the provisions of the Electricity Act 2003 (Central Act 36 of 2003). There would be no costs.

Pronounced in the open court by this Commission on 5th February 2008.

Sd.....
(R. RAJUPANDI)
Member

Sd.....
(B.JEYARAMAN)
Member

Sd.....
(S.KABILAN)
Chairman

/ True Copy /

Secretary

Tamil Nadu Electricity
Regulatory Commission