

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

PRESENT: Shri.T.M. Manoharan. Chairman
Shri. P. Parameswaran, Member
Shri. Mathew George, Member

22nd April 2013

Petition No. OP 36/2012

In the matter of: *withdrawal of additional power allocation to M/s Rubber Park India Pvt. Ltd.*

M/s Rubber Park India Pvt. Ltd : Petitioner

Kerala State Electricity Board : Respondent

ORDER

1. BACKGROUND

1.1 The petitioner, M/s Rubber Park India Pvt. Ltd. (Rubber Park) is a Joint Venture Company of the Govt. of India (GOI) and Govt. of Kerala (GOK) formed to set up an Industrial Park exclusively for promotion of rubber and rubber wood based industries. M/s Rubber Park filed a petition *in the matter of withdrawal of additional Power Allocation by KSEB* under Section 86 (1) (f)of Electricity Act 2003 read with Regulation 22 of KSERC Regulations 2003 before the Commission. According to the petitioner, the respondent Kerala State Electricity Board (KSEB) has entered in to an agreement with the petitioner, Rubber Park on 11-8-2003 for the supply of power to the extent of 3000 KVA for supply to the various industrial units of the Rubber Park. The petitioner entered in to agreement with their consumers for supply of energy and is regularly supplying the same.

1.2 Since the supply of 3000 KVA was insufficient to satisfy the requirement, based on the demand of the petitioner, the respondent KSEB agreed to supply 1500 KVA additional power and directed the petitioner to remit Rs.51,50,110/- by Demand Draft as security deposit and to furnish Bank Guarantee of Rs. 24,86,598/- vide letter dt. 26-4-2010 and further directed to remit Rs.6,07,500/- as Service Connection Charge. The petitioner furnished cash deposit of an amount of Rs.51, 50,110/- and furnished Bank Guarantee for Rs. 24, 86, 598/- as demanded by the respondent. The petitioner also forwarded the duly signed agreement as required by the respondent. Later vide letter dt. 7-4-2011, the respondent intimated that they are withdrawing the additional power allocation. The reason put forward by the respondent is that they do not have surplus power to cater to the new requirements of power from other distribution licensees. The petitioner was also directed to make

alternate arrangements for procurement of power in accordance with the licensing regulations. The petitioner made correspondence with many officials of the Board including the Chairman, KSEB but all of them in vain. KSEB have unilaterally adjusted Additional Cash Deposit from the amount of Rs. 51, 50,110/- already remitted.

1.3 After cancelling the additional power allocation, KSEB is supplying additional energy and charging exorbitant energy charges under the tariff as excess demand charge, ie. charging 50 % more than the normal ruling demand charge. The petitioner moved the Hon. Lok Ayukta by filing complaint No. 690/2012 against the respondent, KSEB and after hearing both sides, Hon. Lok Aukta, by order dt. 2-5-2012, directed the petitioner to adjudicate the grievance before the dispute resolving Forum as constituted under the Electricity Act 2003. Hence the petitioner has filed the complaint before this Commission.

2. HEARING OF THE MATTER

2.1 The petition was admitted as OP No. 36/2012 and heard on 9-10-12 at the Court Room of the Commission at Thiruvananthapuram. KSEB submitted their Counter argument vide letter dated. 9-10-12. Adv. Balachandran, the Counsel for the petitioner requested for adjournment of the hearing, as he obtained the version of the respondent only that day. Considering his request, hearing was adjourned and later held on 14-11-12. M/s Rubber Park filed their further petition dated 14-11-2012. Counsel for the petitioner sought copies of agreements in respect of supply of 250 KVA in 2003 and its enhancement to 450 KVA and 3500 KVA and subsequent reduction to 3000 KVA. KSEB was asked to supply the documents requested by the Counsel.

2.2 KSEB submitted copy of the documents (Agmt. No.58/03-04, Agmt.No.227/04-05, Agmt.No.34/06-07 and Agmt.No.234/08-09) and the documents were forwarded to the petitioner vide letter dt.6-12-2012 from the Commission. KSEB submitted counter statement upon the further petition filed by M/s Rubber Park vide letter dt. 2-2-2013 and hearing was held on 7-2-13 at the Court Room of the Commission at Thiruvananthapuram. On 7-2-13, Advocate S. Balachandran, the Counsel for the petitioner requested for postponement of the hearing. Shri. Pramod-Resident Engineer,Rubber Park and Shri. Pradeep-Executive Engineer, KSEB were heard for clarification on the facts in issue and final hearing was held on 27-2-2013 at the Conference Hall, Rubber Park, Valayanchirangara, Ernakulam.

Relief sought by the petitioner are the following:

- (i) To cancel the order of the respondent dt 7-4-2011 withdrawing the additional power allocation of 1500 KVA to the petitioner and to direct the respondent to restore the order of allocation of 1500 KVA to the petitioner as per the terms and conditions agreed up on earlier.
- (ii) To direct the respondent to adjust the amount collected by them by way of penal charges from the petitioner from Sep. 2010 till the date of

- restoration of allocation of additional 1500 KVA with 24 % interest for the same from the date of receipt of amount till the date of adjustment.
- (iii) To grant such other relief the petitioner seeks and the Commission deems fit in the nature of the case.
 - (iv) To allow the petitioner to realize all costs and liabilities incurred hereby to the petitioner from the respondent and their assets.

2.2 Arguments presented by M/s Rubber Park

On behalf of M/s Rubber Park, the following points were raised.

- 1) The order of withdrawal of additional power allocation to the petitioner is arbitrary, illegal, capricious, void and against all norms of natural justice and hence to be set aside.
- 2) The ground stated for withdrawal of additional power allocation is wrong and unsustainable by raising diametrically opposite reasons.
- 3) KSEB cannot unilaterally cancel the agreement, since being a concluded contract and it can be annulled only in accordance with law.
- 4) Charging of penal rate against the terms of the agreement is illegal. The respondent has no authority to demand excess charges at the penal rate of 1.5 times than the normal rate by way of cancellation of the agreement.
- 5) The respondent allocated additional power since much quantity of power was available for allocation and the substation and feeders had capacity to feed the load applied for. Hence, subsequent cancellation is illegal. Respondent cannot modify or withdraw power allocation once granted and availed of by the petitioner after remitting the security deposit and service connection charges.
- 6) The respondent has no authority to direct the petitioner to make alternate arrangements for additional power, which is arbitrary, unreasonable and violation of the agreement.
- 7) The version filed by the Chief Engineer (C&T) of KSEB may be rejected, since the respondent is to be represented by the Secretary, KSEB.
- 8) For the additional power of 1500 KVA, the terms and conditions were mutually accepted, based on those conditions, amounts were realized from the petitioner and the respondent encashed the entire amount and entered into a valid and concluded contract. Hence, there is a legally valid contract between the petitioner and the respondent.
- 9) The construction of the 110 /11 KV substation of the Rubber park has been carried out by the supervisory committee appointed by the State Govt. and hence the statement of the respondent that Substation is constructed against the standards followed by the respondent is not true and hence modification of the substation is not necessary.
- 10) Respondent is the sole supplier of electricity in the State of Kerala. Small licensees cannot purchase power from open market as it is not economically viable and is violation of the industrial policy of the Govt. There is no facility at all to the petitioner to procure power by making own arrangement.
- 11) Since the respondent initiated action for disconnection of supply, petitioner was forced to approach the Hon.Lok Aukta for getting speedy relief.

- 12) Against the huge increase in tariff rate, the petitioner approached the Hon. High court and the proceedings are even now stayed and hence the petitioner is not liable to pay the said amount.

2.3 Arguments presented by the Kerala State Electricity Board.

KSEB submitted their counter arguments on 9-10-12, which highlighted the following points.

- 1) The responsibility of the respondent and the petitioner as a distribution licensee are identical, as prescribed in the Electricity Act 03. Any sale or purchase of power between Utilities shall be based on mutually agreed terms and conditions and as approved by the appropriate Commission.
- 2) The original agreement with Rubber Park is dt. 23-8-2003 for 250 KVA power. New agreements were entered in to and the latest agreement now in force is the one dt.31-3-2009 for 3000 KVA.
- 3) Though KSEB was inclined to give 1500 MVA, the petitioner failed to fulfil the conditions stipulated regarding the metering arrangements and statutory approval from the Commission. In the absence of a concluded contract, the petitioner cannot claim any services from the respondent.
- 4) Since the dependence of KSEB on purchase of power through short term market is on the increase, respondent requested other distribution licensees in the State including the petitioner to make their own arrangements to meet additional power requirements.
- 5) The petitioner has not remitted the charges for power sourced from KSEB at the rates prescribed by the Commission in its order dt. 13-12-2010. Instead of approaching Appellate Tribunal for electricity against the order, and based on an interim stay from the High Court, they had piled up arrears to the tune of 1.20 Crores, adversely affecting the cash flow position of KSEB.
- 6) The respondent has not forwarded any agreement format of the agreement to be executed. The petitioner has signed a unilaterally drafted agreement and forwarded to the respondent, which is not consistent with the prevailing legal frame work, and relied on repealed laws.
- 7) KSEB submitted their counter statement vide letter dt. 2-2-2013 against the further petition dt.14-11-12 filed by Rubber Park and requested to dismiss the petition as devoid of merits for the following reasons.
- 8) Chief Engineer (C&T) is authorised to represent KSEB before the Commission in all proceedings initiated by the Commission. KSEB has refunded all sums found refundable and the petitioner has accepted those refunds. The petitioner is not able to produce a copy of the so called concluded agreement for additional power and it proves that there is no concluded agreement.
- 9) The respondent has not insisted to modify the Substation but the respondent has informed the necessity of installing metering equipments before the 110 KV Bus, where as the present metering is against the metering standards to be followed.

- 10) The arguments made by the petitioner to substantiate that an agreement was legally executed for supply of 4.5 MVA power is false. There is no such concluded agreement. KSEB has already produced all the agreements so far executed with the petitioner and the prevailing agreement dated 31-3-2009 is for supply of 3 MVA power.
- 11) KSEB never objected to the standards of the substation constructed by the petitioner. The issue is that the metering equipments are erected after the 110 KV bus, which is against the standards specified by CEA Regulations, and it needs to be relocated.
- 12) KSEB does not desire to provide additional power to the licensee, who has accrued huge arrears by stalling the implementation of revision of BST through abuse of the process of law.
- 13) If the petitioner clears all the arrears as per the existing agreement dated 31-3-2009 and as per the revised BST notified by the Commission and relocate the metering equipments as per the provisions in the statutes, then KSEB will be willing to finalise the terms and conditions for additional power supply through mutual negotiations.

3. ANALYSIS AND DECISION OF THE COMMISSION.

3.1 The prayer of the petitioner in the petition filed before the Commission by M/s Rubber Park and admitted as OP 36/12 is to set aside the withdrawal of additional power allocated to M/s Rubber Park by KSEB and to grant other connected relief's. The preliminary question that has come for consideration is whether the petition is maintainable and the Commission has the jurisdiction to resolve the dispute between the parties. The petitioner, M/s Rubber Park is a distribution licensee and the respondent KSEB is the distribution licensee holding generating stations and State Transmission Utility (STU) in the state of Kerala. The petitioner had filed a complaint (No. 690/2012) before the Hon. Lok Ayukta. Standing counsel for the respondent KSEB raised question of maintainability before the Forum. Contention raised on behalf of the respondent was that the complainant has got an effective remedy before the KSERC constituted under Section 82 of the Electricity Act 2003 and that the issues can be decided by that Commission. Hon. Lok Ayukta by way of order dated 2.5.12, directed the complainant to approach the dispute resolving forum constituted under the Electricity Act 2003. Hence, the petition has come before this Commission. The functions of the State Commission is derived from Section 86 of the Electricity Act 2003. Under sub section (1) Section 86, clause (f) of the Electricity Act 2003, "*The State Commission shall adjudicate up on the dispute between the licensees and generating companies and to refer any dispute for arbitration*". Thus, the State Commission has necessary jurisdiction to examine and decide the matter of the dispute between M/s Rubber Park and the Kerala State Electricity Board.

3.2 The reason cited by the respondent KSEB for cancellation of power allocation vide letter dt.7-4-2011 is that KSEB does not have surplus power to cater to the new requirements from other distribution licensees. This reason is erroneous on the face of it. The fact is that KSEB had backed down around 200 MW capacity during the period itself. KSEB cannot take a unilateral or arbitrary approach that they shall not

cater to the needs of other licensees, considering the unique nature of the power sector in the state. Commission does not approve the stand taken by KSEB on the matter. Hence, the cancellation of power allocation vide letter dt.7-4-2011 is erroneous prima facie.

3.3 The basic legal question to be considered is whether there is a concluded contract for 4500 KVA which includes the additional power allocation of 1500 KVA as claimed by the petitioner and disputed by the respondent. Since the petitioner found that 3000 KVA power is insufficient, they requested the respondent for allocation of 1500 KVA additional power. Chief Engineer (Transmission South), KSEB vide his letter dt. 26-4-2010 has intimated M/s Rubber park that Board have accorded sanction to allocate an additional power of 1500 KVA (total 4500KVA) and also instructed them to fulfil certain requirements. The requirements were (1) to remit an amount of Rs. 51, 50,110/- by demand draft in favour of Special Officer Revenue (SOR), KSEB. (2) to furnish a Bank Guarantee for Rs. 24,86,598/- towards the security deposit for the additional power allocation (3) to remit an amount of Rs. 6, 07, 500/- towards service connection charge (4) to submit an agreement in Kerala Govt. Stamp paper worth Rs. 100/- with due attestation on all pages and signature of witness on the last page, for availing 4500 KVA after remitting the security deposit and (5) to submit an undertaking in Kerala Govt. stamp paper worth Rs. 50/- to complete the modification works in the switchyard to facilitate metering at the feeding end conforming to the standards followed in KSEB, before 1-12-10, failing which penalization would be effected. The petitioner remitted the amount of Rs. 51,50,110/- as security deposit, Rs. 6,07, 500/- as service connection charges and submitted bank guarantee for Rs. 24,86, 598/- to the respondent. There is no dispute between the parties on the point that the first three of the above five requirements were fulfilled by the petitioner for availing the 4500 KVA contract demand. The petitioner incorporated the undertaking on Metering as part of the agreement and forwarded to the respondent vide letter dt. 21-5-2010. The respondent therefore accepts that the petitioner has forwarded an undertaking and agreement duly signed by the petitioner for fulfilling the 3rd and 4th requirements. But the respondent has disagreed with the claim of the petitioner that they furnished a format for the agreement to be executed. The respondent has stated that they have not forwarded an agreement format to the petitioner. After nearly a period of one year from the allocation of the additional power allocation of 1500 KVA dt.26-4-2010, the respondent intimated the petitioner that they are withdrawing the additional power allocation to the petitioner vide their letter dt. 7-4-2011. In the letter dt. 7-4-2011, while withdrawing the additional allocation, the respondent KSEB stated that (1) they do not have surplus power to cater to the new requirements for power from other distribution licensees (2) they look forward to taking up the responsibility to supply power to the consumers in the specified area of Rubber Park. In order to appreciate the issue, requiring determination; a few relevant facts are also to be stated. After the original agreement dated, 23-8-2003, there are three more revised agreements executed. In the letter dated 26-4-10 of the Chief Engineer (Transmission South) intimating the additional power allocation for 1500 KVA, no specific format is mentioned. The respondent and the petitioner are engaged in the sale and purchase of power continuously since the year 2003 with revised agreements executed in three previous occasions. The previous agreements signed between the parties show that there is a common pattern and format followed with minor changes/modifications according to additional allocation of power. No approval of the agreement has been obtained from the

Commission by either party in all the previous agreements, though the Electricity Act 2003 has come in to existence and the State Regulatory Commission was also functioning in the State. The copy of the agreement produced by the petitioner as exhibit P3 for 4500 KVA is almost similar to the previous agreements signed between the parties. It is an important fact that the document is neither signed by the respondent nor the deficiency in fulfilling the requirements was communicated to the petitioner within reasonable time. The Counsel for the petitioner had cited the following verdicts of the Hon. Supreme Court to establish that the above situation had resulted in the development of a contract and its subsequent violation by the respondent KSEB. The orders of the Hon. Apex Court submitted by the Counsel for the petitioner are (1) 2010 - Laws (SC) -1-71 Trimax International Fze Ltd. Dubai Vs Vedanta Aluminium Ltd. India. In Appeal No. (Arbitration petition No.10 of 2009) dated 22-1-2010. (2) 1960 – Laws (SC) -1-7 Alopi Parshad and Sons Ltd. Vs Union Of India in Appeal No. (Civil 693-1957) dated 20-1-1960. (3) 2009- Laws-11-65 Geo-Group Communications Inc. Vs Iol Broadband Ltd.in Appeal No.(Arbitration Petition No.9 of 2009) dated 17-11-2009. (4) 1968 – Laws (SC) -3-2 Kollipara Sriramulu (Dead) by his legal representative Vs. T-Aswatha Narayana in Appeal No.(Civil 427,428- 1963) dated 4-3-1968.(5) 2007 - Laws (SC) -10-80 Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co.Ltd. in Appeal No. (Civil 4829- 2007) dated 12-10-2007. It is well established in law that even without a written agreement, there can be a valid contract; provided a valid offer has been accepted for a legitimate consideration. The contention of the respondent to the effect that the power allocation is only a statement relating to capacity of the KSEB to supply power cannot be accepted. Power allocation was followed by Exhibit P1 letter requesting M/s Rubber Park India Ltd. to comply with certain conditions such as remittance of security deposit, service connection charges, furnishing of Bank Guarantee etc, and M/s Rubber Park India Ltd. had, in compliance with the directions of KSEB, remitted the amount and submitted the agreement format duly initialled by its authorised officer. Therefore, the contentions of the Counsel for M/s Rubber Park India Ltd. that there is a valid contract and hence KSEB cannot unilaterally withdraw power allocation have considerable force.

3.4. It was submitted that while availing supply from the respondent during 2003 itself, the petitioner was informed to set up 110 KV metering facility at the incoming feeder point of the Substation. The petitioner has not complied with the standard metering system, even though time was given up to 1-12-2010 as per the letter of additional allocation by the respondent also informing that failure to do so would attract payment of penal charges. The present metering arrangements do not adhere to the Kerala State Electricity Grid Code, 2005 notified by the Commission and CEA (Installation and operation of meters) Regulations 2006, containing the standards specified under Central Electricity Authority Regulations. KSEB specified the same as a special condition for providing the additional power. The petitioner has not denied the position stated by the respondent. Hence, it is clear that lack of fulfilling of agreement conditions exists between the parties even with the concluded contracts signed and accepted by both parties; prior to the agreement under dispute which is signed and forwarded by the petitioner to the respondent vide letter dt.21-5-2010.

3.5 For the purpose of determination of the dispute, it is appropriate to consider whether the principle of sub silentio is attracted in the present case. If the agreement forwarded by the petitioner after the additional power allocation was not according to

the format and as per the conditions as desired by the respondent, that should have been communicated by the respondent to the other party with in a reasonable time after 21-5-2010. Whether the one sided agreement is ineffective because the parties contemplated the execution of a format document or because the format was not as desired by the other party, cannot be accepted as a reason to deny the additional allocation of power. The conduct of the parties, as evident from the correspondence, coupled with the fact that they continued to sell and use power allocated or drawn power for excess use, non settlement of accrued arrears, claiming penal charge on the excess use, non shifting of the metering system to the incoming side of the EHT feeder, etc. indicate that there existed dispute/unsettled issues between the parties in the financial transaction as well as technical standards. The petitioner as well as the respondent acted with different intentions during the period and hence the principle of sub silentio cannot be applied as such in this case. However, the respondent cannot get away from the obligation of the allocated power, subject to fulfilling the conditions.

3.6 The respondent has submitted that they have already reviewed the policy regarding supply of power to the other licensees in Kerala and adopted a provisional system. The petitioner has not remitted the charges for power sourced from KSEB at the rates prescribed by the Commission in its order dated 13-12-2010. Instead of approaching the statutory forum, ie. the Appellate Tribunal for Electricity, as per the Electricity Act 03, the petitioner obtained a stay order from the Hon. High Court of Kerala and caused piling up of arrears to the tune of 1.2 Crores, adversely affecting the cash flow of KSEB. The petitioner was overdrawing power in excess of the contract demand and thereby subjecting themselves to the penal clauses for drawing above the mutually agreed quantum. If the petitioner clears all the arrears as per the existing agreement dt. 31-3-2009 for 3000 KVA and the revised BST notified by the Commission from 1-12-2010 onwards and relocate the metering equipments as per the statutory provisions; the respondent is willing to finalise the terms and conditions for additional supply of power through mutual negotiations. On a conjoint reading of the various submissions and the clauses /regulations it is clear that the respondent has an obligation to deliver the power as already allocated, subject to the fulfilment of the conditions stipulated by the respondent to the petitioner and clearing all financial dues as envisaged in the existing contracts and updating technical standards as per the statutory provisions in good faith and as mutually agreed by the parties.

3.7 The Commission after careful consideration of the submissions made by the parties and the facts of the case, finds that the contentions of the Counsel for M/s Rubber Park India Ltd. that there is a valid contract and hence KSEB cannot unilaterally withdraw power allocation have considerable force. It is all the more so, when M/s Rubber Park India Ltd. had, pursuant to additional power allocation given by KSEB, entered in to power supply agreement with other consumers in its licensed area. Further, the reason for non- availability of surplus power cited for cancellation of additional power allocation cannot hold good in view of the further statement made by KSEB in Exhibit P4 letter itself that it can take up the responsibility to supply power to consumers in licensed area of M/s Rubber Park India Ltd., if M/s Rubber Park was not able to make alternate arrangements for procurement of power in accordance with the Licensing Regulations in force. It is also pertinent to point out that KSEB after having received the agreement initialled by M/s Rubber Park Ltd. did not take any action either to point out any mistakes /modifications or to return it for

around one year. Therefore, the contention of M/s Rubber Park India Ltd. to effect that they had performed all their duties and responsibilities with regard to execution of agreement also gains force. However, the fact remains that metering arrangements in accordance with the rules prescribed by the Central Electricity Authority have not been made by M/s Rubber Park India Ltd. Nobody can violate such statutory requirements. Similarly, M/s Rubber Park has to clear the arrears of payment towards the agreed quantity of purchase already made by them from KSEB on the terms of the existing and mutually accepted agreements and at Tariff determined by the Commission. ie, M/s Rubber Park India Ltd. as a bonafide purchaser has to fulfil the technical and financial commitments in the concluded contracts. The petitioner being a distribution licensee , cannot engage the principal licensee KSEB on litigation and block the current charges due for years together. The Commission cannot approve such practices.

4. ORDERS OF THE COMMISSION.

After detailed examination of the submissions of the petitioner, respondent and after hearing the parties, the Commission issues the following orders on the petition under consideration.

- (i) Withdrawal of the power allocation dated 26-4-2010 by KSEB vide letter dt. 7-4-2011 is erroneous, illegal and arbitrary. The letter dt. 7-4-2011 of KSEB shall be treated as null and void.
- (ii) Contract demand of the Petitioner M/s Rubber Park shall be deemed to have been raised to 4500 KVA from the date on which KSEB received the draft agreement format from the petitioner in 'May 2010'. KSEB and Rubber Park may enter in to new PPA as per the prevailing practice.
- (iii) The excess demand charges for the actual recorded demand over and above 3000 KVA but below 4500 KVA shall be refunded to Rubber Park as and when Rubber Park withdraws litigation against KSEB on current charges at the Tariff determined by the Commission and clears all the legitimate amounts due to KSEB from the petitioner.
- (iv) The petitioner Rubber Park shall relocate/rearrange the metering system as per standards, with in six months and report compliance.

Petition is disposed of as above and ordered accordingly.

Sd/-

P.Parameswaran
Member

Sd/-

Mathew George
Member

Sd/-

T.M.Manoharan
Chairman

Approved for issue

Sd/-
Secretary