BEFORE THE HON'BLE GUJARAT ELECTRICITY REGULATORY COMMISSION AT AHMEDABAD

30th September, 2002

CORAM : Justice S.D. Dave, Chairman
Shri B.M. Oza, Member
Shri R.K. Sharma, Member

PETITION NOS. 27/2000, 57/2001, 58/2001, 74/2002 & 75/2002

Wind Energy Producers Association & Others

V/s

Gujarat Electricity Board & Ors.

ORDER

1. This Petition has been taken out by Wind Energy Producers Association located at Baroda for redressal of grievances in respect of the wheeling charges, charged by the Gujarat Electricity Board and the manner of allocation of compensating units given to them during different time of the day by the GEB. The matter was originally brought before us by three of the Wind Farm Owners, M/s Vishal Malleable Ltd., Ankleshwar, M/s. The Antifriction Bearings Corporation Ltd., Bharuch and M/s Mipco Seamless Rings (Guj) Ltd., Bharuch. Subsequently the Indian Wind Energy Association, New Delhi as well as the Wind Energy Producers Association also intervened to plead on behalf of other Wind Farm Producers in the State, since it was a matter of common interest to all of them.

2. Learned Counsel, Mr Gautam Joshi appeared on behalf of Wind Energy Producers Association and it was agreed by all other petitioners that he represented others as well, in respect of the issues with which all of them were concerned. In the course of hearings, we have also heard Shri Anirudh Dave on behalf of Indian Wind Energy Association and Shri J.K. Shah on behalf of M/s. Antifriction Bearings Corporation Ltd. Shri P.R. Mehta appeared on behalf of GEB and Shri G.P. Chavda, Under Secretary, Energy & Petrochemicals Department appeared on behalf of Government of Gujarat.

3. It was the case of the petitioners that they had set up the Wind Farms in pursuance of the Government Policy, which was promulgated by Govt. of Gujarat in their Resolution No. EDA-1092-M(I)-8-(I)-E dtd. 27.1.93. This Resolution mentioned that the operative period for the scheme was 5 years. The scheme provided that the GEB would undertake wheeling of energy, generated by Wind Farms at a wheeling charge of 2% of the energy wheeled irrespective of the distance from the wind farm. Certain other incentives were also provided to the Wind Farm Producers. According to the petitioner, from the expiry of period of 5 years form the date of issue of this Resolution, the GEB unilaterally revised the terms of wheeling to the disadvantage of the petitioners, in disregard of the Agreement entered with them on the basis of earlier Resolution. The petitioners, therefore, contended that the action of GEB was arbitrary and the circulars issued by them in this regard were required to be struck down.

4. In the initial stages we heard the Government who requested for some more time, for formulation of the new policy since the old policy had

already expired in 1998. Since this was a matter where the Government had essentially decided taking into account the interest of GEB as well as the Wind Power Producers, we directed the parties to sit together and come to an amicable solution. It was reported to us that there had been a meeting between the parties in the presence of Secretary, Energy & Petrochemicals Department, however, the parties could not reach any decision acceptable to both the sides.

5. When this matter was being heard by the Commission, the Govt. of Gujarat did come up with Wind Power Generation Policy 2002 under their Resolution No. EDA-10-2001-3054-B(Part-II) dtd 20.6.2002. We were informed that the provisions of this Resolution were largely acceptable to all parties. However, there was no provision in the Resolution to give it a retrospective effect. The grievance of the petitioners during the intervening period, therefore, remained unresolved. In the course of hearing we asked Shri Chavda who appeared on behalf of Govt. of Gujarat, whether it was possible for the Energy & Petrochemicals Department to give retrospective effect to the provisions of the new Policy. Shri Chavda, however, mentioned that it was not within the competence of the Department and the matter will have to be considered once again, afresh in consultation with the Finance Department. The petitioners, therefore, represented that the matter now could not be solved by mutual negotiations and that the matter should be heard by the Commission. It is in this background that the Commission, decided to proceed with this matter.

6. To recapitulate the facts again, the Government of Gujarat issued a Resolution containing incentive scheme for wind farm generation on 27.1.93. The Resolution contained the details of the Incentive Scheme, like

operative period, eligibility, wheeling, banking and sale of power, exemption from duty, exemption from demand cut, metering, sales tax benefits and other procedural details. The paragraph dealing with the wheeling of energy, which is the bone of contention between the parties as well the one, relating to the procedure, laid down for availing the benefits of the incentive scheme are reproduced below:

"(v) **Wheeling**

The Gujarat Electricity Board would undertake to transmit the power generated by the wind farm to the factory site of the industrial undertaking concerned unit nominated at a wheeling charge of 2% irrespective of the distance from the wind farm.

This means that 2% of the energy generated by the wind mill will be deducted as Board's commission and the balance 98% only will be made available to the party at a place where power is required.

Any industrial undertaking setting up a wind farm in Gujarat will be permitted to nominate any individual unit of its own or otherwise located in the State as beneficiary of power generated by its wind farm."

"(xii) **Procedure**

The industrial undertaking will apply to Gujarat Energy Development Agency for its approval of the project with a copy to the Gujarat Electricity Board which will on recommendation of GEDA, enter into an agreement with the industrial unit as per the terms and conditions

under a standard draft. Detailed terms and conditions regarding wheeling of power, banking, metering, transmission system which will be separately notified by the Gujarat Electricity Board will be incorporated in the draft agreement."

7. In accordance with this Policy various Wind Power Producers entered into Agreement with the GEB. The Agreements were entered into for a period of 5 years from various dates. The Agreement , which was in a standard format, interalia, provided the following clauses in all the cases :

"(i) Wheeling of Power :

Company is permitting to wheel their electricity generated by the wind farm at …… to their own factory site located at …….in the State of Gujarat. The rate of wheeling charge of 2% irrespective of the distance from the wind farm i.e. energy received at the factory site of the company, will be 98% of unit and recorded at nearest substation of GEB sent out by the wind farm after deducting 2%. All accounts relating to wheeling of energy will be settled on a monthly basis, subject to banking as under :

(ii) Banking :

The Company is permitted to bank electricity generated by their wind farm for the maximum period of six months subject to condition that Company will be permitted to draw/wheel energy banked during the same period in which electricity is banked. Any excess drawn over the

electricity banked during respective period will be charged by GEB at the appropriate tariff".

It was also mentioned that the Agreement was made for a period of 5 years commencing from the date of synchronizing for export of the electricity generated by wind farm. It also added that this Agreement will be terminable earlier by three months' notice on either side. The last clause of the Agreement mentioned that wheeling and banking of power at the above rates are extended as per Government's prevalent policy in this regard, which will expire in June, 1996. The State Government will review these Rules thereafter.

8. At the end of a period of 5 years as mentioned in the Resolution dated 27.1.93, the period of operation of incentive scheme came to an end. On 19.5.1998 the GEB issued a Circular regarding wheeling of units generated by the wind farms. This circular provided as follows :

(i) Wheeling losses shall be borne by the recipient unit, which shall be 10% (ten percentage) for power delivered at EHV, i.e., at 33/66 KV and above. In case of power delivered at HV i.e. at 11/22 KV the same shall be 15% (fifteen percentage).

(ii) The recipient unit shall pay to GEB wheeling charges at the rate of 13.5 (Thirteen point five) paise per Kwh and 21 (twenty one) paise per Kwh for power delivered at EHV and HV respectively".

The circular mentioned that the above arrangement was on adhoc basis and shall be modified/altered as per GoG directives in future.

9. On 23.7.99, the GEB issued another Circular entitled “Apportioning of SET OFF against wheeling of power generated at the wind farms”. This Circular clarified that credit of the power generated by the wind farm and wheeled to their industrial premises will be given as follows :

(i) First SET-OFF against the power consumed during night hours (i.e. 22.00 hrs of one day to 6.00 hrs of immediate next day.

(ii) Second SET-OFF against the power consumed during off-peak hours (i.e. 6.00 hrs to 7.00 hrs., 11.00 hrs to 17.00 hrs and 21.00 hrs to 22.00 hrs)

(iii) The remaining units, if any, should be given a SET-OFF against the consumption during peak hours (i.e. 7.00 hrs to 11.00 hrs and 17.00 hrs to 21.00 hrs of the day).

10. In the course of hearings, learned Counsel, Shri Gautam Joshi on behalf of the petitioners brought out the following points:

(a) The decision of the GEB to charge 15% & 10% as wheeling loss and 21 paise and 13.5 paise per unit as wheeling charges for HV and EHV consumers respectively is arbitrary, unreasonable, violation of the principles of agreement, against the principles of natural justice inasmuch as the petitioners were not given any opportunity of hearing to represent their case in that behalf and hence, the same is required to be interfered with by the Commission.

(b) It was the contention of the petitioner that the question of wheeling loss does not arise as there is virtually no loss to GEB because of the fact that the terminal points are at GEB sub-station and from the Wind Farm upto sub-station necessary poles, 66 KV transmission lines are erected by the Wind Farm Owners. 66 KV Sub-Station are established by the Wind Farm owners and the distance between the Wind Farm to that of the nearest Sub-Station is varying between 7 Kms to 25 Kms, which means that wheeling losses are borne by the Wind Farm owners, as GEB issues credit to developers on the basis of power received and metered at GEB Sub-Station. The Wind Farm developer supplies power as door delivery at GEB Sub-Station. The power so received is utilized in nearby areas where the Sub-Station is catering the power requirement. In fact, in the remote areas in which the Wind Farms are located, the availability of power improves the system voltage. There being no loss, the GEB is not justified in charging any loss.

(c) Communication dated 19.5.98 of the Board is unilateral action of the General Manager (Commercial) which was not preceded by any decision of the Board, much less a conscious decision after taking into consideration all the relevant aspects of the matter.

(d) Dealing with the Board's Circular dtd 23.7.99 regarding apportioning of set off against wheeling of power generated by the wind farms, the petitioners stated that the set-off for the supply would be at uniform rates and the purchase would be also at a uniform rate. In other words the set-off was appropriately given as per the time slots during which the supply was made and the purchase was made. Therefore, it was not

open for the Board to make an earning out of the whole transaction, which is sought to be done in the present case. The electricity, which is generated by the members of the Petitioner Association is supplied by the Board as per the time slots. It is a matter of record that the total electricity generated by the members of the Petitioner association is at the maximum capacity of approximately 166 MW, which is supplied by the board to its consumers as per the policy of time slots prescribed by the board itself. Therefore the Board would earn maximum revenue during peak hours and is also, earning some revenue during night hours and therefore, logically, rationally and professionally speaking, the members of the petitioner association would also get the set off as per the time slots and would get the concession as per the time slot and would be given set off as per the time of use charges. It also added that the Petitioners were not aware about the material which had weighed with the Board in taking a decision to withdraw the time of use charges. It was a matter of bilateral relation and if it was not possible for the Board to continue the practice of giving set off in the matter of time of use charges, it ought to have given the proposal to the Members of the Petitioners Association to supply electricity at different rates at the wind farm.

(e) The Resolution issued by the Government of Gujarat reflected certain policies, which were undisputedly long term in nature. The owners of wind farm have established their wind mills by spending a fortune on the basis of the promises held out by the Government and the GEB, whereby certain benefits were not only projected, but were also assured. Therefore, the Government and the Board should be estopped

from changing the same and the Doctrine of promissory estoppel would apply to the fact of the present case in all force.

(f) Apart from that it also added that the Doctrine of legitimate expectation is also violated by the Board

11. Responding to the above contention of the Petitioner, the GEB replied as follows.

(a) **Wheeling loss and Wheeling charges**

GEB contended that the wheeling charges basically being the rental charges for utilization of GEB's transmission facilities played the same role for CPPs as it played for any other identical beneficiary. Drawing a parallel and since the Govt of Gujarat Wind Farm Policy was not extended beyond 31/3/1998 and in pursuance of the provisions of the bilateral agreements, GEB opted to revise the wheeling charges as per the Govt of Gujarat Policy. GEB also came across discrepancies regarding the accounting of the energy generated and consumed by the beneficiary of the wind farm. In order to make a uniform of application, GEB decided to identify different slots for giving set off of the energy generated by the wind farm.

The Commission inquired with the GEB as to the basis on which the new rates had been decided by them. In response to this the GEB filed an affidavit on 18/2/2002 giving details of various costs and the manner in which the wheeling charges were worked out. GEB mentioned that these chargers were determined in line with the

methodology adopted by the Power Grid Corporation of India, who are the sole transmitting company for transmission of central sector power to all the beneficiaries in the country. As regards the wheeling loss, GEB stated that the component related to EHV transmission works out in range of 8 % to 10% while that for lower voltage transmission works out to about 14 to 15%. GEB on the this basis adopted the values of 10 and 15 % towards transmission losses for EHV and HV transmission net work.

GEB also argued that in view of the benefits already approved and the fact that GEB loses revenue earning consumers, reinstatement of wheeling losses and wheeling charge as of the original wind farm policy is not warranted. GEB also mentioned about the wheeling charges and transmission losses charged by the Maharashtra State Electricity Board.

(b) Slotwise Adjustment.

As regards the implementation of slotwise adjustment of energy generated at wind farm GEB stated that it had determined the methodology of apportioning set off against wheeling of power generated at the wind farm in their circular dated 23rd July , 1999. No specific methodology was in existence as of that date and different field officers of GEB were found to be adopting different methodology of apportioning the energy generated at the wind farms to the different slots of time of the day. As the consumption of energy is considered to

be highest during the specific peak hours in a day the consumption is generally low during the night hours. While it is more or less stable during the remaining period of the day. It was in the light of this fact that the GEB laid down uniform policy of apportioning the wind energy. The Petitioners on the other hand wanted a uniform set off energy over the whole of the day instead of slotwise apportioning as above. GEB submitted that the wind farm generation is not uniform and constant during the period of 24 hours in any day. The generation varies corresponding to the wind velocity in the area where the wind farm is located, basically corresponding to the timing of tide. As such it is not justified to give a uniform adjustment of wind farm energy through out the day as prayed for by the Petitioners. The priority of the adjustment as adopted by GEB, it was argued, is logical and reasonable.

(c) **Long term operation of policy**.

As regards the prayer of the Petitioner for making bilateral agreement of perpetual nature as against five years period GEB stated that Government policy was implemented for limited period adding that the wind farm developers had already been compensated of the cost incurred for setting up the wind farm. GEB however, accepted the need for getting such facilities for reasonably long period and proposed for bilateral agreement of 10 years subject to the condition that beyond the original term of five years the extension would be on year to year basis with the proviso to

amend and alter any of the terms and conditions at the time of extension subject to the approval of the Commission.

12. In the light of the submissions made by both the parties, the issues to be decided by us can be spelt as follows:

(i) Whether the GEB's communication dated 19/5/98 laying down the rates of wheeling charges and wheeling losses is valid in the light of above facts and should be allowed to remain operative from the date of issue till 20/6/2002 i.e. promulgation of the new policy.

(ii) Whether GEB's circular dated 23/7/99 regarding apportioning of set off against wheeling of power generated at the wind farms is valid in light of the above facts and should be allowed to remain operative from 1/1/93 till 20/6/2002 i.e. promulgation of new wind power generation policy.

(iii) Whether as contended by the Petitioner the Doctrine of promissory estoppel and legitimate expectations would apply in this case.

13. Before we deal with the merits of the case let us see the back ground in which the wind power policy was promulgated in 1993. As mentioned in the Govt resolution, in the context of the widening gap between demand and supply of power in Gujarat and limited conventional sources for generation of electricity, it was felt by the Government that it was necessary to tap the non-conventional energy sources available in the State to the fullest extent. The Govt of India had also announced policy of incentives for private

investment in wind energy. It was in this context that the State Government had decided to provide incentives to the industrial undertakings to invest and generate electrical power in the state using wind energy. It was therefore with this intention that the State Government decided to encourage the production of electrical energy through wind power. This obviously can not be achieved unless the considerable investment is made by the investors in this area. As we are aware, there is detailed laid down procedures of awarding return to those who invest money for generation through conventional means. The economics of the wind power is different. While the investor here also invests a considerable amount of money, he also bears the risks on account of his dependence on wind velocity, intermittent operations, low utilization of assets and damages due to cyclone and other natural calamities. Ideally it should have been an endeavour of the State to identify these risks reducing them to the costs and provide a proper method of determining cost of electricity generated by the wind power and an appropriate return thereon. This, however, can not be done at this stage since the development of wind power is in nascent stages in Gujarat and even in India. It is in lieu of compensating this unknown cost that the Government has now decided to give incentives through this Resolution. This policy of the Government and its intended continuance on a long term basis is further evidenced by the new Resolution containing Wind Power Generation Policy 2002, which has further rationalized the policy and placed it on a sound footing. Therefore, judging from this background, it can be safely concluded that at no stage the Government intended to take any measures, which might adversely effect the development of wind power in the State. It is in light of this broad policy frame work that the contentions of rival parties are to be evaluated.

14. It is not in dispute that there was a valid contract entered into by the GEB with various wind farm owners and that the minimum period of validity of such contract was 5 years and that it contained a provision for termination with a notice by either party of 3 months. It is also not in dispute that the conditions regarding wheeling charges etc. were according to policy of the State Government valid upto 1996 and then it could be changed by the State Government. These were apparently extended upto March, 1998 or till the disputed circular was issued on 19-5-98. The change in the wheeling charges are to be seen in the light of these facts.

15. According to the facts presented before us, the GEB altered the position regarding the wheeling charges by their communication addressed to their Field Offices on 19.5.98. By this communication the flat charge of 2% of energy was replaced by (a) wheeling loss of 10% for power delivered at EHV and 15% for the power delivered at HV and (b) the recipient unit was also required to pay to GEB wheeling charges @ 13.5 paise per Kwh and 21 paise per Kwh for power delivered at EHV and HV respectively. It was also mentioned that the above arrangement was on adhoc basis and shall be modified/altered as per the Govt. of Gujarat directives in future.

16. The first feature of this alteration was that it was made unilaterally by the GEB. No evidence has been produced before us in the course of proceedings that any consultation was made with the wind farm owners formally or informally. This had happened even when 5 years were not over to many of the Agreements or rather all the Agreements and that they continued to be in force. No notice for termination was given. In fact even the

communication of 19.5.98 was addressed to the field formations of the GEB and not to the affected parties. We do not find any provision in the Agreement empowering GEB to alter the position regarding wheeling charges in a unilateral manner. We are, therefore, constrained to conclude that such unilateral changes were violative of the terms of Agreements.

17. We had also directed GEB to give us details of working about the wheeling charges as well as losses. The main argument advanced by the GEB was that on expiry of the Government resolution dated 27-1-93, the incentives to the wind power producers came to an end and therefore they decided to regulate the wheeling of power in accordance with and on the same terms as the Captive power producers as laid down in the Government's Captive Power Policy, 1995. This argument is fallacious on a number of grounds. First of all, as discussed above, although the period mentioned in -the resolution was over, the agreements entered into in pursuance of that policy during the given period, were still operative and valid and therefore there was no question of altering the terms unilaterally. It also does not appear rational to apply for wheeling of wind power, the terms meant for Captive power. If both the cases were identical, there was no need for Government to frame separate policies. The captive power uses conventional methods of generating power in direct augmentation of resources of the owner and does not require the same incentives as the non-conventional sources like wind power as discussed in para 14 above. Its scale of operation is also much larger than the wind power generation. The application of identical condition to both these categories was therefore hardly rational. In our view therefore the GEB erred in coming to a conclusion that at the end of the period mentioned in the policy the agreement

came to an end and that it had a right to apply unilaterally the rates mentioned in one set of policy to another set of generators. According to the agreements, it was only the State Government, which cold have altered the terms after 1996. In fact the policy of 2002 shows that the Government has continued the same policy with the change in wheeling charges from 2% to 4%. Viewed in the background of the Government policy and intentions, the changes were almost a disincentive for wind power producers. The wheeling loss was charged by GEB at 10% and 15% for EHV and HV respectively, but while presenting the details regarding the cost of supply to the Commission even for the year 2000-01, GEB had mentioned the losses of EHV transmission at 6.50% and those at HT transmission at 6.75%. We are at loss to understand that in the light of these figures how such loss came to be prescribed by the GEB for recovery from the wind power producers. We are, therefore, of the view that from the material presented before us, it appears that no systematic exercise was carried out by the GEB to rationally decide the wheeling charges in these cases.

18. One more fact also needs to be mentioned by us in this regard. According to Section 22(1)(b) of the Electricity Regulatory Commissions Act, 1998, one of the functions of the Commission is to determine tariff for use of transmission facilities in the manner provided in Sec. 29. GEB prayed the Commission for revision of tariff in 1999. No details were given at that time for revising the transmission tariff or putting it on rational basis. We would like to clarify that if the 4% wheeling charges prescribed by the Government in the new Policy are in the nature of transmission tariff, then this needs to be determined by the Commission at the earliest. If, however, these are in the

nature of administrative charges as a commission for GEB as was contended in the earlier policy of 1993, this may be continued to be applied. We, therefore, direct that GEB should clarify the exact nature of charges and in case these charges are in the nature of transmission tariff, the Board must submit necessary details to the Commission in order to enable us to determine the required tariff in pursuance of the provisions of Section 22(1)(b) of the Electricity Regulatory Commissions Act, 1998. However, in order to ensure continuity we order that till such time the GEB brings up a comprehensive proposal for revision of tariff they may continue to apply the provision regarding wheeling charges as laid down in the Government's Wind Power Generation Policy, 2002.

19. In the light of the above facts, we are constrained to conclude that the action on the part of GEB to unilaterally revise the wheeling charges was in violation of the contractual provisions, which did not vest with them any authority to make such revision. The charges revised by them were also not based on rational computation. The whole exercise has thus culminated in the violation of the Principles of Natural Justice, Fair Play and Good Conscience.

20. In view of these facts, we hold that the charges prescribed in the GEB's communication dtd 19.5.98 were not valid and, therefore, they should be held to be inoperative during the period from the date of issue till the promulgation of the new Wind Power Generation Policy. In view of this, it would be just and fair for the GEB to continue to charge the Wind Farm Owners in accordance with the policy laid down by the Government on

27.1.93, i.e. to continue the old policy till new policy has been promulgated by the Government.

21. The next issue is about the apportioning of set off against the wheeling of power generated at the wind farms. The GEB has argued that this was done to bring about the uniformity in allowing the set off. The petitioners on the other hand have argued that this was done in response to an audit objection. While GEB has not contested this contention, they have also not produced any material to show that diverse procedures were indeed prevalent in different divisions. Even if it were so, it is indeed intriguing why there was a need to correct them retrospectively, w.e.f. 1-1-93. By all accounts it is clear that the procedure hitherto followed had been accepted by both sides for a long time and had become apart of unwritten agreed and accepted convention. Its retrospective revision altered the whole package of compensation envisaged in the Govt. Resolution of 27-1-93. In our view GEB violated not only the spirit of the resolution but also the contract by this decision. However, even judging on merits, the decision defies rationality. In the earlier procedure followed, the power utilized by the unit was being uniformly divided into three parts. To prescribe a different method of set off which presumed that the whole power generated by the wind farms should be set off against the power consumed during night hours, is to do injustice to the wind farm producers who produce the power the whole day. No details have been produced by the GEB in respect of the analysis of power generation at different places and the rationale for the new procedure of set off, which they have carried out for prescribing this uniform procedure. We have, therefore, no difficulty in holding that this decision was arbitrary and incorrect and

therefore deserves to be reversed. The original system of set off of power must therefore prevail during the intervening period and the benefits be accordingly passed on to the consumers of wind power producers. We order accordingly.

22. As mentioned above, the State Government has now come with new Wind Power Policy in their Resolution dtd 20.6.2002. The policy clearly defines that "the operative period" would mean that the beneficiary who sets up wind energy generating unit during the said period of 5 years and units installed during this operative period of the policy would become eligible for the benefits which would be declared in the policy. The eligible period should, however, be 20 years or the life span of the wind energy generator whichever is earlier. We hope that this provision, which is so thoughtfully made, takes care of the grievances of the wind farm producers who have made the long term investment. In the light of this policy announced, we do not consider it necessary to deal with the last two issues, viz., those dealing with the Doctrine of Promissory Estoppel as well as the Doctrine of legitimate expectation.

23 With these orders, the petitions stand disposed off.

Sd/-	Sd/-	Sd/-
(JUSTICE S.D. DAVE)	**(B.M. OZA)**	**(R.K. SHARMA)**
CHAIRMAN	**MEMBER**	**MEMBER**

Place : Ahmedabad
Date : 30th September, 2002