

**IN THE HON'BLE TAMIL NADU ELECTRICITY
REGULATORY COMMISSION
CHENNAI**

WEDNESDAY, THE 21st DAY OF JULY 2004

PRESENT:

**The Hon'ble Chairman Mr. A. Balraj, IAS., Retd. - Chairperson
and**

The Hon'ble Member Mr. S. Thangarathnam - Member

M.P. No.263 of 2002 and M.P. No. 1 of 2003

NELLIKUPPAM V. KRISHNAMURTHY
FORMER MP and Legislative Assembly
of Tamil Nadu
No.92 Pudupalayam Main Road,
Cuddalore 607 001.

... Petitioner.

Vs.

1. ST-CMS Electric Power Company
Oomangalam and Post
Viruchachalam Tk. Cuddalore Dist. ... Respondent in MP No.263/2002
 2. M/s. GMR Power Corporation Pvt. Ltd.
No.1 Pullianthope High Road,
Chennai 600 012.
 3. M/s. Samalpatti Power Company Pvt. Ltd.
'SREYAS VIRAT'
No.14, First Floor, Raja Annamalaipuram
Chennai 28
 4. M/s. Madurai Power Corporation Pvt. Ltd.
G.1 No.1 Seshadri Road,
Alwarpet, Chennai 18.
 5. M/s. P.P.N. Power Generation Co. Ltd.
III Floor, Javer Plaza,
1A Nungambakkam High Road,
Chennai 600 034.
 6. Tamil Nadu Electricity Board
800 Anna Salai,
Chennai 600 002.
- Respondents in
M.P.No. 1 of 2003
- 1st Respondent in M.P.No.1 of 2003 and
2nd Respondent in M.P.No.263/2002
-

These two Petitions came up for hearing before us on various dates. During the last hearing, i.e. 21st day of April 2004, Advocates representing the respondents have pleaded that this Commission has to settle the preliminary issue that is to say maintainability of the Petitions on the basic ground of locus standi of the Petitioner to file these Petitions, in the first instance.

Accordingly, this Commission frames the following preliminary issue:

Preliminary issue

Whether the Petitioner has got locus standi to file the above Petitions, and whether he can be said to be an affected person and whether the above petitions are maintainable in law.

(i) Arguments of Petitioner

The Petitioner contended that section 86 of The Electricity Act 2003 gives power to this Hon'ble Commission to regulate the price for the purchase of electricity. He argued that eventhough the Power Purchase Agreement was entered into, prior to the constitution of this Hon'ble Commission, as the Power Purchase Agreement is still in existence this Hon'ble Commission has got suo motu power to entertain the petitions as it is not only an adjudicatory authority but also an investigating authority under the said Act. The Petitioner contended that Section 94 of the Electricity Act 2003 gave powers of a Civil Court to this Hon'ble Commission to call for any records and pass orders. He said that based on the above section 94 he has filed the above Petition calling for the Power Purchase Agreement entered into between the Respondents and the letter (Ins) No. 4 Energy (A1) Department dated 10.11.2001 from the Central Electricity Authority for considering and determining the price for power purchase from the 1st Respondent the TNEB. The Petitioner contended that this Hon'ble Commission has an inherent power to regulate price, as this Hon'ble Commission is not a mere law adjudicatory Commission but it is a Regulatory Commission.

(ii) Arguments for Respondents

The Learned Senior Counsel for 2nd Respondent Thiru Ramasubramaniam in M.P.No.1 of 2003 while referring to paras 21 and 22 of the Counter Affidavit of the 2nd Respondent in M.P. No. 1 of 2003, contended that the Petitioner is not a party to the PPA and it is not disclosed by him as to how he is an aggrieved person. He also contended that the Petitioner has never raised any dispute with the 2nd Respondent at any time and as such he cannot claim to be a person affected or interested in the said PPA.

Tmt. Nalini Chidambaram, the Learned Senior Counsel for 1st Respondent in M.P. No.263 / 2002 while referring to the Supreme Court's decision extracted at Pages 2 - 3 of the Counter Affidavit filed by the 1st Respondent in M.P. No. 263 / 2002 contended that the Petitioner being an individual has no locus standi to file the Petitions and only Consumer Association / Forum can file the Petitions.

Thiru Mohan Parasaran, the Learned Senior Counsel for Respondents 3 and 4 in M.P. No. 1 / 2003 while referring to the preamble to the Electricity Act 2003 and the definition of "Consumer" in section 2 (15) of the Act contended that the Petitioner cannot directly approach this Hon'ble Commission unless he has got a grievance. He also pointed out that there is no nexus between the Petitioner and the Respondents. He also contended that the Petitioner cannot rely upon Regulation 16 (1) of the Conduct of Business Regulations as the said Regulation has been repealed by section 185 (1) of the Electricity Act 2003 and it is not saved by sub-section (2) of the said section 185 of the Act because of the fact that it is inconsistent with section 61 of the Electricity Act 2003 read with section 64 according to which it is only a Generating Company or a Licensee who can approach this Commission for fixation of tariff and that the Petitioner has no locus standi to approach this Commission. He pointed out that the Petition is premature and it can be taken up only when the policy of central Government in regard to tariff is announced.

Thiru Aravind Subramaniam Counsel for 5th Respondent in M.P. No. 1 / 2003 contended that the Petitioner has no locus standi to file this case since he is not a party to the PPA and as such he cannot be a person aggrieved.

(iii) Findings of the Commission:

Regulation 16 (1) of the Tamil Nadu Electricity Regulatory Commission - Conduct of Business Regulations 2002 reads as follows:-

"16 (1) The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person."

The expression "interested person" occurring in the said Regulation 16 (1) is significant. According to the said Regulation 16 (1) apart from affected person, any interested person also may file petitions to the Commission. The Petitioner in his Petition M.P. No. 263/2002 has stated that he is a power consumer under 2nd Respondent (TNEB) and he is paying Rs.10.00 lakhs per annum by himself and his concerns and he is filing these Petitions on a public interest in order to protect the consumers in Tamil Nadu. Further it is seen that the Petitioner is a former M.P. and MLA. As such the Petitioner can file these Petitions as an interested person. Moreover it would be relevant to point out that ultimately in all PPAs the fixation of price affects the consumers only as the burden is shifted to the consumers. In this connection, it would be relevant to note that the Hon'ble Supreme Court in **West Bengal Electricity Commission vs CESC Ltd.** (2002 8 SCC 715) has inter alia pointed out that section 37 of the 1998 Act indicates the participation of interested persons in the proceedings of the Commission. The following observation of the Hon'ble Supreme Court would be relevant.

" At this stage, it may be worthwhile to notice the mandate of the Parliament in Section 37 of the 1998 Act to the Commission that the Commission should ensure transparency while exercising its powers and discharging its functions

which also indicates that the proceedings of the Commission should be public which, in itself shows participation by interested persons."

Section 86 (3) of the new Electricity Act 2003 corresponds to the said section 37 of the ERC Act. In this connection it would be pertinent to point out that even before the Hon'ble High Court, Madras where the Petitioner has filed the W.P. 2053 of 1994 by way of a public interest litigation the locus standi of the petitioner was challenged before the Hon'ble High Court also. But the Hon'ble High Court while relying upon a decision of Hon'ble Supreme Court did not allow that challenge. The following observations of the Hon'ble High Court, Madras would be relevant.

"Learned Counsel appearing for the Corporation has first attacked the locus standi of the petitioner to file the writ petition in a public interest litigation. He refers to **JANATA DAL vs. H.S. CHOWDHARY (A.I.R.1993 S.C. 892)**. That Judgement emphasises the need for bonafide public interest litigation to wipe out the tears of the poor and the needy who suffer on account of ignorance of law."

In view of the said observation of the Hon'ble High Court, Madras, it would be seen that bona fide public interest litigation can be filed by interested persons. Regarding the contention of the Learned Senior Counsel Thiru Mohan Parasaran that the said Regulation 16 (1) is repealed by section 185 (2) of the Electricity Act, 2003, as it is inconsistent with section 61 of the Electricity Act, 2003 read with section 64 of the said Act, it may be pointed out that the said Regulation 16 (1) which forms part of the Tamil Nadu Electricity (Conduct of Business) Regulations 2002 was made under section 58 of the Electricity Regulatory Commissions Act 1998 (Act No. 14 of 1998). The said section 58 of the said ERC Act provides that the State Commission may, by notification in the official Gazette, make regulations consistent with the Act and the rules made thereunder to carry out the purposes of the Act. Section 9 (1) of the ERC Act provides that the Central Commission shall observe such rules of procedure in

regard to the transaction of business at its meetings (including the quorum at its meetings) as may be determined by regulations. The said section 9 (1), which relates to the framing of regulations by Central Commission in regard to transaction of business is applicable to State Commission also by virtue of section 23 of the ERC Act. The TNERC Conduct of Business Regulations were framed by the State Commission by virtue of the provisions contained in section 9 (2) read with section 23 and section 58 of the ERC Act. In the new Electricity Act 2003, section 181 (1) which relates to the powers of the State Commission to make regulations corresponds to section 58 (1) of ERC Act and there is no change in the wordings of both the above provisions.

Similarly section 9 (1) of ERC Act, which relates to framing of regulations in regard to transaction of business of the Commission, corresponds to section 92 (1) of the New Electricity Act 2003, and there is no change in the wording of both the above provisions. There is no inconsistency between the repealed ERC Act and the new Electricity Act 2003 in so far as they relate to the framing of procedure relating to transaction of business of Commission by way of regulations.

Hence the contention of the Learned Senior Counsel Thiru Mohan Parasaran that Regulation 16(1) of the TNERC Conduct of Business Regulations has been repealed has no force and it is not acceptable. In this connection, it may be pointed out that regulation 16 (1) of the new TNERC Conduct of Business Regulations 2004 framed under the new Electricity Act 2003 reads as follows:

“16 (1) The Commission may initiate any proceedings suo motu on a Petition filed by any affected or interested person. “

The said regulation 16 (1) is similar to the old regulation 16 (1) referred to above.

The other contention of the Learned Sr. Counsel Thiru Mohan Parasaran is that under sections 61 and 64 of the Electricity Act, 2003, it is only the

Generating Company or a Licensee who can approach this Commission for the determination of tariff. Regarding this contention, it may be stated that under section 22 (1) (b) of ERC Act 1998, which corresponds to section 86 (1) (b) of the new Electricity Act, 2003, regulation of electricity purchase including the price at which electricity shall be procured from Generating Companies is one of the functions of this Commission. The Petitioner's prayer relates to this function and it is not for determination of tariff. Hence the above contention is not acceptable. The Petitioner has got a locus standi to approach this Commission for regulating the price of electricity under the said provisions of law.

Incidentally it may be relevant to point out that this Commission at page 179 of the Tariff Order have referred to the statement made by the Government of Tamil Nadu in the White Paper on the Tamil Nadu Government's finances placed on the floor of the Legislature Assembly. It is seen that the Government of Tamil Nadu themselves felt that the cost of purchasing electric power from IPPs in the Private Sector has made a serious dent in the TNEB's finance. It is further seen from the statement of Government of Tamil Nadu in the White Paper that the TNEB proposes to negotiate its power purchase cost with the Private Sector IPPs. Based on the above White Paper's report, this Commission have already directed the TNEB one of the Respondents in both the above Petitions to explore all possible options with concerned IPP generators at the earliest in order to optimise the cost of power purchase from IPP sources under the existing low interest regime. The following portion of the Tariff Order is relevant

“Power Purchase Cost

Many objectors have vociferously expressed and criticized TNEB about the high cost of power purchase from IPPs. GoTN, in the “White Paper” on the Tamil Nadu Government's finances placed on the floor of the Legislative Assembly, have stated that **“The unreasonably high cost of purchasing electric power from IPPs in the Private Sector has made a serious dent in the TNEB's**

finances. The Board now proposes to renegotiate its power purchase cost with the Private Sector IPPs ”.

The Commission directs the TNEB to explore all possible options with concerned IPP generators at the earliest in order to optimise the cost of power purchase from IPP sources under the existing low interest regime. The TNEB should also strictly follow the principle of merit order despatch in its power procurement process.”

In the case of Power Purchase Agreements, which provide for determination of tariff on cost plus return basis, it was appropriate for Generating Companies to mitigate their costs. There is also an implied obligation on the part of Generating Companies to reduce or minimise their cost in the same manner as they could have done, if the costs were to be borne by themselves. It would be inappropriate for the I.P.Ps to say that they had no duty to mitigate the costs and expenses, as these were provided as pass through in the tariff. There are number of areas where cost reduction is possible such as interest outgoings by swapping of loans, better operating norms, technology up gradation, reduction in foreign exchange risk, possibilities for change of fuel, alternative mode of transport for fuel supply, reducing the working capital requirement, etc. Similar stand has been taken by APERC in their Tariff Order 2003-04 and they have directed the APTRANSCO to initiate negotiations with Generating Companies where P.P.As were concluded prior to the coming into force of the Reforms Act and constitution of the Commission to explore areas of cost reduction within the existing P.P.As.

G.E.R.C. in their Tariff Order dated 10th October 2000 ordered that “the existing cost of Power Purchase will also have to be reduced. The Commission is of the view that with the passage of time, there has been a qualitative change in the environment for participation of private sector in the power projects and the Board must make efforts in consultation with and co-operation of the I.P.Ps to review the existing arrangements with a view to bring down the cost of power purchase”.

The 2nd Respondent namely TNEB is bound to comply with the directions of this Commission in the Tariff Order. However, while taking note of the pleadings and contentions of the Respondents that the sanctity of the contractual obligations in the concluded agreements should be honoured, this Commission would like to appreciate, in the interest of public, the need for reduction in the Power Purchase cost as enumerated in the previous paragraphs in the changed scenario prevailing now with mutual consent of parties to the agreements.

In the above circumstances, this Commission pronounces the following Common Preliminary Order.

COMMON PRELIMINARY ORDER

In the above circumstances, the Commission rejects the contention of the Respondents that the Petitioner has no locus standi to file the petitions and the above Petitions are maintainable in law. However, as already directed by this Commission at page 179 of the Tariff Order referred to above, the TNEB is directed to explore all possible options with the Respondents in M.P. No. 263 of 2002 and M.P 1. of 2003 as referred to in the cause title in order to optimise the cost of power purchase and send a report to this Commission within six months from the date of issue of this Order.

Pronounced in the Open Court by this Commission on this the day of 21st July 2004

**Sd.....
(S. THANGARATHNAM)
Member**

**Sd.....
(A. BALRAJ)
Chairman**

List of Witnesses examined

NIL

List of Documents

NIL

**Sd.....
(S. THANGARATHNAM)
Member**

**Sd.....
(A. BALRAJ)
Chairman**

/Certified Copy/

Secretary