

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under Section 82(1) of the Electricity Act 2003)
(Central Act 36 of 2003)

PRESENT :

Thiru. S. Kabilan	-	Chairman
Thiru. R. Rajupandi	-	Member
and		
Thiru K. Venugopal	-	Member

D,R.P. No. 27 of 2009

Chennai Petroleum Corporation Ltd.
Represented by its Company Secretary
No.536, Anna Salai
Teynampet
Chennai – 600 018

.. Petitioner
Counsel for Petitioner
Thiru R. Senthilkumar

Vs

Tamill Nadu Electricity Board
Represented by its Secretary
144, Anna Salai
Chennai – 600 002

..Respondent
Counsel for Respondent
Thiru H.S. Mohamed Rafi

Date of hearing: 4-12-2009

Date of Order: 25-2-2010

The above DRP No.27 of 2009 came up for hearing before the Commission on 4th December, 2009. The Commission upon perusing the above petition and connected records and upon hearing both sides passes the following

ORDER

1. Prayer in DRP No.27 of 2009:

The prayer in DRP No.27 of 2009 is

- (a) to direct the Respondent to pay the Petitioner a sum of Rs.2,93,88,806/- comprising the principal amount of Rs.2,16,78,571/- along with interest at 14% per annum on the respective invoices upto the date of this petition.
- b) Direct the Respondent to pay further interest on the sums claimed at the rate of 14% per annum from the date of petition until realisation.
- c) Direct the payment of the costs of this petition.

2. Facts of the case:

The Petitioner has Captive Power generating facilities at Manali, Chennai to generate power for its own use by wheeling through the grid. It entered into a Power Purchase Agreement (hereafter referred to as the "PPA") on 31-03-1999 with the Respondent to sell surplus power over and above its use. The PPA is valid for a period of 15 years up to 31-03-2014.

3. Contentions of the Petitioner

- a) As per clause 3.24 of the PPA, the rate for firm power for the year 1998-99 was fixed at Rs.2.25 per unit and for the subsequent years the parties agreed to an escalation of 5% every year up to the year 2007-08, thereafter, from 1-04-2008, the rate was to be fixed after review.
- b) Contrary to the PPA, the Respondent paid at the rate of Rs.3.01 per unit for the financial years 2005-06, 2006-07 and 2007-08 despite the fact that the PPA specified the rates of Rs.3.16, 3.32 and 3.49 per unit respectively for the said years.
- c) Further, the Petitioner brought this issue to the notice of the Respondent and requested payment as per the agreed rates in its letter dated 5-05-2006, but the Respondent failed to make payments.

The Respondent has, further approached this Commission in PPAP No.4 of 2009 to fix the tariff at Rs.3.01 for three years commencing from 01-04-2008.

- d) As per clause 3.14 (a) of the PPA the cost of the power sold to the Respondent for each billing period is to be paid by cheque to the Petitioner within eight working days from the date of taking the monthly meter reading for that billing period and as per clause 3.14(b), if payment is not made within the above period, interest at the rate of 14% percent per annum for the number of days of delay will have to be paid.
- e) The PPA stipulates under clause 3.25 that disputes that arise on any of the conditions of the agreement are to be settled through mutual discussions. The Petitioner has made all efforts to settle this matter through requests, reminders and negotiations. The Respondent is liable in law to make good the amount due to the Petitioner along with interest thereon till the actual date of realization of the same. Since the respondent has failed to make payments to the petitioner as per the agreed rates for the financial years 2005-06, 2006-07 and 2007-08, the above DRP is now filed before the Commission.

4. Contentions of the Respondent in the counter affidavit

- a) The Board has addressed the Government of Tamil Nadu in letter dated 21-06-2005 requesting for an Order for freezing the rate of power purchased from Captive Power Plants from 2005-06 at Rs.3.01 per unit.
- b) The petitioner all along has not disputed the rate of Rs.3.01 per Kwhr from 2005-06 to 2007-08, but has now approached this Commission, that too only after the TNEB has filed a PPAP No.04 of 2009 for fixation of rate for power purchase from 01-04-2008. The Petitioner has woken up from deep slumber regarding the frozen rate of Rs.3.01 per Kwhr, after a gap of four to five years.
- c) The petitioner in the negotiation meeting conducted on 04-04-2008 has accepted the rate of Rs.3.01 per Kwhr for a period of three years from 01-4-2008 and signed the minutes of meeting to that effect. Without raising any dispute from 2005-06 to 2007-08,

and having accepted the rate of Rs.3.01 per Kwhr for a further period of three years from 1.4.2008, the petitioner has now chosen to approach this Commission claiming Rs.2,93,88,806/- including interest at the rate of 14% per annum.

- d) The petitioner till date has not at all represented regarding the payment to the respondent Board for the alleged amount due for the period from 1-04-2005 to 31-03-2008. Only after the Board has filed a PPAP No.04 of 2009 in the Commission, the petitioner has now approached this Commission stating that the petitioner has to be paid Rs.2,93,88,805/- together with 14% interest per annum from the date of filing of the present petition till the date of payment. It would be relevant to mention here even in the review meeting held on 04-04-2008 the petitioner pleaded for an increase of at least 5% from the present rate of Rs.3.01 per Kwhr.
- e) The Petitioner has approached this Commission after a gap ;of four and a half years, that too after the respondent filed the PPAP No.04 of 2009 before this Commission for fixation of tariff for purchase of power from 01-04-2008.
- f) The petitioner by acquiescence in the rate @ Rs.3.01/Kwhr, for the period 2005-2006 to 2007-08 has lost the right to challenge before this Commission or any other forum. The same is confirmed with the terms of the mutual agreement entered into between the petitioner and the Board on 04-04-2008 by which the petitioner has requested the Board for an increase of 5% from the present rate of Rs.3.01/Kwhr.

5. Findings of the Commission:

5.1. The Power Purchase Agreement was executed by both parties on 31-3-1999. Section 185 of the Electricity Act, 2003 protects the agreement in so far as it is not inconsistent with the provisions of the Act. The PPA laid down a formula for tariff applicable upto 2007-08. As per the formula the tariff for the year 2005-06 works out to Rs.3.16 per unit , tariff for the year 2006-07 works out to Rs.3.32 per unit and tariff for the 2007-08 works out to Rs.3.49 per unit.

5.2. Clause 3.32 of the PPA reads as follows:

“Any alteration or deletion in the terms and conditions of this agreement is to be carried out based on mutual agreement by the Board and the Company.”

No amendment to the tariff rate was carried out by the Respondent for the years 2005-06, 2006-07 and 2007-08 and therefore the original formula contained in the PPA would bind both the parties. Specifically, the Respondent did not incorporate the rate of Rs.3.01 per unit in the PPA applicable for 2005-06, 2006-07 and 2007-08.

5.3. The Respondent settled the tariff bills for 2005-06, 2006-07 and 2007-08 at the arbitrary rate of Rs.3.01 per unit as against the rate of Rs.3.16 per unit, Rs.3.32 per unit and Rs.3.49 per unit respectively stipulated in the PPA. The Respondent claims that the petitioner did not challenge the rate all along and accepted the rate of Rs.3.01 per unit. The Respondent claims that the petitioner by his conduct has waived his right for the contracted rate. We do not accept this contention because the petitioner has submitted invoices month after month during these three years at the rates stipulated in the PPA, although the respondent paid at the rate of Rs.3.01 per unit. Never did the respondent mention in the course of bill settlement that Rs.3.01 per unit constituted full and final payment of the bills. In such a case, the petitioner is entitled to the benefit of doubt that the payments of the respondent amount to partial settlement and do not constitute full and final settlement.

5.4. The respondent submits that the claim is time barred. We have discussed this issue elaborately in DRP No.18 of 2008 in TCP Limited Vs.TNEB, wherein we have ruled that the period of limitation stipulated in the Limitation Act, 1963 would not apply and that the claim should be examined from the angle of delay and laches. That is to say that relief should be sought at the earliest opportunity. In the present case the petitioner has raised the dispute during the currency of the PPA that is between 1999 and 2014. Further, there is no estoppel against law and therefore the petitioner cannot be estopped from claiming the contracted rate stipulated in the PPA for the period 2005-06, 2006-07 and 2007-08.

5.5. The respondent further submits that the dispute should be settled as per the Contract Act, 1872 rather than the Electricity Act, 2003. We would like to record that the present case is a dispute between a generator and a distribution licensee and therefore is covered by Section 86(1)(f) of the Electricity Act, 2003. In Gujarat Urja Vikas Nigam Ltd., Vs. Essar Power Ltd., (2008 (4) SCC 755) the Supreme Court has categorically ruled that all disputes between a generator and a distribution licensee shall be adjudicated by the appropriate Commission and therefore this objection does not survive.

5.6. Clause 3.14 of the PPA stipulates interest at the rate of 14% per annum for delayed payment.

6. Direction:

The Respondent is directed to pay to the petitioner, the difference between the contracted rates of Rs.3.16 per unit, Rs.3.32 per unit and Rs.3.49 per unit respectively for the years 2005-06, 2006-07 and 2007-08 and the actual payment of Rs.3.01 per unit together with interest at the rate of 14% per annum.

7. Appeal:

An appeal against this order lies with the Appellate Tribunal for Electricity as per Section 111 of the Electricity Act, 2003 within a period of 45 days.

With the above findings, DRP No.27 of 2009 is finally disposed of. No costs.

(K. Venugopal)
Member-II

(R. Rajupandi)
Member-I

(S. Kabilan)
Chairman