

**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 R. Rajupandi - Member

and

Thiru K. Venugopal - Member

PPAP No.4 of 2009

Date of hearing – 3-12-2009

Date of Order: 25-2-2010

Tamil Nadu Electricity Board
Represented by its Chairman
144 Anna Salai
Chennai 600 002

Petitioner
Counsel for Petitioner
Thiru H.S.Mohamed Rafi

Vs.

Chennai Petroleum Corporation Ltd.

Respondent
Senior Counsel for Respondent
Thiru R.Muthukumarasamy
Counsels (1) Thiru R.Senthil Kumar
(2) Thiru Arjon Suresh
(3) Thiru Franklin Susan
George

The above PPAP No.4 of 2009 came up for final hearing on 3rd December 2009. The Commission upon perusing the above petition

and other connected records of the case and after hearing both sides passes the following

ORDER

1. Prayer of the petitioner in PPAP No.4 of 2009

The prayer of the petitioner in PPAP No.4 of 2009 is to approve the rates for purchase of power from the Respondent effective from 1-4-2008.

2. Facts of the case

A Power Purchase Agreement (PPA) was executed by the petitioner Board (TNEB) with the respondent namely M/s. Chennai Petroleum corporation Ltd. on 31-3-1999 under the policy laid down in G.O.Ms.No.48 Energy Department dated 22-4-1998. The respondent set up a Captive Generating Plant (CGP) at Manali, Chennai. It wheels energy for captive consumption through the TNEB grid and sells the balance power to the TNEB as per the above PPA.

3. Contentions of the petitioner

- a) As per Clause 3.24 of the PPA the purchase rate from 1-4-2008 is to be fixed after review by both the parties.
- b) The Respondent has given his willingness to come over to the provisions of the Electricity Act, 2003, Electricity Rules, 2005 and TNERC's Order No.4 dated 15-5-06 etc.
- c) The TNEB, has petitioned the Commission to approve the tariff rates for the purchase of power from 1-4-2008 as per Section 86(1)(b) of the Electricity Act, 2003. The petitioner TNEB request the Commission to consider the fixation of rates as the Respondent has already offered to receive the rate of Rs.3.01 per kwhr for a period of three years, during the

negotiation meeting conducted on 4-4-2008, effective from 1-4-2008 till the period when the Respondent M/s. Chennai Petroleum Corporation Ltd. executes a new PPA as per the provisions of the Electricity Act, 2003, Electricity Rules, 2005 and TNERC's Order No.4 dated 15-5-06 etc.

- d) The Commission is the competent authority to fix the tariff rates as per Section 86 (1) (b) of the Electricity Act, 2003 and the Commission may approve the tariff rate of Rs.3.01 per kwhr, which has been agreed to by the Respondent during the negotiation meeting held on 4-4-2008.
- e) It would be relevant to state that the petitioner has negotiated with the Respondent as per the TNERC's Order No.4 dated 15-5-2006 in the negotiation meeting on 4-4-2008 to come over to the Electricity Act, 2003, Electricity Rules 2005 and TNERC's Order No.4 dated 15-5-2006. The Respondent on 4-4-2008 has requested that they want to remain in the policies of G.O.Ms. 48 Energy dated 22-4-1998. But, subsequently, the Respondent while requesting for parallel operation approval of their new 22.5 MW Gas Turbo generator set, and a revised wheeling approval incorporating two more captive users have agreed to come over to the provisions of Electricity Act, 2003, Electricity Rules, 2005, etc.

4. Contentions of Respondent in the Counter-affidavit

- a) The petitioner has not complied with the requirements of Clause 3.24 of the PPA. In particular, the respondent has been 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 specifies the rates of Rs.3.16, 3.32 and 3.49 per unit respectively for the said years. The respondent is filing a separate petition to claim amounts due in this regard from the petitioner herein.
- b) The respondent denies that it accepted the rate of Rs.3.01 per unit in respect of the financial years 2005-06, 2006-07 and 2007-08. On the contrary, the petitioner had agreed to the rates specified in Clause 3.24 of the PPA.
- c) In view of the coming into force of the Electricity Act, both parties were aware that the tariff is required to be determined by this Commission. However, pending such determination, it was necessary to agree upon adhoc rates. The

respondent participated in the negotiation meeting for the purpose of agreeing to such adhoc rates.

- d) The minutes of the meeting held on 4-4-2008 cannot be construed as an agreement with regard to supply of power at the rate of Rs.3.01 per unit. In any event, as already stated, both parties understood the said rate as an adhoc rate subject to and pending fixation of rate by this Commission.

5. Findings of the Commission

- 5.1 The petitioner and the respondent executed a Power Purchase Agreement on 31-3-1999. Section 185 of the Electricity Act 2003 protects this agreement executed prior to the date of enforcement of the Act i.e. prior to 10th June 2003, in so far as it is not inconsistent with the Electricity Act 2003.
- 5.2 The PPA specified the rates up to the period 2007-08 but left the rates for subsequent periods open for review. As per Section 62 of the Electricity Act 2003, the appropriate Commission shall determine the tariff for the supply of electricity by the generating company to the distribution licensee. Since the PPA did not specify the rates for the period beyond 31-3-2008, that power of determination of rate should devolve on this Commission in accordance with the Section 62 of the Act after 10-6-2003.
- 5.3 The Commission notes that the petitioner has filed this petition for determination of tariff effective from 1st April 2008 after a period of 17 months in September 2009 and has virtually taken the approval of the Commission for granted. The petitioner has referred to the minutes of the meeting held on 4th April 2008 wherein the respondent has reportedly accepted the rate of Rs.3.01 for the period 2008-09, 2009-10 and 2010-11. We are constrained to observe that this exercise of tariff determination carried out by the petitioner and respondent is ab initio void and violative of the Electricity Act 2003 and therefore we have no hesitation in setting aside the proceedings of the meeting.
- 5.4 Clause 3.22 of the Power Purchase Agreement between the two parties stipulates that any alteration and revision in the terms and conditions of the agreement is to be carried out based on mutual agreement by the Board and

the Company. Although the parties reached an understanding on the rate of Rs.3.01 for the period from 1-4-2005 upto 31-3-2008, the PPA was not amended in terms of Clause 3.22 to prescribe the rate for three years. Even otherwise, the task of tariff determination is to be carried out by the Appropriate Commission in terms of Section 62 of the Electricity Act 2003, after the commencement of the Act on 10th June 2003 and therefore the very exercise itself is ultra vires of the Electricity Act, 2003.

5.5 The limited issue before the Commission is determination of tariff for the period commencing from 1-4-2008. In this context, the petitioner Board have contended that the respondent being a captive generating plant should be governed by Order No.4 dated 15-5-2006 of the Commission and the relevant tariff should be applied to them. In this context, we refer to clause 4 of Order No.4 dated 15-5-2006 of the Commission.

“4.0 Applicability of Order

This order shall come into force from the date of its issue. This Order shall be applicable to all future fossil fuel based continuous duty Group Captive Generating Plants and fossil fuel based cogeneration plants located within the State of Tamil Nadu. for such of those CGPs' existing but not covered by specific agreement, this order shall automatically apply. It should be noted that the existing contracts and agreements in the matter of Captive Generating Plants between the CGP Holders and the Distribution Licensee signed prior to the date of issue of this order would continue to remain in force. However, the CGP Holders and Distribution Licensees shall have the option to mutually re-negotiate the existing agreements / contracts, if any, in line with this order even before the expiry of the contracts. Any renewal of the said contracts / agreements, new contracts / agreements should be in line with this order.”

5.6 Order No.4 enables the parties to re-negotiate the existing agreement. In this particular case, the parties have not re-negotiated their agreement and therefore the original PPA continues to bind them.

5.7 This leaves the Commission with only one option i.e. to treat the respondent as a captive generating plant and yet determine a tariff consistent with the PPA. The PPA provides for annual escalation of 5% every year beginning with 1998-99. If this formula is adopted, the tariff for the period of three year beyond 1-4-2008 would be as follows:-

2008-2009	:	Rs.3.66 per unit
2009-2010	:	Rs.3.85 per unit
2010-2011	:	Rs.4.04 per unit.

The Commission believes that this formula is just and fair for both the parties. This formula satisfies the spirit of the PPA as well as the requirement of Section 62 of the Electricity Act 2003.

6. Direction

The Commission directs that the tariff for 2008-09 shall be Rs.3.66 per unit, for 2009-10 Rs.3.85 per unit and for 2010-11 Rs.4.04 per unit.

7. Appeal

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

(K. Venugopal)
Member

(R. Rajupandi)
Member

(S. Kabilan)
Chairman