

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.K.Venugopal	Member
	and	
Thiru.S.Nagalsamy	Member

D.R.P. No. 2 of 2011

and

I.A. No.1 of 2011 in D.R.P. No.2 of 2011

M/s. Auro Mira Bio Energy Pudukottai India Limited
Old No. 11, New No.29,
Shaffee Mohammed Road
Off Greams Road
Chennai – 600 006.

.... Petitioner
(Thiru. Rahul Balaji, Advocate for Petitioner)

Vs.

1. The Tamil Nadu Electricity Board
Rep. by its Chairman
800, Anna Salai
Chennai – 600 002.
2. The Chief Financial Controller (General)
Tamil Nadu Electricity Board
NPKRR Maaligai
7th Floor
144, Anna Salai
Chennai – 600 002.
3. The CMD

TANGEDCO Ltd
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.

4. The Superintending Engineer
Pudukottai EDC
TNEB Complex
Old Bus Stand
Pudukottai

.... Respondents
(Thiru.R.Selvakumar, Advocate for Respondents)

Dates of hearing: 2-3-2011 and 14-7-2011

Date of Order : 3-11-2011

D.R.P.No.2 of 2011 and I.A. No. 1 of 2011 in DRP No. 2 of 2011 came up for final hearing before the Commission on **14-07-2011**. The Commission upon perusing the above petitions and other connected records and after hearing both sides passes the following:-

ORDER

Prayer in D.R.P.No.2 of 2011:-

1. To declare that the Petitioner plant is governed by Tariff Order No.3 dated 15-5-2006 and the subsequent tariff orders passed fixing tariff for biomass based power generation plants including Tariff Order No.2 – comprehensive tariff order on biomass based power plants dated 27-4-2009 and pass such further or other orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

Interim Prayer in I.A. in D.R.P.:-

2. To issue an interim order directing the Respondent Board to make payment to the Petitioner as per Invoice No.96/2010-2011 dated 30-9-2010.

Facts of the case :-

3. The Petitioner has a non-conventional energy based generation plant in Pudukottai which uses biomass as the fuel for generation of power. Approval from the Tamil Nadu Electricity Board for establishing a biomass fuel based generation plant was received on 28-1-2004 vide Lr. No. CE/NCES/EE/MCB/A2/F.Chitra Bio/D36/04.

4. The plant has a generating capacity of 7.5. MW. The plant was commissioned on 22-3-2006.

5. The tariff for procurement of power produced by non-conventional energy sources based generation plants was fixed by the Commission in Tariff Order No.3 dated 15-5-2006. The Commission vide this order fixed the base price for procurement of power produced by biomass based generating plants at Rs.3.15 per unit. The Commission while fixing the above tariff also stated that the tariff order would apply to all new agreements that were entered into between the generating plants and the TNEB.

6. The Petitioner company which was previously known as M/s.Chitra Bio Energy Ltd., underwent a name change in 2008 and is now known as M/s. Auro Mira Bio Energy Pudukottai India Ltd. and the same has been brought to the notice of the Respondent Board and its officials. The Petitioner has been availing HT power from the Respondent Board, who recorded such change in name after entering into a fresh HT supply agreement on the 5th September, 2008 and vide Letter No.SE/PEDC/PDKT/AO/R/A1/F.HT Sc. No.114/D.582/2008 dated 9-9-2008 has stated that the HT service connection issued in the name of M/s.Chitra Bio Energy Ltd. would be transferred to M/s.Auro Mira Bio Energy Pudukottai India Ltd. and all future bills and correspondence would be in that name.

7. Consequent to the change of name, the Petitioner entered into a fresh Power Purchase Agreement with the Respondent Board on 5-9-2008 as per the requirement of the approval Lr. No.CE/NCES/EE/MCB/A2/F.Chitra Bio/D.36/04 issued by the Respondent Board to the Petitioner in their erstwhile name.

8. The fresh PPA dated 5-9-2008 set out the terms of and the price at which power produced by the Petitioner would be purchased by the Respondent Board. As per Clause 16 of the PPA, the PPA was to have a currency of 15 years from the date of signing of agreement, i.e. 5-9-2008 – PPA would be valid till 2023. The Petitioner has been supplying power to the Respondent Board as per the terms and conditions contained in the fresh PPA dated 5-9-2008. As per Article 7(a) of the said PPA, the Petitioner is entitled to be paid at the rates specified in Per B.P. (FB) No.59, dated 11-4-2000 as amended from time to time.

9. The Petitioner raised the bill for power supplied by it to the Respondent Board for the month of September 2010 at the current tariff rates of Rs.4.29 per unit for biomass based power. The Fourth Respondent vide letter in Letter No.SE/PEDC/PDKT/DFC/AO/R/RCS-1/D856/2010, dated 26-10-2010 has stated that the Petitioner's plant having being commissioned prior to the Tariff Order No.3 dated 15-5-2006, the current tariff rate of Rs.4.29 cannot be applied to the Petitioner.

Contention of the Petitioner in the DRP and additional affidavit:-

10. As per para 4 of the Commission's Tariff Order No.3, all new agreements between generators and TNEB entered into after 15-5-2006, the date of the order, should be in consonance with the provisions and stipulations contained in the said Order No.3. Therefore, the PPA entered into with the Petitioner dated 5-9-2008 is necessarily required to be in consonance with the Tariff Order No.3 dated 15-5-2006, and entitles the Petitioner to subsequent tariff revisions by the Commission of the tariff rates for procurement of power produced using biomass, if and when such tariff revisions are made.

11. The tariff for biomass based generation plants has been subsequently revised and set out in the Commission's Tariff Order No.2 – comprehensive tariff order on biomass based power plants dated 27-4-2009 of the Commission and the current tariff rate for biomass based generation plants as per this order is Rs.4.29 per unit. A combined reading of para 4 of Tariff Order No.3 extracted

above with Tariff Order No.2 – comprehensive tariff order on biomass based power plants would show that the Petitioner’s plant is covered by the current tariff rate of Rs.4.29 per unit as the PPA for the Petitioner plant was executed afresh on 5-9-2008.

12. Paragraph 5 of Tariff Order No. 2 dated 27-4-2009 reads as follows:-

“5. Applicability of this Order

Order No.3 dated 15-5-2006 of the Commission lays down a control period of three years for that order and therefore normally the next order should take three years for that order and therefore normally the next order should take effect from 15-5-2009 or thereafter. The Commission in the Common Order in M.P. Nos.9,14 and 23 of 2008 dated 19-9-2008 has ruled that the control period of three years specified in Order No.3 dated 15-5-2006 is waived from the date of issue of that order. The control period of three years, thus, stands terminated on 19-9-2008. Therefore, the Commission holds that all the biomass based power plant commissioned on or after 19-9-2008 shall become eligible for the benefits of the present order, subject to the condition that the monetary benefits shall accrue from the date of the present order. The existing agreement between the generators and the distribution licensee shall continue to be valid. The parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with the present order. The agreements between the generators and the distribution licensee in relation to all plants commissioned on or after 19-9-2008 shall be in conformity with this order”.

As per the said order, the total cost per unit for the first six years shall be Rs.3.15, Rs.3.15, Rs.4.183; Rs.4.294 and Rs.4.413 respectively.

13. It is evident that consequent upon paragraph 5 of Tariff Order No.3 dated 15-5-2006, the present case being one of a fresh agreement, by operation of the provisions of the Tariff Order, the same would become applicable to the PPA dated 5-9-2008. Thereafter by virtue of para 10.2 of Tariff Order No.2 dated 27-4-2009, the rates set out therein would become applicable.

14. Between the date of the PPA, i.e. 5-9-2008, for the months of September, November, December, 2008 and January to March 2009, the Petitioner has supplied power to the TNEB and raised invoices at the rate of Rs.3.15 per unit. From April 2009 when the Tariff Order No.2 dated, 27-4-2009 was issued till August 2010, the Petitioner has not been selling power to the Respondent and has been selling its generation to third parties. In the months of September 2010 and January 2011, the Petitioner supplied power to the Respondent in terms of para 10.2 of the Tariff Order No.2 dated 27-4-2009 and have raised invoices at the rate of Rs.4.29 per unit.

15. Since the Petitioner did not agree to the stand of the Fourth Respondent, the Respondent has kept pending the payment of the entire bill amount and has not merely stopped payment on the difference in bill amount that would arise between the bill calculated at Rs.3.15 per unit and Rs.4.29 per unit. The total sum due under the invoices as on March 2011 is Rs.57,51,419/-.

Contentions of the Respondents in Counter Affidavit :-

16. The proposal of M/s. Chitra Bio Energy Ltd for establishment of 7.5 MW biomass power plant at SIPCOT Industrial Complex Pudukottai has been noted on record by the TANGEDCO vide its letter dated 28-1-2004. The above referred power plant has been commissioned on 6-3-2006 and has been supplying power to the TANGEDCO.

17. M/s. Chitra Bio Energy Ltd had entered into a Power Purchase Agreement on 17-5-2004 with the Fourth Respondent in the format earlier adopted by the TANGEDCO for supplying entire power generated after the power plant auxiliaries power consumption to the TANGEDCO. The power purchase tariff is governed by the Permanent B.P. (FB) No.59 dated 11-4-2000.

18. In the above B.P., the power purchase tariff of Rs.2.73 per unit for the year 2000-2001 with 5% annual escalation for the period of nine years upto the year 2010 has been fixed. The above tariff shall not exceed 90% of the prevailing HT industrial tariff. The power purchase tariff of Rs.3.15 per unit, being 90% of HT industrial tariff, is being adopted from the date of commissioning to till date. For fixation of tariff for the remaining period of the agreement i.e. from 1-4-2010, the TANGEDCO has filed the petition before the Commission which is yet to be numbered. Such tariff to be fixed by this Commission is applicable for the Petitioner's power plant also.

19. As requested by the Petitioner company, approval was accorded for name transfer from M/s. Chitra Bio Energy Limited to M/s. Auro Mira Bio Energy Pudukkottai India Limited (Petitioner) by the TANGEDCO vide the Chief Engineer/NCES's Letter dated 28-5-2008 and the Petitioner entered into a Power Purchase Agreement with the Fourth Respondent on 5-9-2008 in the format earlier adopted by the TANGEDCO.

20. The Petitioner has not opted for revised Energy Purchase Agreement in line with Clause 4 of Commission Order No.3 of 2006 dated 15-5-2006 so far. Hence, the existing agreement holds good and the benefit of the said Order No. 3 of 2006 could not be extended to the Petitioner's power plant.

21. The revised Power Purchase Agreement dated 5-9-2008 was only on the grounds of effecting name transfer. Hence the tariff at the rate of Rs.3.15 per unit is being adopted by the TANGEDCO till date.

22. The Petitioner submitted the power purchase bills for September 2010 at the rate of Rs.4.29 per unit as per Commission's Order No.2 of 2009. The Petitioner was informed on 26-10-2010 by the Fourth Respondent that the claim at the rate of Rs.4.29 per unit could not be considered, since the Petitioner's power plant was commissioned before 15-5-2006, i.e. the date of Order No.3 of 2006.

Finding of the Commission:-

23. The main prayer of the Petitioner in the above D.R.P. is to declare that the Petitioner is governed by Tariff Order No. 3 dated 15-5-2006 and the subsequent tariff orders passed fixing tariff for bio-mass based power generation plants, including Tariff Order No. 2, comprehensive Tariff Order of bio-mass power generation plants dated 27-4-2009. The basis for the above prayer as put forth by the Petitioner is that due to name change a fresh PPA dated 5-9-2008 was entered into with the Respondents and as per Clause 16 of the PPA, the said agreement was to have a currency of 15 years from 5-9-2008.

24. Even by the Petitioner's own statement in the petition, the Petitioner's company which was previously known as M/s. Chitra Bio Energy Limited underwent a name change and it is now known as M/s. Auro Mira Bio Energy Pudukottai India Ltd. The PPA dated 5-9-2008 has been entered into with the Respondent Board as per requirement in para 11.0 of the approval letter No.CE/NCES/EE/MCB/ A2/F.Chitra Bio/B36/04 dated 28-1-2004 issued by the Respondent Board to the Petitioner in its former name. On perusal of the aforesaid approval letter, it is seen that the said letter did not signify any intention to apply future tariff order to the Petitioner's company on such name change. On the contrary, paragraph 6.0 of the said letter provides as follows:-

"6-0) The generated power without backing down from the bio-mass power plant will be purchased at the rate arrived at as per the provisions of the B.P. (FB) No. 59, dt. 11-4-2000. As per the BP, the rate for any year after 1-4-2000 shall be based on the base rate of Rs.2.73 per unit from 1-4-2000 with 5% annual escalation for the period upto 2010 and the price shall not exceed

90% of the prevailing HT Industrial tariff and the price for the financial year 2003-2004 is Rs.3.15 per unit”.

25. It has been argued that the agreement dated 5-9-2008 has to be treated as a future agreement for the purpose of Clause 4.0 of Order No. 3 of 2006 and that the benefits flowing out of the said order are to be made available to the Petitioner's power plant. The crucial point for decision is whether the agreement dated 5-9-2008 is a future agreement for the purposes of Order No. 3 of 2006. The agreement executed by M/s.Chitra Bio Energy Limited on 17-5-2004 and the agreement executed by M/s.Auro Mira Bio Energy Pudukottai India Limited on 5-9-2008 have been scrutinized by the Commission. It is noted that both the agreements are identical including Clause No. 16 (i) which provides that the said agreement shall remain in force for a period of 15 years or for the useful life period of the plant, whichever is less, from the date of agreement, both the agreements provide for payment of rates for the bio-mass power supplied by the petitioner company as specified in the permanent BP (FB) No.59 dated 11-4-2000 as amended from time to time [vide clause 7 (a)]. There is no Clause in the said agreement executed by the Petitioner and the Respondent to signify the intention to switch over to Order No. 3 of 2006.

26. In this connection, the scope of Section 23 of the Companies Act, 1956 is relevant. Sub-section (3) of Section 23 of the said Act provides that the change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it; and any legal proceeding which

might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name.

27. It is also relevant to note that the Commission in its order dated 26-8-2009 made in D.R.P. No. 5 of 2009 has concluded “that there will be no necessity for Petitioners to enter into a fresh agreement with the Tamil Nadu Electricity Board on account of change in name under Section 21 of the Companies Act, 1956. Mere corrections have to be carried out in the existing agreements as stipulated in the Section 23 of the Companies Act, 1956”.

28. In view of the position emanating from the above discussion, the Commission concludes that the agreement executed by the Petitioner on 5-9-2008 is neither a future agreement nor a renewal of existing agreement for the purpose of Clause 4.0 of Order No.3 dated 15-5-2006; and instead of executing a detailed agreement by the Petitioner on the lines of the agreement executed by M/s. Chitra Bio Energy Ltd. dated 17-5-2004 it would have been sufficient if necessary corrections were carried out as to the change of name in the agreement already executed by M/s. Chitra Bio Energy Ltd. Therefore prayer of the Petitioner cannot be conceded and the petition is liable to be dismissed.

Order:-

29. In view of the finding in paragraphs 23–28 above, the D.R.P. No. 2 and I.A. No. 1 of 2011 in the said D.R.P. are dismissed.

Appeal:-

30. An appeal under section 111 of the Electricity Act, 2003 against this order shall lie to the Appellate Tribunal for electricity within a period of 45 days.

(Sd.....)
(S.Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

(Sd.....)
(S.Kabilan)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission