

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

PRESENT:-

Thiru.K.Venugopal Member

and

Thiru.S.Nagalsamy Member

D.R.P.No.21of 2012

Raghu Rama Renewable Energy Limited
Plot No.30A, Door No.1
Film Nagar
Jubilee Hills
Hyderabad – 500 033.

..... Petitioner
[Thiru.RahulBalaji,
Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited
Rep. by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002.
2. Chief Engineer / PPP
TANGEDCO
VI Floor
Eastern Wing
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.
3. Superintending Engineer
TANGEDCO
Ramnad Electricity Distribution Circle
Ramnad.

..... Respondents
(ThiruP.H.VinodPandian
Advocate for Respondents)

Dates of hearing : 16-11-2012 and 30-01-2013

Date of Order : 04-06-2013

The above D.R.P.No.21 of 2012 came up for final hearing on 30-01-2013 before the Commission. The Commission after perusing the above petition and the connected records of the case and after hearing both sides passes the following order:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.21 of 2012:-

The prayer of the Petitioner in D.R.P.No.21 of 2012 is to-

- (a) declare that the terms of clause 8 of the EPA are inapplicable for the period from June 2011 to May 2012 in so far as it relates to supply of power by the petitioner in as much as the short fall in supply was caused due to the non-payment of the full invoice values for the energy supplied by the petitioner to the respondent until then and consequently declare that the respondents are not entitled to collect any compensation from the petitioner for the short supply of power.
- (b) direct the respondents to refund the sum of Rs.2,22,26,000/- to the petitioner deducted as compensation towards short supply for the period from November 2011 till May 2012.
- (c) direct the respondents to pay the petitioner the sum of Rs.53,35,560/- towards interest at 12% towards belated payment on invoice amounts from the date on which the invoice was raised till 22-10-2012 and interest at 12% from the date of filing this petition till the date of payment.

2. Facts of the Case:-

- a. The 1st respondent has approached the Commission by way of petition in P.P.A.P.No.5 of 2011 to fix the ceiling of tariff for purchase of electricity in pursuance

of the agreements between the generating companies in the State of Tamil Nadu and TANGEDCO for the period from June 2011 to May 2012.

b. The Commission vide its order dated 11-07-2011 fixed the maximum ceiling for tariff for the month of June 2011 at Rs.3.79 per unit and for the months of July to September 2011 at Rs.3.81 per unit.

c. The Commission also directed the 1st respondent to float tenders for purchase of power for the period from October 2011 to June 2012. In pursuance of the said direction by the Commission, the 1st respondent had floated a tender in Tender No.14/TANGEDCO/2011 dated 12-09-2011 for power purchase on a firm basis for the period from the October 2011 to June 2012 for 600 MW round the clock supply of power.

d. The 1st respondent filed I.A.No.1 of 2011 in P.P.A.P.No.5 of 2011 to fix the maximum ceiling of tariff for purchase of electricity in pursuance of agreements between generating companies in Tamil Nadu and TANGEDCO pursuant to the tender floated by it for the period from October 2011 to June 2012. The Commission had vide its order dated 04-10-2011 fixed the ceiling for tariff at Rs.5.05 per unit for purchase of power by the 1st respondent between October 2011 and June 2012.

e. In pursuance of the direction of the Commission in P.P.A.P.No.5 of 2011 and I.A.No.1 of 2011 in P.P.A.P.No.5 of 2011 and the tender floated by the 1st respondent, the petitioner has entered into an Energy Purchase Agreement (EPA)

dated 14-10-2011 for the supply up to 10 MW of surplus power from its coal based power plant situate in Ramnad District.

f. The petitioner had generated and scheduled power from its plant to the 1st respondent grid during the months of June 2011 to May 2012.

g. It had raised monthly invoices as per the terms of the EPA after supply of power. However, the 1st respondent failed to abide by clause 10 of the EPA and had not made payments against the invoices.

3. Contentions of the Petitioner as set out in the Petition:-

a. Because of the liquidity crunch caused by the default in payments by the respondents, the petitioner was unable to procure sufficient quantities of fuel for the subsequent months.

b.. The petitioner had requested the respondents to waive application of clause 8 of the EPA which requires that party which defaults on the supply or off-take would have to pay compensation to other party, or in the alternative, to permit the petitioner to wheel power from its other group companies for the month of October 2011 as the quality of the fuel had been affected by heavy rains at the petitioner's plant and despite the above mentioned letter to the 1st respondent, the petitioner did not receive any response from the 1st respondent.

c. No payments for the power already supplied, for which invoices had been raised, were made by the 1st respondent, which would have otherwise enabled the

petitioner to procure sufficient quantities of fuel and consequently comply with the terms of the EPA on quantum of supply.

d. Due to the combined factors of heavy rain affecting the quality of the fuel and the liquidity crunch caused by the defaults in payment by the 1st respondent, the petitioner was unable to supply the contracted quantum for the month of the November 2011. Despite the same, the 3rd respondent herein had issued a letter dated 13-12-2011 to the petitioner calling upon to pay a sum of Rs.28,80,000/- (Rupees Twenty Eight Lacs Eighty Thousand only) towards compensation charges of non-scheduling of 80% contracted energy for the month of November 2011.

e. That the petitioner had issued reply vide its letter dated 23-12-2011 requesting the respondents not to levy any compensations till the payments are regularized and to withdraw their letter dated 13-12-2011 for Rs.28,80,000/-. The petitioner further brought to the notice of the 1st respondent the obligation placed on them by clause 10 (e) of the EPA, whereby the 1st respondent was required to make payment within 30 days from the date of submission of the invoice by the company. The inability of the petitioner to comply with supply schedule as provided in the EPA was entirely due to the default of the 1st respondent in making payments against the supplies already made. The petitioner was forced, due to the liquidity crunch caused by the respondent in failing to settle bills, to default on its obligations under the EPA.

f. The petitioner's ability to run its power plant in an economically viable manner forcing the petitioner to drastically cut down on fuel supplies consequently affecting its power production and supply to the TANGEDCO grid. The petitioner submits that

its failure to adhere to the contracted quantum of supply was entirely due to the fault of the respondent in failing to make payment against bills raised.

g. Despite constant and repeated requests to the 1st respondent to waive application of clause 8 of the EPA till regularization of payments by the 1st respondent, the 3rd respondent issued demand notices on monthly basis towards compensation for shortfall in supply.

h. The EPA does not in any manner make the payment by the respondent contingent upon supply of contracted quantum of power by the petitioner. The petitioner was reliant upon timely payment by the respondent for further procurement of fuel and for the running costs of the power plant was known to both parties and implicitly incorporated in the EPA vis-à-vis clause 10 (f) which provides that the respondent would pay surcharge of 12% per annum on belated payments so as to ensure timely payment.

i. The petitioner submits that the contract between the petitioner and the respondents, namely the EPA involves reciprocal promises. The petitioner submits that the petitioner is obligated to supply power and the same is contingent upon the timely payment against invoices by the respondents.

j. By not rescinding the contract, the respondent is deemed to have acquiesced to such breach / modified performance. The respondents cannot seek to unjustly enrich themselves in such a situation of induced breach by seeking to impose penalties on the petitioner for the short supply.

k. The person seeking to impose a penalty for non-compliance of a contractual term or breach of a contractual term by the other party has to prove actual loss suffered due to such breach. The respondent, in the instant case, has not suffered any loss due to the short fall in supply by the petitioner inasmuch as the respondent is not facing any legal action from any consumer or other entity for shortfall in supply by it. In the absence of such actual loss due to the purported breach by the petitioner, the respondent cannot automatically levy the penalty amount as per clause 8 of the EPA.

l. It is settled law that a state entity is required to be in strict compliance with principles of fair and reasonable conduct as embodied in Article 14 of the Constitution even in matters in the commercial / contractual sphere.

m. Failure to supply atleast 80% of the contracted quantum during the months of October 2011 to May 2012 was due to a short fall in fuel which in turn was due to an inability to pay the fuel bills which was caused by the respondent defaulting on payments to be made by it.

n. That it had offered to make good the shortfall in supply of power by supplying power which was otherwise un-contracted from other group companies of the petitioner. The respondent, having forced the petitioner to default on its obligation and also having refused to accept performance through alternative means, cannot seek to unjustly enrich itself from its own omissions and commissions.

4. Contentions of the Respondent as set out in the Petition:-

a. One of the important clauses in the above agreement was none other than clause 8 of the Energy Purchase Agreement which stipulates compensation for default in supply off take.

b. The respondent had constantly made payments on receipt of adequate fund allotment. The Petitioner had preferred a representation dated 07-11-2011 to waive compensation for short supply and for a request to permit the petitioner for wheeling of power from its other group companies for the month of October 2011 as the quantity of the fuel had been affected due to heavy rains at the petitioner's plant. The petitioner's request was not acceptable to this respondent based on the conditions stipulated in the contractual agreement entered into between the petitioner and the third respondent.

c. The respondent cannot be held responsible for non-procurement of fuel by the petitioner for supply of power for the period June 2011 to May 2012 as per the conditions stipulated in the Energy Purchase Agreement, as the petitioner had failed to supply the approved quantum of power as per the agreement for the months November 2011 to May 2012.

d. The petitioner is trying to escape from its contractual obligation by stating that they were unable to settle payment to fuel supplier and hence compensation has to be waived off on account of it. It is submitted that, the above issue cannot be linked since the clauses namely payment clause, surcharge clause for belated settlement

of energy charges and compensation clause are separate one as stipulated in the agreement between the petitioner and the respondent.

e. The petitioner had been intimated by the respondent by preferring a letter dated 19-06-2012, for the adjustment of short fall in generation in their plant with the excess generation from other plants in Indo-Barath group of companies for which the respondent had expressed their non-feasibility of acceptance since the agreements are independent of each other.

f. The respondent endeavored to make timely payment to all energy suppliers as and when the funds received by TANGEDCO. It is further stated that, the Respondent had no intention to breach any terms and conditions stated in the contract entered into with the petitioner. The averment stated by the petitioner that the action of the respondent in delaying payment against invoices raised beyond contractually acceptable period is not acceptable, as the respondent has not purposely or willfully delayed the payment.

g. The petitioner's contention raised in the above petition are not at all acceptable in the eye of law as it is the contractual obligation either to supply contracted quantum of energy or to pay compensation for any short supply of contracted quantum of energy as per agreement.

h. It is submitted that the balance of convenience is in the favour of the respondent and if the above petition is allowed the respondent would be put to

server loss and injury as the same would be treated as a precedent to pave way for accumulation of financial loss to the respondent.

5. Issue for consideration:

We heard both sides. On careful consideration of rival submissions and the material evidences adduced before us by both sides, we find that the following issues arise for consideration:-

- i) Whether the contention of the petitioner that it was only due to the non-payment of the dues in time by the respondent that the supply of energy agreed vide the Power Purchase Agreement could not be met by the petitioner is tenable?
- ii) Whether the contention of the petitioner that the compensation sought for by the respondent, TANGEDCO for non-supply of the energy by the petitioner tantamount to undue enrichment is correct?

6. Finding of the Commission:

- 6.1. The non-payment issue relates to the period from June, 2011 to May, 2012. The petition itself is filed during the end of October, 2012. The two issues framed by the Commission are inter-related. To understand the issues involved, it is necessary to refer to Clauses 8, 10 (e) and 12 of the Power Purchase Agreement entered into between the parties.

“8. Compensation for default in supply/off-take:

Without prejudice to the provision on Force Majeure, the holder has to apply for open access for the quantum as per this agreement and if the company fails to schedule 80% of the contracted energy in a month then, the company shall pay compensation to TANGEDCO at the rate of Rs.1.00 per kwh to the extent of shortfall of 80% of monthly contracted energy.

Similarly, if TANGEDCO fails to take off 80% of contracted energy in a month then compensation shall be paid by

TANGEDCO at the rate of Rs. 1.00 per kwh to the company for the short fall which falls short of 80% of monthly contracted energy.

10 Billing and Payment:

(e) The TANGEDCO agrees to make payment within 30 days from the date following the date of submission of invoice by the Company.

(f) If the payment is made belatedly, the surcharge payable by TANGEDCO will be at 12% per annum.

12. Force Majeure:

No party shall be liable for any claim of any damage whatsoever arising out of failure to carry out the terms of the agreement due to the reasons governed by Force Majeure conditions as give below:

(i) Act of war, invasion, armed conflict, blockade, revolution, riot, insurrection or civil commotion, terrorism, sabotage, fire explosion or criminal damage.

(ii) Act of God, including lightning, cyclone, typhoon, flood, tidal waves, earthquake, land slide, epidemic or similar cataclysmic even.

(iii) Non-availability of transmission capacity by TNEB SLDC.

(iv) Change in Law.

Where a non-performing party is unable to perform its obligation under the above reasons of Force Majeure, the non-performing party shall notify the other party within five days of occurrence of Force Majeure, identifying the nature of the event or the circumstance of Force Majeure, the expected duration of such Force Majeure for which such obligation are expected to be affected.”

6.2. Perusal of the above provisions of the contract indicates the following:-

Clause 8 of the Power Purchase Agreement provides for supply of 80% of the contracted energy in a month, failing which the company shall pay compensation to TANGEDCO at the rate of Re.1.00 per kwh to the extent of shortfall of 80% of monthly contracted energy. Conversely, if TANGEDCO fails to take off 80% of contracted energy in a month, then compensation shall be paid by TANGEDCO at

the rate of Re.1.00 per kwh to the company for the default which falls short of 80% of monthly contracted energy.

6.3. As regards the payment for the energy received, provision **10(e)** of the Power Purchase Agreement envisages that TANGEDCO agrees to make payment within 30 days from the date of submission of invoices by the company and if the payment is made belatedly the surcharge payable by TANGEDCO will be at 12% per annum.

6.4. These two provisions are specific provisions in the Power Purchase Agreement entered into between the parties and squarely reflect the rights, duties and obligations of the parties. It clearly flows out from the provisions that if the supply is less than 80% of the contracted energy then the generator shall pay compensation to TANGEDCO and if the off take is less than 80% of the contracted energy, TANGEDCO shall pay compensation to the generating company. This being an equitable provision and entered into consciously between the parties, this specific provision will have to be considered as such and cannot be mixed with other provisions of the contract.

6.5. As regards payment, the Power Purchase Agreement clearly provides for payment within 30 days failing which surcharge is payable by TANGEDCO at 12% per annum. This is an agreed specific provision and therefore will have to be followed as such.

6.6. The issue of undue enrichment and loss suffered, if any, by TANGEDCO was also raised by the petitioner. Since there is a specific provision with regard to

quantum of supply as well as payment terms with specific provision of compensation and surcharge, the question of undue enrichment will not have any relevance in this case. Further undue enrichment arises mostly in cases where there is no formal contract between the parties. The petitioner also raised the issue of loss, if any, suffered by TANGEDCO. In the instant case there is specific provision in the contract between the parties with regard to the quantum of energy to be supplied / received as well as payment terms. Under these conditions, the Commission is of the view that there is no need to prove the loss suffered for invoking a specific provision of the contract with regard to claim of compensation for reduced supply of energy. Even otherwise, the reduced supply of energy would result in reduced supply to the consumer and loss may be in the form of increased load shedding even if it is not in the form of monetary loss.

6.7. The issue of reciprocal promise namely that the respondent TANGEDCO did not make the payment in time due to which the petitioner generating company could not procure fuel and consequently could not supply the agreed quantum of energy, which then lead to claim of compensation by the respondent is not relevant in this case, when there are two specific provisions in the contract which are the compensation to be paid by either party for failure to supply or receive the agreed quantum and the other provision relating to payment of surcharge for belated payments. Specific provisions will always prevail over general provisions. In view of the same, the Commission does not agree with the arguments of the petitioner that they could not deliver the power because of non-payment of dues for the energy delivered by the respondent TANGEDCO in time.

6.8. Yet another issue raised by the petitioner was TANGEDCO is State entity and therefore, should have acted in compliance with the principles of fair and reasonable conduct as embodied in Article 14 of the Constitution of India. In our view, this argument may not be correct, in as much as the respondent TANGEDCO has been undergoing financial problems and default in payments to many generators. This argument of the petitioner would have been more relevant if the TANGEDCO had refused the payment itself. If there was delay in making payment there can be only compensation by payment of surcharge in accordance with the Power Purchase Agreement entered into between the parties.

6.9. The petitioner has also raised an issue of his proposal to supply power from group companies. This has to be seen in the context of the Power Purchase Agreement entered into between the parties. It should have been mutually agreed between the parties for amendments of the contract which probably did not happen. This argument of the petitioner is also in contradiction with the main issue of the petition namely that the payment of dues by the respondent TANGEDCO has resulted in not procuring fuel and not supplying power to them. To avoid payment of compensation, the petitioner seems to have suggested supply of power from other group companies, not insisting on the payment for the power already delivered. This seems to be later thought to go through a convoluted logic to avoid payment of compensation.

6.10. In view of the above, the Commission is of the view that

- a) Specific provision exists in the Power Purchase Agreement entered into between the parties for payment of compensation

by the generator, the petitioner, or the purchaser, namely, respondent TANGEDCO for inadequate supply of power or inadequate receipt of power, as the case may be. The rate is the same for both non-supply or non-receipt and the rate is Rs.1.00 per kwh. Therefore this provision will operate independently.

- b) The belated payment warrants payment of surcharge at 12% as per Power Purchase Agreement which the respondent TANGEDCO shall pay to the petitioner for the period of delay involved.

In the light of the above, DRP No.21 of 2012 is disposed off.

7. Appeal:-

An appeal against this order lies before the Appellate Tribunal for Electricity under section 111 of the Electricity Act 2003, within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission