

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

PRESENT:

Thiru S.Akshayakumar

.... **Chairman**

and

Dr.T.Prabhakara Rao

.... **Member**

D.R.P. No. 24 of 2011

Terra Energy Limited
"Eldorado" V Floor,
112, Nungambakkam High Road,
Chennai – 600 034.

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

Vs.

1. Tamil Nadu Electricity Board,
Represented by the Chairman
144, Anna Salai
Chennai – 600 002
2. The Superintending Engineer,
Cuddalore Electricity Distribution Circle,
Cuddalore.

... Respondents
(Thiru. M.Gopinathan,
Standing Counsel for Respondents)

D.R.P.No.25 of 2011

Terra Energy Limited,
"Eldorado" – V Floor,
112, Nungambakkam High Road,
Chennai 600 034.

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

Vs

1. Tamil Nadu Electricity Board
Represented by the Chairman
144, Anna Salai
Chennai – 600 002.
2. The Superintending Engineer
Thanjavur Electricity Distribution Circle,
Thanjavur.

....Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

D.R.P. No.26 of 2011

Shree Ambika Sugars Limited,
Eldorado, V Floor,
No.112, Uthamar Gandhi Salai,
Chennai 600 034.

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

Vs.

1. TNEB,
Represented by the Chairman,
144 Anna Salai,
Chennai 600 002.
2. The Superintending Engineer,
Electricity Distribution Circle,
Cuddalore.

.... Respondents
(Thiru M.Gopinathan,
Standing Counsel for TANGEDCO)

D.R.P.No.27 of 2011

M/s.Shree Ambika Sugars Limited,
“Eldorado” – V Floor,
No.112, Uthamar Gandhi Salai,
Chennai 600 034.

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

Vs

1. Tamil Nadu Electricity Board
Represented by the Chairman
144, Anna Salai
Chennai – 600 002.
2. The Superintending Engineer
Thanjavur Electricity Distribution Circle,
Thanjavur.

....Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

Dates of hearing : 24-01-2012, 27-11-2012, 14-12-2012, 08-1-2013
26-02-2014, 21-04-2014, 11-07-2014,
16-10-2018, 27-11-2018 and 31-01-2019

Date of Order : 22-02-2019

The above said D.R.P.No.24 of 2011, D.R.P.No.25 of 2011, D.R.P.No.26 of 2011 and D.R.P.No.27 of 2011 came up for final hearing on 31-01-2019. The Commission upon perusal of the Petition, Counter, Rejoinder and other connected records and after hearing the elaborate arguments of the both parties passes the following:

ORDER

1. Prayer of the Petitioner in D.R.P No.24 of 2011:-

The prayer of the Petitioner is to direct the Respondents to make payment to the petitioner of the sums due amounting to Rs.5,40,90,289/- in terms of clause 7 of the Power Purchase Agreement (PPA) dated 26-03-2004 together with interest at the rate of 18% per annum from the due date of the respective invoices till the date of payment and for payment of interest at the rate of 18% per annum for delayed payments against the invoices raised.

2. The prayer of the Petitioner in D.R.P.No.25 of 2011:-

The prayer of the Petitioner in D.R.P.No.25 of 2011 is to direct the Respondent to make payment to the petitioner of the sums due amounting to Rs.3,31,49,875/- in terms of Clause-7 of the Power Purchase Agreement dated 31.03.2004 together with interest at 18% per annum from the due date of the respective invoices till the date of payment of interest at 18% per annum for delayed payments against invoices raised.

3. Prayer of the Petitioner in D.R.P.No.26 of 2011:-

The prayer of the petitioner in DRP No.26 of 2011 is to direct the Respondent to make payment to the Petitioner of the sums due amounting to Rs.15,34,33,236/- in terms of Clause 7 of the PPA dated 18.08.2004 together with interest at 18% per annum from the due date of the respective invoices till the date of payment and payment of interest at 18% per annum for delayed payments against invoices raised.

4. The prayer of the Petitioner in D.R.P.No.27 of 2011:-

The prayer of the Petitioner in D.R.P.No.27 of 2011 is to direct the Respondent to make payment to the petitioner of the sums due amounting to Rs.1,67,24,532/- in terms of Clause-7 of the Power Purchase Agreement dated 15.03.2002 together with interest at 18% per annum from the due date of the respective invoices till the date of payment and payment of interest at 18% per annum for delayed payments against invoices raised.

5. Brief Facts of the Case in D.R.P. No.24 of 2011:-

5.1. The Petitioner Company is a bagasse based co-gen plant and entered into the Power Purchase Agreement with Respondent Board on 26.03.2004 and the

agreement is valid up to 25.03.2019 or for the useful life period of the Plant whichever is less. The Respondent Board agreed to purchase the power from the Petitioner as per agreement at the rates specified in clause 7 of the PPA. The Petitioner has been raising invoices in terms of the Power Purchase Agreement dated 26.03.2004 for power generated and exported during the season and off-season. Right from inception, the Respondent Board has been making only belated payments seriously affecting Petitioner's finances. The Respondent Board has also arbitrarily made payments only at the rate of Rs.3.01 per unit which is substantially lower than the rates prescribed under the Power Purchase Agreement in respect of power generated and exported during off season periods. The payments are also being made only on an adhoc basis without providing any particulars in respect of adjustment towards specific invoices.

5.2 The Respondent Board agreed to purchase the power from the Petitioner as per agreement at the rates specified in clause 7 therein:-

“7(a) The Sugar Mill/Power Generation Company agrees that the purchase price of bagasse based energy generated exported during the Crushing Season, between 1st December and 30th June of the succeeding year, shall be paid at the rates specified in the permanent B.P.(FB) No.1 dated 11-01-2000 as amended from time to time.

7(b) The purchase price of energy generated and exported during the seasonal period by burning conventional fuel in the boiler and during off-seasonal period between 1st July and 30th November using conventional/non-conventional fuel in the Boiler, shall be paid at Captive rate as specified in B.P.(FB) No.93, Technical Branch dt. 16-05-2000 and in B.P.(FB) No.92 dt. 07-07-2001 and as amended from time to time.”

5.3. The Petitioner Company has been billing the Respondent Board for the surplus power fed into the Respondent Board grid from the Bagasse based

Co-Generation Plant. The Petitioner has been raising invoices in terms of the Power Purchase Agreement dated 26-03-2004 for power generated and exported during the season and off-season.

5.4. The petitioner contended that the Respondent Board has arbitrarily made payments only at the rate of Rs.3.01 per unit. The payments are being made only on an ad-hoc basis without providing any particulars in respect of adjustment towards specific invoices and petitioner has only been orally informed that the rate of Rs.3.01 per unit has been adopted since an application had been made by the Respondent Board to the Government of Tamil Nadu for issuing appropriate orders fixing the purchase rate at Rs.3.01 per unit. To the best of petitioner's knowledge and information, the Government has passed no orders in that regard. The Petitioner states that after coming into force of the Electricity Act, 2003, the Government cannot unilaterally refix the rates. However, till date, the Petitioner has been paid on the basis of a purchase rate of Rs.3.01 per unit for power exported during off-season. The Board was continuing to treat the payment as provisional and the bills were being admitted on that basis. An examination of the respondent board's records would demonstrate the same.

5.5. The Petitioner contended that the present Power Purchase Agreement having been concluded prior to the issuance of the Tariff Policy under the Electricity Act, 2003 in terms of the clarification issued by the Ministry of Power dated March 28, 2006 and February 15, 2008, regarding the status of the Power Purchase Agreement which stood legally concluded before the notification of the

Tariff Policy on January 1, 2006, it would continue to be enforceable as per the terms of the contract and would remain unaffected by the terms of the Tariff Policy. It is now settled that all pre-existing contracts concluded prior to coming into force of the Electricity Act, 2003 would be governed by the terms contained therein.

5.6. The Petitioner contended that during the subsistence of the aforesaid Power Purchase Agreement, the Petitioner had entered into an agreement with Tamil Nadu Newsprint and Papers Ltd (TNPL), for supply of Bagasse for use as raw material in paper manufacture, in exchange for supply of alternative fuel to the Petitioner's Power Plant at A.Chittur. It is submitted that Respondent Board, by Permanent B.P.(FB) No.93 dated May 16, 2000 had permitted this kind of arrangement with TNPL and further fixed the purchase price of power generated by the co-generation Plants using alternative fuel under such arrangement, at the captive power rate.

5.7. The Petitioner contended that the Petitioner is entitled to payments in strict compliance with Clause 7 of Power Purchase Agreement. There cannot be any basis for unilateral adoption, for payment, of a rate which is different from that under Power Purchase Agreement. The Petitioner has been raising invoices from time to time strictly in terms of the Power Purchase Agreement.

5.8. The Petitioner contended that it had preferred a Petition on identical grounds with an identical prayer before the Commission in DRP 21 of 2009. In

that Petition, the Petitioner had also disclosed that the parent company of the Petitioner, Thiru. Arooran Sugars Limited had preferred Writ Petitions in W.P. 20624 to 20629 of 2000 challenging the action of the TNEB in applying BP No.93 dated 16-05-2000 for fixing tariff rates as against G.O.Ms No.230 dated June 16, 1993 issued by the Industries Department, Government of Tamil Nadu. As the Writ Petitions had still been pending, when the DRP had been taken up for final hearing by the Commission. The Commission had closed the DRP with an observation that if the Writ Petitions were to be allowed, it would necessitate the reopening of DRP No.21 of 2009, as the claim in DRP 21 of 2009 was on the basis of BP No.93 dated 16-5-2000 while the validity of the same Board Proceeding had been challenged in the Writ Petitions. The Commission in its order dated 17-08-2010, while closing DRP 21 of 2009 had given liberty to the Petitioner to approach the Commission if the cause of action still existed after disposal of the Writ Petitions.

5.9. The Writ Petitions preferred by Thiru. Arooran Sugars Limited were disposed by the Hon'ble High Court of Madras vide its order dated 06-06-2011 wherein the High Court had observed that G.O.Ms No.230 dated June 16, 1993 would be applicable for the purposes of calculating/determining the tariff rates for the Cogeneration Power Plants. However, the Petitioners would be barred from claiming the same as they are barred by delay and laches in approaching the High Court for a remedy. The petitioner states that in the light of the order of the High Court, BP No.93 dated 16-5-2000 alone would be applicable to the PPA entered into by the Petitioner.

5.10. The Petitioner further contended that the continued delay in settling the invoices in full has resulted in substantial amounts becoming due to the Petitioner. In addition thereto, the Petitioner is entitled to payment of interest on the dues which have been either settled belatedly or withheld wrongly. There has been tremendous increase in the cost of generation which has drastically affected the economics of power generation and supply and the Petitioner has been further penalised by non-payment of tariff in terms of the Power Purchase Agreement. This has seriously affected the viability of Petitioner's operations and crippled its finances.

5.11. Facts of D.R.P.Nos.24 and in 25, 26 and 27 of 2011 are similar except that the supply made to TANGEDCO are from the power plants in A.Chittur, Thirumandankudi, Pennadam and in Kottur respectively.

6. Preliminary objections raised by the Respondents on maintainability of the Petition in D.R.P.No.24 of 2011 and in D.R.P.No.25 of 2011:-

The Respondent, TANGEDCO in its counter affidavit dated 09-04-2012 has raised the following preliminary objections.

6.1 Clause 11 of the power purchase agreement dated 26-03-2004 entered between the petitioner and the respondent clearly stated that any difference or dispute between the parties in relation to supply of power or payment of disputed bills in connection with the agreement which cannot be mutually resolved shall be referred to the Chief Electrical Inspector to Government, whose decision shall be final and binding on both the parties. The Hon'ble Madras High Court in its order

passed on 24-01-2012 in WP No.34580 of 2002 filed by M/s Rajshree Sugars Chemicals Ltd., Coimbatore against the Chief Engineer/NCES/TNEB and Superintending Engineer/Theni EDC/TNEB had directed the petitioner in the said petition to approach the Chief Electrical Inspector to Government. The petitioner suppressing the above facts has chosen to file this petition before the Commission. Therefore, it is clear that even assuming without admitting that there is any dispute relating to payment of disputed bills, the same has to be referred to by the petitioner, only to the Chief Electrical Inspector to Government, and the petitioner is thereby estopped in law from approaching the Commission and request the Commission to adjudicate the alleged dispute raised by the petitioner. Hence, on this short ground itself, it is prayed that the Commission may be pleased to hold that the Commission does not have any jurisdiction to go into the alleged disputes and dismiss the petition filed by the petitioner herein.

6.2 The respondent has every right from time to time to vary the tariff, policy on banking and wheeling and terms and conditions of the agreement by special or general proceedings and conditions relating to generation of electricity through Co-generation, and such variations ordered by the Respondent Board shall be binding on the company meaning thereby the petitioner herein. Once the petitioner has entered into such a clause in the power purchase agreement with open eyes, any proceedings or conditions issued by the respondent Board will be binding on the petitioner herein, and the petitioner cannot raise any dispute, especially when the petitioner has entered into the Power Purchase Agreement dated 26-03-2004 accepting to the above condition.

6.3. That, there has been a delay and laches on the part of the petitioner while making this claim. Ex-facie, on a perusal of the statement furnished by the petitioner, it is clear that stale claims have been made as a claim, and there is no explanation as to why no attempt was made by the petitioner herein to invoke clause 11 of the power purchase agreement, by raising a dispute before the Chief Electrical Inspector to Government, who has been nominated as the person to decide any difference or dispute between the petitioner and the respondent Board. Therefore, the claim made by the petitioner before the Commission is liable to be rejected on the ground of delay and laches and in not approaching the Chief Electrical Inspector to Government for adjudicating the dispute.

7. Reply of the petitioner on maintainability of the Petition in D.R.P.No.24 of 2011:-

7.1 After enactment of the Electricity Act, 2003 which came into force on 10-06-2003, the power to resolve disputes between a generator and a distribution licensee has got vested in the State Electricity Commission and hence no longer remains within the domain of any other authority, notwithstanding any provision in any agreement. This is upheld by the Honble Supreme Court, in its ruling in the case of Gujarat Urja Nigam Ltd Vs Essar Power Ltd.,

7.2 Clause 13 of the PPA which confers unfettered powers on the Board to vary tariff and other policies and which are made binding on the petitioner, the petitioner has been rendered extinct, consequent on the enactment of the Electricity Act, 2003.

Under the said Act, the power to determine tariff payable by a distribution licensee to a generator which includes the power to revise the same has been vested in the State Electricity Commission. Hence, the said power is no longer exercisable by the Respondent invoking any of the provisions of the contract. This is confirmed by the Hon'ble Appellate Tribunal for Electricity in its order in the matter of Tamil Nadu Electricity Board Vs TCP Limited, relevant portion of which is extracted below:

“It is curious how the TNEB took upon itself the task of determining the tariff on 18-05-2007, four years after the commencement of the Electricity Act, 2003 which conferred this authority under section 86 on the State Electricity Regulatory Commissions. We are constrained to hold that the whole exercise of TNEB conducting tariff negotiation after the commencement of the Electricity Act, 2003 is ab initio void.”

7.3. Notwithstanding the aforesaid provision of law, even under the PPA, the power to vary the tariff is exercisable only by a special or general proceedings of the respondent Board whereas as, by their own admission, in the instant case, it was done by an internal note/letter and not by a Board Proceeding. Hence, the question raised by the Respondent on the maintainability, citing a contract condition fails on all accounts.

7.4 The petitioner contended that at all times subsequent to the arbitrary and unauthorised revision of tariff made by the respondent, the petitioner has been raising invoices on the respondent, for the power supplied at the tariff rate in accordance with the terms of the PPA. Besides the petitioner has been diligently following up with the respondent ever since such revision was made and short payment made based thereon. Since, the repeated attempts made by the petitioner to resolve the issue in an amicable manner did not succeed, the petitioner, left with

no alternative, has filed the petition before the Commission. Hence, the challenge to the maintainability of the petition on the ground of delay and latches does not lie.

8. Contentions of the Petitioners:-

The contentions of the Petitioners in D.R.P.Nos.24,25,26 and 27 are almost similar. They have mainly contended as follows:-

8.1. Clause 7 of the PPA provides as follows:

“7(a) The Sugar Mill / Power Generating company agrees that the purchase price of Bagasse based energy generated and exported during the crushing season between 1st December and 30th June of the succeeding year, shall be paid at the rates specified in B.P.(FB) No.1 dated 11.1.2000 as amended from time to time.

(b) The purchase price of energy generated and exported during the seasonal period by burning conventional fuel in the boiler and also during off-seasonal period between 1st July and 30th November using conventional / non-conventional fuel in the Boiler, shall be paid at captive rate as specified in B.P.(FB) No.93, Technical Branch, dated 16.5.2000 and B.P.(FB) No.92, dated 7.7.2001 and as amended from time to time.”

8.2. The First Respondent is bound by the terms of the Power Purchase Agreement entered into between the First Respondent and the Petitioners.

8.3. In terms of the contracted rate of tariff, the Petitioners Company have been billing the Respondent Board for the surplus power fed into the Respondent Board's grid from the Bagasse based co-generation plant. The Petitioners have been raising invoices in terms of the PPA for power generated and exported during the season

and off-season. The Respondent Board has been making only belated payments seriously affecting Petitioner's finances.

8.4. The Respondent Board has also arbitrarily made payments only at the rate of Rs.3.01 per unit which is substantially lower than the rates prescribed under the PPA in respect of power generated and exported during off season periods. The payments are also being made only on an adhoc basis without providing any particulars in respect of adjustment towards specific invoices. No particulars have been forthcoming from the Respondent Board as to the manner or basis of payment and Petitioner has only been orally informed that the rate of Rs.3.01 per unit has been adopted since an application had been made by the Respondent Board to the Government of Tamil Nadu for issuing appropriate orders fixing the purchase rate at Rs.3.01 per unit but to the best of Petitioner's knowledge and information, the Government has passed no orders in that regard.

8.5. After coming into force of the Electricity Act, 2003, the Government cannot unilaterally refix the rates. However, till date, the Petitioner has been paid on the basis of a purchase rate of Rs.3.01 per unit for power exported during off-season.

8.6. The present Power Purchase Agreement having been concluded prior to the issuance of the Tariff Policy under the Electricity Act, 2003, in terms of the clarification issued by the Ministry of Power dated March 28, 2006 and February 15, 2008, regarding the status of the PPA which stood legally concluded before the notification of the Tariff Policy on January 1, 2006, it would continue to be

enforceable as per the terms of the contract and would remain unaffected by the terms of the Tariff Policy.

8.7. All pre-existing contracts concluded prior to coming into force of the Electricity Act, 2003 would be governed by the terms contained therein. During the subsistence of the aforesaid PPA, the petitioner had entered into an agreement with Tamil Nadu Newsprint and Papers Ltd (TNPL), for supply of Bagasse for use as raw material in paper manufacture, in exchange for supply of alternative fuel to the Petitioner's power plant at Kottur. (D.R.P.No.24 of 2011)

8.8. The Respondent Board, by Permanent B.P.(FB) No.93 dated May 16, 2000 had permitted this kind of arrangement with TNPL and further fixed the purchase price of power generated by the cogeneration plants using alternative fuel under such arrangement at the captive power rate.

8.9. Since, TNPL stopped lifting Bagasse with effect from April 14, 2006 (D.R.P.No.24 of 2011) from the Power Plants, invoices were raised by the Petitioner at the normal co-gen rate applicable to bagasse based generation.

8.10. However, such invoices were settled by the Respondent Board by applying only the captive power rate viz., Rs.3.01 per unit and after persistent follow up by the Petitioner, the Respondent Board settled only part thereof and even that after considerable delay. Several communications were sent to the attention of the Respondent that the payments are not being made in terms of the invoices.

8.11. The Petitioners are entitled to payments in strict compliance with Clause 7 of PPA. There cannot be any basis for unilateral adoption, for payment, of a rate which is different from that under Power Purchase Agreement. The Petitioners have been raising invoices from time to time strictly in terms of the PPA.

9. Counter Affidavit filed on behalf of the Respondent, TANGEDCO:-

The Respondent TANGEDCO has filed separate counter affidavits in all these D.R.Ps. The main contention of the TANGEDCO in these counter affidavits dated 09-04-2012 and 19-02-2013 in D.R.P.No.24 of 2011 are as follows:-

9.1. Clause 11 of the PPA entered into between the Petitioners and the respondent provides as follows:

"Any difference or dispute between parties in relation to supply of power or payment of disputed bills or any meter reading arising out of or in connection with the agreement which cannot be mutually resolved shall be referred to the Chief Electrical Inspector to Government whose decision shall be final and binding on both the parties."

On a perusal of the above clause, it is clear that, any difference or dispute in relation to supply of power or payment of disputed bills in connection with the agreement which cannot be mutually resolved shall be referred to the Chief Electrical Inspector to the Government. The Hon'ble High Court of Madras in its order dated 24-01-2012 in W.P.No.35480 of 2002 filed against the CE, NCS, TNEB and the Superintending Engineer/Theni EDC/TNEB had directed the petitioner to approach the Chief Electrical Inspector to Government for effective speedy disposal of the matter as per the above provision made in the agreement dt: 20.02.1990 entered between the two parties (Company & TNEB). Therefore it

is clear that even assuming without admitting that there is any dispute relating to payment of disputed bills, the same has to be referred to by the petitioner, only to the Chief Electrical Inspector to Government, and the petitioner is thereby estopped in law from approaching this Commission and request this Commission to adjudicate the alleged dispute raised by the petitioner. Hence, on this short ground itself it is prayed that this Commission may be pleased to hold that this Commission does not have any jurisdiction to go into the alleged disputes and dismiss the petition filed by the petitioner herein.

9.2. Secondly, Clause 13 of the PPA entered into between the parties provides as follows:

“The Sugar Mill / Power Generation Company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through Co-generation and such variations ordered by the Board shall be binding on the Company”

9.3. On a perusal of the above clause, it is clear that the respondent Board has every right from time to vary the tariff, policy on banking and wheeling and terms and conditions of the agreement by special or general proceedings and conditions relating to generation of electricity through Co-generation, and such variations ordered by the Respondent Board shall be binding on the company meaning thereby the petitioner herein.

9.4. The respondent TANGEDCO had approved vide Lr.No.CE/NCES and R&DSM/EE/WCB/AEE/ F.Co-gen Sugar Mills/D.706/05, dt: 10.06.05 the rate of Rs.3.10 per unit towards purchase of coal based power received from sugar mill co-generation plants and the same is being adopted till date. When once the petitioner has entered into such a clause in

the power purchase agreement with open eyes, any proceedings or conditions issued by the respondent Board will be binding on the petitioner herein, and the petitioner cannot raise any dispute, especially when the petitioner has entered into the PPA dated 26.03.2004 accepting to the above condition. Therefore, it is not open to the petitioner to raise a contention that the respondent is acting contrary to the PPA, and is placing reliance on particular proceedings to reduce the payment to be made to the petitioner. This important aspect has been failed to be mentioned by the petitioner in the petition and on this short ground itself, the petition indulged in by the petitioner is liable to be rejected in limini, and this respondent prays for the same.

9.5. Thirdly, from the averments made in the petition together with the particulars mentioned in the petition, while claiming the alleged amounts on the ground that the Respondent Board has not paid the amounts, it is clear that there has been a delay and laches on the part of the petitioner while making this claim. Ex-facie, on a perusal of the statement furnished by the petitioner, it is clear that stale claims have been made as a claim, and there is no explanation as to why no attempt was made by the petitioner herein to invoke clause 11 of the PPA, by raising a dispute before the Chief Electrical Inspector to Government, who has been nominated as the person to decide any difference or dispute between the petitioner and the Respondent Board. Therefore, from the factual position available in this case, it is clear that the claim made by the petitioner before the Commission is liable to be rejected on the ground of delay and laches and in not approaching the Chief Electrical Inspector for adjudicating the so called claim made by the petitioner herein.

9.6. B.P.No.93 dated 16-05-2000 was also a subject matter of challenge before the Hon'ble High Court, namely in W.P.No.20624 of 2000 filed by the petitioner herein, which position can be seen from the order passed by the Hon'ble High Court, dated 06-06-2011. In fact, W.P.No.20624 of 2000 filed by the petitioner herein challenging BP No.93, dated 16-05-2000 which was also dismissed by the Hon'ble High Court in the Common Order dated 06-06-2011.

9.7. The grievance of the petitioner in Writ Appeal No.1859 of 2011 is that, the validity of BP No.93 dated 16-05-2000 has not been considered by the Learned Judge. While that being so, before this Commission, the petitioner herein wants that payment should be made to the petitioner based on BP No.93 dated 16-05-2000. Therefore, there is a clear inconsistency in case pleaded by the petitioner.

9.8. If both the reliefs are allowed by both the judicial fora, the same would result in conflict of the same judicial decisions because if the writ appeals are allowed, the relief prayed for in the present petition would become meaningless and would be diametrically opposite to the order that may be passed in the present petition.

9.9. Looked at from any point of view, in view of the conflict of judicial opinion that may arise, the petitioner may be called upon either to proceed with the present petition and withdraw the writ appeal or withdraw the present petition and proceed with the writ appeal.

9.10. The Government of Tamil Nadu had framed a policy on captive power generation vide G.O. Ms.No.48 Energy dated 22-4-98 (which was subsequently

amended under the Govt.'s Lr.No.4020/A1/98-3 dated 22-05-98 and Lr.No.6551/A1/98-3 dated 25-08-98). As per Clause (ii) (v) of the above G.O., the rate for firm power for the year 1998-99 was fixed at Rs.2.25 per unit. For the next 9 years, it was fixed under the above said G.O. and in the letter that, there will be an increase of 5% every year on the rate fixed during the previous year.

9.11. As per Clause 11 (iii) of G.O. 48 Energy, dated 22-04-1998 in which firm power is defined as quantity of power in units committed by the owner of the Captive Generation to be sold to TNEB annually. As per Clause 11 (iv) of G.O.48, in which infirm power is defined as quantity of power in units sold to TNEB without any commitment or the entire quantity of power in units sold to TNEB in case the commitment is not fulfilled. Further, as per Clause 11 (ii) of G.O.48, the rate for firm power fixed is at normal rate and the rate for infirm power is fixed at 75% of the normal rate.

9.12. Clause 12 (ii) (a) of G.O. Ms.No.48 Energy, dated 22-04-1998 reads as follows:

“(a) For Firm Power:

Annual commitment of firm power is for the twelve billing months from April to March. The monthly proportionate units will be worked out based on the annual commitment. The energy in terms of units fed into the grid for sale to TNEB during any billing months shall be between 5% and 11.66% of the annual commitment of power in terms of units except for the forced and planned shutdown periods of the captive generations.....”

9.13. The power supplied from the sugar mill co-generation plants to TANGEDCO grid was treated as an infirm one. For the purpose of availing the firm power rate as

per G.O.Ms.No.48 dated 22-04-1998, the generators, should have given a commitment for the quantum of annual power to be supplied to TNEB in terms of units. But, none of the generators had given any such commitment. Therefore, the entire coal based power generated and supplied during crushing season of December to June of succeeding year, and power generated and supplied to TANGEDCO's grid irrespective of the type of fuel used during non-crushing season, namely, during July to December should be considered as an infirm power and paid at infirm power rate (i.e.) 75% firm rate. If the export of power in any billing month is less than the proportionate monthly commitment, billing for that month will be done at infirm power rate. If the total export is equal or in excess of the proportionate monthly commitment, billing for that month will be done at firm power rate. If the total export for the 12 billing months, namely, from April to March is equal or is in excess of the annual commitment, entire power will be billed at firm rate and the difference in billing at infirm rate already due, will be revised in the March bills in the month of March.

9.14. If the total power sold during the year is below the annual commitment, the rate for infirm power will be charged in the same proportion of the short fall in the units supplied as the proportion of short fall in the commitment.

Example:

Committed Power	:	100 Units.
Supplied Power	:	90 units
Short fall in commitment	:	10%

9.15. Out of the 90 units supplied, only 10% of 90 units (i.e. 9 units) will be billed as infirm power and the balance (81 units) as firm power. Any consequent adjustment

that may be necessary, shall be made in the bills for the month of March and if necessary, in subsequent months.

9.16. In (Permanent) B.P.(FB) No.1, dated 11-01-2000, orders were issued, wherein the tariff of Rs.2.73 per unit in 2000-2001 was fixed with 5% annual escalation upto the year 2010 for the power generated and exported during crushing season, which is being adopted by the respondent herein. However, in the said B.P., it has been made further clear (that in B.P.No.1 dated 11-01-2000), the escalated rate should not exceed 90% of HT industrial Tariff energy charges. Accordingly, the power purchase tariff of Rs.3.15 per unit was being adopted from 2003-04 onwards till date.

9.17. In Permanent B.P.(FB) No.93 dated 16-05-2000, another order was issued fixing the tariff of Rs.2.48 per unit with 5% annual escalation for the period upto 2010, for the power generated and exported by using pith and fossil fuels during crushing and non-crushing seasons from the sugar mill co-generation plants, having tie up arrangements with M/s Tamil Nadu News Prints Ltd. (TNPL) for supply of bagasse.

9.19. Clause (iv) of Permanent BP (FB) No.93 dated 16-5-2000 reads as follows:

“The price of captive power is Rs.2.48 per unit (as per G.O.No.48 dated 22-4-1998 the rate for 1998-99 – Rs.2.25 per unit and for 99-2000 – Rs.2.36 per unit and for 2000-01 – Rs.2.48 per unit) effective from 1-4-2000 with 5% annual increase over the previous year rate for a period of 9 years. The above

rate was to be reviewed after ten years, namely, during 2010. Till such review is made and new rates are made applicable from 01-04-2010 and on finalisation, the new rates was to be made applicable from 01-04-2010. Till then, the tenth year rate will be continued to be paid if the sugar mills continue to supply its surplus power”.

9.20. Under Per B.P.(FB) 92 (Technical Branch) dated 07-07-2001, it was decided to adopt captive power rate as stipulated vide (Per) B.P. (FB) No.93 dated 16-05-2000 for the power received from sugar mills during the period from July to November of each year, irrespective of the type of fuel used in the boiler, including bagasse.

9.21. Clause 2 of (Per) BP (FB) No.92, dated 07-07-2001 reads as follows:

“To pay at captive power rate, as stipulated vide B.P. (FB) No.93 dated 16-5-2000 for the power received from sugar mills during the period from July to November irrespective of the type of fuel used in the boiler including bagasse”

Clause (1) there of read as follows:

“To apply bagasse based co-generation rate contemplated vide B.P. (FB) No.1 dated 11-1-2000 only for that portion of energy exported by the sugar mills during the period from December to June of the succeeding year using bagasse as fuel with no provision of extension of season for claiming the above rate”

9.22. In Clause (1) of permanent B.P. (FB) No.92 dated 07-07-2001, it was decided to apply bagasse based co-generation rate as provided vide B.P. (FB) No.1 dated 11-01-2000, only for the portion of energy exported by the sugar mills during the period from December to June of the succeeding year using, with bagasse as fuel

with no provision of extension of season for claiming the above rate. For the purpose of further clarity it bears mentioning here that, for the period commencing from December to June of the succeeding year, namely the crushing season, if power is generated using bagasse, the rate specified in B.P.No.1 dated 11-01-2000 could apply. However, for the period commencing from December to June of the succeeding year, if power is generated by using coal, the rate payable would be as provided in B.P.No.93 dated 16-05-2000. However during the non-crushing period namely for the period commencing from July to November of the same year, if power is generated, irrespective of whether bagasse or coal is used, the rate payable would be as per B.P.No.93 dated 16-05-2000.

9.23. The TANGEDCO had paid firm rate instead of infirm rate (i.e.) 75% of the firm rate. In 2004-05, TANGEDCO had frozen the rate at Rs.3.01 per unit and is being continued till date, in pursuance to the letter of the CE/NCES dated 10-06-2005, which letter was issued in pursuance to the approval granted by the first respondent from the financial year 2005-06. This letter is binding on the petitioners in view of Clause No.13 of the PPA entered into between the parties. However, the rate adopted by the respondent is always on the higher side than the eligible infirm power rate payable to the power generators like the petitioner.

9.24. TNEB in its 813th Board Meeting held on 30-04-1999 took a decision that, long term commitment for purchase of power from new captive power plants need not be made, in anticipation that TNEB may be able to augment sufficient power through independent power projects and TNEB's projects. In spite of the above Board

decision, in order to encourage the generators those who are engaged in NCES based power generation activities, the Board had decided to purchase coal based power from sugar mill co-generation plants on a long term basis. As a matter of fact as of today, some of the sugar mills do not have coal based power generation facilities.

9.25. As per Clause (7) of the above PPA, tariff for bagasse based power received during crushing season from December to June of the succeeding year received by the TNEB is regulated vide B.P. (FB) No.1, dated 11-01-2000. The tariff for coal based power received by the TNEB during crushing season and power received during non-crushing season irrespective of type of fuel used from July to November is regulated by (Per) BP (FB) No.93, Technical Branch, dated 16-05-2000 and (Per) BP (FB) No.92 dated 07-07-2001 and as amended from time to time.

9.26. Clause 13 of the PPA dated 26-03-2004 entered into between the parties read as follows:

“The Sugar Mill / Power Generation Company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through Co-generation and such variations ordered by the Board shall be binding on the Company.”

9.27. In view of the said clause / provision contained in the PPA, the decision taken by the Board as per letter dated 10-06-2005 fixing the power purchase tariff at Rs.3.01 per unit is binding on the petitioner.

9.28. The Petitioner has always been paid from the date of commissioning till 31-03-2010, at the rate more than the infirm power rate. Further, the Commission in Para 4 of the Order No.3 of 2006 has held that the agreement entered into between the parties prior to 15-05-2006 are valid.

9.29. The power purchase tariff of Rs.3.15 per unit for the bagasse based power received from sugar mill co-generation plants for the period from 2003-04 onwards and the power purchase tariff of Rs.3.01 per unit for the coal based power received for the period from 2004-05 onwards are being adopted. The petitioner, in view of having a tie up arrangement with M/s. TNPL for supply of bagasse on exchange of coal, used coal as fuel for power generation throughout the year during the period of tie up arrangement, the power purchase tariff of Rs.3.01 per unit was adopted for the above tie up period as well, as per Per B.P. (FB) No.93 dated 16-05-2000.

9.30. The power purchase bills for coal based power received for the period from 2004-05 onwards has been settled at the rate of Rs.3.01 per unit, was frozen on the ground of reaching the average rate of revenue realisation of the TNEB which was only Rs.3.01 per unit in 2005-06, which is on the higher side (i.e.) 75% of normal rate fixed as per the captive power policy. If petitioner felt that the power purchase tariff offered by the TNEB was not affordable for them they should have sold power to third party users as provided in the order passed by the Commission in Order No.3 of 2006 dated 15-05-2006 and subsequent orders. However, no such representation was received by this respondent from the petitioner seeking approval for third party sale of power.

9.31. The payment towards power purchase bills for the period from April 2005 to June 2009 has been paid in full. Further, the petitioner has claimed the bill belatedly stating that the petitioner had come out of the tie up arrangement with TNPL. Hence, the delay in payment is not because of the respondent. Moreover, no interest clause has been provided in the agreement for delayed payment. Hence, claiming interest by the petitioner is untenable in the eye of law.

9.32. From the year 2008 onwards, there has been power shortage in the Tamil Nadu State. All the sugar mill generators have been requested to maximize their power generation and supply to the grid. None of the generators came forward to supply power to TNEB grid at the agreement rate agreed to. This response of generators shows that they have been in practice of not making any commitment for quantum of power to be supplied to the grid.

9.33. For availing normal rate applicable for firm power, the generators have to give commitment to the TANGEDCO before the month of April for annual quantum of power, in terms of units to be supplied to the grid during the financial year commencing from April to March of the succeeding year. Such power received based on commitment made is treated as firm power and considered for payment at the normal rate.

9.34. For TNEB owned thermal stations (Coal based plants), the generation cost was around Rs.2.00 per unit in the year 2006. Hence, the power purchase tariff of

Rs.3.01 per unit adopted by TANGEDCO was itself is on the higher side, which was done in order to encourage power producers who are engaged in NCES base power generation activates like the petitioner.

9.35. The averment that there was a delay in settling the amounts due to the petitioner is denied except for during the period, the Respondent could not make the payments due to various reasons. Though it has been claimed that the power generation has tremendously increased no details has been furnished. The petitioner is called upon to substantiate that the petitioner's plant operation was crippled because of the delayed payments or wrongly withholding payments.

10. Contentions of the Petitioners in the Rejoinder:-

The Petitioners have filed separate rejoinders on 26-02-2014 in all the D.R.Ps. The main contention in their rejoinder are summarized as follows:-

10.1. As regards the plea regarding lack of jurisdiction in view of the specific Clause 11 contained in the PPA, it is submitted that after the enactment of the Electricity Act, 2003 which came into force on 10.06.2003, the power to resolve disputes between a generator and a distribution Licensee has got vested in the State Electricity Commission and hence no longer remains within the domain of any other authority, notwithstanding any provision in any agreement. This is upheld by the Hon'ble Supreme Court, in its ruling in the case of Gujrat Urja Nigam Ltd., vs. Essar Power Ltd. which is extracted below:-

"In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30.05.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.06.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in section 86 (1)(f) about the nature of the dispute."

10.2. The judgement of the Hon'ble High Court of Madras relied on by the Respondent is in respect of a dispute, which relates to the period prior to the commencement of the Electricity Act, 2003 and hence is not relevant to the issue of jurisdiction of the Commission over the Petition under view which admittedly pertains to a claim against the Respondent arising post 1/4/05.

10.3. As regards the plea on non-maintainability of the Petition on account of Clause 13 of the PPA which confers unfettered powers on the Board to vary tariff and other policies, it submitted that the said power relied on by the Respondent has been rendered extinct consequent on the enactment of the Electricity Act, 2003. Under the said Act, the power to determine tariff payable by a distribution licensee to a generator which includes the power to revise the same has been vested in the State Electricity Commission. Hence, the said power is no longer exercisable by the Respondent invoking any of the provisions of the contract. This is confirmed by the Hon'ble Appellate Tribunal in its order in the matter of Tamil Nadu Electricity Board Vs. TCP Limited, relevant portion of which is extracted below:

“ It is curious how the TNEB took upon itself the task of determining the tariff on 18.05.2007, four years after the commencement of the Electricity Act, 2003 which conferred this authority under section 86 on the State Electricity Regulatory Commissions. We are constrained to hold that the whole exercise of TNEB conducting tariff negotiation after the commencement of the Electricity Act, 2003 is ab initio void”.

10.4. Notwithstanding the aforesaid provision of law, even under the PPA, the power to vary the tariff is exercisable only by a special or general proceedings of the Respondent Board whereas, by their own admission, in the instant case, it was done by an internal note / letter and not by a Board Proceeding. Hence, the question raised by the Respondent on the maintainability, citing a contract condition fails on all accounts.

10.5. As regards the plea of non-maintainability of the Petition on the ground of delay and latches raised by the Respondent, it is submitted that at all times subsequent to the arbitrary and unauthorized revision of tariff made by the Respondent, the petitioner has been raising invoices on the Respondent, for the power supplied at the tariff rate in accordance with the terms of the PPA. Besides, the petitioner has been diligently following up with the Respondent ever since such revision was made and short payment made based thereon. Copies of all the correspondence exchanged between the Petitioner and the Respondent have been annexed to the Petition and the same has not been disputed by the Respondent. Since the repeated attempts made by the Petitioner to resolve the issue in an amicable manner did not succeed, the Petitioner, left with no alternative, has filed the Petition before the Commission. Hence, the challenge to the maintainability of the Petition on the ground of delay and latches does not lie.

10.6. This stand of the Petitioner draws support from a ruling given by the Hon'ble APTEL in another identical matter in Tamil Nadu Electricity Board Vs. M/s. TCP Limited, involving the Respondent herein which reads as follows:

“It is settled law that the Limitation Act would apply only to Courts and not to the other bodies such as quasi-judicial Authorities as held by the Hon'ble Supreme Court. Therefore, the contention of the Appellant that the claim made by the Respondent before the State Commission which is a quasi judicial authority was barred by limitation does not merit consideration. Even with regard to the contention, that there was a delay and latches on the part of the Respondents in approaching the State Commission for making the claim

for payment of arrears, it is to be held that both the Respondents had consistently claimed their rates as well as escalated rates as per the Power Purchase Agreement (PPA) and they had regularly sent the invoices mentioning the PPA rates and the Appellant admittedly had received the same but did not choose to either to raise the objection or to return those invoices to the Respondents and only when the Appellant rejected their claims, the respondents approached the Commission and sought the relief. Under those circumstances the plea that there was delay and latches on the part of the Respondents has got to be rejected. Accordingly the same is rejected.”

10.7. The Respondent has raised a plea that the Petitioner has taken inconsistent stands before two different legal forums. No doubt, the Petitioner had filed a Writ Petition before the Hon'ble High Court challenging the Board Proceedings issued by the Respondent Board, revising and refixing the tariff from time to time and seeking a direction that G.O. M.S. No 230 dated 16-06-1993 alone governs the applicable tariff payable for the power exported by the Petitioner. The fact of filing the Writ Petition and its subsequent dismissal on the ground of delay and latches notwithstanding the finding that the aforesaid G.O. was in fact applicable has been brought out in Petition.

10.8. The Respondent has sought to point out that in the present Petition, the petitioner has stated that in the light of dismissal of the Writ Petition, BP 93 dated 16-05-2000 would alone be applicable to the PPA, which is quite contradictory from

the stand taken by the petitioner before the Hon'ble High Court. In the present Petition, the petitioner has only challenged the arbitrary action of the Respondent in not giving effect to the contractual terms as per the PPA, as regards the tariff payable, and all of a sudden making short payments in respect of the invoices raised by the Petitioner without adducing any reason whatsoever.

10.9. The original Writ petition before the Hon'ble High Court challenging the BP 93 of 2000 was instituted in the year 2000 and in the absence of a stay of such Proceedings or any other direction from the Hon'ble High Court, the Petitioner continued to receive value for the power exported by them to the Respondent at the tariff rate specified in the said BP. The challenge to the BP does not in itself, give a handle to the Respondent to renege from adhering to it, on its own and refuse to make payment on the basis of it and the Petitioner is within their legitimate right to make the claim covered under the present Petition.

10.10. The Respondent has brought to the notice of the Commission that subsequent of the filing of this Petition, the Petitioner has filed Writ Appeal before the Division Bench of the High Court of Madras challenging the order of the Single Judge dismissing the earlier Writ Petition. In the Writ Appeal, it is specifically insisted that the challenge to B.P. No. 93 does not suffer from delay and latches. The filing of the Writ Appeal should not affect the proceedings on this Petition for the reason the cause of action which has given rise to this petition is totally different from the one which is underlying in the Writ Appeal.

10.11. The argument that the benefit accruing to the Petitioner should this Petition succeed would merge into the one that would so accrue if the Petitioner also succeeds in the Writ Appeal holds no water since any speculation about the outcome of both have no basis and also the quantum of benefits above referred have neither been worked out nor quantified as of now. The argument that if the reliefs asked for by the petitioner before the two judicial forums are allowed, the same would result in conflict *inter-se*, is flawed since what is contested before the Hon'ble High Court is the question whether the Board Proceedings can contravene the Government Order while what is contested before the Commission is whether the Respondent can contravene the contract terms. The issues for decision before the two forums thus being different, there will not be any conflict between the decisions.

10.12. The question of granting relief by two different forums came up for consideration by the Hon'ble Delhi Electricity Regulatory Commission (DERC) in the matter of Vijayakumar Vs. M/s. Tata Power Delhi Distribution Ltd. The Hon'ble Commission categorically held that Section 10 of Civil Procedure Code which bars parallel proceedings before two Courts by way of trial of any suit in which the matter in issue is directly and substantially the same and between the same parties does not apply to the proceedings of other nature instituted under any other statute. For this purpose, the Commission was distinguished from a Court, since it does not adjudicate any suit but only adjudicates matters summarily. The relevant paras of the order of DERC read as follows:

“A plain reading and language of the above provision (Section 10 of CPC) clearly suggest that:

(i) It refers to a suit instituted in the civil court and it cannot apply to proceeding of other nature instituted under any other statute. National Institute of Mental Health and Neuro-Sciences Vs. Parameshware, AIR 2005 SC 242.

(ii) There shall be two suits between the same parties involving the same subject matter and same questions.

(iii) The Court where similar suits are pending shall have power to give relief.

.....

It is further observed that the Commission is not a trial court whereas it adjudicates the matters filed with it in a summary way.”

10.13. In view of the above, there is no bar on the Commission in proceeding with disposal of this Petition. The Respondent has sought to bring in certain concepts and facts which are totally alien and irrelevant to the scheme of tariff administered hitherto by the Respondent with reference to bagasse based cogeneration of power from time to time.

10.14. The concept of firm power and infirm power as applicable to captive generation plant which has been largely relied on by the Respondent was brought in for the first time, when the Government of Tamil Nadu framed the policy on captive generation vide GO No. 48 Energy dated 22.04.1998, wherein the tariff payable for both categories of power was also prescribed. The Respondent has proceeded on the premises that the cogeneration power supplied by sugar mill was infirm power and hence was eligible only for 75% of the tariff payable for firm power. While so,

the tariff paid for off season generation post 01.04.2005 at a constant rate of Rs.3.01 per unit was higher than what should have been paid for infirm captive power.

10.15. The bagasse based cogeneration power has at all times been treated on a different footing from power generated from conventional sources. Though by its very nature, it is an infirm power, it is not subjected to a degree of penalty as compared to firm power like the normal case and the same is borne out by the fact that tariff for off-season generation by cogeneration units using lignite as fuel was first announced in 1998 vide B.P. No. 91 dated 10.6.98 and it was fixed at the same rate as for bagasse based generation during season.

10.16. The above B.P. was issued subsequent to G.O. No. 48 dated 22.4.98 which prescribed the policy and tariff for captive generation and also brought in the concept of firm and infirm power. This rate was modified only in 2000 vide B.P.(FB) No. 93 dated 16.5.90 when the tariff for off-season generation using conventional fuel was fixed at captive rate with 2000-01 as base year. No linkage or even a remote reference was made to GO 48 prescribing captive power rate but an absolute figure of Rs.2.48 per unit effective from 1.4.2000 with 5% increase over previous year rate for a period of nine years was prescribed.

10.17. There was no reference to any firm or infirm power therein. Thus, B.P. No.93 dated 16.5.90 dealt exclusively with tariff for off-season power from cogeneration units. The Respondent is put to strict proof regarding the basis on which they have

sought to link the conditions prescribed in GO 48 with the tariff prescribed under B.P. No. 93.

10.18. The Respondent has in his counter furnished a tabular statement showing comparison between tariff for captive power classified as firm and infirm and the corresponding tariff paid off-season cogeneration for each of the years from 2000-01 to 2009-10 but has failed to explain on what basis they had allowed tariff for cogeneration plants at the same rate as for firm power for the years 2000-01 to 2004-05 and suddenly realized the need to apply the rate for infirm power with effect from 2005-06. Even in this case, the rate fixed is not the same as applicable for infirm power, but it is somewhere in between that of firm and infirm power.

10.19. The Respondent admittedly has, at all times, been aware of the nature of power supplied by cogeneration power plants during off season and if they should have paid tariff as applicable for infirm power, then it should have been done from day one. Even assuming that the Respondent came to be aware of the nature of such power only from 01.04.2005, at least from that day, they should have applied the tariff for infirm power. In any case, the Respondent did not have the authority to prescribe a rate different from what was prescribed in G.O. No.48 and prescribe an arbitrary rate without any basis. The contention of Respondent is an afterthought and a clear attempt at importing a non-existing logic to explain an arbitrary decision on their part.

10.20. Having entered into a PPA, the Respondent was bound to pay for the power supplied thereunder strictly in accordance with the PPA terms and is estopped from relying on extraneous considerations to escape their contractual obligations.

10.21. The Respondent has contended that if the power purchase tariff offered by them is not affordable by the Petitioner, they could have resorted to sale of power to third party as provided for in Order No.3 of 2006 dated 15.05.2006 issued by the Commission. The said Order has also stated that the PPAs entered into prior to 15.05.2006 shall continue to be in force while the parties had an option to renegotiate the terms in accordance with the order. As per the terms of the PPA, since the Petitioner had to sell the entire power generated to the Respondent, the question of selling power to third parties did not arise.

10.22. The Respondent has stated that though there has been power shortage in the State since 2008 and all the cogenerated plants were requested to maximize their power generation and supply to the Grid, none of the power generators supplied power at the agreed rate while the generation of power during season was incidental to crushing operations, generation during off season was to be taken up as a standalone activity. Unless found economically viable, there was no way the co-generators can generate and supply power. With the tariff paid for off season power pegged at Rs.3.01 per unit from 01.04.2005, due to subsequent increases in coal cost, it was becoming increasingly unviable. Hence, the cogeneration units could not take up off season supply.

10.23. The Respondent has contended that compare with the generation cost of about Rs.2.00 per unit in 2006 for TNEB owned Thermal Stations, the power purchase tariff of Rs.3.01 per unit paid to cogeneration units was itself on the higher side. The Petitioner is not aware of the cost of generation of TNEB power plants which, in any case, being IPPs cannot bear strict comparison with cogeneration plants. The rest of the contentions made or objections raised by the Respondent are totally irrelevant to the Petition.

11. Findings of the Commission:-

11.1. The Petitioner in D.R.P.No.24 of 2011 seeks to direct the Respondents to make payment to the Petitioners of sums due under the Power Purchase Agreement (PPA) dated 26-03-2004 entered between the Petitioner and the Respondent Board at the time of filing of the petition amounting to Rs.5,40,90,289/- with interest at the rate of 18% thereon.

11.2. The Petitioner in D.R.P.No.25 of 2011 seeks to direct the Respondents to make payment to the petitioner of the sums due amounting to Rs.3,31,49,875/- in terms of Clause-7 of the Power Purchase Agreement dated 31.03.2004 together with interest at 18% per annum from the due date of the respective invoices till the date of payment of interest at 18% per annum for delayed payments against invoices raised.

11.3. The Petitioner in D.R.P.No.26 of 2011 seeks to direct the Respondents to make payment to the Petitioner of the sums due amounting to Rs.15,34,33,236/- in

terms of Clause 7 of the PPA dated 18.08.2004 together with interest at 18% per annum from the due date of the respective invoices till the date of payment and payment of interest at 18% per annum for delayed payments against invoices raised.

11.4. The Petitioner in D.R.P.No.27 of 2011 seeks to direct the Respondents to make payment to the petitioner of the sums due amounting to Rs.1,67,24,532/- in terms of Clause-7 of the Power Purchase Agreement dated 15.03.2002 together with interest at 18% per annum from the due date of the respective invoices till the date of payment of interest at 18% per annum for delayed payments against invoices raised.

11.5. The petitioners have entered into a Power purchase Agreement dated 26-03-2004, 31-03-2004, 18-08-2004 and 15-03-2002 respectively with the respondent for sale of surplus power for its Bagasse based cogenerating plant. As the issues involved in all these D.R.Ps are common, all these Petitions are taken up together and dealt with in this Common Order.

11.6. In the counter, the respondent has taken a specific plea with respect to maintainability or otherwise of the above petition. The preliminary objection raised was on the question of jurisdiction of this Commission referring to the Clause 11 of the terms of PPA which states as follows:

“11. Any difference or dispute between parties in relation to supply of power or payment of disputed bill or any meter reading arising out of or in connection with the agreement which cannot be mutually resolved shall be referred to Chief

Electrical Inspector to Government whose decision shall be final and binding on both the parties.”

11.7. As regards to the above, after the Electricity Act 2003, coming into force, the power to resolve the disputes between a generator and a distribution licensee has been vested with the State Electricity Commission and hence the Commission has the powers of adjudication and also it is a settled position of law that State Commission alone has jurisdiction to adjudicate the dispute between the generator and Licensee. Therefore this argument of the respondent fails.

11.8. It is also seen from the counter that the respondent has submitted that writ petitions have been filed by the parent company of the petitioner, Thiru Arooran Sugars Ltd. and others before the Hon'ble High Court of Madras challenging the action of erstwhile TNEB, the Respondent in applying B.P.No.93 dated 16.05.2000 for fixing tariff rates as against G.O.Ms.No.230 dated 16.06.1993 issued by the Industries Department, Govt. of Tamil Nadu. These writ petitions have been disposed by the Hon'ble High Court of Madras vide its order dated 06.06.2011 wherein the Hon'ble High Court while upholding the G.O. Ms No.230 dated 16.06.1993, that it would be applicable for the purpose of calculating/ determining Tariff rates for the cogeneration plants, has held that the petitioner would be barred from making any claim on the basis of the said GO because the claim made by the petitioner, is barred by delay and laches in approaching the High Court for a remedy. However, it is seen that from the submissions of the respondent, that the petitioner had preferred Writ Appeals on 22.09.2011 before a Division Bench of the

Hon'ble High Court of Madras against the above common order dated 06.06.2011 passed by the Learned Single Judge of the Hon'ble High Court of Madras wherein the validity of GO MS No.230 dated 16.06.1993 and B.P.No.93 dated 16.05.2000 are challenged. The Learned Additional Advocate General during the hearing has submitted that the Commission has to consider whether the present petition filed by the petitioner has to be proceeded or not and to wait for the outcome of the merit of the writ appeals which will have a bearing on the present petition filed by the petitioner. We see some force in the argument of the respondent. When the petitioners approached the Commission by filing DRP Nos. 20, 21,22 and 23 of 2009 with similar prayers when the writ petitions were filed before the Hon'ble High Court of Madras, the Commission in its order 17.08.2010 ruled that the parties may await the judgment of the High Court of Madras and if still there is a cause of action, they may file fresh petition before this Commission. The above situation prevails even now in view of the pendency of the writ appeals filed by the parties in this matter. In order to avoid different orders being passed by different fora, we direct the parties to await the decision of the Hon'ble High Court in the writ appeal filed by them and approach the Commission thereafter if need be for any relief.

With the above direction, these DRPs are finally disposed of.

12. Appeal: - An appeal against this order shall lie 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 the copy of this order by the aggrieved person.

(Sd.....)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission