



**IN THE HON'BLE TAMIL NADU ELECTRICITY
REGULATORY COMMISSION
CHENNAI**

23rd DAY OF AUGUST 2005

PRESENT:

The Hon'ble Chairman Mr. A. Balraj, IAS., Retd. - Chairperson

The Hon'ble Member Mr. S. Thangarathnam - Member

and

The Hon'ble Member Mr. B. Jeyaraman - Member

D.R.P. No.1 of 2004

**Kothari Sugars & Chemicals Ltd.
Kattur, Trichy**

...

Petitioner.

Vs.

1. The Chairman
Tamil Nadu Electricity Board,
NPKKRR Avenue
800 Anna Salai,
Chennai 600 002.
2. The Chief Engineer (Non Conventional
Energy Sources)
NPKKRR Avenue,
800 Anna Salai,
Chennai 600 002.
3. The Superintending Engineer,
Trichy Electricity Distribution Circle/North
Mannarpuram
Trichy 620 020.

...

Respondents

This petition coming on for final hearing on 24th February, 2005 in the presence of Tvl. Srinath Sridevan, R. Ramesh , R. Krishna Priya and A. Saravanakumar, Advocates for the petitioner and of Thiru G. Vasudevan, Advocate for the respondents, upon hearing the arguments of the counsel for the both sides

and upon perusing the petition, affidavit, counter affidavit and other connected documents and having stood over for consideration till this day, this Commission deliver the following

ORDER

1. Prayer of the Petitioner

The prayer in DRP 1 of 2004 is as follows, namely:-

- (a) to quash Letter No. SE/TEDC/N/TRY/AO/Rev/RCS/AI/F.HT.SC.41.d 237 /2002, dt.03.04.2002 of the 3rd Respondent.
- (b) to direct the Respondents to bill by recorded demand instead of sanctioned demand in so far as the Petitioner is concerned.
- (c) to hold that the Petitioner is entitled to refund of Rs.21,85,804/- being the amount held with the 3rd Respondent and to forthwith refund the same with 18% interest per annum to the Petitioner and pass such further orders as the Commission may deem fit in the circumstances of the case.

2. Facts of the Case

- (a) The Petitioner is engaged in the manufacture of sugar at Kattur, Trichy, Tamil Nadu with a capacity of 2900 tpa. The sugar complex consists of cogen plant with the installed capacity of 2 x 5.51 MW. The power so generated by the cogen plant is partly used for the purpose of processing the sugar juice and the excess quantity of power is sold to the Tamil Nadu Electricity Board in terms of the Power Purchase Agreement dt.25.1.1995 entered into between the Petitioner and the Tamil Nadu Electricity Board for a period of five years which was subsequently renewed on 31.10.2000 for a period of 15 years.
- (b) While referring to clauses 9 and 10 of the agreement (extracted at p 2 of the Petition) the Petitioner has stated that the Board shall charge only on the recorded demand during the season and off-season.
- (c) The Petitioner has stated that the Respondent was collecting from August 1996 to February 1999 and till November 1999 charges on the sanctioned

demand instead of the recorded demand, which was contrary to the agreement, referred to above.

(d) The Petitioner made representation on 29.9.1998 to 3rd Respondent. The 2nd Respondent in letter dated 5.3.1999 informed the Petitioner that the billing should be with reference to recorded demand and not with reference to sanctioned demand and that he has clarified the above position to the 3rd Respondent. The 3rd Respondent corrected the billing pattern during the season on the basis of recorded demand. The Petitioner had on 23.10.1999 and 29.10.1999 sent representations to the 2nd and 3rd Respondents requesting them to correct the billing on the above said pattern during the off-season. The 2nd Respondent in his letter dated 24.12.1999 clarified to the Petitioner regarding the billing for the off season and intimated the same to the 3rd Respondent.

(e) Based on the clarification from the 2nd Respondent, the Petitioner sent a representation dated 21.7.2000 to the 3rd Respondent to refund Rs.21,85,804/- being the excess amount paid by the Petitioner. As the Petitioner did not get any reply, a reminder was sent on 25.9.2000. The 3rd Respondent in his letter dated 26.9.2000 replied that the request will be considered on instructions from the headquarters of TNEB. The Petitioner brought to the notice of the 2nd Respondent that various other Sugar Mills were charged only on the basis of recorded demand. Realising their mistake, the 2nd Respondent had orally agreed to refund the amount. The Petitioner has received letter dated 3.4.2002 (hereinafter referred to as Impugned Proceedings) from the 3rd Respondent rejecting his claim for refund and directing the Petitioner to execute a supplementary agreement for modification of clauses 10 (a) (i) and 10 (a) (ii) of the agreement. Aggrieved by the Impugned Proceedings of the 3rd Respondent, the Petitioner filed W.P. No.14480 of 2002 and WMP No.19482 of 2002. The High Court in its order dated 1.9.2003 finally disposed of the above WP with a direction to the

Petitioner to approach the Chief Electrical Inspector to the Government of Tamil Nadu for the resolution of the dispute within a period of three months from the date of the application being made by the Petitioner. The High Court also ordered that till such time, it is upto the Petitioner to pay the consumption charges on the basis of recorded demand. The Petitioner when approached the Chief Electrical Inspector was informed to approach this Commission. As per the above instructions of CEI the Petitioner has filed this Petition to this Commission.

- (f) The contentions of Respondent Board as put forth in their Counter Affidavit are briefly set out as follows:
- (i) Petitioner bound by terms and conditions of Power Purchase Agreement. Hence Petitioner is estopped from contending otherwise.
 - (ii) Both internal and AG Audit parties have raised objections regarding the billing of the Petitioner. Since the generation by Petitioner is by sugarcane baggasse only and application of Tariff I to Co-Generation Service is for the start up or re start purpose only. TNEB has decided to levy the tariff on the sanctioned demand or recorded demand whichever is higher.
 - (iii) Since the Board has decided to change the billing procedure the existing power purchase agreement has to be modified and the Petitioner has been informed to execute a supplementary agreement for modification of clause 10 of the agreement.
 - (iv) The CEI has asked the Petitioner to approach this Commission since section 45 (2) of Electricity Act 2003 is attracted.
 - (v) Petitioner has failed to observe the provisions of agreement and as such the petition is not maintainable. Clause 12 of the PPA enables the Board to terminate the agreement if any, of the conditions are not complied with by the Petitioner.
 - (vi) TNEB will be put to severe financial strain if it is not allowed to bill on the basis of sanctioned demand or recorded demand whichever is higher.

3. Points at issue

From the pleadings of the case referred to in paragraph 2 above, the following issues arise for the consideration of this Commission, viz.:-

- (i). Whether the Respondent Board has got the power to modify the Power Purchase Agreement so as to levy the tariff on the sanctioned demand or recorded demand whichever is higher, as contended by Respondent Board?
- (ii). Whether the Respondent Board has got the power to require the Petitioner to enter into a supplementary agreement modifying cl 10 (a) (i) of PPA?
- (iii). Whether the Petitioner is entitled to the refund of Rs.21,85,804/- with the interest at 18% per annum as prayed for?

4. Point at issue No.(i) in para 3 above viz. Whether the Respondent Board has got the power to modify the Power Purchase Agreement so as to levy the tariff on the sanctioned demand or recorded whichever is higher, as contended by Respondent Board?

(i) Arguments of the Petitioner

The Counsel for Petitioner has contended that the Respondent Board has no power to modify the Power Purchase Agreement. He also stated that the PPA is very clear that the tariff shall be levied only on the recorded demand. In the rejoinder to the counter filed by the Respondent Board in para 3, it has been stated that the 2nd Respondent has instructed the 3rd Respondent to levy the demand charges under recorded demand only. In para 5 of the Rejoinder of the Petitioner, it has been contended that even assuming the Respondent has got the power to modify the agreement unilaterally, then the same can be done only from 3.4.2002 when for the first time the 2nd Respondent replied to the Petitioner that the request for refund cannot be complied with.

(ii) Arguments of the Respondent Board

The Counsel for Respondent Board while furnishing a copy of the agreement dated 27th May 1998 contended that under clause 7 of the said agreement the Respondent Board has got the power to vary the agreement. In para 2 of the

Counter Affidavit of TNEB to the Rejoinder of the Petitioner, the Respondent Board has stated that under clause 7 of the Agreement the Respondent Board has got a right to vary terms of agreement.

(iii) Findings of the Commission

In regard to the above point at issue it becomes necessary to refer to cl 7 of the agreement dated 27th May 1998 which relates to the power to vary the agreement. The said cl 7 of the agreement is reproduced below for the sake of easy reference.

"7. BOARD'S RIGHT TO VARY TERMS OF AGREEMENT

The consumer agrees that the Board shall have the right to vary, from time to time, tariffs, general and miscellaneous charges and the terms and conditions of supply under this agreement by special or general proceedings. The consumer, in particular agrees that the Board shall have the right to enhance the rates, etc. chargeable for supply of electricity according to exigencies. It is also open to Board to restrict or impose power cuts totally or partially at any time as it deems fit."

It is seen that the agreement dated 27th May 1998 in which the said clause 7 is incorporated is not an agreement relating to power purchase agreement, the interpretation of which is under dispute in this Petition. The said agreement dt. 27th May 1998 is a separate agreement different from the power purchase agreement. The said agreement dated 27th May 1998 is not made supplemental to power purchase agreement which is the subject matter of dispute in this petition. There is not even a casual reference to PPA in the said agreement dated 27th May 1998. The said agreement dated 27th May 1998 cannot override the power purchase agreement or modify the power purchase agreement unless there is a specific provision in the said agreement dated 27th May 1998, which provides for modification of the power purchase agreement. If the intention of the parties to the power purchase agreement is to provide for provision for modification of the PPA then clause 12 of the PPA dt.30.6.2000 would have provided for the modification of

PPA also in addition to the provision for termination of the PPA which has been already provided for in the said cl 12 of PPA.

The expression "**by general or special proceeding**" occurring in cl 7 of the agreement dated 27th May 1998 extracted above is significant. The said expression would clearly indicate that if any variation in the Power Purchase Agreement is contemplated by the Respondent Board then the Board would have issued a general or a special BP providing for such modification. So far no such proceedings as contemplated in the said cl 7 of the said agreement varying the PPA has been issued by the Respondent Board. Further the expression "**under this agreement**" occurring in the said agreement dated 27th May 1998 would indicate that the Board has got the power to vary only the said agreement dt.27th May 1998 and not the PPA, which is the subject matter of dispute.

Moreover, in this connection, it may be relevant to point out that subsequent to the said agreement dt.27th May 1998 which *interalia* contains provision for variation of the agreement, the original PPA as renewed by the parties w.e.f. 30.6.2000 did not provide for variation of the PPA.

On the contrary the said PPA dated 30.6.2000 has reproduced the same clauses as contained in the original PPA. In other words, it may be pointed out that cl 10(a)(i) of the renewed PPA provided for the levy of tariff only on the **maximum demand and energy recorded by the Import meter**. For the sake of easy reference, the opening portion of the cl 10 (a) (i) of the renewed PPA is extracted below which reads as follows:

"Maximum demand and energy recorded by the import meter (i.e. drawal of power from Board's grid) shall be charged at Board's tariff"

The above cl 10 (a) (i) of the renewed Power Purchase Agreement, which is subsequent to the said agreement dated 27.5.1998 wherein cl 7 relating to Board's right to vary the terms of agreement is incorporated clearly provides for the levy of tariff only on the maximum demand and energy recorded and not on **sanctioned**

demand. Further, if really the Board has got the power to vary the PPA as contended by them, then there is no need to require the Petitioner by the Impugned Proceedings to execute a supplementary agreement modifying the said cl 10 (a) (i) of the PPA. In view of the above circumstances, the Commission holds the view that the Respondent Board has no power to modify the PPA without the consent of the Petitioner.

5. Point at issue No.(ii) in para 3 above viz. Whether the Respondent Board has got the power to require the Petitioner to enter into a supplementary agreement modifying cl 10 (a) (i) of PPA?

(i) Arguments of Petitioner

In the Petition filed by the Petitioner, one of the grounds as set out at pp 5 – 6 of the Petition, is that the unilateral action of 3rd Respondent in requiring the Petitioner to modify the agreement is highly arbitrary and against the principles of fair play and natural justice and that the Respondent cannot coerce or compel the Petitioner to enter into supplementary agreement. During the argument, the Counsel for Petitioner while citing a Supreme Court decision reported in 2004 1 SCC p 13 contended that the Respondent Board cannot compel the Petitioner to execute the Supplementary agreement.

(ii) Arguments of Respondent Board

At para 5 at p 4 of the Counter of TNEB to the Rejoinder of the Petitioner, it has been stated that M/s. Teena Energy Ltd. HT SC No.34 Thanjavur Electricity Distribution Circle has executed the modified Power Purchase Agreement by incorporating the modified clause 10 (a) (i) and (ii) and paid the CC charges at 90% of the sanctioned demand or the recorded demand whichever is higher during non-crushing season period. The counsel for Respondent Board while furnishing a copy of the agreement referred to above, contended that it is lawful for the Respondent Board to require the Petitioner to execute a supplementary agreement. He further contended that the Respondent Board cannot show preference to the Petitioner and the Petitioner is bound to execute the supplementary agreement which has been executed by other persons.

(iii) Findings of the Commission

Under the Contract Act, 1872, it is necessary that the consent given by the parties to the agreement should be free and voluntary and that it should not be caused by coercion or undue influence, etc. Hence, the Commission holds the view that the Respondent Board cannot compel the Petitioner to execute a supplementary agreement modifying cl 10 (a) (i) of the PPA as required by the Impugned Proceedings issued by the Respondent Board.

6. Point at issue No.(iii) in para 3 above viz. Whether the Petitioner is entitled to the refund of Rs.21,85,804/- with the interest at 18% per annum as prayed for by them?

As point No. (i) at issue referred to above is held in favour of the Petitioner, the Petitioner is entitled to the refund of excess amount of Rs.21,85,804/- But the Commission is of the view that the interest at 18% per annum as claimed for by the Petitioner is not reasonable. As per regulation 12 (2) of the TNERC Supply Code, if it is found that the consumer has been over charged, the excess amount paid in such cases will be adjusted against future current consumption charges and that if even after such adjustment against future current consumption charges for two assessment period, there is still a balance to be refunded, the refund will be made by cheque.

The said Regulation 12 (2) does not provide for the payment of interest in regard to the refund of excess amount recovered from the consumer. Both the Petitioner being a consumer as well the Respondent being a licensee are bound to comply with the above regulation 12 (2) which is applicable to the instant case.

The above regulation 12 (2) of the Supply Code will have to be followed in the instant case and that even after such adjustment as per the said regulation 12 (2) of the Supply Code, there is a balance amount, then such balance amount will have to be refunded to the Petitioner without any interest.

7. Conclusion

In the above circumstances, the Commission hereby directs the Respondent Board, :

- (i). to revoke the Impugned Proceedings No.SE/TEDC/N/TRY/AO/ Rev/ Rcs/ A1/ F.HT.SC. 41/(d 237/2002 dated 3.4.2002 of the 3rd Respondent which is not in accordance with law.
- (ii). to bill by recorded demand instead of sanctioned demand in so far as this Petitioner is concerned, based on the agreement already entered into by both the parties..
- (iii). to adjust the sum of Rs.21,85,804/- being the excess amount collected by the Respondent Board from the Petitioner after verifying the correctness of the amount against future current consumption charges payable by the Petitioner for the two assessment periods and if even after such adjustment it is found that any balance amount is to be refunded to the Petitioner, then such balance amount has to be refunded to the Petitioner without any interest as per Supply Code provisions.

With the above observations, the said DRP 1 of 2004 is finally disposed off by this Commission. There would be no costs.

Pronounced in the Open Court by this Commission on 23rd August 2005

Sd.....
(B. JEYARAMAN)
Member

Sd.....
(S. THANGARATHNAM)
Member

Sd.....
(A. BALRAJ)
Chairman

List of Witnesses examined

NIL

List of Documents

NIL

Sd.....
(B. JEYARAMAN)
Member

Sd.....
(S. THANGARATHNAM)
Member

Sd.....
(A. BALRAJ)
Chairman

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SECRETARY