



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

PRESENT :

Thiru S. Kabilan - Chairman

Thiru B. Jeyaraman - Member

and

Thiru R. Rajupandi - Member

D.R.P. No. 26 of 2008

DCW Limited
Through its Authorised Representative
Having its Registered Office at
Dharangadhra;
And its Head Office at
Nirmal, 3rd Floor, Nariman Point,
Mumbai 400 021

Also at Factory Address:

Sahupuram
Tuticorin
Tamilnadu

.... Petitioner

Versus

Tamil Nadu Electricity Board
114, Anna Salai, Chennai 600 002.

.... Respondent

DRP.No.26 of 2008 came up for final hearing on 1st April 2009. The Commission upon perusing the above petition and the connected records and upon hearing both sides passes the following:

ORDER DATED 22ND APRIL 2009

1. Prayer of the petitioner

The prayer of the petitioner in DRP.No.26 of 2009 is to

- (a) set aside / quash the communication / letter dated 18-11-2008 issued by TNEB to DCW.
- (b) Declare that “.. and sale of balance surplus power to TNEB” in the terms and conditions of the approval letter dated 29-03-2008 is unlawful, contrary to the statute and void.
- (c) Declare that the insistence of TNEB to incorporate the term “... and sale of balance surplus power to board” is illegal and unsustainable.

2. Facts of the case

2.1 The petitioner had set up a 2 x 25 MW CPP located in the DCW's premises at Sahupuram with TNEB's grid as per sections 39(2)(d) and 9(2) of the Electricity Act 2003. On 29-3-2008, the Respondent Board granted its approval to the petitioner for parallel operation of 2 x 25 MW CPP of the petitioner. The approval of Respondent Board was subject to the conditions listed in the approval letter which inter alia includes the following:

a) DCW was required to enter into an agreement for parallel operation incorporating specific and standard terms and conditions mentioned in the approval.

b) Para 1 of Annexure to the said Approval Letter, inter alia, stated as under;-

“The Company and the Board have agreed to the following terms and conditions set out for the parallel operation of their Captive / Co-generation Plant, and Sale of balance surplus power to the Board”.

c) The existing 6x6 MW DG based captive power plant were to be disconnected.

d) “Any alteration or deletion in the terms and conditions of this agreement is to be carried out based on mutual agreement between the Board and the Company”.

2.2 Pursuant to the approval letter, DCW and TNEB after negotiations on 11-4-2008 entered into an Agreement for parallel operation of 2 x 25 MW coal based power plant at Sahupuram. However the specific and standard terms and conditions which were mentioned in the approval letter, namely “and the sale of balance surplus power to the Board,” has not been incorporated In the Agreement dated 11-4-2008.

2.3 In letter dated 18-11-2008 (hereinafter referred to as impugned letter) the Respondent Board requested the petitioner to sign an addition to the agreement incorporating the words “and sale of balance surplus power to the Board” failing which further course of action as deemed fit will be taken straight away.

2.4 The above DRP filed by the petitioner seeks to set aside the said Impugned letter.

3. Contentions of the petitioner

a) The letter / communication dated 18-11-2008 issued by TNEB is a clear indication of monopolistic practices and arm-twisting tactics being adopted by TNEB in as much as TNEB is directing the Petitioner to accept the onerous term of sale of balance surplus power to TNEB.

b) Petitioner apprehends that TNEB may, contrary to its statutory and contractual obligation, disrupt supply / services provided to DCW.

c) The onerous term which TNEB proposes to incorporate in the addendum is violative of the fundamental and the statutory right of DCW to conduct business and sell power to third parties.

4. Contentions of Respondent Board as set out in the counter-affidavit

a) In the order of approval it was specifically mentioned that the company had to sell balance of the surplus power to the Board and such a clause should form part of the agreement to be executed between the parties.

b) As there is a contractual obligation on the part of the petitioner to honour its commitment the failure would frustrate the agreement and the respondent Board would be at liberty to withdraw the approval for the parallel operation of the generators.

c) The company after the receipt of the order of approval had not objected to the clause 1 GENERAL standard terms and conditions “The Company and the Board have agreed to the following terms and conditions for the Parallel Operation of their Captive / Cogeneration Plant (henceforth be referred as CPP or CGP), and sale of balance surplus power to the Board. But the petitioner company intentionally removed the words “ and sale of balance surplus power to the Board” while preparing the agreement and executing it.

d) A combined reading of sections 9(1), 9(2), 10(2), 30 and 42(2) of the Electricity Act 2003 would indicate that the parallel operation of generators with the grid (grid connectivity) could be permitted only if sale of electricity to the licensee or wheeling of electricity to captive user / third party consumer is envisaged.

5. Findings of the Commission

5.1 The Tamil Nadu Electricity Board conveyed its approval for parallel operation on 29-3-2008 in letter CE/PPP/EE1/AEE1/ CPP/ F.DCW/D.No.152/2008. The approval letter stipulated that all the standard terms and conditions should be incorporated in the agreement. The first condition in the standard terms and conditions reads as follows:

“The Company and the Board have agreed the following terms and conditions for the parallel operation of their captive / co-generation plant (henceforth be referred as CPP or CGP) and sale of balance surplus power to the Board.”

The agreement between M/s. DCW and the TNEB was executed on 11-4-2008. The relevant clause(1) in the standard terms and conditions in the Annexure to the approval letter dated 29-3-2008 reads as follows:

“The Company and the Board have agreed to the following terms and conditions for the parallel operation of their captive plant/ co-generation plant (henceforth be referred as CPP or CGP) and sale of balance surplus power to the Board.”

5.2. The TNEB submits that omission of the above condition regarding sale of balance surplus power was a deliberate attempt on the part of M/s. DCW to depart from the agreed terms and conditions. The TNEB mentioned during the argument that the concerned Superintending Engineer has been placed under suspension for this lapse. The TNEB cited a case law AIR 1980 SC 1285 to submit that the TNEB is not bound by the act of its subordinate officers. To quote from the judgement:-

“The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. It would be

open to the authority to plead and prove that there were special considerations which necessitated his not being not able to comply with his obligations in public interest.”

5.3 After the execution of the agreement, M/s. DCW submitted an application on 9-5-2008 to the TNEB seeking concurrence for selling of surplus power to Tata Power Trading Company. The TNEB on 26-5-2008 in Letter No. CE/PPP/EE1/AEE1/PPP/F.DCW/ D.No.238/2008 sought a clarification from M/s. DCW on this issue. M/s. DCW replied to that letter on 28-5-2008. M/s. DCW reminded the TNEB on 5-6-2008 regarding the request for sale of surplus power to Tata Power Trading Company. This was followed up by letters dated 15-7-2008 and 25-7-2008. By letter dated on 28-5-2008 M/s. DCW petitioned the TNEB for waiving the clause regarding sale of surplus power to the Board.

5.4. The TNEB sent a letter on 20-8-2008 to insist that the surplus power should be sold to TNEB. M/s. DCW replied on 21-8-2008 stating that the agreement does not provide for sale of surplus power to the TNEB and they reiterated their right under the Electricity Act 2003 to sell surplus power to any person. M/s. DCW sent a reminder to the TNEB on 9-9-2008 on their petition for open access. The TNEB on 18-11-2008 informed M/s. DCW that the agreement has deliberately omitted the clause on sale of surplus power to the Board and directed M/s. DCW to modify the agreement to provide for sale of surplus power to the TNEB. The same letter also informed M/s. DCW about the rejection of their request for sale of surplus power to Tata Power Trading Company.

5.5. We wish to observe that the approval granted by TNEB on 29-3-2008 to M/s. DCW for parallel operation of 2 x 25 MW coal based captive power plant with TNEB's grid, was, in effect, an approval under Section 2(47) of the Electricity Act 2003 for the non discriminatory use of the distribution system

of the licensee by the person engaged in generation. Therefore, the captive generator, namely M/s. DCW, has a right under Section 9(2) of the Act for carrying electricity from his captive generating plant to the destination of his use, which includes sale to any person. Therefore, the condition regarding sale of surplus power to the Board runs counter to the Electricity Act 2003. The generator cannot be compelled under law to sell surplus power to the distribution licensee.

5.6. That being the case, it is of no avail to the TNEB to argue that the generator has violated the understanding. The generator cannot be compelled to insert a condition in the concluded agreement contrary to Electricity Act 2003. It is curious that the TNEB did not raise the question of omission of clause on surplus sale till 20-8-2008, although the agreement was signed as early as 11-4-2008 and M/s. DCW petitioned the TNEB as early as 9-5-2008 and 14-5-2008 seeking permission for surplus sale. In their letter of 26-5-2008 TNEB did not raise this point of omission of the condition on surplus sale. Again on 28-5-2008 when M/s. DCW petitioned the TNEB for waiver of the clause of surplus power and followed it up by letters on 5-6-2008, 15-7-2008 and 25-7-2008 there was no response from the TNEB. It was only on 20-8-2008, the TNEB insisted on sale of surplus power. Thereafter, a demand was made on 18-11-2008 for modifying the concluded agreement. The rejection of the request of M/s. DCW was apparently aimed at preventing the sale of surplus power to Tata Trading Company. As regards the case law cited by TNEB to the effect that the TNEB is not bound by the action of the subordinates, we wish to point out that this judgement does not come to the rescue of the TNEB for incorporating a condition, which runs counter to the Electricity Act 2003

5.7. Therefore, we have no hesitation in concluding that the letter No. CE/ PPP/ EE1/ AEE1/ CPP/ F.DCW/ CF.Vol.2/

D.No.529/08 dated 18-11-2008 of the TNEB is a violation of the Electricity Act 2003 and is liable to be struck down.

6. Conclusion

The Impugned letter of the Respondent Board namely letter No. CE/ PPP/ EE1/ AEE1/ CPP/ F.DCW/ CF.Vol.2/ D.No.529/08 dated 18-11-2008 is set aside.

With the above finding, DRP.No.26 of 2008 is finally disposed of. No cost.

Pronounced in the open court by this Commission on this the 22nd day of April 2009.

(Sd.....)
(R. RAJUPANDI)
Member

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

(Sd.....)
(S.KABILAN)
Chairman

/ True Copy /

Assistant Secretary (i/c)
Tamil Nadu Electricity
Regulatory Commission