



**THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION
CHENNAI**

**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

PPAP NO. 1 OF 2009

In the matter of: Miscellaneous petition filed under Section 63 and 86 (b) of the Electricity Act, 2003 and Hon'ble TNERC's Conduct and Business Regulations dated 8-1-2004 for adopting the tariff determined through the transparent process of bidding for the procurement of surplus power from captive power plants during the period January 2009 to June 2009 as per the direction of the High Court made in W.P. No.1462 of 2008, etc. Batch

**Petitioner : Tamil Nadu Electricity Board
144, Anna Salai
Chennai-2**

PPAP No. 1 of 2009 came up for hearing before the Commission on 1st and 22nd April 2009. The Commission upon perusing the said PPAP 1 of

2009 and the connected records and upon hearing the arguments made by the Learned Advocate General Thiru Masilamani passes the following

ORDER DATED 22nd May 2009

1. Prayer in PPAP 1 of 2009

The prayer in PPAP No. 1 of 2009 is that the Commission may be pleased to adopt the tariff determined through transparent process of bidding for procurement of power from captive power plants during the period January 2009 to June 2009 at the rate of Rs.6.70 / KWH.

2. Facts of the Case

In its Order dated 29-10-2008 passed in DRP No.19 of 2008, the Commission directed the Respondent Board to allow Inter State Open Access for 40 MW and to execute a revised wheeling agreement for 25 MW, vide interim order dated 29-10-2008, in favour of M/s. Arkay Energy (Rameswaram) Ltd. Against the said order dated 29-10-2008, the TNEB filed WP No.26411 of 2008 before the Hon'ble High Court, Madras which stayed the said order. On the Stay vacation Petition filed by M/s. Arkay Energy, the Hon'ble High Court directed the Commission to pronounce the final order within a week. The order was pronounced on 20-11-2008 allowing Inter State open access for 40 MW. The Board was directed to execute a revised Wheeling Agreement for 25 MW. Aggrieved by the Order dated 20-11-2008, the TNEB filed WP No. 28098 of 2008 in the Hon'ble High Court which by Order dated 25-11-2008 allowed Inter State open access for 20 MW and Intra State open access for the remaining 20 MW. WA No. 1462 of 2008 was filed by TNEB against the Order dated 25-11-2008 passed by Learned Single Judge of Hon'ble High Court, Madras. The Hon'ble High Court on 18-12-2008 gave interim directions to the Generating Company and the TNEB to discuss regarding the purchase of power by TNEB at a reasonable cost, so as to improve the

supply of electricity within the state of Tamil Nadu, instead of selling to some other States in the interest of the people of Tamil Nadu and come with a solution, posting the matter to 22-1-2008. The Petitioner Board floated an open tender for procurement of power on short term basis for the period from January 2009 to June 2009. The tender was opened on 30-12-2008 at 14.15 hrs., and the Generating Companies gave their acceptance to supply power at the negotiated rate of Rs.6.70 / unit. The Petitioner Board accepted the proposal for procurement of surplus power available with captive generators at the rate of Rs.6.70 /kwhr for the period between January 2009 and June 2009. The case once again came up for hearing on 23-1-2009, and the Learned Additional Advocate General apprised the Court about the tenders and the Hon'ble High Court permitted the Board to confirm the tender offers by holding that "Tendency of these cases shall not stand in the way of TNEB to confirm the tender (s) purchased on the basis of quotation / negotiation between the parties." As per the terms of Sections 63 and 86 (1) (b) of the Electricity Act 2003, the above PPAP 1 of 2009 has been filed by TNEB before the Commission.

3. Queries raised by the Commission

During the hearing of the above PPAP No. 1 of 2009 on 1-4-2009, the Commission raised the following queries:

- (a) Whether there are any guidelines of Central Government under Section 63 of the Electricity Act 2003 and if so whether they were followed by TNEB?
- (b) Justification for departure from order No.4 dated 15-5-2006 of the Commission.
- (c) Whether the Commission has got power to approve tariff with retrospective effect.

4. Additional Affidavit filed by TNEB answering the queries raised by the Commission

With reference to the queries raised by the Commission, as referred to in paragraph 3 above, TNEB has filed an additional affidavit. The contentions as raised in the additional affidavit are briefly as follows:-

- (a) The Central Government had not framed any guidelines in respect of the short term procurement i.e. less than one year.
- (b) With a view to curtail the power from being sold outside the State and for better competitive rate of power, TNEB floated the tender for purchase of power and negotiated the price to purchase the surplus power.
- (c) The procurement of power now made by the Petitioner Board is for a short term i.e. for a period of 6 months i.e. January 2009 to June 2009 that too under the directions issued by the Hon'ble High Court made in Writ Appeal No. 1462 of 2008. Since no guidelines have been framed in respect of the short term procurement, the Board followed the Rule 20 (2) of the Tamil Nadu Transparency in Tenders Rules 2000 framed under the Tamil Nadu Transparency in Tenders Act, 1998 by the State Government.
- (d) The Board after final negotiation with the remaining captive generators brought down the rate to Rs.6.70 / unit, the final rate accepted by the captive power generators.

5. Findings of the Commission

5.1. This is a petition filed by the TNEB seeking adoption of tariff of Rs.6.70 / unit by TNERC for procurement of power from captive power plants between January 2009 and June 2009. A tender notice was floated by the TNEB on 24-12-2008 seeking procurement of short term power from private power generators for the period from January 2009 to June 2009 using coal, LSHS and gas. The deadline for the tender was fixed as 30-12-2008. 12 generators with a total capacity of 167 MW participated in the tender quoting rates

varying from Rs.6.80 / unit upto Rs.7.40 / unit. The TNEB negotiated with them and fixed a rate of Rs.6.70 / unit.

5.2. Sections 62 and 63 of the Electricity Act 2003 empower the Commission to determine tariff for supply of electricity by a generating company to the distribution licensee. Section 86 of the Act lists the functions of a State Commission, one of which is to regulate electricity purchase and procurement process including the price at which electricity shall be procured from generating companies by the distribution licensee.

5.3. This is a petition of the TNEB for adoption of tariff for procurement of power from fossil fuel based captive generating plants as fixed by TNEB after final negotiation with captive generators. The Commission would like to observe that there is an order of the Commission fixing tariff for procurement of such power. This is Order No. 4 dated 15-5-2006 of the Commission, which has fixed the tariff in the band between Rs.2.10 / unit and Rs.3.45 / unit depending on frequency of the grid. Although this Order has been in force for more than two years, the petition of the TNEB does not explain why they could not procure power at this lower rate of Rs.2.10 / unit to Rs.3.45 / unit and why they had to pay higher rate of Rs.6.70 / unit. After intense questioning the TNEB filed an additional affidavit in April 2009, nearly three months after the filing of the main affidavit, offering justification for procurement of power at higher rate.

5.4. Section 63 of the Act is reproduced below:-

“63. Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff, if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

5.5. The guidelines issued by the Central Government relate to the medium term procurement for a period exceeding 1 year upto 7 years and long term procurement exceeding 7 years. Since there are no guidelines for a period less than one

year, the Commission believes that Section 63 of the Act would not apply in the present case. Rather Section 62 (1) of the Act, extracted below, should apply in such a case.

5.6. *“62. Determination of tariff – (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for*

(a) supply of electricity by a generating company to a distribution licensee;

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity’

(b) transmission of electricity;

(c) wheeling of electricity

(d) retail sale of electricity’

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.”

5.7. The learned Advocate General appearing for the TNEB submits that although the Central Government have not prescribed any guidelines for a period less than one year, the TNEB has adopted a transparent process of bidding in accordance with the Tamil Nadu Transparency in Tenders Act 1998 and as such Section 63 should apply to this particular case. But, the records produced before the Commission reveal that a vital provision namely Section 9(2) of the Tamil Nadu Transparency in Tenders Act 1998 has not been complied with by the TNEB. Section 9(2) is reproduced below:-

“9. Function of the Tender Inviting Authority – (2) The Tender Inviting Authority shall communicate the notice inviting tenders to the Bulletin Officers according to the value of the procurement and within such time as may be prescribed, so as to publish the same in the appropriate Tender Bulletin.”

5.8. Whether this lacuna has vitiated the outcome of the tender is something which we would not like to speculate upon. Suffice to say that the TNEB would have been well advised to take recourse to Section 62 (1) of the Act which deals with shortages for a period not exceeding one year, rather than Section 63 which deals with procurement of power for a period exceeding one year.

5.9. Though the TNEB cited urgency and the prevailing high cost of power in the open market as justification for deviating from Order No.4 dated 15.5.2006 of the Commission, it transpires that out of the 12 generators with installed capacity of 167 MWs, 5 generators with capacity of 130 MWs commenced supply from February 2009. Two others commenced supply in April 2009 and other five do not seem to have supplied at all.

5.10. Yet another point which came up for discussion is whether the Commission is clothed with powers to approve tariff retrospectively. The TNEB filed the petition on 2-2-2009 and the procurement of power by TNEB also commenced on 2-2-2009. The additional affidavit was filed on 21-4-2009. The learned Advocate General appearing for the TNEB cited Section 37 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land Act) 1961 to argue that the Commission has inherent powers to approve tariff retrospectively. In our view, retrospective approval of tariff, except under Section 63 of the Act would go against the grain of the procedure prescribed in Section 64 of the Act which stipulates prior publication and public hearing. Retrospective approval of tariff would render the consultative process of inviting objections and suggestions from the public superfluous.

5.11. The Commission is constrained to draw the attention of the TNEB to the 17th Electric Power Survey published by the Central Electricity Authority in

March 2007. The survey estimated the peak demand for power during 2008-09 at 10649 MW. Actual peak availability during 2006-07 was 8826 MW. Taking into account the anticipated capacity addition during 2007-08 and 2008-09, peak availability during 2008-09 assessed optimistically should have been 9298 MW, which left a gap of 1351 MW for the year. The TNEB should have planned for coping with this power shortage and initiated suitable advance action. In such a situation, the Commission would have had adequate time to deal with the present tariff petition in accordance with the procedure prescribed by Section 64 of the Electricity Act 2003. Yet another relevant factor is a condition imposed in the distribution licence, which mandates the approval of the Commission for procurement of power.

6. Conclusion

In the final analysis the Commission approves the tariff of Rs.6.70 / unit with the advice to the licensee that they observe the provisions of the Electricity Act 2003 scrupulously in future.

Pronounced in the open court on this day the 22nd May 2009

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

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission