

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**

and

Thiru. K.Venugopal **Member**

DRP NO. 6 OF 2010

M/s. Ind Barath Powergencom Ltd.
New No.20, Old No.129
Chamiers Road
Nandanam
Chennai – 600 035

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

Vs.

The Chairman
Tamil Nadu Electricity Board
New No.144, Anna Salai
Chennai – 600 002.

... Respondent
(Thiru.H.S. Mohammed Rafi, Advocate for Respondent)

Date of hearing 18-08-2010

Date of order 19-10-2010

The D.R.P.No.6 of 2010 came up for hearing before the Commission on **18-08-2010**. The Commission upon perusing the above

D.R.P.No.6 of 2010 and other connected records and after hearing both sides passes the following:-

ORDER

1. **Prayer in D.R.P. No.6 of 2010:-**

The prayer in D.R.P. No. 6 of 2010 is to direct the Respondent to make payment against invoices raised for power supplied to the Respondent Board for a sum of Rs.12,74,72,925.72 and interest thereon at 18% per annum from the date of invoice till the date of payment.

2. **Facts of the case:-**

- a. The Petitioner is engaged in the generation of electricity as an electricity generating company. The Petitioner had set up 3 x 63 MW coal-based Thermal Power Station at Pudur Pandiapuram, Tuticorin District.
- b. The Petitioner has made several requests to the Respondent Board seeking payment for their supplies effected to the Respondent's grid. But till date no payment was forthcoming.
- c. Aggrieved with the non-payment of the just and reasonable amounts genuinely due to the petitioner, the present petition is being filed praying for the relief of directing the Respondent to release immediately payment for the power supplied by them to the grid of the Respondent.

3. **Contentions of the Petitioner:-**

- a. The act of the Respondent in failing to make payments in respect of the supply of infirm power amounts to violation of the Order of the Hon'ble

Commission in Order No.4-3 dated 10-06-2009 wherein the Hon'ble Commission in para (vii) has expressly observed that the rate of purchase of firm as well as infirm power shall be based on the UI rate under the principles of Availability Based Tariff (ABT).

- b. The Respondent is seeking to take advantage of its own actions in directing deletion of the name of the Petitioner from the list of approved generators of PTC Ltd., which itself would be impermissible and thereafter seeking to appropriate the power free of charge.

4. **Contentions of the Respondent Board in Counter Affidavit filed by them:-**

- a. In the letter dated 31-12-2009 the Respondent Board approved the parallel operation of the generator with TNEB grid for the further period from 01-12-2009 to 07-12-2009 with the condition that the energy pumped into the grid which is infirm power in nature will not be paid at any circumstances since the infirm power was not required by TNEB which may not support the grid always. In other words Board has not given any approval to pump in energy between 01-12-2009 to 07-12-2009.
- b. The Petitioner also synchronized the 63 MW Unit-II with TNEB grid on 21-01-2010, unauthorisedly without seeking the prior approval of the Board, which shows the high handedness on the part of the Petitioner. The Respondent is proposing to take necessary action in this regard.
- c. The Respondent has given approvals for the periods 17-09-2009 to 30-11-2009 and 08-12-2009 to 31-12-2009 in respect of Unit -1 alone and

as such Respondent is willing to make payment only for the aforesaid periods at the rates as fixed by this Hon'ble Commission for which the Petitioner has to file appropriate petition before the Hon'ble Commission.

5. **Findings of the Commission:-**

- 5.1. At paragraph 19 of the counter, the Respondent Board has admitted that it has given approvals for the periods 17-09-2009 to 30-11-2009 and 08-12-2009 to 31-12-2009 in respect of Unit-I alone and it is willing to pay at the rates fixed by the Commission.
- 5.2. At paragraph 9 of the counter, the Respondent Board has stated that it has not given any approval to pump in energy between 01-12-2009 to 07-12-2009.
- 5.3. In ground (iii) at page 10 of the petition, the Petitioner has averred that this Commission in para (vii) to sub-section (1) of section 12 of Order No.4 dated 15-05-2006 as amended by order 4-3 dated 10-06-2009 has expressly observed that the rate of purchase of infirm as well as firm power shall be based on the UI rate under the principles of Availability Based Tariff (ABT). The above averment has not been disputed by the Respondent Board. It is to be noted that the amendments issued in order 4-3 dated 10-06-2009 of the Commission relate to power purchase and allied issues in respect of fossil fuel based Group Captive Generating plants and fossil fuel based co-generation plants. Since the Petitioner's power plant does not fall under either of the above two categories order 4-3 dated 10-06-2009 cannot be directly applied to this case.

- 5.4. The Respondent TNEB have given “in principle” approval for synchronizing the three units subject to certain conditions. It transpired during the hearing that Unit No.3 has not been synchronized with the grid so far.
- 5.5. The TNEB has admitted that it has given approvals for infirm power during the period 17-09-2009 to 30-11-2009 and 08-12-2009 to 31-12-2009 in respect of Unit I alone and is willing to pay at the rates fixed by the Commission. The Respondent has also stated that no approval was given for pumping energy between 01-12-2009 to 07-12-2009. Significantly, the disapproval for the period from 01-12-2009 to 07-12-2009 was communicated by TNEB belatedly on 31-12-2009. This could not have been acted upon by the Petitioner inasmuch as the Petitioner should have been put to notice before the event. Inasmuch as the TNEB have communicated “in principle” approval for synchronization of all the three units and the belated communication for rejecting the energy pumped between 1-12-2009 and 7-12-2009, it is but fair that the Commission has to accept the contention of the Petitioner for compensation for the energy supplied between 1-12-2009 and 7-12-2009.
- 5.6. Further it is to be noted that as per section 70 of the Indian Contract Act, 1872, the Petitioner is entitled to payment for the energy supplied by them as per the law viz Section 11 (1) of the Electricity Act. Moreover, the Hon’ble Supreme Court in the case of **Piloo Dhunjishaw Sidhwa Vs.**

Municipal Corporation of the City of Poona 1970 (1) SCC 213 at paragraph 10 observed as follows:-

“Under Section 70 of the Contract Act, a person lawfully delivering goods to another, and not intending to do so gratuitously, is entitled to demand that the goods delivered shall be returned, or that compensation for the goods shall be made. Compensation would normally be the market price of the goods. By refusing to return the goods, the person to whom the goods have been delivered cannot improve his position and seek to pay less than the market-value of the goods.”

The TNEB having utilized the energy pumped in between 1-12-2009 and 7-12-2009 is obliged to compensate the supplier. The question is whether market rates mentioned in the above case law should be adopted. We are of the view that since there is a specific provision for compensation for such energy in the Tariff Regulations, 2005 of the Commission, that formula should be adopted.

- 5.7. From the foregoing paragraphs, it could be seen that the Respondent is liable to pay for the quantum of energy received as infirm power. Order No.4-3 dated 10-06-2009 relied upon by the Petitioner for making this claim is not applicable in this case as the Petitioner's power plant does not fall under Group captive or co-generation plants, to which the said order relates. The Commission would therefore like to place reliance on Clause 20 (3) of Terms and Conditions for determination of Tariff Regulations, 2005 which envisages a methodology for payment for infirm power. Clause 20 (3) reads:

“Cost of infirm power shall be the lowest fuel cost applicable to the existing similar type of station.”

Clause 38 (2) of the same Regulation further states that “Any revenue other than the recovery of fuel cost earned by the Generating Company from the sale of infirm power shall be taken as reduction in capital cost as provided in Clause 20”. In the light of the above discussions, the Commission is of the considered view that for the infirm power injected into the grid, for which grid support was provided by the Respondent TNEB, the variable charge is to be paid by the Respondent to the Petitioner. The Regulation provides for the variable charge to be reckoned as for a similar power station. Ennore TPS is the only comparable station in the TNEB system. The normative variable cost of Ennore TPS, corresponding to the period in which infirm power was delivered by the Petitioner, shall be the basis for the compensation to be paid by the Respondent to the Petitioner.

5.8. The contention of the Petitioner referred in para 3 (b) of this order is not relevant to the issue under consideration in this petition.

6. **Direction:-**

The Respondent Board is directed to pay for the entire quantum of energy delivered by the Petitioner during the period 17-09-2009 to 31-12-2009 at the rate of normative variable cost of Ennore TPS during the same period.

7. **Appeal:-**

An appeal against this order lies to the Appellate Tribunal for Electricity as per section 111 of the Electricity Act, 2003 within a period of forty five days.

With the above directions, D.R.P. No.6 of 2010 is finally disposed of. There would be no cost.

Sd.....)
(K. Venugopal)
Member - I

(Sd.....)
(S.Kabilan)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission