

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.K.Venugopal **Member**
and

Thiru.S.Nagalsamy **Member**

D R P .NO.7 OF 2010

&

I.A. No. 1 of 2010 in D.R.P. No. 7 of 2010

PPN Power Generating Company Private Limited
III Floor, Jhaver Plaza
1-A, Nungambakkam High Road
Chennai – 600 034
Represented by its Managing Director

... **Petitioner**
Thiru.Rahul Balaji, Counsel for Petitioner

Vs.

The Tamil Nadu Electricity Board
Represented by its Principal Secretary and Chairman
144, Anna Salai
Chennai – 600 002.

... **Respondent**
1. Thiru P.S. Raman, Advocate General
2. Thiru.H.S. Mohammed Raffi, Counsel for
Respondent

**dates of hearing: 06-04-2010, 07-09-2010, 19-10-2010,
27-10-2010 & 19-01-2011**

Date of Order: 2-3-2011

The D.R.P. No.7 of 2010 came up for final hearing before the Commission on 19-01-2011. The Commission upon perusing the above D.R.P. No. 7 of 2010 and other connected records after hearing both sides and after considering the written submissions of both parties passes the following:

ORDER

1. **Prayer in D.R.P. No.7 of 2010:-**

The prayer in D.R.P.No.7 of 2010 is to call for the records of the Respondent comprised in the communication of the Respondent bearing No.CE/PPP/EE/IPP/DFC/F.Tsunami/D114/10, dated 20-03-2010 and to set aside the same as being illegal and contrary to the terms of the PPA.

Prayer in I.A. No. 1 of 2010 in D.R.P. No. 7 of 2010

The prayer in the I.A. No. 1 of 2010 in D.R.P. No. 7 of 2010 is to pass an interim order of stay of the impugned communication of the Respondent bearing No. CE/PPP/DFC/F.Tsunami/D114/10 dated 20-03-2010 and all proceedings pursuant thereto including the proposal to recover the sum of Rs.32.57 crores pending disposal of the D.R.P. No. 7 of 2010.

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

2.1 The Petitioner herein is engaged in the generation of electricity as an electricity generating company. The Petitioner is carrying on business in Tamil Nadu and has set up a 330.5 Mega Watt power generating station to generate electricity

- and supply the same to the Respondent. The Petitioner is generating power by a Combined Cycle Gas Turbine Power Station situated at Pillaiperumalnallur Village, Tharangambadi Taluk, Nagapattinam District, Tamil Nadu.
- 2.2 The Petitioner herein has entered into a Power Purchase Agreement (PPA) with the Respondent on January 03, 1997 for the purchase of entire capacity and energy generated by the power generating station pursuant to the terms and conditions of the PPA. The Petitioner achieved the Commercial Operation Date (COD) on April 26, 2001.
- 2.3 In terms of the provisions of PPA, the Fixed Capacity Charges (FCC) for the year is payable, if the Plant Load Factor (PLF) for the relevant year (actual generation plus deemed generation) is 68.4932% (which is the standard PLF).
- 2.4 A force majeure event being the Tsunami, occurred on 25-12-2004. Though the Tsunami did not affect the power plant as such, in order to ensure the integrity of their onshore and offshore facilities, the Petitioner decided to issue a notice intimating an event of force majeure and accordingly issued a notice on 26-12-2004.
- 2.5 In respect of Non-Political Force Majeure, under Article 13.5 (a) (iii), no FCC is payable by the Respondent to the Petitioner. It is further provided that the Petitioner may seek to receive FCC except return on equity, which will be returned to the Respondent by the Petitioner with interest determined pursuant to Article 10.6. The said amount is required to be refunded to the Respondent with interest on the earlier to occur of (i) of the company achieving the Standard PLF in a year or (ii) at the end of the year.
- 2.6 The Petitioner never chose to exercise its option available under 13.5 (a) (iii) seeking payment of FCC as contemplated under the said provisions.

- 2.7 The Respondent had initially withheld payment towards FCC for the year 2004–05 and later on released the withheld amount of FCC for the said period.
- 2.8 The Respondent through communication No. CE/PPP/EE/IPP/ DFC/F.Tsunami D 114/10, dated 20-03-2010 informed the Petitioner that the Accountant General (Audit), after going through the relevant provisions of the PPA relating to payment of FCC had pointed out that payment of FCC for the period from 26-12-2004 to 31-01-2005 was not correct as per provisions contained in the PPA and had required the Board to recover the said amount with interest and that the wrongful payment of FCC amounting to Rs.32.57 crores paid for the said period of force majeure event will be recovered with interest from the Petitioner's ensuing bill without further notice.

3. **Contentions of the Petitioner in the Affidavit and Reply Affidavit:-**

- 3.1 The Petitioner had already exceeded the standard PLF and the provisions of Article 13.5 (a) (iii) would be inapplicable.
- 3.2. The Petitioner conducted certain checks and tests of the pipelines after the issue of notice of Non-Political Force Majeure on 26-12-2004. After confirmation from technical experts that there was no damage to the said equipments had notified the Respondent of resumption of generation.
- 3.3. The payments by the Respondent in respect of invoices were not being made by the due date and were ad hoc and being adjusted on first-in-first out (FIFO) basis as intimated by the Petitioner in writing to the Respondent. The Respondent never gave any particulars of payments being made as against any particular invoice. No details were ever provided on the basis of how payments are made and hence there would be no method of determining if any deduction had been made

towards Non-Political Force Majeure. The first communication on this issue was in August 2009.

- 3.4 The Respondent had initially withheld payment, towards FCC for the year 2004-05 and later on released the withheld amount of FCC for the said period. It is therefore evident that the Respondent had itself understood the clear provisions of the PPA that, inasmuch as the Petitioner had exceeded standard PLF, it was entitled to the payment of full FCC in terms of the calculation set out in the PPA.
- 3.5. As per Article 10.2 (e) of the PPA, in respect of any invoice, the Respondent is duty bound to raise a dispute within a period of one year of due date of each such invoice after following the procedure set out for raising a dispute. No invoice was ever disputed. In as much as during the period of non-political force majeure, no FCC is to be paid by the Respondent, the Petitioner had also not claimed deemed generation for the relevant period.
- 3.6. As the Petitioner had far exceeded the Standard PLF, without considering any deemed generation for the period of non-political force majeure, it was entitled to payment for the PLF achieved.
- 3.7. Actual generation plus deemed generation would be taken up for calculation of PLF. If PLF is more than 68.4932%, full FCC will be allowed for the billing period / annually. It is, therefore, clear that the parties understood that so long as PLF is more than the Standard PLF, full FCC would be allowed and payable.
- 3.8. The entire basis for the present impugned demand had arisen from an audit objection of the Accountant General (Audit) conducted for the relevant period. Audit objections are internal to the Board and it is part of Respondent's normal business process to deal with the same and the audit objection cannot be used to withhold the monies legitimately due to the Petitioner.

- 3.9. It is clear that the Respondent has sought to take undue advantage of the situation by seeking to make a claim for recovery rather than deal with the objection by issuing appropriate clarification to the Accountant General's office explaining the working of the relevant clauses and the reasons for making payment.
- 3.10. The Respondent with the sole intention of seeking to unjustly enrich itself, is seeking to take a position that a particular claim was made when it was never made and thereafter stating that the payment was made against the same incorrectly when no such payment could have been made in the absence of a claim and consequently seeking a refund.
- 3.11. In the absence of a dispute, after following the procedure contemplated, the respondent cannot unilaterally arrogate to itself the power to determine a particular payment to be due and payable and seek to recover the same unilaterally without following the relevant provisions of the PPA.
- 3.12. While the Petitioner has raised its invoices strictly in terms of PPA, the Respondent has also through its action clearly admitted that those payments are due and payable in terms of PPA. Having understood the clause and the relevant provisions correctly and after having acted upon them, the Respondent is stopped from reneging on its commitment by resorting to such an arbitrary and illegal action.
- 3.13. A clause of the PPA cannot be interpreted so as to put the affected party in a situation which is worse than when the plant is not available for a non-force majeure event. Had the plant been declared unavailable for a non-force majeure event, full FCC would have been payable. Because a non-political event of force majeure had occurred, the Petitioner is made ineligible for full FCC for the year. This is illogical and hence not tenable.

4. **Contentions of the Respondent Board in Counter Affidavit filed by them:-**
- 4.1 The Respondent Board raised a dispute in the month of January 2005 itself for the bill raised for the period from 13-12-2004 to 13-01-2005 in connection with the invoice pertaining to the period of tsunami by deducting the FCC amount proportionate to the period of tsunami from the bill pertaining to that period i.e. the bill raised for the period from 13-12-2004 to 13-01-2005. This itself would establish that the Board is disputing the invoice raised by the Petitioner during the relevant period.
- 4.2 The tariff payment given in the article 13.5 (iii) overrides the payment given in the Schedule "A".
- 4.3 On the occurrence of the non-political force majeure event the Respondent Board is not bound to pay the FCC during the period of the force majeure event when the plant was not generating power. Article 13.5 (iii), which stipulates the payment procedure during non-political force majeure, is an exception to the payment of the FCC as mentioned in the Schedule "A" of the PPA
- 4.4 For calculation of PLF deemed generation should also be considered during the normal course of billing and that the Petitioner is not eligible for FCC during the period of force majeure.
- 4.5 The interpretation of the Article 13.5 in the PPA by the Petitioner is not correct. The audit objection is not illogical as claimed by the Petitioner. The Petitioner is not entitled to FCC since article 13.5 (a) (iii) specifically states that "for non-political force majeure no FCC will be paid by TNEB to the company".
- 4.6 The failure to generate and supply power due to the Tsunami during the period between 26-12-2004 and 31-01-2005 is the force majeure event and article 13.5 (a) (iii) would apply to the said period.

- 4.7 As per article 13.5 (b) (iii) of the PPA the company may seek to receive the FCC except the return on equity which would be returned to the Board by the IPP with interest as per the Article 10.6 on the (i) the IPP achieving the Standard PLF in a year or (ii) at the end of the year, whichever is earlier.
- 4.8 The payment of FCC every month envisaged under Schedule “A” is applicable only during the normal circumstances and not during non-political force majeure period. The cogent and proper reading of the article 13.5 (a) (iii) of the PPA would clearly show that this article is an exception to the payment of the FCC as mentioned in the Schedule “A” of the PPA and on the occurrence of the non-political force majeure event the Board need not pay the FCC during the period of the force majeure event when the plant was not generating power.
- 4.9 The Tsunami being a non-political force majeure event as per article 13.1 (b) (i), the Petitioner would not be entitled for the payment of the FCC from the Board as per article 13.5 (a) (iii) during the Tsunami period, when the plant was not generating power.

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

- 5.1 Clause 13.2 of the PPA between the TNEB and PPN reads as below:-

*“13.2 **Restrictions**- Notwithstanding that an event of Force Majeure may otherwise exist, the provisions of Article 13 shall not in any event excuse any failure to pay or delay in paying money due and owing under this Agreement.”*

- 5.2 Clause 13.5 of the PPA reads as below:-

“13.5 Continuing Payment Obligations-

- (a) *Upon the occurrence and during the continuance of any event of Force Majeure, the Tariff and all other payment obligations of the Parties hereunder shall continue to be payable as set forth below:*
- (i) *For Direct Indian Political Event the Project is deemed to be operating at the Standard PLF and FCC shall be paid by TNEB.*
 - (ii) *For Indirect Indian Political Event the Project is deemed to operate at the Standard PLF and the Company is entitled to the FCC except the Return on Equity.*
 - (iii) *For Non-Political Force Majeure no FCC will be paid by TNEB to the Company. However the Company may seek to receive the FCC except the Return on Equity which will be returned to TNEB by the Company with interest determined pursuant to Article 10.6. The said amount will be refunded to TNEB with interest on the earlier to occur of (i) Company achieving the Standard PLF in a Year; or (ii) at the end of the Year.*
 - (iv) *For Force Majeure affecting grid system, FCC less Return on Equity will be paid by TNEB.*

5.3 Simply interpreted, Clause 13.2 states that the TNEB is obliged to pay as per the agreement even during an event of force majeure. Clause 13.5 sets out the payment obligation during the occurrence of an event of force majeure. 13.5(a)(i) deals with direct Indian political event, during which period the plant shall be deemed to operate at the standard PLF, although the plant is physically shut down. This ensures that the Generator can raise an invoice for the standard PLF and there would be assured financial liquidity during the period. 13.5(a)(ii) deals with indirect Indian political event, during which period the plant shall be deemed to operate at standard PLF, although the plant is physically shut down. The

Generator can raise an invoice for standard PLF but the payment will be restricted to FCC less the Return on Equity. This again ensures financial liquidity during indirect Indian political event. For both the cases covered by 13.5 (a) (i) and 13.5 (a) (ii), the plant will be deemed to operate at standard PLF, which would count for the annual average PLF, although the plants were physically shut down during the force majeure period.

5.4. But, the situation is different during a non political force majeure contemplated in 13.5(a)(iii) during which period no FCC is payable by the TNEB to the Generator. The Generator is merely entitled to an advance equivalent to FCC minus Return on Equity, which has to be refunded to the TNEB with interest, on the company achieving standard PLF for that year or if standard PLF is not achieved, the advance will have to be returned at the end of the year. Thus, during a non political force majeure event, since the Generator is deprived of financial liquidity, cash advance has been contemplated.

5.5 It is to be noted that for the case covered by 13.5 (a) (iii), the plant load factor during the occurrence of force majeure will be deemed to be zero as against standard PLF in the other two cases. Thus, during non-political force majeure event the plant load factor will be deemed to be zero, which, would pull down the annual average PLF. In this situation, the average PLF for the whole year shall exclude the non-political force majeure period, during which period the plant load factor shall be treated as zero. This is in sharp contrast to the other two situations under 13.5 (a) (i) and 13.5 (a) (ii) during the period of force majeure, when, the plant would be deemed to operate at standard PLF and therefore the annual average PLF for the whole year shall be computed as though the plants have operated during the force majeure period at standard PLF.

5.6. Clause 10.1 of the PPA defines the payment obligation of the TNEB. Clause 10.1(a) states that TNEB will make payments to the Company as determined in accordance with tariff which is hereby incorporated in this agreement as Schedule-A hereto.

5.7. Clause 3 of Schedule-A prescribes the formula for payment of Fixed Capacity Charge which is reproduced below:

“Fixed Capacity Charge

(a) The FCC with respect to any month in any year shall be

$$\frac{\text{Cost} \times D \times (A/B)}{\text{Number of days in such year}} - C$$

Number of days in such year

Where

A = PLF calculated (rounded to the fourth decimal place) over all Months between and including the first Month in such Year and to the end of the applicable prior Month (the Month for which the FCC is being calculated) in such Year, which, however shall not exceed “Standard PLF”

B = 68.4932% (the “Standard PLF”)

C = the sum of all FCC payments due for all prior Months in such Year

D = the number of Days elapsed in such Year through the last day of such Month

Cost is equal to the sum of the following (for Months containing the Commercial Operation Date and the Month in which this Agreement terminates, items (ii), (iii), (iv) and (v) below shall be pro-rated accordingly)”

- (i) Debt payment
- (ii) Depreciation
- (iii) O & M Expenses
- (iv) Return on Equity
- (v) Interest on Working Capital

(vi) Specified Taxes

As each of the above is projected hereunder by the Company at the times specified in Section 2(b) of this Schedule.

- 5.8. In the instant case, the Generator declared the plant to be available from 1-2-2005. The plant operated from 1-2-2005 onwards. The plant did not operate between 26-12-2004 to 31-1-2005. The FCC for February 2005 is to be determined as under:-

D is the number of days in that year till the last date of February; this is 11 months.

C is the sum of all FCC payments due for all prior months in that year. In this particular case this will be the sum of FCC received till 26-12-2004.

A/B is limited to Unity as the PLF achieved upto February 2005 was more than the standard PLF. The number of days for that year is corresponding to 12 months. Therefore, the FCC payable during February 2005 works out to FCC for 11 months less the FCC received upto 26-12-2004. Effectively, the plant becomes entitled to receive the FCC for the period from 26-12-2004 to 31-1-2005. In other words, as soon as the plant achieves the standard PLF at any time during the year, a Generator recoups the full FCC for the prior period also, despite the fact that at certain time during that year he may have fallen short of standard PLF even on account of Non-Political Force Majeure. The PLF achieved by this particular generator for the period from 1-4-2004 to 31-3-2005 is 83.11%, which is far higher than the standard PLF and therefore the generator is entitled to receive FCC for the whole year in terms of a conjoint reading of various provisions of the PPA as discussed above.

- 5.9. The Petitioner argued that under Clause 10.2(e) of the PPA, the TNEB shall not have the right to dispute an invoice after a period of one year from the due date of such invoice. The full payment for FCC for the period from 26-12-2004 to 13-1-2005 was paid by TNEB in April 2005. For the billing period from 13-12-2004 to 13-1-2005 and for the billing period from 13-1-2005 to 13-2-2005 invoices were raised by the generator on 13-1-2005 and 14-2-2005 respectively. Due date for the payment of invoice is 30 days from the date of invoice. The TNEB has raised the dispute in August 2009. The Petitioner argues that the TNEB have lost their right to raise the dispute on the payment of FCC in terms of the PPA.
- 5.10. The TNEB countered this argument saying that the annual invoice for 2004-05 was submitted by the generator in July 2007 and therefore the TNEB did not have the benefit of reconciling the monthly invoices with the annual invoice before raising a dispute. The Petitioner stated that both in the case of monthly invoice and annual invoice the dispute period is one year and since the TNEB raised the dispute in August 2009, well beyond the one year period, the TNEB should be deemed to have forfeited their right to dispute the payment of FCC.
- 5.11 The TNEB argued that while the same petitioner has raised disputes in related matters before the Commission several years later, the TNEB is being bound by a mutual contract to limit the dispute period to one year.
- 5.12 The Commission would like to record here that it has consistently held that while the limitation period prescribed in the Limitation Act 1963 is strictly not applicable to proceedings before the Commission, delay and laches have to be explained and justified. This applies both to generators such as PPN and also to the TNEB. Just as PPN has raised disputes before the Commission several years after their occurrence, the TNEB also is at liberty to raise disputes much after the limitation period provided they justify the delay and laches. As a matter of fact, in

Sulochana Cotton Mills Ltd., Vs. TNEB in DRP.No.11 of 2010 decided by the Commission on 20-1-2011, the Commission has rejected the petitioner's claim on account of delay and laches and not because of limitation.

5.13. But, where parties are bound contractually by a bilateral agreement setting forth time limits for raising of disputes, such contracts would bind them and the parties cannot wriggle out of contractual obligation. While a bilateral contract between the two parties would apply to limitation period of disputes between themselves, the two parties are at liberty to raise a dispute before the Commission justifying delay and laches irrespective of the limitation period set forth under the Limitation Act, 1963.

5.14. In view of the findings in paras 5.1 to 5.13 above, the impugned communication of the Respondent dated 20-03-2010 is unsustainable.

6. **Order:-**

In view of the findings of the Commission in paras 5.1 to 5.14 above, the communication of the Respondent No.CE/PPP/EE/IPP/DFC/F.Tsunami/D.114/ 10, dated 20-03-2010 is set aside.

Interim order dated 06-04-2010 made in I.A. No. 1 of 2010 in the above D.R.P. is merged with this order.

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.

(Sd.....)
(S. Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

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

/ True Copy /

Secretary
Tamil Nadu Electricity Regulatory Commission