



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.Nos. 12 & 13 of 2008

M/s. Raghu Rama Renewable Energy Ltd.,
Registered Office: Plot No. 30A, Road No.1
Film Nagar, Jubilee Hills
Hyderabad – 500 037.

.. . **Petitioner in D.R.P.No.12 of 2008**

M/s. Ind Barath Energies (Thoothukudi) Ltd.,
Registered Office: Plot No. 30A, Road No.1
Film Nagar, Jubilee Hills
Hyderabad – 500 037.

.. . **Petitioner in D.R.P.No.13 of 2008**

Vs.

1. The Chairman, TNEB,
144, Anna Salai, Chennai-2.
2. The Chief Engineer, NCES,
TNEB, Anna Salai, Chennai-2.
3. The Superintending Engineer,
Ramnad Electricity Distribution Circle, TNEB,
Ramnad.

4. The Superintending Engineer,
Tuticorin Electricity Distribution Circle, TNEB,
Tuticorin.

.....**Respondents in both the
D.R.P.Nos.12&13 of 2008**

The above petitions D.R.P. Nos. 12 & 13 of 2008 came up for final hearing on 14th August 2008. The Commission upon perusing the petitions and the counter affidavits of Respondents and all connected records of the case and upon hearing the arguments of both sides passes the following Common Order:

COMMON ORDER DATED 25th FEBRUARY 2009

1. (a) Prayer of the petitioner in D.R.P.No. 12 of 2008

The prayer of the petitioner in D.R.P.No. 12 of 2008 is to approve their Letter dated 26th April 2008 (REF:RRREL/TNEB/008/2008) issued to the Chief Engineer / NCES, TNEB requesting the termination of the Power Purchase Agreement dated 20.06.2002 and direct the Respondent Board to accept their letter referred to above and terminate the Power Purchase Agreement referred to above.

1. (b) Prayer of the petitioner in D.R.P.No. 13 of 2008

The prayer of the petitioner in D.R.P.No. 13 of 2008 is to approve their Letter dated 26th April 2008 (REF:IBETL/TNEB/026/2008) issued to the Chief Engineer / NCES, TNEB requesting the termination of the Power Purchase Agreement dated 15.03.2004 and direct the Respondent Board to accept their letter referred to above and terminate the Power Purchase Agreement referred to above.

2. Contentions of the petitioners in D.R.P.Nos. 12 & 13 of 2008

The contentions of the petitioners in D.R.P.Nos. 12 & 13 of 2008 are same. They are briefly as follows:

- (a) While referring to Section 56 of Contract Act and the judgement of the Hon'ble Supreme Court in the case of Sushila Devi and another Vs. Hari Singh and others (AIR 1971 SC 1756) the petitioners contend that applying the said Section 56 of Contract Act, they are entitled to have the agreement terminated.
- (b) While referring to new PPA as framed by the Commission, the petitioners contended that bilateral termination as provided for in the new PPA framed by the Commission should be made applicable to the petitioners and the denial of such a right of termination would amount to discrimination and arbitrary and violative of Article 14 of the Constitution of India.
- (c) The unilateral termination by TNEB as stipulated in the PPA is contrary to Section 62 of Contract Act, according to which both the parties have the right to rescind a contract.
- (d) The right to sell power to other licensees and traders under Section 10(2) of the Electricity Act, 2003 which is a right of property cannot be deprived by the PPA which is violative of Article 300-A of the Constitution of India.
- (e) As per the working sheet furnished by the petitioners, at the fuel cost of Rs.2025, the average cost per unit works out to Rs.5.21 per unit.

3. Contentions of the Respondents

The counter affidavits filed by the Respondents in both D.R.P.Nos 12 & 13 of 2008 are the same. The Respondents have contended that on expecting power to be supplied by the power plant of the petitioner company, the Respondents have committed to supply power to various

groups of HT & LT consumers whose service connections were effected after commissioning of the above power plant.

4. Issue

Whether the prayer of the petitioners in both the D.R.P.Nos. 12 & 13 of 2008 namely directing the Respondents to terminate the power purchase agreement can be allowed.

5. Findings of the Commission

5.1 The prayers of the petitioners in DRP No.12 of 2008 and DRP No.13 of 2008 are identical, namely, to terminate the power purchase agreement on the ground that performance of the contract has become impossible and that the power purchase agreement (hereinafter referred to as PPA) may be terminated in terms of Section 56 of Indian Contract Act 1872.

5.2 M/s.Raghurama Renewable Energy Limited the petitioner in D.R.P. 12 of 2008 is a biomass based power plant with a capacity of 18 MW located in Ramanathapuram District. The petitioner and the TNEB entered into a PPA on 20-06-2002 for a period of 15 years or for the useful life period of the plant, whichever is less, from the date of the agreement. The plant was commissioned on 01-01-2004.

5.3 M/s.Ind Bharat Energy (Thoothukudi) Limited the petitioner in D.R.P. 13 of 2008 is a biomass based power plant with a capacity of 20 MW located in Tuticorin District. The petitioner entered into a PPA

with TNEB on 15-3-2004 for a period of 15 years or for the useful life period of the plant, whichever is less, from the date of the agreement. The plant was commissioned on 18-5-2006.

5.4 The petitioners in both cases have pleaded that the price of the biomass fuel has risen sharply from Rs.1000/- per MT in 2006 to Rs.2000/- per MT at the time of filing of the petition in 2008. The petitioners submit that the price rise is abnormal and therefore, the performance of the contract has become impossible. Neither of them has produced evidence to prove the price of the fuel at the time of signing of the agreement on 20-06-2002 and 15-3-2004. The Commission could have compared the prices ruling at the time of the agreement and the current prices to ascertain whether the price rise could warrant a conclusion to the effect that performance of the contract has become impossible.

5.5 The petitioners have cited the following case laws:-

(i) AIR 1971 SUPREME COURT 1756 in Smt.Sushila Devi and others Vs. Hari Singh and

(ii) AIR 1991 MADRAS 158 in Easun Engineering Company Limited Vs. The Fertilizers and Chemicals Travancore Limited

in support of their contention that the performance of the contract has become impossible and that the Commission

should invoke Section 56 of the Indian Contract Act 1872 to terminate the PPA. The Commission, further, studied the following case law:-

AIR 1960 SC 588 in M/s.Alopi Parshad and Sons Limited Vs. Union of India.

5.6 A combined reading of these case laws suggests that an abnormal price rise would justify the termination of the PPA. But, the petitioners have failed to establish the linkage between the prices ruling at the time of signing of the agreement and the prices ruling at the time of filing of the petition. Therefore, the Commission is unable to come to any definite conclusion on this aspect. That the prices have doubled between 2006 and 2008 does not constitute sufficient justification.

5.7 The petitioners have contended that the PPA does not provide for exit of the petitioners from the contract and therefore, they are unable to terminate the contract with the TNEB. In this regard, we wish to point out that the energy purchase agreement prescribed by the Commission under Order No.3 dated 15-5-2006 provides for exit of both the parties. Order No.3 of the Commission enables the petitioners, who had executed PPA with TNEB prior to 15-5-2006, to opt for Order No.3. Having failed to exercise their option to switch over to the Order No.3, the petitioners are estopped from claiming the facility of exit clause.

5.8 We also wish to refer to the tariff rate prescribed in the PPA. Clause 7(a) of the PPA stipulates the purchase price, which states that the rate shall be as specified in the Permanent BP(FB)No.59

dated 11-4-2000 of TNEB. The BP states that the purchase price of energy is fixed at Rs.2.73 per unit effective from 1-4-2000 with 5% annual escalation for a period of nine years upto 2010. The price so fixed shall not exceed 90% of the prevailing HT Tariff-I rate applicable for industrial consumers, which may get revised from time to time. The purchase price in terms of the formula of TNEB is as follows:

1-4-2000	-	Rs.2.73 per unit
1-4-2001	-	Rs.2.87 per unit
1-4-2002	-	Rs.3.01 per unit
1-4-2003	-	Rs.3.16 per unit

The HT tariff on the relevant dates was as follows:

		<u>HT Tariff – I</u>	<u>90% of HT Tariff-I</u>
1-4-2000	-	Rs.3.50 / Rs.3.40 per unit	Rs.3.15 / Rs.3.06 per unit
1-4-2001	-	Rs.3.50 per unit	Rs.3.15 per unit
1-4-2002	-	Rs.3.30 / Rs.3.20 per unit	Rs.2.97 / Rs.2.88 per unit
1-4-2003	-	Rs.3.50 per unit	Rs.3.15 per unit

5.9 Thus, the petitioners were fully aware that the ceiling of 90% of the HT Tariff-I applies to the purchase price of energy and therefore, the plea of the petitioners, at this stage, that the purchase price of Rs.3.15 per unit, equal to 90% of the current HT tariff-I, is unremunerative, is not tenable. The petitioners were fully aware of the price ceiling imposed by the PPA. It is sheer bad luck for the petitioners that the HT Tariff-I has remained static since 16-3-2003 but the petitioners must admit that this is part of the

business risk. If the HT Tariff-I had been enhanced periodically, the petitioners would have gained

5.10 We also wish to record here that the Commission is in the process of enhancing the purchase price of electricity generated by biomass based power plants. The Commission has held discussions with experts in this field on 16-7-2008. Thereafter, a consultative paper has been circulated by the Commission on 27-1-2009 amongst all the stakeholders to elicit their view points. The Advisory Committee of the Commission is scheduled to discuss the consultative paper on 26-2-2009. Thereafter, the enhanced tariff will be announced by the Commission. The rise in the cost of the fuel has been taken note of by the Commission and appropriate purchase price would be prescribed by the Commission. The petitioners would also be eligible for increase in the purchase price.

5.11 Considering all these factors, the Commission believes that the petitioners do not have a strong base for termination of the PPA and accordingly the petitions are dismissed. No costs.

Pronounced in the open court by this Commission on this the 25th day of February 2009.

(R. RAJUPANDI)
Member

(B.JEYARAMAN)
Member

(S.KABILAN)
Chairman