



THE TAMIL NADU ELECTRICITY REGULATORY COMMISSION

[Constituted under Section 82 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.19 of 2008 and I.A. No.7 of 2008

M/s. Arkay Energy (Rameswaram) Ltd.,
Rep. by its Chairman & Managing Director K. Raghu
Registered Office: Plot No.30A, Road No.1
Film Nagar, JubileHills,
Hyderabad 500 037.

... Petitioner

Vs.

1. The Chairman
Tamil Nadu Electricity Board,
No.144, Anna Salai, Chennai 2.
2. The Member (Generation)
Tamil Nadu Electricity Board,
No.144, Anna Salai, Chennai 2.
3. The Chief Engineer / PPP
Tamil Nadu Electricity Board,
No.144, Anna Salai, Chennai 2.

4. The Chief Engineer / Operation
Tamil Nadu Electricity Board,
No.144, Anna Salai, Chennai 2.

5. The Superintending Engineer
Ramnad Elec. Distn. Circle,
Ramnad.

.. Respondents

The above DRP No.19 of 2008 and IA No. 7 of 2008 came up for final hearing before the Commission on October 23, 2008. On October 29, 2008 an interim order in the above DRP has been issued by the Commission. In continuation of the said interim order, the following final order is hereby pronounced, namely:

ORDER DATED 20th November 2008

1. Prayer in DRP No.19 of 2008

The prayer in DRP No.19 of 2008 is to accord approval for open access to the petitioner to trade their surplus power of 20 MW + 20 MW to M/s. PTC Ltd. and to direct the 5th Respondent to execute the wheeling agreement for 25 MW to their captive consumers in terms of the letter of the 2nd Respondent dated 31-5-2008.

2. Prayer in IA No. 7 of 2008

The prayer in IA No.7 of 2008 is to fix an early date of hearing of the above DRP No.19 of 2008.

3. Contentions of the petitioner

The contentions of the petitioner are as below:

- (a) The denial on the part of the respondents is opposed to the provisions contained in Sections 9 & 10 of the Act.
- (b) Referring to section 2 (47) of the Electricity Act 2003 and section 40 ((c) (i) the petitioner contends that the denial of open access is violative of the Act.
- (c) While referring to consent letter dated 26-6-2008 issued by Chairman, TNEB, the petitioner contended that the respondents are estopped on going behind the said consent.
- (d) Though approval has been granted for revised wheeling of 25 MW and the petitioner has given a fair agreement signed, the Superintending Engineer/Ramnad EDC has not signed the same. There is no justification for the Superintending Engineer/Ramnad ERC to keep the same pending.
- (e) The petitioner submits that having regard to the facts and circumstances of the case, the Respondents should be directed to execute the revised wheeling agreement for 25 MW and to permit open access for bilateral trading for 20 + 20 MW from the petitioner's plant.
- (f) The action of the Respondent in not entering with the petitioner the revised wheeling agreement reducing the wheeling from 45 MW to 25MW is wholly illegal.
- (g) The action of the Respondent in denying open access to enable the petitioner to trade 20 + 20 MW power with M/s.PTC India Ltd is illegal.

4. Contentions of the Respondent

The contentions of the respondent Board in their counter affidavit are briefly as follows:

- (a) Any overdrawal at the cost of prevailing UI rates from the Southern regional grid results in lowering of the operating frequency well below 49Hz leading to threat to grid security which is strictly not permitted.
- (b) TNEB is forced to go for load management by resorting to load shedding.
- (c) Once trading is committed, the TNEB would be responsible for transmitting the power to the other states irrespective of the generation maintained by the generators and that shortfall in the generation could be penalized only in terms of UI charges at later date and would not be compensated with power.
- (d) The respondent submitted that pending suitable directions from the Government of Tamil Nadu under section 11 giving concurrence was kept pending.

5. Arguments

- (a) Thiru R. Muthukumaraswamy, Learned Sr. Counsel representing the petitioner contended that the Respondent in their counter at paras 1 to 7 have accepted the contentions of the petitioner and what is required to be done is only the execution of the orders issued by the respondent. He further pleaded that it is not open to TNEB to say that the Government's order under section 11 of the Electricity Act 2003 has to be awaited. He stated that section 11 of the Act which is proposed to be invoked by the respondent refers to operation and maintenance of generating station and that it is not applicable to the instant case where wheeling of power generated by the petitioner's generating company to the PTC by way of sale of power is involved.
- (b) The Learned Counsel Thiru K. Surendranath representing the respondent Board while referring to paragraph 13 of the counter, contended that if the generating company is not generating the power to be wheeled to PTC then the TNEB

would be vary much affected. He pointed out that there is a Supreme Court decision (which is dealt with in the subsequent paragraph) wherein the Supreme Court has emphasized the equitable consideration based on which there can be exception to the legal rights of a person.

In regard to the above decision Thiru R. Muthukumaraswamy, the Learned Senior Counsel replied that the Supreme Court has laid down the principles of the equitable consideration which are an exception to the principle of promissory estoppel and that equity has no role in matters governed by statutory law.

6. Issue

The issue is whether the action of the Respondents in not executing the agreement for reducing the wheeling from 45 MW to 25 MW and not forwarding the concurrence for trading of additional 20 MW is sustainable under the Electricity Act, 2003.

7. Findings of the Commission

7(1) The petitioner owns a captive generating plant with a capacity of 65 MW in Ramanathapuram district. He has been wheeling the entire 65 MW to his captive consumers. He submitted a petition on 28-4-2008 to the Chief Engineer (PPP), TNEB proposing to trade 20 MW out of the sanctioned capacity of 65 MW and wheel the balance 45 MW to his captive consumer. He enclosed an application seeking concurrence from the State Load Despatch Centre (SLDC) for bilateral trading of 20 MW. Strictly speaking, this application should have been addressed to Chief Engineer (Operation) who is in charge of the SLDC. Chief

Engineer (Operation) is the designated authority for conveying concurrence of the SLDC to the nodal agency for interstate bilateral transaction, namely the Regional Load Despatch Centre.

7(2) The Chief Engineer (Operation) replied on 30-4-2008, within the period of 3 three days stipulated in Clause 8 (3) of Central Electricity Regulatory Commission (Open Access in Interstate Transmission) Regulations 2008. Member (Generation), TNEB on 31-5-2008 issued orders reducing the wheeling from 65 MW to 45 MW and directed the petitioner to contact the Chief Engineer (Operation) regarding the inter-state short term open access for trading of 20 MW. The petitioner was, further, directed to execute an agreement with the Superintending Engineer, TNEB, Ramanathapuram for reducing the wheeling from 65 MW to 45 MW. All the formalities were completed and the inter-state open access for 20 MW came into effect from 1-7-2008 to 30-9-2008 and subsequently extended by another month upto 31-10-2008.

7(3) The petitioner submitted another application on 21-7-2008 to the Chief Engineer (Operation), TNEB seeking concurrence for trading of additional 20 MW and to reduce the wheeling to 25 MW. He did not dispose it of within the period of 3 days stipulated in Clause 8 (3) of Central Electricity Regulatory Commission (Open Access in Inter State Transmission) Regulations 2008. On the other hand, Member (Generation), TNEB replied on 28-8-2008 according approval for reducing the wheeling from 45 MW to 25 MW. The petitioner was directed to contact the Chief Engineer (Operation) in regard to the concurrence for trading of additional 20 MW. He was, further, directed to execute an agreement with SE, TNEB, Ramanathapuram for reducing the wheeling from 45 MW to 25 MW. The Member (Generation) endorsed a copy of his order to the Chief Engineer (Operation) directing

him to issue approval for trading of additional 20 MW after the execution of the revised agreement by the Superintending Engineer, TNEB, Ramanathapuram.

7(4) The SE, TNEB, Ramanathapuram dithered in executing the revised agreement for reducing the wheeling from 45 MW to 25 MW despite the orders of Member (Generation). The petitioner submitted further representation to Member (Generation) on 18-9-2008 seeking his intervention for resolving the stalemate. There was no response. Aggrieved by the delay of more than a month in SE, TNEB, Ramanathapuram executing the agreement for revised wheeling of 25 MW and the Chief Engineer (Operation) conveying the concurrence for trading of additional 20 MW, the petitioner has filed this Dispute Resolution Petition.

7(5) To understand the facts of the case, it is necessary to set out the legal provisions governing the present dispute. Section 31 of the Electricity Act 2003 enjoins upon the State Government to establish a centre to be known as the State Load Despatch Centre. The SLDC shall be operated by a Government Company or any authority or Corporation established or constituted by or under any State Act, as may be notified by the State Government, provided that until a Government Company or any authority, or Corporation is notified by the State Government, the State Transmission Utility shall operate the SLDC.

7(6) Section 32 of the Act describes the functions of the SLDC. Section 32 (2) stipulates that the SLDC shall be responsible for optimum scheduling and dispatch of electricity within a State in accordance with the contracts entered into between the licensees or the generating companies operating in that State. Section 33 deals with the compliance of directions of the SLDC. Section 33

(2) provides that every licensee and generating company shall comply with the directions issued by the SLDC.

7(7) As far as Tamil Nadu is concerned, SLDC is operated by the State Transmission Utility, which is the TNEB, in terms of Section 31 of the Act. As the Tamil Nadu Electricity Board has not been unbundled, the TNEB functions as Generator, deemed Distribution Licensee under Section 14 and State Transmission Utility under Section 172 (a). The Chairman of TNEB is the executive head of Generation, Distribution Licensee, State Transmission Utility and the SLDC. The overlapping of the roles has blurred the statutory distinction between the functions and powers of the various entities.

7(8) It is relevant, in this context, to refer to the Central Electricity Regulatory Commission (Open Access in Inter State Transmission) Regulations 2008 promulgated by Central Electricity Regulatory Commission on 25-1-2008 in exercise of the powers conferred by Section 178 of the Electricity Act 2003. These Regulations deal with the procedure for grant of inter-state open access with effect from 1-4-2008. Clause 5 says that the nodal agency for bilateral transaction shall be the Regional Load Despatch Centre of the region where the point of drawal of electricity is situated. Clause 8 (1) states that wherever the proposed bilateral transaction has a State Utility or an intra State utility as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. Clause 8(3) and 8 (4) stipulate a time period of three days for acting on the application for bilateral transaction. Clause 26 provides for Redressal Mechanism which states that unless the dispute involves the State Load Despatch Centre and the intra state entities of the concerned State and falls within the

jurisdiction of the State Commission, all disputes arising under these Regulations shall be decided by the Commission based on an application made by the person aggrieved.

7(9) The three intra-State entities involved in the present dispute are the SLDC, TNEB and the generator. The petitioner presented the application to the Chief Engineer (Operations) for seeking concurrence for trading of additional 20 MW of power. As the head of the State Load Dispatch Centre, he ought to have dealt with the application in the manner prescribed in the CERC (Open Access in Inter State Transmission) 2008 which stipulates a deadline of three days for either accepting or rejecting the application. He did not act as per the Regulations. The second entity is the distribution licensee namely the TNEB, who refused to execute its own order on the revised wheeling agreement. The third entity is the generator, who, again, is located within the State. As per clause 26 of the CERC (Open Access in Inter State Transmission) regulations 2008, all the three entities being intra-state entities the dispute resolution squarely falls within the purview of the State Commission. In addition, Section 86 (1) (f) of the Electricity Act 2003 lays down that the State Commission shall adjudicate upon disputes between the licensees and the generating companies. As both the generator and the distribution licensee are located within the State, dispute adjudication falls within the purview of the State ERC. Section 111 of the Act provides an appeal to the Appellate Tribunal for Electricity against the orders of the State Commission within a period of 45 days.

7(10) The learned counsel for the petitioner contends that a vested right has accrued to the petitioner in view of the approval granted by the Member (Generation), TNEB, for reducing the wheeling from 45 MW to 25 MW. In this context, we may refer to the judgement of the Hon'ble Supreme Court in Union of India Vs. Godfrey Philips India Limited (1995) 4 SCC 369 as below:-

“Of course we must make it clear and that as also laid down in Motilal Sugar Mills case, that there can be no estoppel against the Legislature in the exercise of its legislative functions nor can the Government or Public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation it made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in Motilal Sugar Mills case and we find ourselves wholly in agreement with what has been said in that decision on this point”

7(11) The above judgement of the Hon'ble Supreme Court reinforces the contention of the learned senior counsel for the petitioner that a public authority cannot be debarred by promissory estoppel from enforcing a statutory prohibition. As the distribution licensee has consented to reduce the wheeling from 45 MW to 25 MW and as the CE (Operation) has been directed by the licensee to concur for trading of additional 20 MW, we endorse the view of the petitioner that a

vested right has accrued to him. The Respondents have stated that they are awaiting the orders of the State Government under Section 11 of the Electricity Act 2003 in regard to pending applications for interstate open access. So far no order has been passed by the Government and therefore, in our view, the situation is hypothetical.

7(12) We shall be failing in our duty, if we do not refer to the rights of a captive generator enshrined in the Electricity Act 2003. Section 2 (8) defines a captive generating plant as a power plant set up by any person to generate electricity primarily for his own use. Rule 3 of the Electricity Rules 2005 framed by the Central Government has prescribed the qualification for a captive generating plant as one in which not less than 26% of the ownership is held by the captive users and not less than 51% of aggregate electricity generated in such plant, determined on an annual basis is consumed for the captive use.

7(13) Section 9 is reproduced below:

“(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”.

7(14) Section 2 (8) states that a captive generating plant generates electricity primarily for own use. Rule 3 of the Electricity Rules 2005 permits maximum of 49% of the electricity generated for other use. Second proviso to Section 9 (1) makes it clear that a captive generator is permitted to supply electricity to a distribution licensee or a trading licensee or a consumer.

7(15) It is significant that Section 9 (2) refers to “his use” of the captive generator in contrast to “his own use” of the captive generator mentioned in Sections 38(2)(d), 39 (2) (d), 40 (c) and 42 (2) of the Electricity Act 2003. “His own use” should be interpreted to mean captive consumption whereas “his use” should be interpreted to include supply of electricity to a distribution licensee or a trading licensee or sale to any consumer.

7(16) In our view, open access is a statutory right of a captive generator conferred by the Electricity Act 2003, subject to the availability of adequate transmission facility and subject to fulfilment of the conditions prescribed in the Intra-State Open Access Regulations 2005 of TNERC and the CERC (Open Access in inter-state transmission) Regulations 2008 of CERC.

7(17) In the present case, availability of adequate transmission facility is not an issue since the captive generator has been wheeling the entire 65 MW of his generation already to his captive consumers and no additional transmission facility is sought. The Respondents have pleaded that the present acute power crisis calls for strict measures. While we accept their view, we wish to observe that the remedy has to be devised within the frame work of the Electricity Act 2003 and the Rules and Regulations framed thereunder. We hold that the action of the

distribution licensee in not executing the agreement for reducing the wheeling from 45 MW to 25 MW and not granting concurrence for trading of additional 20 MW is arbitrary and ultra vires of the Electricity Act 2003.

8. Conclusion

Accordingly, we direct the Tamil Nadu Electricity Board to execute the agreement for reducing the wheeling from 45 MW to 25 MW as per their own order and grant concurrence for trading of additional 20 MW. Interim Order of this Commission is merged in this order.

Pronounced in the open court by this Commission on twentieth day of November 2008

**(R.RAJUPANDI)
MEMBER II**

**(B.JEYARAMAN)
MEMBER I**

**(S.KABILAN)
CHAIRMAN**