



**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.N0.27 of 2008

Apollo Infrastructure Projects Finance  
Company Private Limited  
Jhaver Plaza, II Floor  
1A, Nungambakkam High Road  
Chennai 600 034 - **Petitioner**

Vs.

1. The Chairman  
Tamil Nadu Electricity Board  
144 Anna Salai  
Chennai 600 002  
2. The Secretary  
Energy Department  
Secretariat, Chennai - **Respondents**

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The above petition namely D.R.P.No.27 of 2008 came up for final hearing before the Commission on 12-01-2009. Upon perusing the petition and counter affidavits and hearing the arguments of both sides the Commission passes the following:

ORDER DATED the 25<sup>TH</sup> FEBRUARY 2009

1. Prayer of the petitioner

The prayer of the petitioner is to hold conditions Nos.2,4,9 and 16 contained in the impugned letter in MS.No.120 Energy (A1) Department dated 10-12-2007 and as modified in impugned letter in Lr.Ms.No.13 Energy (A1) Department dated 29-02-2008 as ultra-vires the provisions of the Electricity Act, 2003 and therefore set aside the same and consequently direct the respondent to refrain from enforcing the said conditions in so far as the petitioner is concerned.

2. Facts of the case

a) The petitioner i.e. Apollo Infrastructure Projects Finance Company Private Limited, Chennai, was incorporated in 13-8-1996 as a Public Limited Company with its primary object being to promote and fund infrastructure projects.

b) The petitioner forwarded their proposal for setting up a Merchant Power Plant to the 1<sup>st</sup> respondent i.e. Tamil Nadu Electricity Board. As part of its procedure, the 1<sup>st</sup> respondent had forwarded the same to the Government for consideration. The Government thereafter issued ibid letter Ms.No.120 of 10-12-2007 whereunder the Letter of Facilitation was issued to the petitioner for establishment of the Power Project. The said Letter of Facilitation was subject to conditions set out therein. A perusal of the said

Letter of Facilitation revealed that certain conditions apart from being contrary to the statutory provisions would also militate against the very setting up of the power plant, by inclusion of certain unviable and insurmountable conditions for setting up of the same. The petitioner issued a communication dated 7-1-2008 to the 2<sup>nd</sup> respondent, bringing to its attention the illegality of certain conditions stipulated and seeking for amendment thereof. The petitioner had specifically raised objections to Conditions Nos.2,4,9 and 16.

c) The 2<sup>nd</sup> respondent rather than amending the said conditions issued a further letter Ms.No.13 dated 29-02-2008, which is also impugned in the present petition issuing certain amendments to the Letter of Facilitation.

d) The petitioner states that in view of the fact that objections raised by the petitioner have remained unresolved, it has no option than to approach this Commission under Section 81(1)(f) of the Electricity Act 2003, since the dispute amounts to one between a generator and the licensee.

### 3. Contentions of the petitioner

The petitioner contended that the impugned letters are violative of Sections 7 and 10(1) of the Electricity Act 2003 and Articles 14 and 300 A of the Constitution of India. While relying upon the decision of Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd., Vs. Essar Power Ltd., the petitioner contended that the powers of this Commission in resolving dispute under Section 86(1)(f) of the Act are not restricted to the matters referred to in clauses (a) and (k) of Section 86(1) of the Act.

### 4. Contentions of Respondent Board

a) Keeping in mind the demand supply gap in Tamil Nadu as well as in India during the ensuing years and considering the pro-active industrial policy in Tamil

Nadu, a draft approach paper on establishing imported coal based thermal stations at coastal locations in Tamil Nadu aiming to make Tamil Nadu the “Power Hub of India” which will serve the all India market was prepared by the Tamil Nadu Electricity Board. The draft approach paper was approved by the Government of Tamil Nadu in Lr.No.(MS) No.55, dated 05-06-2007 wherein the second respondent namely the Government of Tamil Nadu directed the Tamil Nadu Electricity Board that proposals for Merchant Power Plants in Tamil Nadu may be considered on merits, on a case by case basis as per the guidelines enumerated in the draft policy paper.

b) A letter of facilitation was issued to the petitioner M/s.Apollo Infrastructure Projects Finance Company Private Limited by the 2<sup>nd</sup> Respondent in letter (MS) No.120 dated 10-12-2007 with the terms and conditions stipulated in the approach paper approved by the Government of Tamil Nadu.

c) In order to safeguard the interest of the State, an indicative upper limit is required to be set to the promoters as Tamil Nadu Electricity Board has the first right of refusal for 25% capacity of the plant.

d) As per the letter of facilitation, the Area Development Contribution amount of Rs.1 Lakh / MW per year is to be levied by the Tamil Nadu Pollution Control Board and not by the distribution licensee.

e) The power to levy this amount to safeguard the environment lies with the Central / State Government and not with the Commission as contended by the petitioner. The proposed amount of Rs.1 lakh / MW / Annum is not a cess / tax as contended by the petitioner, but an Area Development Contribution to be used for development purpose in the infrastructure lagging coastal area.

5. Contentions of Government of Tamil Nadu

The Government of Tamil Nadu in their counter-affidavit have stated that the counter-affidavit filed in DRP No.3 of 2008 (M/s.Ind Barath Power Corporation Ltd.,) and in DRP Nos.8, 5 and 4 and 14 of 2008 may be adopted for the present petition also.

6. Issues

The following issues arise for the consideration of the Commission namely:-

- i) Whether the impugned conditions 2,4,9 and 16 issued in letter Ms No.13 Department dated 29-02-2008 are legally valid and enforceable?
- ii) Whether the dispute involved in the instant case is covered by Section 86(1)(f) of the Electricity Act, 2003 (Act 36 of 2003)?
- iii) Whether the petitioner can be said to have acquiesced in the jurisdiction of the Respondent Board and the GOTN in regard to seeking approval for setting up of a Merchant Power Plant (MPP)?

7. Findings of the Commission with reference to first and second issues

a) M/s.Apollo Infrastructure Projects Finance Company Private Limited has challenged the legal validity of the conditions 2,4,9 and 16 issued in letter MS No.13 of Energy Department dated 29-02-2008.

b) The Energy Department in their letter MS No.120 dated 10-12-2007 imposed 19 conditions. Subsequently, the petitioner addressed the Energy Department on 7-1-2008 seeking amendments, to conditions 2,4,9 and 16, based on which the Energy Department revised their letter of approval in letter MS No.13 dated 29-02-2008.

c) The respondents have questioned the applicability of Section 86(1)(f) of the Electricity Act, 2003 for the dispute resolution petition filed by the petitioner. The petitioner originally addressed the letter to the Tamil Nadu Electricity Board, who in turn referred the letter to the Energy Department. The Energy Department issued the approval letters addressed both to the generator and Tamil Nadu Electricity Board. The letters of the Energy Department bind the Tamil Nadu Electricity Board in regard to the conditions imposed by the Government. The Respondent Board submits that the letters of facilitation were issued by the Government and as such the dispute is between the generator and the Government. It is to be noted that the Respondent Board has not disowned the letter of approval issued by the Government. As a matter of fact, the Respondent Board is very much bound by the conditions imposed by the Government. Further, the Respondent Board referred the application of the generator to the Energy Department for approval and as such the Board is not entitled to hold the view that they have nothing to do with the letter of the Energy Department. In this connection, it is to be noted that from a perusal of paragraph 8 of the counter affidavit filed by TNEB that keeping in view of the demand supply gap in Tamil Nadu as well as in India during the ensuing years, a draft approach paper on establishing imported coal based thermal stations at coastal locations in Tamil Nadu aiming to make Tamil Nadu and the Power Hub of India has been prepared by the TNEB the first Respondent herein. The draft approach paper was approved by the Government of Tamil Nadu in Lr.MS.No.55 dated 05-06-2007 wherein the Government of Tamil Nadu directed the TNEB to consider

proposals for Merchant Power Plants in Tamil nadu on merits on a case to case basis as per the guidelines enumerated in the draft policy paper. From a perusal of the counter filed by Government of Tamil nadu in DRP No.3 of 2008, it is to be noted that it is only the TNEB the first respondent who received the applications and placed before a Sub-committee formed by the Government of Tamil Nadu and letters of facilitation are issued by Government for setting up of Merchant Power Plant to promoters. From the perusal of paragraph 11 of the counter of TNEB, it is to be noted that the letter of facilitation was issued to the petitioner by the Government of Tamil nadu with the terms and conditions in the approach paper which was prepared by TNEB and approved by the Government of Tamil Nadu. From a perusal of the averments made in the counter affidavit of Government of Tamil Nadu, it is to be noted that the entire process of setting up of Merchant Power Plant and the conditions relating thereto was undertaken only by the TNEB. As such TNEB is the author of the scheme of setting up of Merchant Power Plant. It is to be further noted that there is no direct correspondence between the petitioner and the Government of Tamil Nadu in regrd to setting up of Merchant Power Plant. The petitioner had approached only the TNEB with the application and it is only the TNEB which forwarded the application to the Government of Tamil Nadu with the terms and conditions for the setting up of Merchant Power Plant. Therefore, we are constrained to conclude that indirectly and actually there is a dispute between the generator and the licensee on the conditions imposed by the Energy Department.

8. Findings of the Commission with reference to third issue

a) The third issue is whether the petitioner having acquiesced in the jurisdiction of the respondent Board and the Energy Department in seeking approval for setting up of a Merchant Power Plant, can be deemed to have relinquished the rights to challenge the conditions imposed in the letters of approval. In the decision of Hon'ble Supreme Court in the case of Chief Engineer Hydel Project and others Vs. Ravindernath and others (2008 2 SCC 350) wherein the Hon'ble Supreme Court at para 25 at p 360 observed as follows:

“25 The court then proceeded to rely on Bahrein Petroleum Co.Ltd., Vs.P.J.Pappu and observed in para 32 that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit.”

b) The Electricity Act, 2003 does not confer any authority on the licensee or the Government for imposing conditions for setting up of Merchant Power Plant. Therefore, we hold that the mere submission of the petitioner to the jurisdiction of licensee and the Government does not confer authority on the Government to impose conditions.

c) The petitioner has sought relief to modify the letters MS No.120 dated 10-12-2007 and No.13 dated 29-02-2008 of the Energy Department. In letter dated 7-1-2008 the petitioner requested modification to the condition Nos.2,4,9 and 16 of the modified letter MS No.13 dated 29-02-2008. Modified condition 2 stipulates a time limit for completion of power project. Modified

condition No.4 determines the tariff of the power to be supplied by the Merchant Power Plant. Modified condition No.9 stipulates Area Development Contribution at the rate of Rupees One Lakh per annum per MW of installed capacity. Modified condition No.16 stipulates that when the load exceeds 85% the excess capacity shall be made available to the respondent board at variable cost alone.

- d) Section 7 of the Electricity Act, 2003 states that any generating company may establish, operate and maintain a generating station without obtaining licence under this Act, if it complies with technical standards relating to connectivity with the grid referred to in clause (b) of Section 73, Section 10(2) lays down that a generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may subject to the regulations made under subsection (2) of Section 42, supply electricity to any consumer. Section 10(3)(b) stipulates that every generating company shall coordinate with the state transmission utility for transmission of the electricity generated by it. Section 7 of the Act dispenses with obtaining a licence for setting up a power plant so long as it complies with technical standards referred to in Section 73(b). Section 10(3)(b) requires a generating company to coordinate with State Transmission Utility, which is the Tamil Nadu Electricity

Board in the present case, for transmission of the electricity generated. Therefore, it is evident that neither the respondent board nor the Government of Tamil Nadu has any authority to impose conditions for setting up a Merchant Power Plant.

- e) Section 62(1)(a) of the Act states that the Appropriate Commission shall determine the tariff for supply of electricity by a generating company to a distribution licensee. Section 86(1)(b) states that the State Commission shall regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power from distribution and supply within a State. Section 86(1)(g) lays down that the State Commission shall levy fee for the purposes of the Act.
- f) The modified condition No.2 contained in Government letter No.13 dated 29-02-2008 stipulates a time limit for completion of the power plant. This contravenes section 7 of the Act which dispenses with licence for power plants. Modified condition No.4 deals with tariff which is a function of the State Commission as per Section 62(1)(a) and 86(1)(b). The modified condition No.9 stipulates Area Development Contribution of Rs.1 Lakh per annum per MW of the installed capacity. This is a recurring charge which has a direct bearing on tariff and therefore impinges on the

functions of the State Commission under Section 86(1)(b) and 86(1)(g) and Section 32(3) which empower the State Commission to levy and collect such fee and charges from the generating companies and licensees engaged in the intra state transmission of electricity. The modified condition No.16 deals with the cost of supply of power by the generator to the licensee at variable cost. This is again a function of the State Commission under section 86(1)(b)..

- g) In this context, it is to be noted that in Ground P at page 11, the petitioner has extracted the observations of Hon'ble Supreme Court to the effect that there is no restriction in Section 86(1)(f) about the nature of the dispute. The Supreme Court has observed as follows:

“After 10-06-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86 (1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”

The above contention has not been contradicted either in the counter affidavit filed by the respondent or in the arguments of the counsel for the Respondent.

In the final analysis, the Commission holds that the modified conditions Nos.2,4,9 and 16 are ultravires of the Electricity Act, 2003.

9. Conclusion

Modified conditions 2,4,9 and 16 contained in the letter MS No.13 dated 29-02-2008 of the Energy Department, Government of Tamil Nadu are ultravires of sections 7,10, 32, 62 and 86 of the Electricity Act, 2003. The Respondents are directed to refrain from enforcing the above conditions in so far as the petitioner is concerned. This order would take prospective effect viz. from the date of filing the D.R.P.No.27 of 2008. There would be no refund of Area Development Contribution if the petitioner has acquiesced in the payment of the said amount without any protest. There would be no costs.

**Pronounced in the open court by this Commission on 25<sup>th</sup> February 2009.**

(R.RAJUPANDI)  
Member

(B. JEYARAMAN)  
Member

(S. KABILAN)  
Chairman