

**BEFORE THE TAMIL NADU ELECTRICITY REGULATORY
COMMISSION**

PRESENT

Thiru S. KABILAN **Chairman**

Thiru B. JEYARAMAN **Member**

and

Thiru R. RAJUPANDI **Member**

M.P. No. 10 OF 2006 AND M.P. No. 1 of 2007

In the matter of condoning the delay for filing the petition for approving the amended and restated Power Purchase Agreement (PPA) between the Tamil Nadu Electricity Board and M/s.Tri-Sakthi Energy Private Ltd., under the Electricity Act, 2003 and approval of the PPA .

M/s.TRI-SAKTHI ENERGY PRIVATE LIMITED
No.6, Mamatha Complex,
25 (Old No.13), Whites Road,
Chennai – 600 014

... Petitioner

Vs

Tamil Nadu Electricity Board
Represented by its Chairman
800, Anna Salai,
Chennai – 600 002

... Respondent

The above miscellaneous petition was posted for final Orders of the Commission on 2nd April 2007. But before the pronouncement of the final Orders on the said date, the Commission was requested by Learned Counsels on both

sides to defer the pronouncement of the final Orders as there was a need to reconsider the matter. Subsequently, the petitioner filed M.P.No. 1 of 2007 for condonation of delay and the respondent Board filed an additional counter affidavit supporting the petitioner's stand. Several hearings were held. When the petition was posted on the 11th September 2007, the petitioner was not present. The Commission feels that it is not appropriate to keep the above petition pending. The Commission, upon perusing the records of the case passes the following

ORDER

1. Prayer of the Petitioner:

The prayer of the petitioner is that "this Commission must consider the petition in a comprehensive manner for perusal, approval and favourable discharge of this petition in favour of the petitioner and not just on the basis of delay in line with law" which the petitioner "respectfully pleads for condoning by the Commission".

2. Contentions of the petitioner company:

The Commission in accordance with section 86(1)(b) of Electricity Act, 2003 has to essentially regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensees or from other sources through agreements for purchase within the State.

The petitioner company promoted one such project which is an imported coal based power station of a single unit capacity of 525 MW christened as

'North Madras Thermal Power Project Stage III'. All the formalities upto financial closure for the above project has been completed by the petitioner company including the signing of amended and restated PPA between TNEB and the petitioner company.

Though the Commission has taken a tentative decision not to reopen or review the PPA already entered into by TNEB , yet the Commission will advise TNEB to negotiate the respective PPA whenever conditions warrant.

The petitioner company have stated that they are currently waiting for Govt. of Tamilnadu's approval for the amended and re-stated PPA executed on 19th July 1999. The petitioner company have stated that they are willing to re-open for negotiating the PPA which has been executed on 19th July 1999 in accordance with current guidelines and also the project costs based on the present conditions prevailing in the electricity industry in the country in general after such approval.

3. Contentions of the Respondent Board in the counter affidavit:

(a) Neither the Electricity Act 2003 nor the Conduct of Business Regulations of the Commission confer powers on the Commission to condone any delay in filing a petition seeking in-principle approval of the project cost and condonation of delay in filing the application for setting up a 525 MW capacity coal based thermal power plant at North Chennai under Memorandum of understanding route.

(b) The Government of India in their letter dated 20-03-2006 has clarified that where the Power Purchase Agreement has been signed and

approved by the Appropriate Commission prior to 6-1-2006 or where the Power Purchase Agreement has been signed and is pending before the Appropriate Commission on 6-1-2006, such procurement could be treated as falling outside the scope of clause 5.1 of the tariff policy, as contractual obligations for procurement of power has been firmly established in such cases. Similarly, the Ministry of Power has clarified that where appraisal of any power project has started before 6-1-06 by the relevant Financial Institution for lending funds to the project on the basis of appropriate evidence of process of procurement of power by any utility, such procurement could be treated as falling outside the scope of clause 5.1 of tariff policy, provided that in all such cases the final Power Purchase Agreement is filed before the Appropriate Commission by 30-09-06. In view of the above clarification issued by the Government of India, this respondent submits that this Commission has no jurisdiction to entertain the present petition and the petition may be dismissed summarily.

(c) The petition is not maintainable inasmuch as the Commission has no jurisdiction or authority to extend the dead line beyond 30-9-2006 allowed by Government of India.

(d) The Petitioner Company has not produced any documentary evidence to prove that as on 6-1-2006 negotiations were under way for financing the project and to achieve financial closure.

(e) Even some of the major provisions/ commitments under the initialed PPA of 19-7-1999 have totally changed . TNEB have informed the petitioner company that they will not be in a position to

provide escrow cover. The common facilities like cooling water system, coal yard, ash dyke etc., with the existing North Chennai Thermal Power Station, originally contemplated to be offered is no longer available to the petitioner. Government have directed TNEB in their letter dated 7-9-2006 to issue notice of termination of the initialed PPA dated 19-7-1999.

- (f) Petitioner company has neither approached the Respondent Board to sign the final Power Purchase Agreement nor submitted the final Power Purchase Agreement before the Commission before 30-9-2006, the dead line set by Ministry of Power for entering into Power Purchase Agreement under Memorandum of Understanding route.
- (g) Tamil Nadu Electricity Board in its Minutes of the 897th Board meeting held on 28.11.2006 accorded in-principle approval for procurement of power for a capacity 3000 MW through Tariff Based Competitive Bidding following the guidelines issued by Government of India (GOI) / Central Electricity Regulatory Commission (CERC) and accordingly issued orders in Permanent B.P.(FB) No.248 Technical Branch dated 06-12-2006.
- (h) In view of the foregoing, there is no compelling necessity for any intervention by the Commission in favour of the petitioner.

4. Contentions of the Respondent Board in the additional counter affidavit:

(a) After filing the counter affidavit the respondent received a letter dated 30-03-2007 from the Government of Tamil Nadu with a direction to offer the remarks of respondent and by letter dated 05-04-2007 the respondent has expressed its requirements of power on account of increased demand for power. It was brought to the notice of Government that the earlier PPA was in fact not terminated.

(b) In letter dated 05-04-2007, the Government of Tamil Nadu permitted the Chairman TNEB to proceed further with the already signed PPA following the usual procedure.

5. Arguments of the petitioner:

Learned Counsel for petitioner contended that TNERC has got jurisdiction to modify the power purchase agreement (PPA). He stated that the nod of Government of Tamil Nadu for the PPA is awaited and that the PPA is a valid binding agreement. He pointed out that the non-implementation of PPA by the TNEB will not preclude the petitioner from filing the PPA before the Commission for its approval.

6. Findings of the Commission:

1. The petitioner has sought condonation of delay in filing the petition for approval of the PPA. Strictly speaking, there is no delay as such in filing the petition. The petition has been filed on September 25, 2006, ahead of the deadline of September 30, 2006, prescribed in the National Tariff Policy.

2. The crucial question is whether the application fulfils the conditions laid down in the National Tariff Policy. The Government of India clarified in para 5(1) of the tariff policy to the effect that the financial appraisal of the power project should have commenced before 6-1-2006 and the final PPA should have been filed before the appropriate Commission by 30-09-2006.

3. In the instant case the PPA between Tri Shakthi Energy (P)Ltd., and TNEB was finalized on July 19, 1999. Para 3 (5) of the PPA states that TNEB should obtain the approval of Government of Tamil Nadu for this agreement. This approval of the Govt. of Tamil Nadu was not received till the deadline of September 30, 2006 and therefore, the PPA cannot be deemed to be the final one. This has been admitted by the respondent in their original counter affidavit. As a matter of fact, the TNEB has contended that the Govt. of Tamil Nadu directed them on September 7, 2006 to issue notice of termination of the PPA. Therefore, it is evident that what has been filed before the Commission is not the final PPA. The TNEB in their additional counter affidavit has stated that Government have directed them not to proceed with the above directive of September 7, 2006. But, this does not alter the situation that the PPA filed with the Commission is not the final PPA.

4. Further, the tariff policy stipulates that the appraisal of power project should have commenced before 6-1-2006 by the relevant financial institution for lending funds to the project on the basis of appropriate evidence of procurement of power. The petitioner has not produced any evidence to show that the appraisal started before 6-1-2006. The respondent's original counter affidavit

has confirmed this aspect. On this ground also, the petitioner does not fulfil the condition prescribed in the tariff policy.

5. The respondent filed their counter affidavit on 6-2-2007. 8 dates were fixed for arguments since then between 6-2-2007 and 11-9-2007, but there has been no progress in the case. The petitioner and the respondent were informed on 1-8-2007 that arguments would be heard on the question of financial appraisal and finality of PPA during the following hearing. Despite this clear direction of the Commission, neither the petitioner nor the respondent was ready for arguments. They sought further time. It is evident that they have nothing to say by way of defence.

Conclusion:

There is no justification warranting further adjournment. The petition is dismissed on the ground that the conditions laid down in the tariff policy are not fulfilled. However, the petitioner is at liberty to approach the Commission should there be a fresh cause of action. No costs.

Pronounced in open court by this commission on 25th October 2007.

R. RAJUPANDI
Member

B.JEYARAMAN
Member

S.KABILAN
Chairman.