



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**

PPAP No.03 of 2008

TCP Limited
No.4 (Old No.10)
Karpagambal Nagar
Mylapore
Chennai 600 004

... Petitioner

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

The above PPAP No.3 of 2008 came up for final hearing before the Commission on 10th November 2008. The Commission upon perusing the petition and other connected records and upon hearing both sides passes the following order, namely:

ORDER DATED 25th February 2009

1. Prayer of the Petitioner

The prayer of the petitioner is to direct the respondent Board to negotiate with the petitioner in terms of the Power Purchase Agreement (hereinafter referred to as PPA) dated 29-1-1999 for fixation of tariff rate under clause 3.26 of PPA after taking into consideration the cost involved.

2. Facts of the case

The petitioner Company entered into a PPA with TNEB on 29-1-1999. The PPA is valid for 15 years. TNEB agreed to purchase power from the petitioner as per PPA at the rates fixed therein for each year commencing from 2000 onwards. It is specifically stated in the said PPA that from 1-4-2008 the rate will be fixed after review. The petitioner seeks fixation of tariff at Rs.5.89 per unit effective from 1-4-2008 with an escalation of 5% annually.

3. Contentions of Petitioner

- (a) TNEB arbitrarily admitted only Rs.3.01 per unit as against the contracted rate of Rs.3.17, Rs.3.32 and Rs.3.49 from the year 2005-2006 onwards.
- (b) The petitioner approached this Commission for issuing suitable clarification and direction directing the respondent Board to negotiate and arrive at a fair price and in case the respondent Board refuses to act upon the said direction to fix the appropriate tariff itself.

4. Counter of the respondent Board

- (a) The petitioner company was informed by TNEB in letter dated 05-01-1998 that a minimum of 51% of the energy from the Captive Power Plant should be utilized for their own group of industries/sister concerns apart from auxiliary consumption for power generation, since the plant proposed was a Captive Power Plant. The minimum captive consumption was relaxed by TNEB in letter dated 21-01-1998. As per the policies of G.O.Ms.48 Energy, dated 22-04-1998, there was no minimum mandated consumption (51% consumption) to be consumed by the captive users.
- (b) Since, the petitioner company had accepted the rate of Rs.3.01 per kWh in the minutes of the meeting held on 18-5-2007, the company's request for payment of Rs.44,62,67,540 seems to be contrary, unjustifiable and further the petitioner is estopped from claiming huge amount and taking shelter under the PPA dated 29-01-1999, as there was a mutual understanding between the parties to freeze the rate.

(c) The petitioner company has demanded a rate of Rs.4.50 per kWh since as per their statement, the cost of power including fixed and variable cost works out to Rs.4.35 per kWh. The petitioner by letter dated 25-03-2008 addressed to the respondent Board had asked for the same rate. Since an agreement could not be reached at the negotiation meeting, it was decided to request the Company to approach this Commission, as per Section 86 (1) (b) and (f) of Electricity Act 2003, for determining the rate of Power Purchase from 01-04-2008.

5. Findings and Conclusion

5.1. The limited issue is the determination of tariff from 1-4-2008. The TNEB and the Petitioner entered into an agreement on 29-1-1999. The tariff for 1998-99 was fixed at Rs.2.25 per unit. For the following nine years, the tariff was escalated at 5% per unit as below:

<u>Year</u>	Rs./ unit
1999-2000	2.36
2000-2001	2.48
2001-2002	2.60
2002-2003	2.74
2003-2004	2.87
2004-2005	3.02
2005-2006	3.17
2006-2007	3.32
2007-2008	3.49

The tariff for the period from 1-4-2008 was to be fixed after review.

5.2. The agreement was finalised on 29-1-1999 before the Tamil Nadu Electricity Regulatory Commission was constituted. Section 185 of the Electricity Act 2003 and Clause 35 (2) of TNERC (Terms and Conditions for determination of tariff) Regulations 2005 protect the agreements concluded prior to the enforcement of the Act.

5.3. So long as the PPA between the two parties laid down specific rates for each year upto 2007-2008, the agreed rates would continue to remain valid in terms of Section 185 of the Act and Clause 35 (2) of Tariff Regulations. The PPA left the tariff beyond 1-4-2008 open for negotiation between the two parties. As per Section 62 of the Electricity Act 2003, the Appropriate Commission shall determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee. Since the PPA did not specify the rates of purchase for the later part of the period in the PPA beyond 31-03-2008, that function should be assumed by the Tamil Nadu Electricity Regulatory Commission in terms of Section 62. The above assumption is fortified by the fact that the Petitioner Company at paragraph 7.7 of their petition and the Respondent Board at paragraph 9 of their counter-affidavit have requested this Commission to fix the appropriate tariff.

5.4. The petitioner pleads for determination of tariff at par with an Independent Power Producer. Factually, the generating company of the Petitioner is a captive generating plant as per the terms of the

PPA between the two parties and therefore the Commission is unable to treat the Petitioner as an Independent Power Producer.

5.5. The Respondents have contended that the Petitioner being a Captive Generating Plant should be subjected to Order No.4 dated 15-5-2006 of the Commission and the relevant tariff should be applied to them. We refer to Clause 4 of Order No.4 dated 15-5-2006 of the Commission:-

“4.0 APPLICABILITY OF ORDER

This order shall come into force from the date of its issue. This Order shall be applicable to all future fossil fuel based continuous duty Group Captive Generating Plants and fossil fuel based cogeneration plants located within the State of Tamil Nadu. For such of those CGPs' existing but not covered by specific agreements, this order shall automatically apply. It should be noted that the existing contracts and agreements in the matter of Captive Generating Plants between the CGP Holders and the Distribution Licensee signed prior to the date of issue of this order would continue to remain in force. However, the CGP Holders and Distribution Licensees shall have the option to mutually re-negotiate the existing agreements / contracts, if any, in line with this order even before the expiry of the contracts. Any renewal of the said contracts / agreements, new contracts / agreements should be in line with this order.”

5.6. While Order No.4 protects the agreements finalized before 15-05-2006, at the same time, it enables the two parties to re-negotiate the existing agreement in accordance with the Order. In this

particular case, neither the petitioner nor the respondent moved for re-negotiation with the result that the PPA of 1999 continued to operate. The life of the PPA is for a period of 15 years upto 29-1-2014. The only open question is the tariff applicable from 1-4-2008.

5.7. As the PPA had been concluded before 15-05-2006, and as the PPA was not re-negotiated in accordance with Order No.4, the Commission holds that the contention of the respondent for fixation of tariff in accordance with the Order No.4 cannot be accepted.

5.8. This leaves the Commission with only one option, i.e. to treat the petitioner as a captive generating plant and yet determine a tariff consistent with the PPA. The PPA provides for annual escalation of 5% every year beginning from 1998-99. If this formula is adopted, the tariff for the period beyond 1-4-2008 will be as follows:

2008-09	Rs.3.66 per unit
2009-10	Rs.3.85 per unit
2010-11	Rs.4.04 per unit
2011-12	Rs.4.24 per unit
2012-13	Rs.4.45 per unit
2013-14	Rs.4.67 per unit

5.9. The Commission believes that this formula is just and fair for both parties which satisfies the spirit of the PPA as well as the requirement of Section 62 of the Electricity Act 2003.

With the above findings, PPAP 3 of 2008 is finally disposed of. No costs.

Pronounced in the open Court by this Commission on 25th February 2009.

(Sd.....)
(R. RAJUPANDI)
Member

(Sd.....)
(B. JEYARAMAN)
Member

(Sd.....)
(S. KABILAN)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission