

petition, the affidavit filed in support thereof and the counter-affidavit filed by the Respondent Board and the rejoinder affidavit filed by the petitioner for the counter-affidavit of the Respondent Board and all other connected records and upon hearing of the arguments of learned counsel for both sides, the Commission hereby makes the following:

ORDER

1. Prayer of petitioner in DRP 5 of 2006

The prayer of the petitioner in DRP No.5 of 2006 is that this Commission may issue order calling for the record culminating in the Letter bearing Ref.No.SE/NEDC/NGT/AO/(R)/ RCS/AS/A1/F.PPN-I/D /2006 dt.13-09-2006 (hereinafter referred to as the Impugned letter) issued by the Second Respondent and quash the paragraphs (ii) and (iii) of the Impugned letter relating to the demand made by the Second Respondent directing the Petitioner to pay a sum of Rs.84,01,000 and consequently the contents of the Impugned letter except for the first paragraph therein relating to the refund of excess amount to the company and direct the Second Respondent to refund forthwith a sum of Rs.70,21,017 along with interest @ 15% per annum from the date of collection of this amount.

2. Prayer of petitioner in MP 15 of 2006

The prayer of petitioner in MP No.15 of 2006 is that this Honourable Commission may be pleased to stay the operation of paragraphs (ii) and (iii) of the Impugned letter demanding the amount of Rs.84,01,00/- issued by the Second Respondent, pending disposal of the Dispute Resolution Petition.

3. Contention of Petitioner

The petitioner herein is engaged in the generation of electricity as an electricity generating company. The Petitioner is carrying on business in Tamil Nadu and has set up a 330.5 MW power generating station to generate electricity and supply the same to the Tamil Nadu Electricity Board (TNEB).

The petitioner commenced the construction activities on 1-1-1999 and declared 26-4-2001 as the Commercial Operation Date (COD).

The Petitioner states that the Respondents provided 230 KV power supply on 11-8-2000 with a temporary metering arrangement by providing two meters.

The Petitioner states that neither the Petitioner made any application to TNEB nor had TNEB called for the same prior to the date of supply namely 11-8-2000.

As per the terms and conditions of HT Service Connection to a consumer, 30 days notice has to be issued to the consumer to pay charges, meter caution deposit and service connection charges, apart from execution of an agreement.

The Petitioner in his letter dated 20-9-2000 had informed that the company would be liable for paying the maximum demand only for one Service Connection, instead of two and requested the Second Respondent to revise the bill accordingly.

The petitioner in para 13 of the petition contended that they had been paying the bills under protest for fear of disconnection. At a meeting held on 5-4-2002, it was agreed that the two alleged Services numbering 54 & 55 could have been effected through one Service with two meters installed for recording the

energy consumed for the purpose of billing. It was also agreed that action would be taken to regularise the two alleged Services as a single Service with effect from 11-8-2000, i.e. the date of power supply.

In November 2005, the Petitioner was informed orally that the First Respondent had approved and authorised for regularisation of the alleged two Service Connections to a single Service Connection and refund the excess amount collected from the Petitioner.

The Second Respondent in his letter dated 7-9-2006 informed that they have revised the billing and the amount to be refunded to the Petitioner was awaiting the report from their Deputy Chief Internal Audit Office before refund of excess amount.

The same is barred by Sec.56 of the Electricity Act, 2003 which prescribes limitation of two years.

The claim now set up by the Respondents is imaginary, fanciful, arbitrary, whimsical and totally untenable in law and has been deliberately set up with ulterior motives.

The Respondents are estopped by conduct from reopening this matter on some fanciful grounds. Limitation, waiver, estoppel and acquiescence bar any such claim by the Respondents from being entertained by any authority.

4. Contentions of Respondent Board

The contentions of Respondent Board as raised in their counter are briefly set out as follows:

- a) In view of the urgent circumstances and due to pressure of the petitioner to provide start up Power as per PPA conditions, supply

was given to this plant in this Circle under the belief that the Petitioner had already made application and paid necessary charges and deposit (ie Development charges, EMD/CCD and Registration fees) while the PPA was executed by the Petitioner with TNEB Head quarters for these start up Power HT services. The fact of non submission of application and non payment of Initial charges and deposit were not disclosed at the time of effecting the service.

- b) After the GAS Turbine at the Generating station was synchronized with the Grid on 20-02-2001 the question of treating two services for Billing did not arise.
- c) At the meeting held on 05-04-2002, TNEB informed that action will be taken to regularise the two services as a single service with effect from 11-08-2000 with a sanctioned Demand of 1000 KVA upto 20-02-2001 and revise the Bill accordingly. Petitioner informed that they are not agreeable for the billing based on 1000 KVA for the above period.
- d) Due to the objection of the Petitioner regarding regularization of M.D. in the meeting held, the revision of Bills could not be done. The same has been done only after the regularisation effected in November 2005.
- e) As per instructions from the Headquarters of TNEB, Pre Audit has been made and the same has been intimated to the Petitioner

vide Lr.No.SE/NEDC/NGT/ AO(R)/RCS/A1/F.PPN / D.529/2006 dt.7-9-2006.

f) According to the pre Audit, the refund due to revision of Bills for the period from 11-8-2000 to 26-4-2001 is Rs.70,21,017/-. The Audit has also pointed out that the initial charges (Miscellaneous charges and Current Consumption Deposit (CCD) omitted to be collected before effecting supply and for Additional Demand effected is Rs.84,01,000/- and the excess amount for refund is to be adjusted. (Enclosure No.8) The fact has been intimated vide this office Lr.No. SE/NEDC/NGT/AO.R/RCS/A.I/D. dt. 13-9-2006 to the petitioner (enclosure no.9).

g) As like as other HT Consumers, the Petitioner shall also pay the initial charges of Development charges and Registration charges for having availed the HT supply from TNEB. As per PPA Article No.4.5 "Upon the Company's request TNEB shall provide at the sole cost and expense of the Company, energy for Construction, Testing, Commissioning and Project Startups, the Company shall pay TNEB for such energy in accordance with TNEB's then prevailing tariff rate for Industrial Consumers".

The above clause in the PPA clearly indicates that the HT supply to be extended for startup Power comes under the pervue of HT Billing and hence the Company shall pay all Miscellaneous charges to TNEB.

5. Rejoinder of the Petitioner to the counter of Respondent Board

The averments of the petitioner in the rejoinder filed by them are briefly set out as follows:

- a) The Respondents herein have clearly and categorically acknowledged that they are liable to refund the sum of Rs.70,21,017/- and that it was only due to certain Pre-Audit objections these amounts were withheld from refund.
- b) The Respondents have slept over this issue and only in 2006 they have raised this demand, which is clearly barred and is based on the observations of their Pre-Audit group.
- c) The Respondent have categorically admitted that they had intimated all the concerned officials to refund the money, which was done pursuant to the meeting dated 05-04-2002 and November 2005.
- d) The Respondents herein should act in terms of the statutory provisions and therefore without any basis cannot mechanically act on the Pre-Audit Report.

6. Arguments of the Petitioner

The Petitioner has filed written submission. The main grounds as set out in the written submission are briefly set out as follows:

- a) While referring to Article 4.5 of the Power purchase agreement (PPA), the petitioner contended that the PPA contemplates a contractual obligation on the Respondent to provide energy to the Company and also contemplates an obligation on the Company to pay only “energy charges” in accordance with TNEB’s then prevailing tariff rate and

does not contemplate any other charges, MD or deposits as is assumed and allegedly demanded by the Respondent.

- b) Five years after disconnection of the SCs and four years after the approval (at the Meeting of April 05, 2002) of the admitted / acknowledged debt / refund, the Respondents now demand after a pre-audit a sum of Rs.84,01,00/- (Rupees Eighty four lakhs one thousand only) towards development charges and current consumption deposits, deposits and other charges, when (i) it is not payable as there is no service connection in existence; and (ii) they have forfeited their rights.
- c) Hence the demand by the Respondents of a sum of Rs.84,01,000/- (Rupees Eighty four lakhs one thousand only) towards other charges are fictitious, baseless and an after-thought, and more so for a Service Connection which is non-existent, just to defeat and deny the legitimate dues of the Respondents to the Petitioner.
- d) Section 56(2) of the Electricity Act, 2003 ("the Act") specifically provides for a period of two years as limitation, for recovery of any sum due from any consumer. Assuming for the sake of argument whilst not admitting the same, that the demand of the Respondents was a legitimate demand, the Respondents are barred by the Act from demanding the deposits and other charges and also in view of the submissions that it was a contractual obligation of the Respondent / TNEB.

7. Arguments of the Respondent Board as set out in the written submission

The learned counsel for Respondent Board contended that the limitation period as set out in section 56 of the Electricity Act 2003 should run only from the date of regularisation of the electricity supply to the petitioner which is made only in November 2005. As such the claim made by the Respondent Board in the impugned letter dated 13-9-2006 is not barred by limitation as laid down in section 56 of the Act. He further contended that the petitioner company having enjoyed the benefit of supply and additional supply of electricity is bound to pay the development charges and other miscellaneous charges which are paid by other HT Industrial consumers. He also contended that the petitioner company should be treated like other HT Industrial consumer.

8. Findings of the Commission

In the instant case there are five points in issue which have to be decided by the Commission. The first point in issue is whether under which date the period of limitation as laid down in section 56(2) of the Electricity Act 2003 has to be reckoned. The said section 56 (2) is reproduced below for reference:

“Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.”

The learned counsel for the Respondent Board has contended that the amount claimed by the Respondent Board in the impugned letter can be said to be due only from the date of regularisation of the supply made to petitioner that is to say 9-11-2005 and not from the date of commencement of supply. In the instant case the first billing was received by the petitioner on 1-9-2000. As per clause 13.03 of the terms and conditions of supply of electricity, every consumer shall pay to the Board from the date of commencement of supply till the agreement is terminated, current consumption charges / minimum / monthly charges / fixed charges, special guarantee if any, and other charges as provided in the tariff notifications, terms and conditions of electricity and restriction and control orders from time to time. In view of the said clause 13.03 the development charges and other charges due from the petitioner in respect of the service and additional service are payable from the date of commencement of supply which is earlier to the date of first billing i.e. 1-9-2000. The said charges cannot be said to be due from the date of regularisation of supply i.e. 9th November 2005 as contended by the Respondent Board which is contrary to the said clause 13.03 of the terms and conditions of supply of electricity. Further, it is relevant to point out that in the regularization letter dated 9-11-2005 issued by the Respondent Board (page 5 of typed set of Respondent Board) there is no mention about the sum claimed by the Respondent Board in the impugned letter.

The issue of regularisation is concerned about the merging of two service connections into one which relates to the Tariff related energy charges and not to non-tariff related issues. The payment of non-tariff related development charges was raked up only when the audit raised it. As per the audit point the date for the

cause of action should have been before the date of service connection and not from the date of regularization.

As such the amount claimed by the Respondent Board towards development charges and other charges can be said to be first due from the date of commencement of supply. Hence the period of limitation can be said to run only from the date of commencement of supply and the claim is time barred under section 56(2) of the Act.

The second point in issue is whether the petitioner who had enjoyed the benefit of service and additional service of supply is bound to pay the development charges and other charges due in respect of such service and additional service. The learned counsel for the Respondent Board has contended that the petitioner having enjoyed the benefit of service should be bound to pay the development charges. The findings made by the Commission with regard to the first point in issue above would equally hold good to this point in issue.

Moreover it may be pointed out that the petitioner has paid the electricity charges for the enjoyment of the supply. It is only the development charges and other miscellaneous charges which are disputed by the Petitioner. Art 4.5 of the PPA as relied upon by both sides reads as follows:

“Energy prior to completion Upon the Company’s request, TNEB shall provide, at the sole cost and expense of the Company, energy for construction, testing, commissioning and Project start-ups. The Company shall pay TNEB for such energy in accordance with TNEB’s then prevailing tariff rate for industrial consumers”.

The expression "prevailing tariff rate" occurring in the said Art 4.5 of PPA would refer to the tariff rates namely electricity charges and it would not refer to development charges. In the Tariff order dated 15-3-2003 the Commission has specified the tariff rates for various categories of consumers. In the miscellaneous order dated 31-8-2004 issued in MP No.41 of 2003 filed by TNEB, the Commission has dealt with the development charges and other miscellaneous charges. Development charges fall within the purview of the order dated 31-8-2004 which relates to non-tariff related charges. The above position would indicate that development charges cannot be termed as tariff so as to fall within the purview of the said Art 4.5 of PPA.

There is no mention about the collection of non-tariff related charges from the petitioner in Article 4.5 of the PPA. When that being the case, the audit remarks of liability of the petitioner to pay the development charges being the non-tariff related charge is not valid i.e. an unjustified audit remarks.

As per clause 12.01 of the Terms and conditions of supply of electricity, for the levy of development charges, it is essential for the Respondent Board to issue 30 days notice to the petitioner asking the petitioner to execute an agreement. It is only when the agreement in terms of the said clause 12.01 is executed by the petitioner, the development charges payable under Non-Tariff related charges can be levied. Without such agreement, the development charges cannot be levied and recovered from the petitioner. The PPA is different from the agreement referred to in the said clause 12.01 of the Terms and conditions of supply of electricity. The agreement executed in terms of the said clause 12.01 is the authority for the levy and collection of development charges.

There is a lapse on the part of Respondent Board in not having issued the 30 days notice as contemplated under the said clause 12.01 of the Terms and conditions of supply and not obtaining the agreement from the petitioner.

The third point in issue is whether the letter dated 7th September 2006 (page 9 of typed set of Respondent Board) will amount to acknowledgement of liability on the part of the Respondent Board as contended by the learned counsel for petitioner. Regarding this contention, it may be stated that though paragraphs 1 and 3 of the said letter dated 7-9-2006 mention about the payment of excess amount, the 2nd paragraph of the said letter refer to pre-audit which has to be done before the refund of excess amount. The statement with regard to refund of excess amount is subject to the condition of pre-audit. In view of the above, the said letter dated 7-9-2006 cannot be said to have acknowledged the liability of Respondent Board.

The fourth point in issue is that the claim of the petitioner for the refund of sum of seventy lakhs and above is barred by limitation.

The Respondent has in his written submission contended that the claim of the petitioner for the refund of the sum of Rs.70.21017 is barred by limitation. Regarding this contention it may be pointed out that when the first billing was received on 1-9-2000 by the petitioner, the petitioner raised the objection that they had never approached the Respondent Board for the two service connections. The petitioner in his letter dated 20-9-2000 represented to the Respondent Board for merger of two services into one service and for revising the bill. The Respondent Board have only in 9th November 2005 passed regularization order merging the two services into one retrospectively with effect

from the date of supply. It is only after the merger which took place in 9th November 2005, the petitioner would be able to know about the electricity charges which are over-paid by them. The cause of action for the refund has arisen only in 9th November 2005 whereas the cause of action for the claim made by the Respondent Board in the impugned letter has arisen from the date of commencement of supply itself viz., 11-8-2000. There is no limitation which has been prescribed under the Electricity Act 2003 for the petition filed by the petitioner under section 86 (1)(f) of the Act. Even under the general law of limitation, the limitation period is three years (vide Art 113 of First schedule to Limitation Act) from the cause of action for refund made by the petitioner namely 9th November 2005. The Petitioner's claim is not time-barred due under the general law of limitation.

The fifth point in issue is that whether the petitioner has to approach the Civil court of law for the refund.

The Respondent Board in its written submission has also contended that it is only the Civil court which has jurisdiction to entertain the petition of the petitioner.

The petitioner has filed the petition under section 86 (1)(f) of the Electricity Act 2003 for the adjudication of the dispute. Under section 86(1)(f) of the Act, the Commission has jurisdiction to adjudicate the dispute made by the petitioner being a generating company and the Respondent Board being a licensee. Under section 94 of the Act, the Commission has been conferred with the powers vested in a Civil court under the code of civil procedure code while discharging its functions.

In view of the fact that all the points in issue referred to above, except the third point in issue which is not a vital point, are held to be in favour of the petitioner, the prayer of the petitioner will have to be allowed.

9. Conclusion

In the above circumstances the prayer in sub-paragraph (i) of para 38 of the petitioner is allowed. The Respondent Board is directed to refund a sum of Rs.70,21,017 without interest to the petitioner.

As regulation 12(2) of TNERC supply code which relates to refund of excess amount paid by a consumer does not provide for any interest, the Commission is of the view that the interest of 15% per annum as claimed by the petitioner need not be granted. There would be no cost.

Pronounced in open court by this commission on the 2nd April 2007

(B.Jeyaraman)
Member

(S.Thangarathnam)
Member

(S.Kabilan)
Chairman