

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 98 of 2011**

**Dated : 3<sup>rd</sup> January, 2012**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**In the matter of:**

**Tamil Nadu Newsprint and Papers Limited .... Appellant (s)**  
No.67, Mount Road,  
Guindy,  
Chennai – 600 032

**Versus**

**1) Tamil Nadu Electricity Board ..... Respondent (s)**  
144, Anna Salai  
Chennai – 600 002

**2) Tamil Nadu Electricity Regulatory Commission**  
No.19A, Rukmini Lakshmi pathy Salai  
Egmore  
Chennai – 600 008

Counsel for the Appellant (s) : Mr. V.M. Shiva Kumar  
Mr. A. Punnambalam  
for TNPL  
Mr. K.P. Bala Murali

Counsel for the Respondent (s) : Mr. S. Vallinayagam  
for R-1  
Mr. Subbura J.

## **JUDGEMENT**

### **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

This appeal has been filed by Tamil Nadu Newsprint and Papers Limited against the order dated 20.04.2011 passed by the Tamil Nadu Electricity Regulatory Commission ("State Commission") regarding tariff for supply of power from the captive power plant of the appellant to Tamil Nadu Electricity Board ("Electricity Board").

2. The appellant is in the business of manufacture of newsprint and printing and writing papers using bagasse as primary raw material. It also operates a fossil fuel based captive power plant for captive consumption as well as for supplying surplus

power to the Electricity Board. The Electricity Board and the State Commission are the first and the second respondents respectively.

3. The brief facts of the case are as under:

3.1 The State Government issued a policy on captive power generation vide its Order No.48 dated 22.04.1998 including the tariff applicable for the supply to the Electricity Board.

3.2 The Electricity Board in the year 2001 approved the proposal of the appellant to install a 24.62 MW captive co-generation plant at its paper plant and to export its surplus power to the Electricity Board including the tariff for supply of its surplus power.

3.3 Based on the above approval, the appellant entered into an agreement with the Electricity Board on 17.10.2001 for supply of surplus power for a period of five years. The tariff agreed under the agreement was Rs.2.25 per kwh during the FY 2001-02, to be escalated by 5% every year over the tariff for the previous year. The rate agreed between the appellant and the first respondent were lower than that decided by the State Government under its captive power policy. The purchase price for the FY 2005-06 was Rs.2.73 per kwh and with mutual consent the same rate was adopted for the FY 2006-07. The agreement expired on 16.10.2006.

3.4 On 15.05.2006 the State Commission issued its Order No.4 deciding the tariff applicable to captive and co-generation plants.

3.5 In October, 2006, the appellant approached the first respondent for renewal of the agreement. The first respondent instead of renewing the agreement in terms of the order 4 dated 15.05.2006 of the State Commission, by its order dated 27.10.2006 approved the renewal of the agreement from 17.10.2006 for the period of three years at the prevailing rate of Rs.2.73 per unit, without any escalation.

3.6 Subsequently, the respondent no.1 by its order dated 10.04.2008 refixed the purchase rate for energy supplied by the appellant at Rs.3.01 per

kwh for the period 17.10.2006 to 31.03.2008 and thereafter to follow the guidelines proposed by the State Commission.

3.7 Finally, the appellant and the first respondent entered into an agreement for sale of surplus power from the appellant's captive power plant on 06.03.2009 for a period of three years from 17.10.2006 extendable for further period based on the mutual agreement between the parties. According to the agreement, the rate for power purchase was linked to the frequency in accordance with the Central Commission's UI rates subject to floor rate of Rs.2.10 per kwh and the ceiling rate of Rs.3.45 per kwh. The rate for infirm power was 90% of the applicable rate for firm power.

3.8 The appellant raised a supplementary bill for the period 17.10.2006 to 31.03.2008 for the difference in tariff and raised a bill @ Rs.3.01 per kwh from April, 2008 onwards on the first respondent. However, the first respondent did not agree the enhancement of tariff at Rs.3.01 per kwh.

3.9 The first respondent in September, 2009 filed a petition before the State Commission seeking for fixing purchase price for the power supplied by the appellant for three year period with effect from 17.10.2006.

3.10 The State Commission passed the impugned order dated 20.04.2011 holding that the tariff for the period 17.10.2006 to 15.09.2009 would be

Rs.2.73 per kwh and for the period from 15.09.2009 in accordance with the Order No.4 dated 15.05.2006 of the State Commission.

3.11 Aggrieved by the above order dated 20.04.2011 of the State Commission, the appellant has filed this appeal.

4. The appellant has submitted as under:

4.1 The State Commission has erroneously fixed the tariff at Rs.2.73 per kwh for the period 17.10.2006 to 15.09.2009 without considering the State Government's Policy for captive power generation.



4.2 The State Commission should have considered that the annual escalation of 5% in tariff was allowed to the appellant upto 16.10.2006.

4.3 The order is also discriminatory as in a similar case the State Commission had allowed the benefit of 5% escalation in tariff in accordance with the Government Policy.

4.4 The respondent no.1 had always represented to the appellant that it would be entitled to purchase price of Rs.3.01 per kwh. The respondent no.1 had already used the power from the appellant and is now estopped from holding out otherwise after a lapse of more than two years.

4.5 The State Commission failed to notice that the period of October 2006 to October 2009 took place during the transition period of the State Commission's orders on tariff fixation for various categories.

5. According to the counter affidavit filed by the first respondent, the appellant had agreed to supply power at the rate of Rs.2.73 per kwh for the period 17.10.2006 to 06.03.2009 but the appellant approached the Government of Tamil Nadu to get the tariff fixed at Rs.3.01 per kwh. Thereafter, first respondent vide its order dated 10.04.2008 approved the rate of Rs.3.01 from 17.10.2006 to 31.03.2008 and to follow the guidelines proposed by the State Commission

thereafter. According to the PPA dated 06.03.2009 for a period of three years from 17.10.2006, the rate of power purchase agreed is linked to the prevailing UI rate subject to floor and ceiling rates. The rate for purchase of infirm power was 90% of the applicable rate of firm power. The State Commission by order dated 15.05.2006 had made it mandatory that ABT meter should be fixed for frequency linked tariff (UI tariff) and generators were required to install ABT meter for recording electricity supplied by them. The appellant did not install ABT meters and was selling only infirm power. In the circumstances, the appellant was paying the rate of Rs.2.73 per kwh, which is between the floor rate of Rs.2.10 per kwh and ceiling rate of Rs.3.45 per kwh. Further, the appellant was entitled to get only

90% of the tariff of Rs.2.73 per kwh in view of infirm nature of power supplied by it. The jurisdiction to determine the tariff after coming into effect of the Electricity Act is only with the State Commission. Accordingly, the two orders of the respondent no.1 dated 27.10.2006 and 10.04.2008 fixing the tariff applicable to the appellant were ultra vires and correctly struck down by the State Commission. The government policy relied upon by the appellant ceases to have effect after the coming into existence of the State Commission.

6. We have heard the Ld. Counsel for the appellant and Ld. Counsel for the respondent no.1. In view of the rival contentions submitted by the parties,

the following issues would arise for our consideration:

- i) Whether the State Commission was correct in fixing the tariff for supply of surplus power by the appellant to the respondent no.1 for the period from 17.10.2006 to 15.09.2009 i.e. till the date of installation of ABT meter, at a fixed rate of Rs.2.73 per kwh?
- ii) Whether the State Commission was correct in fixing the tariff contrary to the State Government Policy for captive power generation?
- iii) Whether the impugned order of the State Commission is discriminatory to the appellant?

- iv) Whether the State Commission could have reduced the rate even though the respondent no.1 had in principle agreed to pay the rate in line with the tariff for captive power generation decided under the State Government's Policy?
7. All the above issues are intercontected and, therefore, we would be dealing with them together.
8. The first PPA entered into between the appellant and the respondent no.1 was dated 17.10.2001 which was effective for a period of five years. The tariff for power sold during the year 2001-02 was Rs.2.25 per kwh which was to be escalated by 5% every year on the previous year's tariff.

9. The tariff decided by the State Government under its policy for captive power plants for the firm power in its Order No.48 dated 22.04.1998 for the year 1998-99 was Rs.2.25 to be enhanced by 5% every year for the next nine years. The rate of infirm power was at 75% of the rate for firm power.
10. The rate agreed in the PPA dated 17.10.2001 between the appellant and the first respondent and that decided under the policy of the State Government as per its order dated 22.04.1998 for the firm power are as under:

<b>Year</b>	<b>Rate as per PPA dated 17.10.2001 'Rs per kwh'</b>	<b>Rate for firm power as per State Government Policy 'Rs per kwh'</b>
2001-02	2.25	2.60
2002-03	2.36	2.73
2003-04	2.48	2.87
2004-05	2.60	3.01
2005-06	2.73	3.16

Thus the rate agreed between the parties in the PPA dated 17.10.2001 were lower than that fixed for firm power under the State Government Policy. The above PPA expired after its term of five years on 16.10.2006.

11. It is noticed that the State Commission's Order No.4 dated 15.05.2006 applicable to captive and co-generation plants came into force from the date of issue for all future power plants. However, according to the order, the existing agreements between the captive power plants and the distribution licensee prior to the date of issue of order would have continued to remain in force and any renewal of the said agreements and new



agreements had to be in line of the Order No.4 dated 15.05.2006.

12. The first PPA dated 17.10.2001 between the appellant and the respondent no.1 expired on 16.10.2006, i.e. after the issuance of Order No.4 dated 15.05.2006. Thus the renewal of the agreement should have been made in accordance with the Order No.4 of 2010, immediately after the expiry of the first agreement.

13. However, the appellant continued to supply power to the respondent no.1 and the respondent no.1 continued to avail power without signing any PPA till 06.03.2009.

14. The respondent no.1 first decided to continue to purchase power w.e.f. 17.10.2006 at Rs.2.73 per kwh by its order dated 27.10.2006. However, later by its order dated 29.03.2008 re-fixed the tariff at Rs.3.01 per kwh for the period 17.10.2006 to 31.03.2008 and thereafter to follow the order of the State Commission.
  
15. Even though the appellant denied that it had accepted the rate of Rs.2.73 per kwh after the expiry of the first agreement on 16.10.2006, the Ld. Counsel for the respondent no.1 has submitted a copy of letter dated 11.10.2006 from the appellant agreeing for sale of surplus power at the rate of Rs.2.73 per kwh on renewal of the PPA. We also notice that the order dated 27.10.2006 issued by the first respondent also indicated that

the appellant had agreed to continue to supply power at Rs.2.73 per kwh for a period of three years. The order dated 10.04.2008 issued by the respondent no.2 also mentions that the appellant on expiry of the first agreement had agreed to extension of the agreement for a period of three years at Rs.2.73 per kwh by its letter dated 11.10.2006

16. Let us now examine the findings of the State Commission. The relevant extracts are reproduced below:

*“5.1 The petitioner and the respondent entered into a Power Purchase Agreement for a period of 5 years effective from 17-10-2001 for purchasing the surplus power from the 24.62 MW captive co-generation plant of the respondent at Pugalur. The agreement fixed a rate of Rs.2.25 per unit for 2001-02 with 5% annual escalation as per BP (FB) No.58 dated 12-5-2001. The purchase price during 2005-06 was Rs.2.73 per unit. With mutual*

*consent, the same rate was adopted for 2006-07. The agreement expired on 16-10-2006.”*

*“5.4 Vide (Per) B.P. No.61, Technical Branch, dated 10-4-2008, the TNEB agreed to fix the rate of Rs.3.01 per unit for the period from 17-10-2006 to 31-3-2008 and thereafter to follow the guidelines proposed by TNERC. The prayer of the TNEB is for the Commission to fix the tariff for the period from 17-10-2006 till 15-9-2009, the date of installation of ABT meters by TNPL.”*

*“5.5 We wish to observe that whatever agreement was entered into prior to the enforcement of Electricity Act, 2003 between the parties is protected by Section 185 of Electricity Act, 2003 and accordingly the tariff of Rs.2.73 is approved upto 16-10-2006. After the enforcement of the Electricity Act 2003 on 10-6-2003 the powers of tariff determination have been vested in State Electricity Regulatory Commissions and therefore the proceedings of the TNEB in (Per) B.P.(FB) No.227, Technical Branch dated 27-10-2006 and Per. B.P.(FB) No.61, Technical Branch, dated 10-4-2008, which determined tariff effective from 27-10-2006 are struck down as ultra vires of Electricity Act, 2003.*

*5.6 The TNPL stated during the arguments that in accordance with (Per) B.P. (FB) No.61, Technical Branch dated 10-4-2008 they have*

*raised invoices retrospectively for the period from 17-10-2006 to 31-3-2008 at the rate of Rs.3.01 per unit. But, since the BP has been declared ultra vires of the Electricity Act, 2003, the tariff fixed by the TNEB is struck down. For the limited period from 17-10-2006 upto 15-9-2009, the TNPL raised the bill at the rate of Rs.2.73 per unit, which was settled by TNEB in full. After 15-9-2009, the rates would be as per Order No.4 of 2006.”*

*“5.8 The TNPL was as much at fault as the TNEB for signing a contract on 6-3-2009 to bring the TNPL under Order No.4 of 2006 of the Commission without installation of ABT Meters, which were installed subsequently on 15-9-2009, six months after execution of the contract.”*

The State Commission struck down the two orders of the respondent no.1 dated 27.10.2006 and 10.4.2008 as ultra vires of the Electricity Act, 2003 and decided the tariff from 17.10.2006 to 15.09.2009 at Rs.2.73 per kwh and thereafter in accordance with its Order No.4 dated 15.05.2006.

17. Keeping in view the circumstances of the case, we are in agreement with the above findings of the State Commission. We do not agree with the contentions of the Ld. Counsel for the appellant that the tariff as per the State Government Policy dated 22.04.1998 should be applicable. After the enactment of the 2003 Act, the tariff has to be determined by the State Commission and not in terms of the State Government's Policy which was issued in the year 1998 prior to the enactment of the 2003 Act.

18. According to the Ld. Counsel for the appellant the tariff should have been escalated @ 5% every year as per the terms of the PPA dated 17.10.2001. The first PPA dated 17.10.2001 had expired on 16.10.2006. Therefore, the annual escalation of

5% agreed under this PPA would not be relevant for the subsequent period. After the expiry of the PPA dated 17.10.2001, the new PPA for the period from 17.10.2006 onwards should have been entered into as per the terms of the Order No.4 dated 15.05.2006. However, this was not done, immediately after the expiry of the first agreement. The respondent no.1 first vide its order dated 20.07.2006 fixed the tariff at Rs.2.73 per kwh and thereafter by its order dated 10.04.2008 refixed the tariff as Rs.3.01 per kwh. Accordingly, the State Commission has correctly struck down the orders of the respondent no.1 fixing the tariff for the period after 16.10.2006 as ultra vires.

19. We also notice that the appellant vide its letter dated 11.10.2006 had given an undertaking to the respondent no.1 to sell its surplus power at the rate of Rs.2.73 per kwh.
  
20. We also notice that the rate for power purchase agreed in the renewed agreement dated 06.03.2009 entered into between the appellant and the respondent no.1 is linked to frequency in accordance with the prevailing UI rate subject to floor rate of Rs.2.10 per kwh and the ceiling rate of Rs.3.45 per kwh. In the absence of ABT meters at the power plant of the appellant frequency linked tariff as agreed in the agreement could not be applied in the interim period from 17.10.2006 to 15.09.2009. The State Commission has correctly held that the appellant was as much at



fault as the respondent no.1 for signing an agreement on 06.03.2009 to bring the supply from the appellant's captive power plant in line with Order No.4 of 2006 of the State Commission without installation of the requisite ABT meters which were installed subsequently on 15.09.2009. The State Commission decided the rate for the period from 17.10.2006 to 15.09.2009 at Rs.2.73 per kwh and thereafter as per the Order No.4 dated 15.05.2006 of the State Commission. We do not find any reason to interfere with the order of the State Commission.

21. The Ld. Counsel has argued that the State Commission in another order dated 25.02.2010 in case no.3 of 2009 in the matter of Tamil Nadu Electricity Board Vs M/s. Sun Paper Mills Ltd had

decided a higher tariff for supply of power from captive power plant according to the PPA. This order is not under challenge and, therefore, we can not go into the facts of the case and findings of the State Commission in this case.

22. In view of above we dismiss the appeal being devoid of any merit, without any cost.

23. Pronounced in open court on 3<sup>rd</sup> day of January, 2012.

**(Mr. Justice P.S. Datta)**  
**Judicial Member**

**(Mr. Rakesh Nath)**  
**Technical Member**

√

**REPORTABLE/NON-REPORTABLE**

**mk**