Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:3rd Apr, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 240 of 2013

Tamil Nadu Generation and Distribution Corporation Ltd
144, Anna Salai
Chennai-600 002

... Appellant

Versus

1. **M/s. Lanco Tanjore Power Company Limited**
   3rd Floor, 25, G.N Chetty Road,
   T. Nagar,
   Chennai-600 017

2. **Tamil Nadu Electricity Regulatory Commission**
   TIDCO Office Building,
   No.19-A, Rukmini Lakshmipathy Salai,
   Egmore, Chennai-600 008

Respondent(s)

Counsel for the Appellant : Mr. S Vallinayagam

Counsel for the Respondent (s): Mr. Vijay Narayan, Sr. Adv.
Mr. Vinod Kumar
Mr. Abraham Vishal Jacob
Mr. S Gowtham
Mr. R. Chandrachud

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO), is the Appellant herein.

2. The Appellant has filed this Appeal as against the Impugned Order dated 15.7.2013 passed by the Tamil Nadu State Commission.

3. The State Commission in the Impugned Order while rejecting the claim of the Appellant, quashed the demand notice by holding that the demand of Rs.1,59,57,115 made by the Appellant through the demand notice dated 26.8.2010 towards the Low Power Factor Penalty, Maximum Demand Charges and Development Charges in respect of power supplied by the Appellant to the Generating Company, the Respondent during the period when the Respondent's power plant was on its testing and commissioning stage was not valid in law.

4. The short facts are as follows:

   (a) The Appellant, the Distribution Company entered into a Power Purchase Agreement with M/s. Lanco Tanjore Power Company Limited, the Generating

Company, the First Respondent for the purchase of 113.2 MW of electricity on 1.9.2003.

(b) The Respondent-1 is an independent Power Producer selected through an international competitive bidding process to construct, run and operate a 113.2 MW natural gas based power plant. As per the PPA dated 1.9.2003, the entire power generated by the plant was to be supplied to the TANGEDCO, the Appellant.

(c) The Power Purchase Agreement dated 1.9.2003 sets out the rights and obligation of the parties concerning the start-up of the plant, generation and supply of the power.

(d) Prior to commencement of the commercial operation, the turbines and other equipments used at the plant have to be tested. For completing the commissioning and testing phase of the power plant, power supply was required to be provided to the Respondent Company as per the terms of the Power Purchase Agreement.

(e) The Power supplied by the Appellant to Respondent Company during the period of testing and commissioning of the plant was used for testing the equipments to ensure that the turbines are running at desired loads and generating continuous power.

(f) As per the provisions of the PPA, the Appellant has obligation to supply power to the project at different stages. They are as follows:

(i) Construction stage;

(ii) Testing and commissioning stage

(iii) After the date of Commercial Operation;

(g) The Generating Company, the Respondent completed the construction works relating to the switch yard and GTG by September, 2004. Thereupon, the Respondent made repeated requests to the Appellant to provide power for testing and commissioning of the equipments from October, 2004 onwards. After such repeated requests, the Appellant provided the power for testing and commissioning w.e.f 31.12.2004 up to 10.8.2005.

(h) After testing and commissioning the equipments, the Appellant allowed the synchronization of Gas Turbine on 18.2.2005 enabling the Generator to generate firm power in open cycle.

(i) While providing the power for testing and commissioning, the Appellant fixed net sanctioned demand for the power supplied to the Respondent. Apart from the Energy and Demand Charges, the Respondent was asked to pay towards low power factor penalty also.

The Respondent, at that stage, paid the entire amounts levied in the invoices.

(j) Having realized that the Respondent Company was not liable to pay any charge other than the Demand and Energy Charges, on 15.9.2005, the Respondent Company sent a letter to the Appellant stating that the Respondent ought not to have been charged for the power supplied for testing and commissioning other than the Energy Charges and Demand Charges and thereby requesting the Appellant to refund the amount which had already been paid as per the demand.

(k) In pursuance of the said request, the matter was placed before a Three Member Committee comprising of Chief Engineer (PP), Chief Financial Controller and Executive Director (Operations) by the Appellant to go into the question of refund.

(l) The said Committee, after discussion, took a decision to refund the amount of Rs.77,33,115/- collected from the Respondent towards the low power factor penalty during the period from 31.12.2004 to 10.8.2005. As per this decision, the said amount was refunded to the Respondent Company on 20.02.2007.

(m) After a lapse of more than 4 years, the Appellant sent a Demand Notice dated 29.3.2010 calling upon the Respondent Company to pay a sum of Rs.1,59,57,115

towards maximum demand charges, development charges and low power factor penalty charges for the power supplied to the plant for testing and commissioning during the period between 31.12.2004 and 10.8.2005.

(n) Challenging this demand notice, the Respondent Company filed the Writ Petition in April, 2010 in Madras High Court and obtained interim injunction as against the demand made by the Appellant.

(o) Ultimately, the High Court by the order dated 7.7.2010 disposed of the said Writ Petition holding that since Show Cause Notice was not issued to the Respondent Company by the Appellant prior to the issuance of the demand notice dated 29.3.2010, the said demand notice shall be construed to be show cause notice and accordingly directed the Respondent Company to give a reply to the said demand notice to the Appellant which would in turn, decide the matter after taking into consideration of the reply.

(p) In pursuance of the said direction, on 27.7.2010, the Respondent Company sent a reply to the said notice dated 29.3.2010 made by the TANGEDCO requesting the demand notice to be withdrawn. But, rejecting the said reply, the Appellant sent demand notice on 26.8.2010 directing the Respondent Company to make the payment of the amount mentioned in the Show Cause Notice dated 29.3.2010 within 15 days. Thereupon, the Respondent

Company filed another Writ Petition in September, 2010 and obtained the interim injunction as against the notice dated 26.8.2010. However, ultimately, the High Court by the Order dated 23.11.2010, disposed of the Writ Petition and directed the Respondent Company to approach the State Commission for resolving the said dispute.

(q) Under those circumstances, the Respondent Company filed a Petition in DRP No.9 of 2011 seeking for the adjudication over the dispute between the Appellant and Respondent. The Appellant filed counter Affidavit stating that the Respondent Company was liable to pay the said amount as per the Tariff Order, 2003 and Tamil Nadu Supply Code.

(r) After hearing both the parties, the State Commission passed the Impugned order dated 15.7.2013 allowing the Application filed by the Respondent holding the following:

a) The Generator, the Respondent who is delivering the entire power to the Appellant's Grid is not a consumer.

b) The payment of capacity charges and energy charges for power drawn during the testing and commissioning period and the Commercial Operation Period shall be in accordance with the PPA.

c) The demand for Low Power Factor Penalty, Maximum Demand Charges and Development Charges amounting to Rs.1,59,57,115/- cannot be recovered from the Generating Company.

d) Accordingly, the Demand Notice dated 26.8.2010 issued by the TANGEDCO is set aside.

(s) Aggrieved by the said Order, the Appellant has presented this Appeal.

5. The Appellant has urged the following contentions in this Appeal:

a) The State Commission may be right in holding that a Generator who entered into a PPA with the licensee for supplying the entire power cannot be treated as a consumer for the purpose of availing start-up power. But in this case, the power has been provided not for availing start-up power but for testing and commissioning the operation before the Commercial Operation Date. Therefore, it is wrong on the part of the State Commission to hold that the Respondent Company which has drawn the power for testing and commissioning prior to commercial operation was not to be treated as a consumer.

b) The power for testing and commissioning is different from the power for start-up. The former is prior to Commercial Operation Date and the later is post Commercial Operation Date.

c) The State Commission has wrongly held that the Respondent Company was liable to make the payment of Demand and Energy Charges only and not the other charges. The provisions of PPA do not state that the Generating Company will pay only the demand and energy charges. The PPA provides that the Generating Company is liable to pay on the same line as the then prevailing tariff charged by the Board for High Tension Tariff III or Low Tension Part C Temporary Tariff, depending upon the load requirement.

d) The judgments cited by the Respondent Company deal with the question of a Generating drawing only the start-up power and not the charge in question. In those judgments, the question was raised as to whether the Generating Company can be termed as a consumer merely because it would be drawing start-up power from the Grid occasionally. Those judgments did not deal with the issue of power supplied by the licensee for testing

and commissioning of the project under the HT Service Connection.

e) The Tariff Order 2003 was applicable to the tariff paid by the Respondent Company. Therefore, the Appellant has no authority under the Electricity Act, 2003 to refund the amount collected. The State Commission cannot hold that the provisions of the PPA would prevail over the Tariff Order passed by the State Commission under the Electricity Act, 2003.

f) The Tamil Nadu State Commission notified its Supply Code which is effective from 1.9.2004. Revision of Development Charges for effecting new service connections was approved by the State Commission and became effective from 1.10.2004. The Respondent Company sought HT service connection for testing and commissioning of its power plant on 31.12.2004. Therefore, the Respondent Company is liable to pay these charges as per the provisions of Tariff Order, 2003 and Tamil Nadu Supply Code which came into effect from 1.9.2004.

6. The learned Counsel for the Respondent Company refuted these submissions and contended on the basis of the

various findings given by the State Commission in the Impugned order that the conclusion arrived at by the State Commission was perfectly in accordance with the law.

7. In the light of the rival submissions made by both the parties, the question that may arise for consideration in this Appeal is as follows:

> "**Whether the findings of the State Commission that the Generator is liable to pay only demand and energy charges as per the PPA and not other charges namely Maximum Demand Charges, Low Power Factor Penalty and Development Charges as applicable to a consumer for power consumed for testing and commissioning of the Generating Plant before the Commercial Operation Date is justified in the light of the Tariff Order and Supply Code ?**

8. Before delving into the question framed above, it would be necessary to refer to the issues framed by the State Commission in the Impugned order. The State Commission framed two issues which are as follows:

> *(a)* Whether the demand Notice dated 26.8.2010, issued by the Electricity Board claiming an amount of Rs.1,59,57,115/- for the power supplied to the Generating Company during the testing and

commissioning stage during the period between 31.12.2004 and 11.8.2005 is valid or not ?

(b) Whether the Generating Company is entitled to the deemed Generation as claimed by the Generating Company amounting to Rs.31,96,03,798/- ?

9. The State Commission in respect of the First issue held in favour of the Generating Company and set aside the demand Notice dated 26.8.2010.

10. In respect of the Second Issue regarding the claim for deemed generation made by the Generating Company, the State Commission rejected the claim of the Respondent Company.

11. As far as the 2nd issue in which the claim of the Generating Company was rejected, there is no Appeal preferred by the Respondent Generating Company.

12. However, the Appellant, the Electricity Board has filed this Appeal aggrieved by the findings in respect of the first issue quashing the demand notice dated 26.8.2010 issued by the Appellant.

13. Let us now refer to the analysis and findings of the State Commission in the Impugned Order. The same is as follows:

"7.8.6 The TNEB / TANGEDCO during arguments reiterated their stand that they levied the charges correctly for the Low Power Factor Incentive, Excess Demand Charges and Development Charges as per the Tariff Orders of the Commission, TNERC Supply Code and as per the audit Para of the learned Accountant General. The Commission has perused the pleadings of the parties and also the arguments. Going by the Judgements of APTEL in the above referred cases, it is clear that a generator who has a PPA with the Licensee for supplying the entire power cannot be treated as a consumer for the purpose of availing start-up power. This could either be for testing and commissioning operations prior to commercial operation or for availing start-up power subsequent to declaration of commercial operation. Further, the PPA talks of payment of demand charges and energy charges only. The Tariff Regulations of this Commission as extracted in Para 6.5 recognizes the existing contracts.

7.8.7 A combined reading of all these provisions lead us to the conclusion that the Petitioner Generator herein is not to be treated as a consumer and should not be charged for the start-up power whether before or after the commercial operation date as a consumer. He should be charged in accordance with the PPA and levied the demand charges and the energy charges only.

7.8.8 Further, the various provisions of the PPA extracted in Para 7.5 of the order clearly indicates that the Petitioner shall pay the Demand Charges and Energy Charges (actually consumed on this account in terms of kwhr) on a monthly basis for the supply provided for construction, testing and commissioning of the project. As regards the supply provided for start-up power after commissioning of the units, the same

shall be on the basis of "net metering" in line with the tariff fixed for the generator as per Section 7.2 and 7.3 of the PPA.

7.8.9 In the light of the above discussions, the Commission concludes that the Petitioner Generator who is delivering the entire power to the Respondent TNEB / TANEDCO is not a consumer. The payment of capacity charges and energy charges for power drawn during the testing and commissioning period and thereafter during the Commercial Operation period shall be in accordance with the PPA entered into between the parties. Consequently the demand for Low Power Factor Penalty, Maximum Demand Charges and Development Charges amounting to Rs.1,59,57,115/- cannot be recovered from the Petitioner. Accordingly, the claim of TNEB / TANGEDCO in Notice dated 26.08.2010 in this regard is set aside".

14. The gist of the findings referred to above is given below:

(a) **The Generator, who has entered into the PPA with the licensee for supplying the entire power, cannot be treated as a Consumer for the purpose of availing start-up power as laid down by this Tribunal. This could either be for testing and commissioning operation prior to the commercial operation or for availing start-up power subsequent to declaration of commercial operation. Therefore, the Generator cannot be treated as a consumer and should not be charged for the power supplied by the Electricity Board**

whether before or after the commercial operation date as a consumer. The Generator should be charged in accordance with the PPA as such, the demand charges and energy charges could alone be levied on the Generator.

(b) **Various provisions of the PPA would indicate that the Generating Company shall pay demand charges and energy charges alone for the power actually consumed on this account on monthly basis for the supply provided for construction, testing and commissioning of the project. With regard to the supply provided for start-up power after the commercial operation date, the same shall be on the basis of the net-metering in line with the tariff fixed for the generator as per the provisions of the PPA.**

(c) **In view of the above, it is concluded that the Generating Company who is supplying the entire power to the TNEB/TANGEDCO, is not a consumer. Consequently, the demand for low power factor penalty, maximum demand charges and development charges amounting to Rs.1,59,57,115/- which are the charges other than the demand and energy charges cannot be recovered from the Generating Company.**

Hence, the Demand Notice issued by the TANGEDCO dated 26.8.2010, is not valid in law. Accordingly, it is set aside.

15. In the light of these findings, we shall consider the plea made by the Appellant.

16. According to the Appellant, the power supplied by the Board for testing and commissioning of a power plant and the Tariff Regulations, 2003 cannot be held to be a start-up power and since the power had been used by the Generator prior to the commercial date of operation for testing and commissioning, the Generating Company who applied for and got a HT III Service Condition shall be treated as a consumer but the State Commission without adducing any reason has simply held that the Tariff Order of 2003 and the Supply Code Regulations, of 2004 were not applicable.

17. In the light of the above contention urged by the Appellant we shall first analyse the question as to whether the Respondent Company could be treated as the consumer in view of the terms of the PPA.

18. According to the Respondent Company, it should not be treated as a consumer in view of the terms of the PPA as interpreted by the State Commission with reference to this aspect.

19. As per the scheme of the PPA, the Respondent Company cannot be treated as a consumer when availing power for testing and commissioning purposes. As per the provisions of the PPA, the Appellant has obligation to supply power to the project at different stages. The first is the construction stage. This is dealt with Article 3.3 (c) of the PPA. The second stage is testing and commissioning stage. This is dealt by the Article 3.3 (f) of the PPA. The next stage is supply of power by the Board after the date of Commercial Operation. This is dealt with by the Article 3.3 (g) of the PPA.

20. In the present case, we are more concerned with the Article 3.3 (f) of the PPA. This Article obligates the Appellant to supply power to the Generating Company required for testing and commissioning of the plant pursuant to Schedule-I of the PPA. The said Article provides that the tariff charged for the power required for testing and commissioning shall be on the same lines as the then prevailing tariff charged for HT Tariff-III. This Article further specifies that the Generating Company shall pay for demand charges and energy charges actually consumed for testing and commissioning purpose on a monthly basis.

21. The Respondent Company from October, 2004 onwards made requests to the Appellant predecessor i.e. the Electricity Board to provide power for testing and

commissioning of the equipment from October, 2004 onward. Ultimately, the power for testing and commissioning was provided by the Electricity Board for the period from 31.12.2004 till 10.8.2005. While doing so, the Electricity Board did not fix any sanction demand for the power supplied to the Generating Company. In the bills relating to the power supplied during the period, a permitted maximum demand charge has been referred to as NIL. However, apart from the energy charges at Rs.5 per unit and demand charges at Rs.300 KVA on recorded demand, the Board levied low power factor penalty also. At this stage, the Generating Company paid the entire amount levied in the invoices.

22. Thereupon, the gas turbine of the plant was synchronized with the Grid on 18.2.2005 enabling the plant to generate firm power in open cycle.

23. Then the Generating Company had offered to supply electricity Board the firm power on being paid fixed charges in addition to variable charges.

24. After several requests, the Electricity Board purchased the firm power generated in open cycle mode from 14.5.2005 to 14.7.2005 on ad-hoc price of Rs.1.86 per unit even though the Tariff during the period was Rs.2.28 per unit prescribed under the PPA.

25. At that stage, the Respondent Company sent a letter on 15.9.2005 requesting the Board that after the Gas turbine was synchronized with the Grid on 18.2.2005, the Respondent Company was liable to pay charges for the power supplied for testing and commissioning at the same rate at which it was being paid for the power supplied to the Board. On this basis, the Respondent Company requested for refund of the excess amount collected from the Company in respect of the power supplied from 31.12.2004 to 11.8.2005.

26. The said request of the Company was placed before the Three Member Committee comprising of the Chief Engineer (PPP), Chief Financial Controller and Executive Director (Operations) by the Appellant.

27. This Committee examined the request made by the Company and discussed the matter and ultimately submitted its report to the Appellant recommending for the refund of the excess amount collected on account of Low Power Factor Penalty. Accordingly, the refund of Rs.77,33,116.80 was sanctioned and the same was refunded on 8.1.2007.

28. Thus, the request for the refund had been acceded by the Committee and the report of the Committee was acted upon by the Appellant.

29. After about 3 years of the refund of the amount, the Appellant suddenly for the first time raised demand through its notice dated 29.3.2010 claiming a sum of Rs.1,59,57,115/- from the Generating Company towards the Maximum Demand Charges, Development Charges and Low Power Factor Penalty for the testing and commissioning of the power supplied to the plant by the Appellant during the period between 31.12.2004 to 11.8.2005.

30. As a matter of fact, no sanction demand was fixed and advised to the Respondent Company in respect of HT Service Condition 84 at which the testing and commissioning of power was provided by the Appellant. Hence, there cannot be any question of collecting maximum demand charges as well as the development charges.

31. As stated above, the Maximum Demand Charges and Development Charges were not levied in the bills raised on the Respondent Company for the power provided during the period 31.12.2004 and 11.8.2005. Low Power Factor Penalty as mentioned above was initially charged erroneously. As mentioned above, this was subsequently refunded way back in January, 2007 itself as recommended by the Committee considering that the similarly placed other independent power producers in the State were not charged with Low Power Factor Penalty.

32. Despite this, the demand notice dated 29.3.2010 was issued to the Respondent Company. Therefore, the Respondent Company filed a Writ Petition before the Madras High Court. The Madras High Court by the Order dated 7.7.2010 disposed of the Petition and gave an opportunity to the Respondent Company to give reply to the demand notice dated 29.3.2010 treating it as a show cause notice. Accordingly, a detailed reply was submitted by the Respondent Company to the Appellant. However, the Appellant while rejecting the Respondent Company's reply, reiterated the demand of the amount and issued final demand notice dated 26.8.2010. The said demand was purely based on the objections raised by the audit.

33. This Demand Notice was also challenged by the Respondent Company in the Madras High Court. However, the Madras High Court directed the Respondent Company to seek recourse as against the demand notice by approaching the State Commission. Accordingly, the State Commission filed a Petition in DRP No.9 of 2011 seeking for the resolution of the above dispute by the State Commission.

34. As narrated above, Article 3.3 (f) is the relevant provision in relation to the power supplied for testing and commissioning. Article 3.3 (f) makes it clear that it is the Board's obligation to supply the power for testing and commissioning.

35. Let us refer to the said Article 3.3 (f) which reads as under:

> "***Section 3.3(f)*** *: The Board shall provide the necessary power required for testing and commissioning of the Project, pursuant to the provisions of Schedule 1. The tariff charged by the Board for providing the power required for testing and commissioning shall be on the same lines as the then prevailing tariff charged by the Board for High Tension Tariff III or Low Tension Part C Temporary Tariff, depending upon the load requirement. The Company shall pay for demand charges and energy (actually consumed on this accounting terms of Kwhr) on a monthly basis*"

36. As per this Article, the Electricity Board shall provide necessary power required for testing and commissioning of the project pursuant to the provisions of Schedule-I. The tariff for the said power for testing and commissioning shall be on the same lines as the then prevailing tariff charged by the Board and the Generating Company shall pay for demand charges and energy charges on a monthly basis.

37. As per these provisions, these three items are not leviable in view of the relevant provision of the PPA which calls for payment of the demand and energy charges only. In other words, the other items in the form of miscellaneous charges are applicable only to consumers and not generators.

38. As pointed out by the State Commission in the Impugned Order that the expression prevailing tariff as referred to in Article 3.3 (f) would refer only to the tariff rates namely

electricity charges. In other words, it would not refer to the development charges which are in the nature of non tariff related charges.

39. In this context, it would be worthwhile to refer to the judgment rendered by this Tribunal interpreting the term "consumer" in Appeal No.47 of 2011. The relevant extract is as follows:

> *"31. The State Commission has also held that Respondent No.1 is a consumer in terms of Section 2(15) of the Act. Section 2(15) of the Electricity Act, 2003 is reproduced as under:*
>
> > *"2(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be"*
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> *32. We do not agree with the State Commission that Respondent No.1 is a consumer under the definition of sub-Section (15) of Section 2 of the Act. The definition indicates that it includes persons whose premises are for the time being connected for the purposes of receiving electricity with the works of a licensee. However, the generating company is connected to the licensees' network for supplying electricity and not for receiving electricity. If the explanation as given by the State Commission is applied, then all the generating companies will be consumers under the Act. The Respondent No.1 had*

also not entered into an agreement with the appellant for drawal of power for start-up purpose in terms of the tariff order of the State Commission for the FY 2006-07 and 2007-08. Having decided the dispute under Section 86(1)(f) treating the dispute between the Respondent NO.1 as generator and the appellant as a licensee, the State Commission should not have allowed the relief to the Respondent No.1 under Section 56(2) of the Act. Thus the tariff applicable to "other HT industries" for temporary supply would be applicable to the Respondent No.1 for drawl of power from the grid from 19.8.2006 to 4.4.2008".

40. The above observations made by this Tribunal would clearly indicate that there was a specific finding that the State Commission has wrongly held that the Generating Company was a consumer. While interpreting the definition, this Tribunal held that the consumer is a person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee. This Tribunal further held that the Generating Companies connected to the licensee's network only for supplying electricity to the licensee and not for receiving electricity by the Respondent Company. This ratio which has been decided by this Tribunal in the above case, would squarely apply to the present case also as the Generating Company is connected to the licensee's network only for supplying electricity and as such; the Respondent Company cannot be construed to be a consumer.

41. According to the Appellant, the State Commission could not treat the power supplied for testing and commissioning purpose as start-up power as referred to in Article 3.3 (g). It is true that this Tribunal in various decisions i.e. 2012 ELR APTEL 78 and 2011 ELR APTEL 0898 dealt with the start-up power to conclude that the Generating Company is not a consumer.

42. According to the Appellant, this would not apply to the present case as it does not deal with the start-up power. This contention is not tenable. The State Commission has correctly held that the Respondent Company should not be charged as a consumer for the power drawn during testing and commissioning stage and after the commercial operation date since the consequences of non supply of power under Article 3.3 (f) and 3.3 (g) are similar.

43. On that basis, the State Commission has held that while availing the power during testing and commissioning stage as well as withdrawing start-up power, the power plant cannot be considered as a consumer.

44. Apart from the fact that the Respondent Company cannot be considered to be a consumer as per the PPA, it shall be observed that even in terms of Electricity Act, 2003, the Generating Company cannot be said to be a consumer and treated similar to the other consumers who had drawn HT

power supply and required to pay the tariff and applicable charges.

45. Section 2 (15) of the Act defines a consumer as a person supplied with the electricity for his own use. The entire power generated at the plant is meant for supply to the TANGEDCO.

46. In terms of the PPA, the TANGEDCO, the Board had an obligation to supply requisite power to ensure that the plant is tested and commissioned. In this case, the power supplied by the Board for the purpose of testing and commissioning to enable the unit to be commissioned and put the commercial use to supply power to the distribution licensee and should not be equated with the consumer and shall be charged for power as per the terms of the PPA.

47. Section 43 of the Electricity Act, 2003 casts a duty on the licensee to supply power within 30 days, when application is made by any person seeking for the supply of power. In terms of Clause 27 of the Distribution Code, the application for HT supply is to be made in From No.4.

48. In the present case, the Respondent Company did not submit any application for availing power supply for testing and commissioning. In fact, Clause 33 of the Distribution Code warrants that all intending consumers shall execute an Agreement with its licensees governing the supply of

electricity. The Respondent Company did not execute any such Agreement for availing and testing and commissioning of the power in this case. That apart, the Respondent Company did not pay and security deposit which is required in the case for getting a service connection. The Appellant also did not incur any expenditure towards Development Charges as normally incurred to extend connection to a consumer.

49. Thus, it is clear that the supply made by the Board was only in terms of the PPA. Since the Respondent Company was not required to comply with any of the requirements which a normal consumer getting electricity connection is required to do, the Respondent Company cannot be treated as a consumer. Therefore, the Respondent Company cannot be called upon to pay the charges which are applicable in respect of consumers of HT III connection.

50. The perusal of Section 45 of the Act also would make it clear that only if the supply of electricity is in pursuance of Section 43 to a consumer, the licensee is entitled to levy the charges based on the tariff fixed. In this case, the Tariff Order also did not have any provision for tariff to be made applicable for power supplied to a Generator for testing and commissioning of the unit.

51. As indicated above, the PPA warrants payment of energy charges and demand charges only. Admittedly, these charges have already been paid by the Respondent Company.

52. In view of the above, the contention of the Appellant that the Generating Company was required to pay tariff as well as the non tariff related charges paid by a normal consumer in terms of tariff order as well as the provisions of Supply Code is without any basis.

53. The provisions of Supply Code and the Tariff Order dated 1.10.2004 would not apply to the present case. The provisions of the PPA alone are to be considered. The drawing of power supplied by the Appellant for testing and commissioning under Article 3.3 (f) of the PPA would not make a Generating Company as a consumer of the Board. Consequently, no other amounts are payable by the Respondent Company for the power provided to the Respondent Company's plant during 31.12.2004 to 11.8.2005 except the other charges namely demand and energy charges.

54. As indicated above, under the PPA only demand charges and energy charges applicable to HT-III Tariff category are to be levied and collected for the power provided before testing and commissioning.

55. As per the Supply Code, the Maximum Demand Charges, Development Charges and Low Power Factor Penalty would fall under head “miscellaneous charges” and not under “tariff related charges”.

56. The Supply Code regulates the aspect of the supply of electricity to the consumers. It does not apply to power availed by the power plant under the PPA for the purpose of testing and commissioning purposes. Similarly, the tariff order passed by the Commission which sets-out the tariff payable by different categories of consumers would not apply to the Respondent Company as the Respondent Company’s entitlement to supply is not by virtue of being a consumer of the electricity but is under the PPA for the purpose of commissioning the plant. Hence the question of the PPA contemplating something other than what is applicable to the consumers under the Supply Code and Tariff Order would not arise.

57. Thus, the State Commission, in our view, has correctly concluded that the demand charges and energy charges for the power drawn during testing and commissioning period is to be in accordance with the PPA and therefore, the Maximum Demand charges, Development Charges and Low Power Factor Penalty are not payable by the Generating Companies.

58. There is one more aspect to be noticed.

59. The State Commission in the Impugned order has relied upon the ratio decided by this Tribunal in Appeal No.112 of 2007 to hold that the claim made by the parties was barred by limitation.

60. The relevant portion of the ratio decided by this Tribunal is as under:

> *"37(b) The liability of the Company to pay to the Board on account of non-payment of Development Charges and other charges from the date of commencement of the supply (if not earlier) even though held admissible, in terms of the PPA, is not payable as the appellant has defaulted on so many counts and has raised the demand notices after lapse of more than six years of creation of liabilities and is consequently barred by the Limitations Act. "*

61. This ratio decided by this Tribunal would apply to the present facts of the case also.

62. In the present case, the power was supplied between 13.12.2004 to 10.8.2005. The amount towards the Development Charges, Maximum Demand Charges and Low Power Factor Penalty were first time demanded only through the Notice dated 29.3.2010 i.e. after a lapse of about four years. This is clearly barred by limitation as laid down by the Commission.

63. That apart, in respect of low power factor penalty, originally the amount of Rs.77,33,115/- was collected. When the Respondent Company brought to the notice of the Appellant that the collection of the said amount towards Low Power Factor Penalty was not in accordance with the law, the Appellant itself constituted a Committee comprising of senior officers of the Board which in turn, recommended for refund of the said amount. Accordingly, the amount had been refunded to the Respondent Company on 27.2.2007 itself. Now in respect of this amount, through the Demand Notice dated 29.3.2010, the Appellant directed the Respondent Company to refund the same. In fact, the Appellant had originally taken a conscious decision to refund the low power factor penalty and not to charge maximum demand and development charges. But, now the Appellant has taken a different stand that too after a lapse of several years to recover the amount from the Respondent Company merely on the basis of the audit objection.

64. As a matter of fact, when the audit objection was raised, the Appellant itself sent a letter dated 18.8.2003 to the Office of the Accountant General explaining the reasons for refund and justifying the stand regarding the refund of low power factor penalty and non levy of the maximum demand charges and development charges.

65. Now the Appellant has taken a “U” turn by taking a different stand to plead that the Appellant is entitled to recover those amounts. This is not a proper approach.

66. As correctly pointed out by the learned Counsel for the Respondent and the State Commission in the Impugned Order, the Appellant having waived its rights to claim the above charges cannot be permitted to recover the said amount on the basis of the claim which is clearly barred by limitation.

67. However, it is made clear that once it has been decided that these charges other than the demand and energy charges cannot be claimed by the Appellant for the power supplied for testing and commissioning, could not be construed to be the supply of power to the Respondent Company as a consumer of the licensee, other questions need not be gone into.

68. In other words, when the main question is decided holding that the Respondent could not be termed as a “consumer”, the question of liability to pay the charges other than the demand and energy charges would not arise.

69. Consequently, we conclude that the findings rendered by the State Commission in the Impugned Order on this aspect are perfectly justified.

70. **Summary of Our findings**

(a) **The Appellant is entitled to charge from the Generating Station of the Respondent No.1 demand Charges and Energy Charges (actually consumed in terms of Kwhr) only on monthly basis for supply made available for testing and commissioning of the project by the Appellant as per the terms of the PPA.**

(b) **The Appellant has also not entered into any supply Agreement with the Respondent No.1 for supply of power for testing and commissioning of the power plant. The drawal of power for testing and commissioning by the Generating Station of the Respondent No.1 has to be governed in terms of the PPA only and other charges applicable to High Tension Consumer could not made applicable to the Respondent No.1. Accordingly, the Respondent No.1 is not liable to pay Development Charges, Maximum Demand Charges and Low Power Factor Penalty as applicable to a consumer for availing power for testing and commissioning of the Power Plant.**

(c) **The claim of the Appellant is also barred by limitation.**

71. In view of the above findings, we are not inclined to interfere in the Impugned Order.

72. Consequently, the Appeal is dismissed as devoid of merits.

73. No order as to costs.

74. Pronounced on this 3rd day of April, 2014 in the Open Court.

(Rakesh Nath) **Technical Member**

(Justice M. Karpaga Vinayagam) **Chairperson**

Dated: 3rd Apr, 2014

√REPORTABLE/~~NON REPORTABLE~~