

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

Appeal Nos. 106, 120, 121, 123 & 124 of 2006

Dated: May 18 , 2007

Present:

**Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member**

Appeal No. 106 of 2006

Tamil Nadu Newsprint and Papers Ltd.,
No. 67, Mount Road,
Guindy, Chennai -600 032 Appellant
V/s

Tamil Nadu Electricity Regulatory Commission,
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet,
Chennai – 600 018. Respondent

For the Appellant : Mr. K. Raghu Raman (Rep.)
For the Respondent : Mr. G. Umapathy, Advocate for TNERC

Appeal No. 120 of 2006

M/s. the South Indian Sugar Mills Association,
"Karumuttu Centre", Second Floor,
498, Anna Salai,
Chennai – 600 035.

M/s. Terra Energy Limited,
"Eldorado", 5th Floor,
112, Nungambakkam High Road,
Chennai – 600 034 ... Appellants
Vs.

1. Tamil Nadu Electricity Regulatory Commission,
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet,
Chennai – 600 018.
Represented by its Secretary

2. Tamil Nadu Electricity Board
No. 800, Anna Salai, Chennai-600 002.
Represented by its Chairman Respondents

Appeal No. 121 of 2006

M/s. Shree Ambika Sugars Limited,
“Eldorado”, 5th Floor,
112, Nungambakkam High Road,
Chennai – 600 034
Rep. by its Company Secretary
Mr. N. Krithivasan Appellant
V/s

1. Tamil Nadu Electricity Regulatory Commission,
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet,
Chennai – 600 018.
Represented by its Secretary
2. Tamil Nadu Electricity Board
No. 800, Anna Salai, Chennai-600 002.
Represented by its Chairman Respondents

Appeal No. 123 of 2006

M/s. Dharani Sugars & Chemicals Ltd.
PGP House,
57, Sterling Road, Nungambakkam
Chennai – 600 034 Appellant
V/s

1. Tamil Nadu Electricity Regulatory Commission,
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet,
Chennai – 600 018.
Represented by its Secretary
2. Tamil Nadu Electricity Board
No. 800, Anna Salai, Chennai-600 002.
Represented by its Chairman Respondents

Appeal No. 124 of 2006

M/s. Rajshree Sugars & Chemicals Ltd.
338, The Uffizi, Avinashi Road, Peelamedu,
Coimbatore – 641 004

Rep. by its Director & Chief Operating Officer .. Appellant
V/s

1. Tamil Nadu Electricity Regulatory Commission,
No. 17, Third Main Road,
Seethammal Colony,
Alwarpet,
Chennai – 600 018.
Represented by its Secretary

2. Tamil Nadu Electricity Board
No. 800, Anna Salai, Chennai-600 002.
Represented by its Chairman Respondents

Counsel for the Appellant(s) : Mr. C. Kodanda Ram

Counsel for the Respondent(s) : Mr. G. Umapathy for TNERC
Mr. Ramji Srinivasan and
Ms. Mandakani Singh for TNEB

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

These appeals are preferred against Order No. 3 dated May 15, 2006 passed by the Tamil Nadu Electricity Regulatory Commission (for short 'TNERC') in suo-motu proceedings relating to power purchase and allied issues linked with Non-Conventional Energy Sources based Generation and Co-generation plants. In these appeals, the appellants are aggrieved by the fixation of tariff for purchase of power from the Non-Conventional Energy Sources (NCES).

2. In view of the nature of the controversy, it is not necessary to mention the facts except that the suo-motu cognizance of various issues relating to Bagasse based power generation plants was taken by the TNERC. It needs to be pointed out that the Regulatory Commission passed the impugned order in view of the growth of the NCES based generation in the State and to give effect to the provision of the Electricity Act, 2003, National Electricity Policy and MNES guidelines and for giving impetus to the generation from NCES.

3. The TNERC while passing the order has kept in view the fact that the State of Tamil Nadu has a high potential for development of power from NCES and therefore, benign policies and procedures are required to be followed for development of environmental friendly energy sources for sustained growth of the sector. The TNERC took pains in preparing a draft consultative paper titled "Policy on purchase of power from Renewable Energy Sources and Co-generation in Tamil Nadu". The draft consultative paper was put on the website of the TNERC so that it could be accessed by the public at large for their comments and suggestions. The draft consultative paper was transmitted to the members of the State Advisory Committee. The members of the State Advisory Committee and special invitees were invited for discussion at a meeting, which was held on November 24, 2004.

4. A public notice was inserted in various newspapers in English and Tamil for inviting objections/comments/views on the consultative paper. In response to the notice, views of the stakeholders and others were received by the Commission. A public hearing was held on May 18, 2005. Thereafter, a fresh draft discussion paper on “Tariff related Issues for Non-Conventional Energy Sources” was prepared by the Commission. The paper was circulated to the Advisory Committee Members and others. The discussions on the paper were held on November 11, 2005. Several members of the State Advisory Committee and special invitees participated in the meeting.

5. Thereafter, a public notice was inserted in the newspapers on November 18, 2005 inviting views on the consultative paper. Another public hearing was held on December 23, 2005. It was only after giving extensive opportunity to the stake holders and the public and discussions that the impugned order was passed by the TNERC after taking into consideration the representations and presentations made before it.

6. In the circumstances, therefore, we are of the view that a very fair approach was adopted by the TNERC. The impugned order was passed after much deliberations and deep consideration.

7. It is not in dispute that the impugned order is applicable to future agreements and renewal of existing agreements in respect of the Non-

Conventional Energy Sources based Generating Plants and Non-Conventional Energy Sources based Co-generation Plants in the State of Tamil Nadu. The impugned order, however, does not interfere with the present and existing contracts/agreements between the NCES based generators and the distribution licensee. In other words, contracts signed before the passing of the impugned order have to be worked out in accordance with the stipulations made therein and they will remain in force. The impugned order would be applicable to the new contracts and renewal of the existing contracts between the NCES based generators and the distribution licensee. The appellants are governed by the existing contracts and therefore, they are not affected by the impugned order. In this view of the matter, the appeal is liable to be dismissed.

8. The learned counsel for the appellants however, submitted that the TNERC has fixed the price for the procurement of power by the distribution licensees for Non-Conventional Energy Source based Co-generation Plants without specifying the terms and conditions for determination of tariff under Section 61. Since the impugned order does not affect the appellants, it is not necessary to examine the plea but for future guidance of the Regulatory Commissions, we are inclined to go into the submission of the learned counsel for the appellants.

9. In Appeal Nos. 4,13,14,23... etc. of 2005, M/s. Siel Ltd. vs. Punjab State Electricity Regulatory Commission...etc., a full Bench of this

Tribunal has held that framing of Regulations under Section 61 of the Electricity Act, 2003 cannot be a condition precedent for determination of tariff. In this regard, it was held as follows:-

“13. After coming into force of the Act of 2003 and Constitution of the State Regulatory Commission, a mandatory duty under Section 62 thereof has been cast on the Regulatory Commission to determine tariff. The duty cast on the Central and State Commission to determine tariff is also reflected by Sections 79 and 86 of the Act of 2003. While Section 79 specifies the functions of the Central Commission, Section 86 lays down the functions of the State Commission. Section 79, inter-alia, provides that the Central Regulatory Commission shall discharge the functions to regulate tariff of generation companies owned or controlled by the Central Government. It also entrusts the central Commission to regulate the tariff of generating companies, other than those, owned and controlled by the Central Government in case such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Similarly, Section 86, inter-alia, provides that the State Commission shall discharge the functions of determining the tariff for generation, supply, transmission and wheeling of electricity, wholesale or bulk or retail, as the case may be, within the State. Thus, Sections 79 and 86, besides Section 62, cast a mandatory obligation and duty on the respective Commission to determine tariff. Determination of tariff cannot brook any delay in view of the revenue requirements of the generators and licensees. It was for good reason the Act of 2003, nowhere prescribes that fixation of tariff shall be made after the framing of the Regulations under Section 61 thereof. Otherwise, determination of tariffs by the Commissions could be delayed inordinately. We, however, hasten to add that it is not our view that the appropriate Commission is exempt from framing Regulations or they can frame them at their convenience. In case Regulations are not framed by a Regulatory Commission, surely the Tribunal is not powerless to direct the Commission to frame the Regulations. Under Section 121 of the Act of 2003, the Tribunal is empowered to issue such orders, instructions or

directions as it may deem fit to any appropriate Commission for performance of its statutory functions under the Act.....

15. Neither Section 61 nor Section 178(2)(s) or Section 181 (2) (zd) of the Act of 2003 are indicative of any compulsion on the part of the Commission to determine tariff only after framing of the Regulations. Pressing necessity to determine tariff cannot be postponed or overlooked for want of Regulations, which could not be framed in a short time. Although the need and importance of framing the Regulations cannot be undermined, the non-existence of Regulations, however, cannot be a ground for the Commission to justify non determination of tariff by it.

16. The obligation to determine tariff by an appropriate Commission also emanates from Section 64 of the Act of 2003. Section 64, *inter alia*, provides that the appropriate Commission shall issue tariff order or reject the application within 120 days from the date of the receipt of the tariff application from a generating company or a licensee and after considering the suggestions and objections received from the public thereto. The legislative command to determine the tariff under Section 64 has to be carried out by the Commission, once an application of a generator or a licensee is received and it cannot be stifled or diluted because of the failure of the Commission to frame the Regulations. It is significant to note that Section 61 of the Act of 2003 or any other provision thereof does not specify the consequences for the failure of the Commission to frame Regulations. This being so, the provisions requiring the Commission to determine the tariff cannot be held to be in-operative till such time the Regulations are framed under Section 61 read with Sections 178 & 181 of the Act of 2003.

17. While power is conferred on the appropriate Commission to frame Regulations, it has also been saddled with a duty to determine the tariff. The generating company or a licensee, as the case may be, cannot be allowed to suffer for the delay on the part of the Commission in the exercise of its power to frame Regulations. The duty imposed on the Commission to determine tariff could be well discharged without the Regulations, if they have not been framed, by seeking guidance from the factors and parameters laid down in Section 61. The application of the generating company or

a licensee cannot be placed in cold storage in the absence of the Regulations”.

10. According to the aforesaid observations, some delay in framing of the Regulations by appropriate Commissions can be tolerated but they are not exempt from the obligation to frame Regulations. They cannot postpone the framing of Regulations for indefinite period of time. According to para 6.0 of the National Tariff Policy, generation capacity is to be increased at an accelerated rate to meet the growing demand of electricity. Adequacy of generation is also essential for efficient functioning of power market. Rules of the game should be known to the players so that they can make investment for setting up their plants and add to the capacity. If this is not done the investors will shy away. Regulatory Commissions can give proper direction to the power sector by framing Regulations in such a manner that generation based on renewable sources of energy including solar, wind, bio-fuel (bio-mass, bagasse etc.) receives the necessary encouragement, so that capacity addition could take place without causing much disturbance to environment. Protection of environment is the crying need of the hour. The nature is being injured and treated violently. In case the trend is not reversed, it will respond with equal brutality. The signs are disturbing. It is time to act now, otherwise it may be too late.

11. The Fourth (W.G.-1) Assessment Report, 2007 rendered by the Intergovernmental Panel on Climate Change (IPCC), established by two

United Nations Organisations, namely the World Meteorological Organisations (WMO) and United Nations Environment Programme (UNEP) in the year 1988, is revealing. Due to the global warming contributed by use of fossil fuel, the glaciers and the snow cover have receded, level of oceans have risen and seawater has expanded. The danger needs to be averted by undertaking measures to curtail emission of green house gases. Though largely it is the developed countries which are major contributors of green house gases, we also need to regulate electricity sector for protection of environment in accordance with the spirit of the Constitution and the Electricity Act, 2003. Small steps in the first instance, to reduce dependence on fossil fuel to the extent possible, which does not impact the progress of electricity sector, can ultimately lead to generation of momentum for a giant leap in the development of technology for production of clean energy.

12. At present we have a capacity of 1, 32,000 MW. In addition about 1, 00,000 MW is needed by us by the year 2012. While our dependence on coal is critical for expanding our capacity to the desired level and to maintain growth, it is in the interest of ecology to boost production by utilizing renewable sources of energy. Germany is stepping up solar energy for power, even though it has not many sunny days. Today Germany is producing about ½ of the World's Solar Energy based power. This has been accomplished by adopting legislation which

has given impetus to the use of renewable energy sources. The utilities are required to buy solar energy at such rates that allow some profit to the companies generating electricity by using photo voltaic panels for converting solar energy into electricity. We need to follow Germany's example.

13. The State and its Authorities including the Electricity Regulatory Commissions have a solemn responsibility to protect and improve the environment for present and future generations. Article 48A of the Constitution of India, as a directive principle of the State Policy, *inter alia*, provides that the State must endeavour to protect and improve the environment. Article 51-A (g) casts a duty on the citizens of India to protect and improve the natural environment. Article 21 of the Constitution, which in its bosom conceals different facets of the right to life, imposes a positive obligation on the State and the Authorities created by it, to take preventive measures, to protect the ecology and environment and to conceive, anticipate and attack the causes of environmental degradation.

14. The preamble to the Electricity Act, 2003 recognizes the significance and importance of promotion of efficient and environmentally benign policies. Section 61 (h) of the Electricity Act, 2003 requires Regulatory Commissions to frame Regulations to promote co-generation and generation of electricity from renewable sources of

energy. In consonance with the preamble, Section 61 (h) of the Electricity Act, 2003, spirit of the Constitution and concern for the environment, it is the bounden duty of the Regulatory Commissions to frame Regulations with a view to give fillip to the production of power through renewable sources of energy. While framing the Regulations, the Regulatory Commissions must have regard to the thrust and spirit of the aforesaid provisions of the Constitution and Electricity Act, 2003, the National Electricity Policy and MNES guidelines. The Regulations should be fashioned in such a manner that it should be possible to built up sizable capacity through clean renewable sources of energy.

15. It was also urged by the learned counsel for the appellants that the TNERC in the impugned order gave a direction to the Tamil Nadu Electricity Board to prepare a model Power Purchase Agreement (PPA) relating to NCES generation. It was pointed out that this direction has not been carried out by the TNEB so far.

16. Since the Commission has given a direction to the TNEB to frame and file model PPA for approval of the TNERC, we have no manner of doubt that the TNEB will present model PPA before the TNERC and in case it does not do so within reasonable period of time, the TNERC is not powerless in securing implementation of its directives.

17. In the circumstances, therefore, while we are not disturbing the order of the TNERC dated May 5, 2003, direction under Section 121 of the Electricity Act, 2003 need to be issued to all the Regulatory Commissions of the country to frame Regulations in the light of the observations made by us. We order accordingly. The Regulations shall be framed within three months of the receipt of the copy of this order.

18. The appeals are dismissed but with the above directions under Section 121 of the Electricity Act, 2003.

(Anil Dev Singh)
Chairperson

Dated: May 18, 2007

(H.L. Bajaj)
Technical Member