

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.148 of 2012

Dated: 10th July, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

M/s. Penna Electricity Ltd.,
Sri Bezawada Vikram
New No.37, Vijayaraghava Road,
T. Nagar, Chennai-600 017

...Appellant

Versus

- 1. Tamil Nadu Electricity Board**
144, Anna Salai
Chennai-600 002
- 2. Member (Generation)**
Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600 002
- 3. The Chief Engineer**
(Independent Power Project)
The Tamil Nadu Electricity Board,
No.144, Anna Salai,
Chennai-600 002
- 4. Tamil Nadu Electricity Regulatory Commission**
TIDCO Office Building
No.19A, Rukmini Lakshmipathy Salai
Egmore, Chennai-600 008

..... Respondent

Counsel for the Appellant : Mr. R Muthu Kumaraswamy, Sr Adv
Mr. Buddy A Ranganadhan
Mr. A Satyaseelan
Mr. Najeeb Ahmed

Counsel for the Respondent(s) : Mr. S Vallinayagam

J U D G M E N T

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

1. M/s. Penna Electricity Company Limited is the Appellant herein.
2. Challenging the order dated 30.12.2011 passed by the Tamil Nadu State Commission rejecting its claim relating to the underpaid fixed charges of Rs.18.06 under Combined Cycle Operation and the claim of underpaid variable charges of Rs.12.77 Crores under Combined Cycle Operation for the period from 1.7.2006 to 15.6.2009, the Appellant has presented this Appeal.
3. The short facts are as follows:
 - (a) The Appellant is an independent power producer. The Generating Capacity of the Appellant is 52.8 MW. The technology is gas based Combined Cycle Operation. The generating station is located at Valantharavai Village, Ramnad District in Tamil Nadu.

(b) The Generating Station of the Appellant is dedicated to the Tamil Nadu Electricity Board, the first Respondent herein. The entire power generated by the Generator has to be supplied only to the Electricity Board as per the Agreement. When the dispute arose between the Generator, the Appellant and the Distribution Licensee, the First Respondent, the Appellant filed a Petition in DR No.14 of 2009 and MP No.1 of 2010 before the Tamil Nadu State Commission, the 4th Respondent herein.

(c) In the said Petition, the Appellant principally sought for two prayers:

- (i) Claiming payment of fixed and variable charges in respect of power generated and supplied from the operation of the Gas Turbine Generator in Open Cycle Mode during the period between 29.10.2005 and 30.6.2006.
- (ii) Claiming the payment towards underpaid fixed charges and variable charges in respect of the power generated and supplied from the combined cycle operation of the Generating Station arising out of the short supply in the contracted quantity of the

gas during the period between 1.7.2006 and 15.6.2009.

(d) The State Commission though allowed the claim made by the Appellant under the first prayer, rejected the claim under second prayer by the impugned order dated 30.12.2011.

(e) As against the finding in favour of the Appellant herein, in regard to the 1st prayer, the Tamil Nadu Electricity Board filed the Appeal before this Tribunal in Appeal No.112 of 2012.

(f) While the said Appeal filed by the Electricity Board was pending, the Appellant as against the rejection of the claim of the Appellant in the second prayer, has filed this present Appeal in Appeal No.148 of 2012.

(g) The detailed facts about the entire back ground of the case have been enumerated in the other Appeal in Appeal No.112 of 2012 filed by the Electricity Board which has been delivered. Therefore, it would suffice to give only the minimal facts concerning the issue relevant to the Second prayer made by the Appellant claiming the underpaid fixed charges and underpaid variable charges. Those facts are as follows:

- (i) The Appellant is the Generator. The power generation project of the Appellant which was selected by the Tamil Nadu Industrial Development Corporation Limited through the tariff based industrial competitive bidding process as a Diesel Generator Based Power Project with HSFO as fuel. This was in the year 1996.
- (ii) In respect of this power project, a Power Purchase Agreement was entered into between the parties on 29.4.1998.
- (iii) The Fuel Supply Agreements were entered into by the Generator and Gas Authority of India (GAIL) for supply of Gas in different quantity through the Agreements dated 16.12.1999 and 9.3.2001. This was necessitated on account of the increase in the price of HSFO. Accordingly, after obtaining the approval from the Government of Tamil Nadu, the Technology of the Power Generation was changed from Diesel Engine to Gas Turbine Based Generation with Natural Gas as Fuel and the location was also shifted to Ramnad District in Tamil Nadu.

- (iv) Consequent to the change in the technology, fuel and location of the project, an amended Power Purchase Agreement was executed between the Generator, the Appellant and the Licensee, the Respondent on the basis of these changes on 25.8.2004.
- (v) In pursuance of the same, the amended Fuel Supply Agreement was also entered into between the Generator, the Appellant and GAIL for additional allocation of the Gas on 27.8.2004.
- (vi) On the basis of the permission granted by the Electricity Board, the Gas Turbine Generating Unit in Open Cycle Operation was synchronized with Electricity Board Grid on 29.10.2005.
- (vii) The Combined Cycle Operation of the Generating Station with Gas Turbine Generating Unit and the Steam Turbine Generator commenced on 1.7.2006.
- (viii) As per the PPA, the Appellant was to achieve 85% of the Plant Load Factor. On account of short supply in the supply of Gas

by the GAIL, the Appellant was not able to achieve 85% of the Plant Load Factor. It was able to achieve a Plant Load Factor of only 73.2%. In the meantime, M/s. GAIL informed all gas consumers in the area including the Appellant regarding 15% cut in the allocated daily contract quantity. Again, the GAIL reduced the allocation to the Appellant.

- (ix) Under those circumstances, the Generating Station of the Appellant was able to achieve only 67.9% PLF on account of cut in the allocated quantity of gas.
- (x) Under the amended PPA dated 25.8.2004, the Appellant Generator and the Distribution Licensee (1st Respondent) are to mutually discuss and arrange for alternate Fuel in the event of short supply of gas under the Gas Supply Agreement.
- (xi) The Appellant requested the Electricity Board for mutual discussion to arrange and organise for an alternate fuel, in the light of the short supply of the natural gas by GAIL and to ensure the assured payment of tariff

being full fixed charges and the full variable charges in relation to operation of Generating Station. But, there was no response.

- (xii) On account of short supply of gas, the Gas Turbine of Generating Station did not operate to its rated capacity resulting in reduction in the generation.
- (xiii) Consequently, it affected the operation of Steam Turbine which resulted in higher Heat Rate in Generating Station than as specified in the PPA for reimbursement of the variable charges.
- (xiv) The Electricity Board, the 1st Respondent did not reimburse the gas bill paid by the Appellant to M/s. GAIL. But it paid the gas bill only for the lesser quantity of gas related to the Heat Rate specified in the PPA.
- (xv) Thus, the Distribution Licensee underpaid fixed charges to the tune of Rs.18.06 Crores and underpaid the variable charges to the tune of Rs.12.77 Crores for the period between 1.7.2006 to 15.6.2009.

(h) Under those circumstances, the Appellant filed the Petition in DRP No.14 of 2009 read with MP No.1 of 2010 claiming the fixed charges and variable charges in respect of the period between 29.10.2005 and 30.6.2006 in open cycle operation and also claiming underpaid fixed charges and underpaid variable charges in respect of the power supplied from the Combined Cycle Operation of the Generation Stations for the period between 1.7.2006 to 15.6.2009.

(i) As indicated above, the claim of the Appellant in respect of the fixed and variable charges for the period between 29.10.2005 and 30.6.2006 in open cycle was allowed by the State Commission. However, the claim for the underpaid fixed charges and underpaid variable charges in respect of the period from 2006 to 2009 has not been allowed in the impugned order.

(j) Aggrieved by this disallowance in the impugned order, the Appellant has filed the present Appeal as against the findings in so far as it relates to the claim for the underpaid fixed charges to the extent of Rs.18.06 Crores and underpaid variable charges to the tune of Rs.12.77 Crores for the period between 1.7.2006 to 15.6.2009.

4. The Appellant has urged the following grounds assailing the portion of the impugned order of the State Commission in respect of the disallowance of the claim for underpaid charges:

(a) The impugned order in so far as it relates to the claim of the Appellant for the payment of underpaid fixed charges and underpaid variable charges is erroneous in as much as the State Commission failed to notice the non achievement of 85% of the Plant Load Factor to get paid the full fixed charges was due to Force Majeure situation and consequently, the Appellant is entitled to get the payment under deemed generation provisions as contained in the PPA dated 25.8.2004.

(b) The State Commission has failed to notice the fact that the short supply of gas by the GAIL to the Appellant, was a direct result of the increased requirements of the gas of the Electricity Board for its Generating Plants, hence at the instance of the Electricity Board, the supply of gas by the GAIL was diverted away from the Appellant and supplied to the Electricity Board. Therefore, the Electricity Board would be bound to compensate the losses of the Appellant especially when the Appellant cannot sell the power to 3rd party but it can sell its energy only to the

Electricity Board under the Power Purchase Agreement. The State Commission did not consider this aspect.

(c) The State Commission has specifically held in the order dated 30.12.2011 that the PPA after coming into force of the Electricity Act, 2003 ought to have been placed before the State Commission and the PPA is not in alignment with the Act as well as the 2004 Regulations of the Central Commission. Having held so, the State Commission ought to have issued directions as prayed for by the Appellant in MP No.1/2010 to rectify and modify the said PPA to suit the technology of the Appellant Generating Station and in line with the norms and factors under the Tariff Regulations made under the Electricity Act, 2003.

5. In reply to these grounds, the learned Counsel for the Electricity Board has made the following submissions:

(a) There is no Clause in the PPA which provides for payment of full fixed cost to the Generator even after the Generator fails to meet the PLF agreed to, under the PPA. The Fuel Supply Agreement is between the Appellant and M/s. GAIL only. If the Gas supplier namely M/s. GAIL defaulted in supply of natural gas to the Appellant's Plant, it is for the Appellant to seek the

appropriate remedies from the gas suppliers on damages on account of short supply of natural gas. The Electricity Board, at any cost, cannot be held responsible for meeting of short supply by M/s. GAIL to the Appellant.

(b) The Appellant never initiated any proceedings under the Force Majeure and the same is without any basis. The inability of the Appellant to achieve 85% of the PLF is not due to any Force Majeure as claimed. The allocation of gas being diverted to the Plant of Electricity Board is a contention without any documentary evidence. There is no material to show that short supply of gas to the Plant of the Appellant was due to the increased requirement of gas by the Electricity Board. The project of the Appellant was based on the Notification dated 6.11.1995 issued by the Government of India. One of the primary conditions stipulated in respect of the fuel in the said Notification issued in the year 1995, was that the responsibility of the fuel linkage would be that of the independent power producers and any fuel supply risk would have to be shared between the independent power producers and fuel suppliers, The State Electricity Board will not take any fuel supply risk. In pursuance of the said Notification, the Appellant entered into a Gas Supply

Agreement with M/s. GAIL on 16.12.1999 and 31.7.2008 with regard to the quantum of the gas supply.

(c) The Power Purchase Agreement between the Appellant and the Respondent was entered into based upon the Notification of the Government of India dated 6.11.1995. Therefore, the claim of the compensation by way of deemed generation due to shortage in fuel supply, which is the sole responsibility of the Generator, is not applicable as per the Power Purchase Agreement dated 25.8.2004. Therefore, the State Commission's refusal to allow the claim for underpaid fixed charges and underpaid variable charges is perfectly justified.

6. On these rival contentions, the following questions would arise for consideration:

(a) Whether the Generator, the Appellant is entitled to be paid the full fixed charges and actual variable charges in respect of the generation and operation of the Generating Station during the period between 1.7.2006 and 15.6.2009 during which period, the operational parameters of the Generating Station was affected on account of cut in the supply of contracted

quantity by M/s. GAIL which resulted in non-achievement of 85% of the PLF?

(b) Whether the amended PPA dated 25.8.2004 consequent to the change in Fuel, change in location and change in technology, was required to be amended and consequently required to be approved by the State Commission to ensure fair and justifiable operating terms and conditions including the payment of tariff therefor to the Generator?

7. On these questions, the learned Counsel for both the parties has made their submissions at length.
8. Let us now discuss these issues.
9. Before dealing with these issues we will refer to the findings rendered by the State Commission on these issues:

“9.3. Whether the petitioner is entitled for the following on account of short supply of gas by GAIL:

i) The payment of actual fuel charges paid to GAIL.

ii) The payment of short charges recovered on account of fixed charges as well as increase in heat rate due to part load operation both on account of reduced supply of gas by GAIL.

iii) In the event of not providing any relief on i) & ii) above, whether the PPAs could be considered as

unenforceable in law and the petitioner permitted to exit the PPA.

The petitioner has sought compensation from TNEB for shortage of gas allegedly caused by the diversion of gas for the TNEB project at Vazhudhur. The petitioner has stated that he has kept the TNEB informed about the shortage of gas. In this connection, the Commission would like to observe that the petitioner has entered into a contract with GAIL for supply of gas. The same supplier has also supplied gas for the TNEB project at Vazhudhur. If the gas supplier defaulted in supply of gas to the petitioner, it was for the petitioner to seek appropriate remedies from the gas supplier for damages on account of their supply. The TNEB, as power purchaser, has no control over the gas supplier. We are, therefore, unable to accept the contention that the TNEB should compensate the petitioner for short supply of gas.

Finally, the Petitioner pleads that the power purchase agreement is unenforceable and unworkable and therefore the Commission should declare the power purchase agreement as unworkable. We would like to refer to the Order of the Commission in DRP.Nos.12 and 13 of 2008 M/s.Raghu Rama Renewable Energy Ltd., Vs TNEB and M/s. Ind Barath Energies (Thoothukudi) Ltd., Vs. TNEB, where the Commission declined to terminate the contract for power purchase between the TNEB and the Petitioners. The Petitioners in both the cases pleaded that the performance of the contract became impossible on account of hardship. The facts of the case of the present petitioner is similar, if not identical, to the facts of the case in DRP Nos.12 and 13 of 2008. The Commission believes that contracts, which have been voluntarily executed between two parties, cannot be terminated by the Commission. We are of the firm

belief that the Petitioner would have carried out due diligence exercise and weighed the pros and cons of the various clauses of the power purchase agreement.

9.4. Linking of alternate fuel Naphtha to enable operation of the power plant at optimal capacity and recover full fixed charges.

As regards linking of alternate fuel to enable operation of the power plant at optimal capacity, the petitioner has proposed linking of Naphtha. This issue has been going back and forth between the petitioner and the respondent.

Provision regarding change in fuel is contained in Article 7.5 of the PPA. This article covers the option for change of fuel by the Board or the Company. In case the Company desires to use an alternative fuel specified in schedule 8 for the above reasons, it shall do so only with prior written permission of the Board. In such a case the provisions of Section 7.5 shall apply.

Certain technical issues were raised by the TNEB with regard to road transportation of Naphtha as well as cost of generation with Naphtha as fuel. These issues have not been resolved between the parties. We are of the view that the techno economics can only decide the use of alternate fuel such as Naphtha which is highly volatile and also require special storage facilities and special fuel handling system. Further, some modification to the Gas turbine may also be necessary. The techno economics will have to be seen with regard to the percentage of Naphtha that can be used economically, additional capital cost involved and its impact on the fixed charge, etc. Neither these details have been worked out by the parties nor they have been placed before the

Commission. The Commission is unable to pass any order on this subject in the absence of such details. It is for the parties to discuss this matter in detail and then come before the Commission, if necessary.”

10. Keeping the above findings in mind, let us discuss the issue now.
11. The Appellant’ producers M/s. DLF Power Limited was selected through international competitive bidding for establishment of 52.8 MW Diesel Generator Based Power Project at Hosur with HSFO as fuel. M/s. DLF Power Limited later formed M/s. Arkay Energy Limited to execute their Power project. Due to change of fuel, technology of plant and location, the amended PPA was signed on 25.8.2004 with M/s. Arkay Energy Limited now M/s. Penna Electricity Limited, the Appellant, for establishment of 52.8 MW Combined Cycle Gas Turbine Power Project.
12. There is no dispute in the fact that this project was taken up on the basis of the Notification dated 6.11.1995 issued by the Government of India. The relevant portion of the Notification is as follows:

“The Government has therefore, decided to permit private sector units to also set-up diesel engine generating (DG) units of reciprocating type and using heavy fuel oils such as, Heavy Petroleum Stock (HPS), Low Sulphur Heavy Stock (LSHS), Heavy Furnace Oil (HFO), Furnace Oil (FO) and Natural Gas, wherever available as primary fuel.”

13. As per this Notification, the Fuel of the Power project was either heavy fuel oils or natural gas. One of the primary conditions stipulated in the said Notification is as under:

“4.3 The responsibility of either indigenous or imported fuel linkage would be that of the Independent Power Producer (IPP) and any fuel supply risks would have to be shared between the IPP/Fuel suppliers. The State Electricity Board will not take any fuel supply risk.”

14. As per this condition, the responsibility of fuel linkage either heavy fuel or natural gas would be that of the Appellant to the Generator. If there is any risk in the supply, the same have to be shared between the Generator and Fuel Supplier. This Notification further classified that the State Electricity Board will not take any fuel supply risk.

15. Admittedly, the Appellant has entered into a Gas Supply Agreement with M/s. GAIL on 16.12.1999 and 31.7.2008 with regard to supply of gas in different quantities.

16. During the period from 1.7.2006 to 23.10.2007, sufficient quantity of natural gas was available to the Appellant to operate the power plant at 52.8 MW contracted capacity but the tariff heat rate by the Plant was always more than 1980 Kcal/Kwr which is a tariff heat rate as per the PPA.

17. Thus, the actual consumption of the Appellant's plant was more than the designed value of the Plant. It was the

responsibility of the Appellant to improve the efficiency of the machine.

- 18.** It is specifically contended by the Respondent that during the billing period from 30.6.2012 to 15.7.2012, the power plant of the Appellant got sufficient quantum of natural gas to operate at the full load of 52.8 MW but even during that period, the Appellant was able to achieve only 84.29% of the PLF with 100% gas availability.
- 19.** As pointed out by the learned Counsel for the Respondent, there is no clause in the PPA which provides for payment of full fixed cost to the Generator, if the Generator fails to meet the PLF as agreed to under the PPA. Any compensation by way of deemed generation or relaxed heat rate due to partial loading of machine due to shortage of fuel supply which is the sole responsibility of the Generator, is not applicable as per the Power Purchase Agreement dated 25.8.2004.
- 20.** Further, we find no provision for compensation by way of deemed generation or relaxed operational norms due to operation of the power plant at partial load due to shortage of fuel in the 2004 Regulations of the Central Commission which were in force when the amended PPA was entered into between the parties or in the Station Commission's Tariff Regulations of 2005 which were made effective subsequent to the signing of the PPA. Under these

circumstances, the State Commission has correctly decided not to allow the claim of the Appellant for the underpaid fixed and variable charges on account of shortage of gas.

- 21.** The learned Counsel for the Respondent has placed the copy of the order dated 13.3.2004 issued by the Ministry of Petroleum and Natural Gas, Government of India, allocating additional quantity of natural gas to the consumer of Perungulam zone of Tamil Nadu as per the following Table:

Sl.No.	Name of Party	Quantity in MMSCMD	Prorated Quantity in MMSCMD	Remarks
1.	TNEB, Chennai	0.45	0.438	To double existing plant capacity
2.	BOC India Ltd., Kolkata	0.02	0.019	Captive Power Generation
3.	Coromandel Electric Co.,Ltd.,Chennai	0.04	0.039	Additional gas for full capacity utilisation of the existing project.
4.	M/s. Arkay Energy Limited.,Chennai	0.05	0.048	Additional gas for full capacity utilisation of the existing project.
5.	M/s. Arkay Energy Limited., Chennai	0.30	0.292	To double existing plant capacity

- 22.** From the above table, it is evident that apart from TNEB getting 4,38,000 SCMD of Natural Gas, the Appellant (formerly M/s. Arkay Energy Limited and now M/s. Penna Electricity Limited) also got additional quantity of 2,92,000
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SCMD to double the existing capacity of their plant. Based on this additional quantity, TNEB developed Valuthur-II Power Plant and the Appellant developed the power plant called M/s. Arkay Energy Limited (Energy) Rameswaram. Both the new plants were commissioned during the year 2007. It is pertinent to note that the availability of gas to all the consumer in the Perungulam Region started to reduce. The Appellant's new power plant has also contributed to short supply of natural gas to the power plants in the Perungulam zone. Since, TNEB is also consumer in that zone, the Appellant's claim of Force Majeure for shortage of gas is not correct and the State Commission also rejected the request of the Appellant for fixed charges compensation and the actual variable charges for the alleged gas shortage.

- 23.** Further, the claim by the Appellant on the basis of the Force Majeure cannot be accepted as the Appellant never initiated any proceedings under the Force Majeure as per the procedure incorporated in the PPA.
- 24.** In other words, the inability of the Appellant to achieve 85% of the PLF due to shortage of gas cannot be said to be due to Force Majeure as claimed.
- 25.** That apart, there is no material to show that the short supply of gas by M/s. GAIL to the plant of the Appellant was only due to the increased requirement of the gas by the

Electricity Board. Furthermore, the fuel supply risk would have to be shared between the independent Power Producer and Fuel Supplier and the State Electricity Board will not take any fuel risk. Therefore, the issue with regard to short supply cannot be said to be between the Appellant and Respondent but it was a dispute between the Appellant and M/s. GAIL. Therefore, the Appellant cannot be permitted to claim the underpaid fixed charges and underpaid variable charges just because M/s. GAIL who was a party to the Fuel Supply Agreement was unable to supply adequate quantity of the Gas to the Appellant in violation of the provisions in the Fuel Supply Agreement. For this act of short supply of gas, the Electricity Board cannot be held responsible.

- 26.** In regard to **the 2nd issue**, it is contended by the Appellant that the State Commission having held that the amended PPA which was required to be approved, was not placed and approved by the State Commission, ought to have directed the parties for the further amendment of the said PPA dated 25.8.2004 and placed before the State Commission by the Electricity Board for its approval and as such, the State Commission has not considered the prayer made by the Appellant in MP No.1/2010 filed by the Appellant during the pendency of DRP No.14 of 2010 praying for the direction for the amendments to ensure and

insulate the operation of the Generating Station so that the Station would be functional in alignment within the Electricity Act, 2003 and Regulations.

27. While discussing this issue, let us see the question framed by the Commission with regard to the said issue and discussions over the said issue by the State Commission in the impugned order. The question is as follows:

“(iii) In the event of not providing any relief on (i) and (ii) above, whether the PPAs could be considered as unenforceable in law and the Petitioner permitted to exist the PPA.”

28. As per Para (iii) in Sub Para-3 of Para-9 of the Findings of the Commission, the question has been framed on the basis of the prayer made by the Appellant that the PPA may be considered as unenforceable in law and consequently, the Petitioner (Appellant) may be permitted to execute the PPA.

29. Let us refer to the discussion made on the issue by the State Commission:

“9.3. Whether the petitioner is entitled for the following on account of short supply of gas by GAIL:

i) The payment of actual fuel charges paid to GAIL.

ii) The payment of short charges recovered on account of fixed charges as well as increase in heat rate due to part load operation both on account of reduced supply of gas by GAIL.

iii) In the event of not providing any relief on i) & ii) above, whether the PPAs could be considered as unenforceable in law and the petitioner permitted to exit the PPA.

The petitioner has sought compensation from TNEB for shortage of gas allegedly caused by the diversion of gas for the TNEB project at Vazhudhur. The petitioner has stated that he has kept the TNEB informed about the shortage of gas. In this connection, the Commission would like to observe that the petitioner has entered into a contract with GAIL for supply of gas. The same supplier has also supplied gas for the TNEB project at Vazhudhur. If the gas supplier defaulted in supply of gas to the petitioner, it was for the petitioner to seek appropriate remedies from the gas supplier for damages on account of their supply. The TNEB, as power purchaser, has no control over the gas supplier. We are, therefore, unable to accept the contention that the TNEB should compensate the petitioner for short supply of gas.

Finally, the Petitioner pleads that the power purchase agreement is unenforceable and unworkable and therefore the Commission should declare the power purchase agreement as unworkable. We would like to refer to the Order of the Commission in DRP.Nos.12 and 13 of 2008 M/s.Raghu Rama Renewable Energy Ltd., Vs TNEB and M/s. Ind Barath Energies (Thoothukudi) Ltd., Vs. TNEB, where the Commission declined to terminate the contract for power purchase between the TNEB and the Petitioners. The Petitioners in both the cases pleaded that the performance of the contract became impossible on account of hardship. The facts of the case of the present petitioner is similar, if not identical, to the facts of the case in DRP Nos.12 and 13 of 2008. The Commission believes that contracts, which have been

voluntarily executed between two parties, cannot be terminated by the Commission. We are of the firm belief that the Petitioner would have carried out due diligence exercise and weighed the pros and cons of the various clauses of the power purchase agreement.”

- 30.** The above discussion would reveal that the main prayer was made by the Appellant before the State Commission that the Power Purchase Agreement may be declared to be unenforceable and unworkable and on the basis of the said prayer, the State Commission held that the Power Purchase Agreement between the parties had been voluntarily executed and as such, it cannot be terminated.
- 31.** Now the grievance of the Appellant is that the State Commission has failed to give a direction to the Board to amend or modify the PPA and place it before the State Commission for approval.
- 32.** The reading of the Petition filed before the State Commission in DRP No.14 of 2009 would reveal that the main prayer made by the Appellant was with reference to the claim for fixed charges and variable charges for the Power generated and supplied to the Electricity Board during this specified period.
- 33.** The prayer (a) to (d) in the Petition filed by the Appellant is for the direction to the Electricity Board for payment of those charges to the Appellant. The last prayer made by the
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Appellant was to direct the Electricity Board to make the payments and relieve the Appellant from the obligation of the amended PPA dated 25.4.2004. The prayer is quoted below:

“(e) For any reason if the Respondent were not to consider any or all of the relief claimed above by the Petitioner, then, to direct the Respondent to make the payments due to the Petitioner as in prayer (a), (b) and (c) above and relieve the Petitioner from the obligations of the amendment PPA dated 25.8.2004.”

34. During the pendency of DRP No.14 of 2009, the Appellant/Petitioner filed another Petition in MP No.1 of 2010. The prayer made in the MP No.1 of 2010 has been referred to in the impugned order which is as follows:

“J. The PPA executed on 25.8.2004 ought to have been placed before the Commission for approval and determination of the tariff in terms of the provisions contained in Electricity Act, 2003. If only the said Power Purchase Agreement dated 25.8.2004 had been placed before the Commission for approval and determination as contemplated in law, this Commission as a Regulatory Authority, would have noticed the non-conformities and the workable provisions of the PPA with reference to the technology employed and directed the suitable modifications and amendments thereof to ensure the fairness and the justness of the provisions to the benefit of both the Respondents and the Petitioner. But, as the PPA has not been placed before this Commission as required, it is submitted that the entire Power Purchase Agreement dated 25.8.2004

has become unworkable and unenforceable document in the eyes of law and this Commission therefore, has the power to direct appropriate changes to be made in view of the statutory power enjoined upon it to regulate the electricity purchase and procurement process of a distribution licensee.”

35. We find that there is no provision for compensation for capacity charges and variable charges due to the fact that the plant was not able to maintain the normative availability/Plant Load Factor on account of shortage of fuel in the Central Commission’s Tariff Regulations, 2004 which were in vogue when the amended PPA was entered into between the parties or in the State Commission’s Tariff Regulations, 2005. Admittedly, the State Commission’s Tariff Regulations were made effective subsequent to the signing of the PPA. The State Commission could not intervene in allowing amendment in the provisions of the PPA in this regard which were voluntarily agreed by both the parties and which are not in contravention to any provision of the Act or Rules or the Regulations.

36. Therefore, there is no infirmity in the findings of the State Commission in not agreeing to interfere with the provisions of the PPA declaring the PPA unworkable with regard to compensation for fixed charges for the above period due to shortage of supply of gas.

37. Thus, this point is decided as against the Appellant.

38. Summary of Our Findings

- i) The Appellant is not entitled to payment of full fixed charges and actual variable charges in respect of supply of energy between 1.7.006 to 15.6.2009 when the operational parameters were affected on account of shortage supply of gas by M/s GAIL in view of non availability of any provision in this regard in the PPA or Tariff Regulations.**
- ii) There is no infirmity in the findings of the State Commission in not agreeing to interfere with the provisions of the PPA or declaring the PPA unworkable with regard to compensation for fixed and variable charges for the above period due to shortage of supply of gas.**

39. In view of the above, the Appeal is dismissed. No order as to costs.

40. Pronounced in the Open court on 10th Day of July, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 10th July, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~