Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.163 of 2005

Dated: July 7, 2006

Present: **Hon'ble Mr.Justice Anil Dev Singh, Chairperson**
Hon'ble Mr.A.A. Khan, Technical Member

IN THE MATTER OF:

1. The Chairman,
Tamil Nadu Electricity Board,
800, Anna Salai,
Chennai – 600 002,
TAMILNADU

2. The Chief Engineer,
Non-Conventional Energy Sources,
800, Anna Salai,
Chennai – 600 002,
TAMILNADU

3. The Superintending Engineer,
Trichy Electricity Distribution Circle/North,
Tamil Nadu Electricity Board,
Mannarpuram,
Tirchy – 620 020,
TAMILNADU ... Appellants

Vs.

M/s. Kothari Sugars & Chemicals Ltd,
Kattur, Trichy-District,
Tamil Nadu ..... Respondent

For Appellants : Mr. R. Ayyam Perumal &
Mr. S. Valli Nayagam, Advocates

For Respondents : Mr. Y. Ramesh &
Mr. Y. Rajagopala Rao, Advocates

JUDGEMENT

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

This appeal is directed against the order of the Tamil Nadu Electricity Regulatory Commission dated August 23, 2005, whereby the appellants have been directed to bill the respondent on the basis of recorded demand instead of sanctioned demand, in accordance with the agreement entered into by the parties and to adjust a sum of Rs. 21,85,804/- (Rupees Twenty One lakh Eighty Five Thousand Eight Hundred Four only), being the excess amount collected by the Board from the respondent herein against future current consumption charges payable by the latter for two assessment periods and in case, out of such adjustment it is found that any balance amount is to be refunded to the respondent then such balance amount shall be refunded without payment of any interest.

2. The facts giving rise to the appeal briefly stated are as under:

3. The respondent manufactures sugar in its factory located at Kattur, Trichy, Tamil Nadu. It has a capacity of 2900 TPA.

It also has a cogeneration plant based on begasse with an installed capacity of 2x5.51 MW. The power generated by the cogeneration plant is used for processing of sugarcane juice and some part of the power, which is in excess of the respondent's requirements, is sold to the Tamil Nadu Electricity Board (for short TNEB or Board).

4. On January 20, 1995, the TNEB and the respondent entered into a Power Purchase Agreement whereby it was agreed that the sugar mill of the respondent would feed the surplus power from its begasse based cogeneration plant into the Board's grid and the Board would draw power and pay for it under section 43 of the Electricity (Supply) Act, 1948. The duration of the agreement was for a period of 5 years. As per clause 9 of the PPA, maximum demand recorded during non seasonal period at the time of drawal of energy from the respondent was to be charged at board's tariff. According to clause 10.1 of the Agreement maximum demand and energy recorded by the import meter during the seasonal period was

to be charged at Board's tariff. Clauses 9 and 10.1 read as under:

> "**Clause 9** :Maximum demand recorded during the non seasonal period at the time of withdrawal of energy from their account will be charged at Board's Tariff.
>
> **Clause 10.1**: Maximum demand and energy recorded by the import meter (i.e. drawal of power from Board's Grid) during the seasonal period will be charged at Board's Tariff."

5. Subsequently, by an agreement dated May 27, 1998 between the parties it is inter-alia agreed that the respondent will be permitted to avail of 1000 KVA at 110 KV as additional start up power over and above the already permitted 1000 KVA (hereinafter called renewed start-up power agreement).

6. On October 31, 2000, a fresh Power Purchase Agreement (for short PPA) was entered into between the parties for a period of 15 years. Like the earlier agreement of 1995, maximum demand and energy recorded by the import meter under the new PPA is liable to be charged at board's tariff on recorded demand. Similarly power drawn from the grid is to be charged under Board's H.T. Tariff-III including HD charges

on recorded demand. The relevant clauses of the PPA read as under:-

> "10 (a) (i): Maximum demand and energy recorded by the import meter (i.e. drawal of power from Board's grid) shall be charged at Board's Tariff, (HT Tariff I rate applicable for Industrial consumers) including M.D. charges on recorded demand. Penal and other surcharges are to be applied as per the notified tariff conditions if the sanctioned demand is exceeded or power is availed during peak load hours as the case may be or conditions specified from time to time."
>
> 10(a)(ii) Power drawn from the grid for the purpose of sugar mill/cogeneration plant annual maintenance works, trial run of equipments, water works etc., shall be charged under Board's H.T. tariff III including M.D. charges on recorded demand.

7. Prior to the fresh PPA of 2000 the appellant from August, 1996 to February, 1999, billed the respondent on the basis of sanctioned demand.

8. On September 29, 1998, the respondent by a written representation to the third appellant, the Superintending Engineer, Trichy Electricity Distribution Circle(North), TNEB, Manarpuram pointed out that the respondent could be billed only on the basis of recorded demand and charges could not be levied on sanctioned demand.

9. By yet another letter dated December, 3, 1998, the respondent asked the second appellant, the Chief Engineer, Non Conventional Energy Sources (for short NCES) to refund the excess amount paid by the respondent on the basis of sanctioned demand.

10. On March 5, 1999, the Chief Engineer, NCES agreed with the respondent that the bills should be raised with reference to recorded demand instead of sanctioned demand. He also informed the respondent that he had clarified the position to the Superintending Engineer, Trichy Electricity Distribution Circle(North), TNEB, Manarpuram.

11. In March, 1999, the Chief engineer raised the bills, for the seasonal period on the basis of the recorded demand. On October 23, 1999 and October 29, 1999, the respondent preferred representations to the appellant for correcting earlier bills on the basis of recorded demand. The aforesaid representation was followed by another representation dated July 21, 2000 in which the respondent requested the

appellant to refund a sum of Rs. 21, 85, 804/- which was paid in excess on account of the bills raised on the basis of sanctioned demand. Since the respondent did not receive any favourable response, a reminder was sent by the respondent on September, 25, 2000 to the Superintending Engineer.

12. On December, 27, 2001, the Chief Engineer, NCES informed the respondent that the power consumed by the respondent from TNEB grid will be charged at HT industrial tariff I during crushing season and HT commercial III rate during non-crushing season, including MD charges on recorded or sanctioned demand, whichever is higher. The respondent was informed that the revision will take effect from February, 2002. The respondent was also informed that clause 10 (a) of the PPA requires to be modified.

13. On January 17, 2002, the Superintending Engineer repeated the contents of the letter of the Chief Engineer dated December 27, 2001 and required the respondent to execute the supplementary agreement immediately.

14. On April 3, 2002, the Superintending Engineer informed the respondent that the request for refund of excess bill demand charges during non-crushing period was not capable of compliance as per the instruction of the headquarters. It was emphasized in the letter that the respondent should execute the supplementary agreement so that clause 10 (a)(i) and 10(a)(ii) of the PPA could be modified.

15. Aggrieved by the stand of the Board, the respondent filed a writ petition. The High court was of the view that the respondent could approach the Chief Electrical Inspector for relief. Accordingly, the Writ petition was disposed off with the direction that till such time the matter is resolved by the Chief Electrical Inspector, the respondent shall pay consumption charges on the basis of recorded demand. Thereupon, the respondent approached the Chief Electrical Inspector who, in turn, required the respondent to approach the Tamil Nadu Electricity Regulatory Commission.

16. Consequently, the respondent filed a petition before the Regulatory Commission whereby it was prayed as follows:

(a) Letter dated April 3, 2002 of the Superintending Engineer, Trichy, Electricity Distribution Circle be quashed;

(b) The appellants be directed to bill the respondent on the basis of recorded demand instead of sanctioned demand;

(c) The respondent be held entitled to refund of Rs. 21, 85,804/- being the amount charged in excess by the appellant on the basis of sanctioned demand.

17. The Regulatory Commission by its order dated August 23, 2005 considered and determined the following issues arising in the matter:-

1. Whether the respondent Board has got the power to modify the Power Purchase Agreement so as to levy the tariff on the sanctioned demand or recorded demand whichever is higher, as contended by the respondent Board?

2. Whether the respondent Board has got the power to require the Petitioner to enter into a supplementary agreement modifying clause 10(a)(i) of PPA?

3. Whether the Petitioner is entitled to the refund of Rs.21,85,804/- with the interest at 18% per annum as prayed for?

18. In so far as Issue No. 1 is concerned, the Regulatory Commission was of the view that the Board did not have any power to modify the PPA without the consent of the respondent.

19. As regards, Issue No. 2, the Regulatory Commission held that the Board cannot compel the respondent to execute a supplementary agreement modifying clause 10(a)(i) of the PPA.

20. In so far as Issue no. 3 is concerned, the Regulatory Commission was of the view that that respondent had been over charged and it was entitled to refund of the excess amount of Rs. 21,85,804/-. As regards the claim of interest, the Regulatory Commission held that the respondent was not entitled to interest.

21. Accordingly, the Commission directed the Board to revoke the proceedings dated April 3, 2002 as the same were not in accordance with law, the respondent be billed as per the recorded demand instead of sanctioned demand on the basis of the agreement already entered into by both the parties and

to adjust the sum of Rs. 21,85,804/- being in excess of the amount collected by the Board from the respondent after verifying the correctness of the amount against future current consumption charges payable by the respondent for the two assessment periods and if even after such adjustment it is found that any balance amount is to be refunded then such balance amount be refunded without any interest as per the provisions of the Supply Code.

22. Aggrieved by the order, the appellants have filed the instant appeal. We have heard the learned counsel for the parties. We now proceed to examine each one of the issues arising in the matter.

Issue No. 1:

Re: Whether the Board has got the power to modify the Power Purchase Agreement so as to levy the tariff on the sanctioned demand or recorded demand whichever is higher, as contended by respondent Board?

23. The learned counsel for the appellants submitted that the board is empowered to modify the PPA and to levy the tariff on sanctioned demand or recorded demand, whichever is higher.

In support of the submission, the learned counsel for appellants relied upon clause 7 of the agreement dated May 27, 1998. The learned counsel highlighted the fact that as per Clause 7, the Board has a right to vary the terms of the agreement and it was in pursuance of the power vested in the Board that it had required the respondent to execute the supplementary agreement for modification of Clauses 10(a) (i) and 10(a) (ii) of the PPA dated October 31, 2000. On the other hand, the learned counsel for the respondent submitted that Clause 7 of the agreement dated May 27, 1998 has no application and the respondent cannot be compelled to execute a fresh PPA for the purpose of modifying the agreement. Clause 7 of the Agreement dated May 27, 1998, on which reliance has been placed by the appellants, needs to be set out. The Clause reads as follows:-

"**7: <u>BOARD'S RIGHT TO VARY TERMS OF AGREEMENT</u>**

"T*he consumer agrees that the board shall have the right to vary, from time to time, tariffs, general and miscellaneous charges and the terms and conditions of supply under this agreement by <u>special or general proceedings</u>. The consumer, in particular, agrees that the Board shall have the right to enhance the rates etc. chargeable for supply of electricity according to exigencies. It is also open to Board to restrict or*

impose power cuts totally or partially at any time as it deems fit".

24. The clause postulates that the board can vary the tariff from time to time but this clause has not been incorporated in the subsequent PPA dated Oct., 31, 2000. This PPA also makes no reference to the agreement dated May 27, 1998.

25. According to clause 10 (a)(i) of the PPA dated Oct., 31, 2000, maximum demand and energy recorded by the import meter is liable to be charged at the boards' tariff when power is drawn by the respondent from the board's grid. Similarly as per clause 10(a)(ii) of the PPA, power drawn from the grid for the purpose of sugar mill/cogeneration plant, annual maintenance works, trial run of equipments, water works etc. is to be charged on recorded demand. In case the intention of the parties was that it will be open to the board to vary the terms of the PPA including clauses 10(a)(i) and 10(a)(ii), a clause to that effect would have certainly been incorporated in the PPA itself. The PPA of 2000 is an independent agreement - independent of the agreement of 1998. It is an agreement

which was entered after the execution of the agreement of 1998 relating to additional start up power. This agreement of 2000 does not empower the board to unilaterally change the terms of the agreement, and to ask or compel the respondent to execute a fresh agreement for the purpose of modifying clauses 10(a) (i) and 10 (a) (ii) of the PPA of 2000, so that the respondent can be billed on the basis of recorded or sanctioned demand, whichever is higher, during the non-crushing season.

26. In the circumstances, therefore, we find that the following view of the Commission can not be faulted:-

i. The agreement dated May 27, 1998 is a separate and different agreement from the PPA.
ii. Agreement dated May 27, 1998 has not been made supplemental to PPA.
iii. The agreement dated May 27, 1998 cannot override the PPA or modify the terms thereof.
iv. In case the parties had agreed for modification of the provisions of the PPA in that event the PPA would have made provision for such modification.

27. Clause 7 of the agreement dated May 27, 1998 postulates that variation in the tariff is to be brought about by special or general proceedings. The terms "general or special proceedings" occurring in clause 7 of 1998 agreement can not be ignored. They show that the board is required to initiate proceedings for change of tariff. Obviously, the word "proceedings" has a different connotation than the agreement between the parties. It is not the case of the appellants that they have initiated general or special proceedings providing for modification of tariff. In any event, Clause 7 cannot be taken recourse to for the purposes of compelling the respondent to agree for modification of the PPA.

28. It is well settled that contractual terms cannot be changed unilaterally by a party. The terms of a contract can be altered or varied under section 62 of the Contract Act only by the agreement of both the parties. In CITI Bank N.A. Vs. Standard Chartered Bank, (2004) 1 SCC 12, it was held as follows:

> *"Novatio, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done*

with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novatio of the contract."

29. Under the PPA the board is obliged to raise bills in accordance with clauses 10(a) (i) and 10(a)(ii) thereof. In other words, the board is under an obligation to charge the respondent on the basis of maximum demand and energy recorded by the import meter. It cannot raise a bill in contravention of the contractual stipulations.

30. In Indian Aluminium Co. vs. Kerala State Electricity Board, the Supreme Court held that Section 59 of the Electricity (Supply) Act, 1948 did not authorize the board to enhance its charges in breach of the contractual stipulations. In this regard, the Supreme Court held as follows:-

"……*That is why this Court pointed out in Maharashtra State Electricity Board Vs Kalyan Borough Municipality that cost- is not the sole or only criterion for fixing the tariff. Now obviously, where, by a stipulation validly made under Sub-section (3) of Section 49, the Board is under a contractual obligation not to charge any thing more than a specified tariff, it would not be 'practicable' for it to enhance its charges, eve if it finds that it is incurring operational loss. To do something contrary to*

law – in violation of a contractual obligation – can never be regarded as 'practicable'. Section 59 does not give a charter to the board to enhance its charges in breach of a contractual stipulation. The Board can adjust its charges under the section only in so far as the law permits it do so. If there is a contractual obligation which binds the board not to charge any thing more than a certain tariff, the Board cannot claim to override it under Section 59. It is significant to note the difference in language between Section 59 on the one hand and Section 57 read with clause (1) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law, agreement or instrument applicable to the licensee" shall in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of the Sixth Schedule and clause (I) of the sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not so far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer; enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in Section 59 and, on the contrary, the words there used are "so far as practicable". We do not think that Section 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under Sub-section (3) of Section 49."

31. In view of the aforesaid discussion, we are of the view that the contractual obligations flowing from clause 10(a)(i) and clause 10(a)(ii) of the PPA are binding on the Board. In any event, the board has not initiated any proceedings for the

change of tariff contemplated by clause 7 of the agreement of 1998. It is pertinent to point out that after the coming into force of the Electricity Act, 2003, the board has no power to fix or vary the tariff. It is the Regulatory Commission which has been assigned the function of fixation of tariff.

32. Accordingly, we do not find any reason to differ with the view of the commission that the board does not have the power to vary the PPA.

Issue No. 2:

Re: whether the Board has got the power to require the respondent to enter into a supplementary agreement modifying clause 10(a) (i) of PPA?

33. It is the view of the Commission that the board cannot compel the respondent herein to execute the supplementary agreement for modifying clause 10(a)(i) of the PPA. This view is unexceptional and no fault can be found with the same. No such power was given to the Board under the PPA. Any contract which is not based on free volition of the parties and has been induced by force or coercion is void. To constitute an agreement the contracting minds of both the parties must

be ad-idem. They must be free to execute or not to execute the agreement. Therefore, the Commission was right in holding that the Board has no power to require the respondent herein to enter into supplementary agreement for modification of clause 10(a)(i) of PPA.

Issue No. 3:

Re: whether the respondent is entitled to the refund of Rs.21, 85,804/- with the interest at 18% per annum as prayed for?

34. In view of the fact that the board has no power to modify the PPA without the consent of the respondent, the respondent is to be billed on the basis of maximum demand and energy recorded by the import meter and not on the basis of the sanctioned demand. Despite the fact that Chief Engineer/NCES, TNEB, accepted the position that under clause 10(a) of the PPA, the respondent was to be charged on the basis of recorded demand only and not on the sanctioned demand, the excess amount of Rs. 21, 85,804/- charged on the basis of the sanctioned demand was not refunded to the respondent.

35. In the circumstances, therefore, we do not find any ground to interfere with the order passed by the Regulatory Commission. Accordingly the appeal of the appellants is dismissed. No costs.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member