

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

Dated :26th July, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson.
Hon'ble Mr. V.J. Talwar, Technical Member**

Appeal No. 125 of 2010

In the matter of:

Ind Barath Energies (Thoothukudi) Ltd

Appellant

Versus

1. The Chairman
Tamil Nadu Electricity Board
No 144, Anna Salai
Chennai 600-002
2. The Chief Engineer
Tamil Nadu Electricity Board
No 144, Anna Salai
Chennai 600-002
3. The Superintendent Engineer
Tuticorin EDC
Tamil Nadu
4. Tamil Nadu Electricity Regulatory Commission
No 19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai

Respondents

And

Appeal No. 126 of 2010

In the matter of:

Raghu Rama Renewable Energy Ltd
Versus

Appellant

1. The Chairman
Tamil Nadu Electricity Board
No 144, Anna Salai
Chennai 600-002
2. The Chief Engineer
Tamil Nadu Electricity Board
No 144, Anna Salai
Chennai 600-002
3. The Superintendent Engineer
Tuticorin EDC
Tamil Nadu
4. Tamil Nadu Electricity Regulatory Commission
No 19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai

Respondents

Counsels for Appellants
Counsels for Respondents

Ms N Shoba & Mr Adhimoolam
Mr H S Mohammed Rafi for (R 2-3)

JUDGEMENT

Per Hon'ble Mr. V.J. Talwar, Technical Member

1. M/s Ind Barath Energies (Thoothukudi) Ltd is the Appellant
(Appellant – 1) in the Appeal No. 125 of 2010. M/s Raghu

Ram Renewable Energy Ltd is the Appellant (Appellant -2) in the Appeal No. 126 of 2010. Chairman and officers of Tamil Nadu Electricity Board (TNEB) are Respondent No. 1 to 3 in both the appeals. Tamil Nadu Electricity Regulatory Commission (State Commission) is the 4th Respondent in both the Appeals.

2. These Appeals have been filed by the Appellants aggrieved by the Orders dated 23.10.2009 in DPR No. 3 of 2009 and DPR No. 4 of 2009 passed by the State Commission. Since, the issues are the same, common judgment is being rendered in both the Appeals. The short facts are as under:
3. The Appellants are biomass based Generating Companies. The Respondent TNEB had entered in to the Power Purchase Agreements (PPA) with the 1st Appellant on 15.03.2004 and with 2nd Appellant on 20.06.2002 respectively.

4. Clause 7(a) of the said agreements provided for the price as per rates specified in the Permanent B P (FB) no 59 dated 11.04.2000 (herein TNEB Order). The TNEB Order fixed the price payable subject to a ceiling of 90% of the prevailing H.T.Tariff-I rate applicable for the industrial consumers.
5. The prevailing H.T.Tariff-I for industrial consumers was a two part tariff. It comprised of energy charges at Rs.3.50 per unit and demand charge at Rs.300 per KVA of maximum demand per month. However, while calculating the dues payable to the Appellant, the Respondent, TNEB took into account only the energy charge component of the HT Tariff I. Accordingly the Respondent TNEB put a ceiling of Rs 3.15/unit (90% of Rs 3.50) on energy procured from the Appellants. The Appellants alleged that while doing so the Respondent TNEB has omitted the demand charges and other charges payable by industrial consumers as per H.T. Tariff – I.

6. The Appellants requested the Respondent TNEB for modification in the ceiling limit taking in to account the demand charges component in the H T Tariff – I as per terms of PPA. However, the respondent TNEB declined and justified its omission on the ground that although the HT Tariff I is a two part tariff (i.e. energy charges + demand charges), the Appellant companies are entitled for availing maximum purchase price of Rs.3.15 per unit (i.e. 90% of energy charges of HT Tariff I for industrial consumer).
7. Hence, the Appellants herein filed separate petitions being petition No. DRP 3 & 4 of 2009 respectively before the State Commission. The issue before the State Commission was whether the Respondent TNEB has correctly excluded the demand charges component of HT Tariff –I in fixing the ceiling of purchase price for power procured from the Appellants.

8. The State Commission, vide separate orders dated 23.10.2009 dismissed petitions of both Appellants.
9. Aggrieved by the orders of the State Commission, the Appellants have filed these Appeals before us.
10. Ms Shoba, Ld Counsel for the Appellants raised following contentions:
 - I. The Appellants are biomass generating companies. The Appellants have entered in to PPA with the Respondent, TNEB. As per clause 7(a) of the said PPA read with TNEB Order, the Appellants were entitled for a tariff at Rs 2.73 per unit effective from 1.4.2000 with 5% annual escalation. The price so fixed had a ceiling of 90% of prevalent H T Tariff – I applicable for Industrial Consumers.
 - II. The prevailing HT Tariff – I was a two part tariff comprising of energy charges at Rs 3.50 per unit and demand charges at Rs 300 per kVA of maximum

demand. Demand charges are integral part of tariff and ought to have been included while fixing ceiling of 90% of prevalent H T Tariff – I. Taking in to account the demand charges and converting it to per unit rate at 100% load factor and unity power factor, H T Tariff-I work out to be Rs 3.50 + Rs 0.417 = Rs 3.917. Ceiling at 90% of this price would be Rs 3.525 per unit.

- III. As per above provision, the purchase price for various years works out as given below:

<u>Year</u>	<u>Purchase Price</u>
2000-2001	Rs 2.73
2001-2002	Rs 2.73 + 5% esc = Rs 2.86
2002-2003	Rs 2.86 + 5% esc = Rs 3.00
2003-2004	Rs 3.00 + 5% esc = Rs 3.15
2004-2005	Rs 3.15 + 5% esc = Rs 3.31
2005-2006	Rs 3.31 + 5% esc = Rs 3.57 = Rs 3.525 (ceiling)
2006-2007	Rs 3.525 (ceiling)
2007-2008	Rs 3.525 (ceiling)
2008-2009	Rs 3.525 (ceiling)
2009-2010	Rs 3.525 (ceiling)

- IV. The Respondent, TNEB have paid the Appellants only at rate of Rs 3.15 per unit i.e. 90% of only energy charge component of H T Tariff – I. The Respondent,

TNEB has completely ignored the demand charge component of tariff.

11. Mr H S Mohammed Rafi, Ld Counsel for the Respondent TNEB has refuted these contentions of the Appellants. He submitted that

- I. As per TNEB Order, the energy charges alone are to be taken into account for the purpose of fixing ceiling price.
- II. As per two part tariff structure, energy charges are levied for the energy actually consumed by the consumer. The demand charges are billed to meet out the committed demand by the H T consumers by providing necessary capacity by the Respondent TNEB.
- III. In terms of Power Purchase Agreement the rates are subjected to amendments from time to time. The state Commission has fixed the purchase price at Rs 3.15 per unit by its Tariff Order No. 3 of 2006 dated

15.5.2006 in respect of Non-conventional Energy Sources Power Plants.

- IV. The Respondent, TNEB was charging start up power at rate higher than the H T Tariff – I. Subsequently the State Commission by Order 2 & 4 dated 15.5.2006 fixed Rs 6.2181 per unit for startup power drawn from the grid by the generators. The said charges being beneficial to the Appellant – 1, the Appellant – 1 filed a petition No. DRP 10 of 2009 before the State Commission. In this petition No. DRP 10 of 2009, the Appellant – 1 has relied upon clause 14 of the Power Purchase Agreement. This clause binds the Appellants to agree with the variations in tariff and other terms and conditions as ordered by the TNEB or the State Commission.
- V. The State Commission accepted the contention and prayer of the Appellant-1 in view of this clause 14 of

PPA. The State Commission in its order dated 26.6.2009 in DRP No. 10 of 2009 observed that the PPA has not been renegotiated, the existing PPA executed on 15.3.2004 should prevail and as such clause 14 of PPA conferring the benefits of variation of the terms and conditions of the agreement ordered by the State Commission would be available to the 1st Appellant.

VI. The 1st Appellant has derived benefit by virtue of provision of clause 14 of PPA dated 15.3.2004. The same logic and ratio is to be adopted in the present case. By virtue of clause 14 of PPA the rates fixed by the State Commission at Rs 3.15 per unit for purchase of power from Biomass Power Plants is applicable to the Appellants.

12. We have heard the Ld. Counsel for both the contesting parties.

13. On a specific query about approval of the State Commission to the Power Purchase Agreements entered between the Appellants and the Respondent TNEB, the Ld Counsel for the Appellants informed this Tribunal that the PPAs were not submitted to the State Commission for its approval.
14. In the light of the rival contentions referred to above urged by the learned counsel for parties, and in view of the fact that PPAs had not been approved by the State Commission, following questions would arise for our consideration:
- I. Whether Power Purchase Agreements entered between the Appellants and the Respondent TNEB are valid PPAs?
 - II. Whether tariff for procurement of power from Non-conventional Sources of Energy specified by the State Commission in its tariff order dated 15.5.2006 would be applicable to the Appellants?

III. Whether demand charge component of two part H T Tariff -I is to be taken into account while fixing ceiling for purchase price for power to be procured from generating stations of the Appellants?

15. We would now take each one of the above questions one by one. The first question before us for our consideration as to whether the Power Purchase Agreements entered between the Appellants and the Respondent TNEB are valid PPAs?
16. In order to appreciate the point at issue, it will be necessary to set out certain historical facts and the relevant provisions of the Electricity Regulatory Commission Act 1998 and Electricity Act 2003.
17. Until 1998, Indian power sector was governed by Indian Electricity Act 1910 and Electricity (supply) Act 1948. On 25th April 1998, the Electricity Regulatory Commission Act 1998 (1998 Act) was enacted by the Parliament of India.

18. The 1998 Act had provision for establishment of Electricity Regulatory Commissions at central level as well as at state level. Accordingly, Tamil Nadu Electricity Regulatory Commission was established in the year 1999. Section 22 of 1998 Act dealt with the functions of State Commissions. Relevant portion of Section 22 of 1998 Act is reproduced below:

22. Functions of State Commission.—(1) *Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:—*

(a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State; {emphasis supplied}

19. Thus in terms of Section 22 (c) of 1998 Act, State Commission had powers to regulate power purchase and procurement process of the Respondent TNEB. It also had power to fix the price at which power is to be procured from generating companies.
20. Tamil Nadu Electricity Regulatory Commission was established in the year 1999. The Respondent TNEB approved Permanent BP (FB) no 59 on 11.04.2000 fixing the price payable for procurement of power from Non-conventional Sources of Energy Power Plant. TNEB entered in to PPA with the 1st Appellant on 15.3.2004 and with the 2nd Appellant on 20.6.2002 respectively. From these facts it is evident that these transactions took place after establishment of the State Commission. It was, therefore, incumbent on TNEB and the Appellants generating companies to get the PPAs approved from the State Commission. Admittedly this had not been done.

21. In the absence of mandatory approval of the State Commission, the PPAs cannot be held as valid and binding on any of the parties.
22. We are at loss to understand the attitude of TNEB towards the State Commission, a Statutory Body established under 1998 Act and adopted under 2003 Act.
23. We are constrained to deprecate the action of TNEB in undermining the authority of the State Commission. We are equally surprised that State Commission also had not taken note of this fact while dealing with the petitions of the Appellants in DPR no. 3 of 2009 and DPR No 4 of 2009.
24. However, merely because the approval of PPA by the State Commission was not obtained, we do not incline to reject the Appeal on the said technical ground. On the other hand we would like to indulge ourselves in the examination of the other issues in hand and decide those issues on merits.

25. Next question before us for our consideration as to whether tariff for procurement of power from Non-conventional Sources of Energy specified by the State Commission in its tariff order dated 15.5.2006 would be applicable to the Appellants?
26. Ld. Counsel for the Respondent TNEB would submit that In terms of clause 14 of the Power purchase Agreement, the Appellants are bound by any variation in tariff, term and conditions approved by the State Commission. The state Commission has fixed the purchase price for procurement of power from biomass based power plants at Rs 3.15 per unit by its Tariff Order No. 3 of 2006 dated 15.5.2006 in respect of Non-conventional Energy Sources Power Plants.
27. Ld Counsel for the Respondent TNEB further submitted that The 1st Appellant has derived benefit by virtue of provision of clause 14 of PPA read with clause 4 of the State Commission's Order No. 3 of 2006 dated 15.5.2006, the

same logic and ratio has to be adopted in the present case and by virtue of clause 14 of PPA, the rates fixed by the State Commission at Rs 3.15 per unit for purchase of power from Biomass Power Plants is applicable to the Appellants.

28. Per contra, Ld. Counsel for the Appellants opposed the contention of the Respondent TNEB and submitted that the plea of the Respondent TNEB is unsustainable for the following reasons: Clause 4 of Order no.3 dated 15.05.2006 passed by the State Commission provided for the applicability of the order. According to this clause the existing agreements between Non-Conventional Energy Source based generators and the Respondent TNEB would continue to remain in force. The PPA with 1st Appellant was executed on 15.03.2004 and PPA with 2nd Appellant was executed on 20.06.2002. Thus both the PPAs, being executed prior to date of order i.e. 15.5.2006, would remain

in force and State Commission's Order No. 3 dated 15.5.2006 would not be applicable to the Appellants.

29. We have considered the submissions of both the parties carefully in the light of Clause 14 of PPA and Clause 4 of State Commission's Order No. 3 of 2006 dated 15.5.2006.
30. Clause 14 of PPA executed between the 1st Appellant and the Respondent TNEB read as under:

“14) The Power Generating company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through biomass and such variations ordered by TNERC and TNEB shall be binding on the company.”

31. Clause 4.0 of State Commission's Order No. 3 of 2006 dated 15.5.2006 provides

“4.0 Applicability of Order – This order shall come into force from the date of its issue. This order shall be applicable to all future and renewal of existing contracts/agreements for the Non-Conventional Energy Sources (NCES) based Generating Plants and Non-

Conventional Energy Sources based Co-Generation Plants located within the State of Tamil Nadu. It should be noted that the existing contracts and agreements between NCES based generators and the distribution licensee signed prior to the date of issue of this order would continue to remain in force. However, the NCES based generators and the distribution licensees shall have the option to mutually re-negotiate the existing agreements/contracts, if any, in line with this order even before the expiry of the contracts. Any renewal of the said contracts/agreements, new contracts/agreements shall be in line with this order.”

32. The bare reading of the Clause 4 of the State Commission's Order No. 3 of 2006 would imply that the PPAs, in totality, executed prior to 15.5.2006 would remain in force. It does not convey that the State Commission's Order No. 3 of 2006 would not be applicable to such cases. Further, it cannot be construed that some portion of existing PPA would continue to remain in force and other clauses would not be applicable. The wording contained in the said clause that “PPA would remain in force” implies that whole of PPA, including clause 14 of the PPA, would remain in force.

33. Let us now examine the findings of the State Commission. Relevant findings of State Commission given in Order against DPR No. 3 of 2006 read as under:

“5.9. Further, Clause 14 of the PPA reads as follows:

“14) The Power Generating company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through biomass and such variations ordered by TNERC and TNEB shall be binding on the company.”

5.10. Clause 14 makes it clear that the tariff ordered by TNERC shall be binding on the company. The tariff for biomass units was determined by the TNERC at Rs.3.15 per unit effective from 15-5-2006 vide Order No.3 dated 15-5-2006. In our view, this rate should be applicable to the petitioner, whose plant was commissioned on 9-6-2006.”

34. We concur with the above findings of the State Commission to the effect that Clause 14 of PPAs executed between the Appellants and the Respondent make it clear that the such

variations ordered by the TNERC shall be binding on the company.

35. To clarify further, we shall state that Clause 4 of State Commission's Order No. 3 of 2006 has saved the existing PPAs. As indicated above, Clause 14 of the PPAs provides that the variations ordered by the TNERC and the TNEB on tariff shall be binding on the company. State Commission has ordered variation in tariff and has fixed the tariff at Rs 3.15 per unit vide its Order No. 3 of 2006 dated 15.5.2006. This variation in tariff ordered by the State Commission is binding on the Appellants by virtue of clause 4 of the State Commission's order No. 3 of 2006 read with clause 14 of the PPA
36. In view of the above, the Respondent TNEB is liable to pay the price of energy procured from the Appellants' biomass based power plants at Rs 3.15 per unit with effect from 15.5.2006.

37. Incidentally, it was brought to the notice of Tribunal by the Respondent TNEB that the Appellant in Appeal No. 125 of 2010 in another case being DPR 10 of 2009, had taken benefit of Clause 14 of the PPA read with Clause 4 of the State Commission's Order No.3 of 2006 in connection with lower tariff for startup power drawn from the TNEB Grid from the State Commission. This aspect was conceded by the Ld. Counsel of the said Appellant and hence she did not press for the relief prayed for in the Appeal No. 125 of 2010.
38. However, she stated that since the Appellant in the Appeal No. 126 of 2011 did not ask for any benefit of lower tariff for startup power drawn from the TNEB grid by virtue of clause 14 of PPA, it is entitled for the relief sought for in the Appeal i.e. higher tariff for energy from its Biomass based Generating Plant in accordance TNEB Order.

39. In this connection, it is important to note the findings of the State Commission in DPR No. 10 of 2009 dated 29.6.2009.

The relevant portion of the said order read as under:

“6.1 The Power Purchase Agreement between M/s.Ind-Barath Energies (Thoothukudi) Ltd., and the Tamil Nadu Electricity Board was executed on 15-3-2004. Clause 10(a) of the PPA which deals with drawal of power from the Board’s grid reads as follows:

...

...

6.3 The Petitioner draws the attention of the Commission to clause 14 of the PPA extracted below:

“The Power Generating Company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through biomass and such variations ordered by TNERC and TNEB shall be binding on the Company.”

6.4 Clause 14 makes it clear that the variations ordered by the TNERC and the TNEB on tariff, policy on banking, wheeling and the terms and conditions of the agreement shall be binding on the company. One such variation ordered by TNERC relates to the tariff applicability during the outage of the generator. The tariff during the outage condition has been fixed at Rs.6.2181 per unit in Order No.2 dated 15-5-2006. Outage is a condition when the generator is unable to

*inject power into grid either during start up or maintenance. The TNEB has contended in the counter affidavit that the petitioner company has not entered into a fresh energy purchase agreement in accordance with TNERC Order No.3 dated 15-5-2006 and therefore not entitled to start up power at the rate of Rs.6.2181 per unit. **The Commission observes that as the PPA has not been re-negotiated between the Distribution Licensee and the generator, the existing PPA executed on 15-3-2004 should prevail and as such clause 14 of the PPA executed on 15-3-2004, which confers the benefit of variations in the terms and conditions of the agreement ordered by TNERC or TNEB shall be available to the generator. The company is, therefore, entitled to the benefit of the tariff charge of Rs.6.2181 per unit during the outage condition.***

40. Clause 14 of both the PPAs is verbatim same. Therefore, finding of the State Commission in relation to this clause read with clause 4 of Order No. 3 of 2006 ought to be the same in both the cases.
41. In the light of above discussions and findings of the State Commission we are of the view that tariff determined by the State Commission vide its order No. 3 of 2006 is binding on

the Appellant from the date of issue of said order i.e. from 15.5.2006.

42. The question is answered accordingly.
43. Next Question for our consideration as to Whether demand charge component of two part H T Tariff -I is to be taken into account while fixing ceiling for purchase price for power to be procured from generating stations of the Appellants?
44. In view of our answer to 2nd question given above, this question is to be dealt with the limited relevance.
45. The Appellant claimed that as per clause 7 of the PPA read with TNEB Order, ceiling price for procurement of power from Biomass based power plant is to be fixed taking into account the demand charge component of HT Tariff – I. As per the Appellant's contention the ceiling price works out to be Rs 3.52 per unit. Respondent TNEB has however fixed the ceiling at Rs 3.15 per unit which is 90% of the energy charge component of HT Tariff -I.

46. The main contention of the Appellant is based on interpretation of Clause 7 of the PPA executed between the Appellant and the Respondent TNEB. Clause 7 of PPA is reproduced below:

“7. (a) The Power Generating Company agrees that the purchase price of biomass based energy generated and exported to the TNEB grid shall be paid at the rated specified in the permanent B.P (FB) No. 59 dt.11.04.2000 as amended from time to time.”

47. The relevant portion of permanent BP (FB) No.59 referred to in clause 7 (a) is as under:

“ i) The purchase price of energy received from the Power Projects using Non-conventional fuels like Biomass, Municipal Solid, Liquid and other Industrial Wastes, animal wastes etc. is fixed at Rs.2.73 per unit effective from 01.04.2000 with 5% annual escalation, over the previous year rate, for a period of nine years up till the year 2010. The price so fixed shall not exceed 90% of the prevailing H.T.Tariff-I rate applicable for the Industrial consumers which may get revised from time to time.”

48. Before indulging ourselves in getting in to the merits of the Appellant's claim, it would be appropriate to examine the findings of the State Commission on this aspect in the impugned order dated 23.10.2009. The relevant extracts of the impugned order is reproduced below:

“5.11. Reading together the various clauses of the PPA, the inescapable conclusion is that what the TNEB means by HT tariff I is the energy component of HT tariff I. Apart from the above logic, even from a practical point of view, computation of precise demand-equivalent energy charges is impossible since such a calculation will have to assume a certain power factor for the load of the consumer and a certain load factor. The figures of power factor and load factor vary from consumer to consumer and there is no universal figure which can be adopted for the computation of demand equivalent charges. Therefore, the figure of Rs.0.417 per unit calculated on the assumption of unity power factor and 100% load factor is irrational. The figure of Rs.0417 would be higher, if a lower power factor or if lower load factor is adopted..”

49. The findings of the State Commission are elaborate. The prevailing HT Tariff - I was two a two part tariff. It comprised of energy charges at Rs 3.50 per kWh and demand charges

at Rs 300 per kVA per month of 90% of contracted demand or maximum demand recorded during the period, whichever is higher.

50. On the other hand, the tariff for Biomass based power plants was single part tariff comprising of only energy charges. The Appellant, in its claim, has converted demand charge component of two part tariff to energy charge component in per kWh. By doing so, the Appellant has divided rate of demand charges (Rs 300 per kVA per month) by number of hours in a month. In fact the Appellant has worked out effective tariff for industrial consumer by adopting 100% load factor at unity power factor. Effective Tariff of consumer is worked out as

$$ET = EC + DC / (H \times LF \times pf)$$

Where

- ET is effective tariff
- EC = Energy Charges in Rs per kWh
- DC = Demand Charges in Rs per kVA per month
- H = Number of Hours in a month
- LF = Load Factor
- pf = power factor

51. Both single part tariff and two part tariff structures are in vogue in the Indian Power Sector. On generation side, two part tariff has fixed charges and variable charge components. Fixed charges in form of 'Capacity charges' are levied to recover annual fixed charges of the generating company. Generating companies recover full capacity charges on achieving a predefined plant load factor say 85%. In case PLF achieved is less than 85%, capacity charges are reduced proportionately.
52. On distribution and supply side, two part tariff structure comprises of demand charges and energy charges. Demand charges are levied from consumer by distribution licensee for committed supply of contracted demand. Consumer is entitled to draw up to contracted demand power from the grid and distribution licensee is committed to supply the same. In case Consumer exceeds the contracted demand, a penalty is levied.

53. Thus fixed charges in generation and demand charges in distribution are levied for committed supply. On a specific query about committed amount of supply, in MW terms, by the Appellant, Ld counsel of the Appellant informed this Tribunal that there was no committed supply of power made to the Respondent TNEB. Power from the Appellant's power plant is supplied to the Respondent TNEB after meeting captive loads. Since there is no firm commitment to supply, power supplied by the Appellants to the Respondent TNEB is 'infirm' power. Accordingly, the tariff for the Respondent has been fixed as single part tariff comprising of energy charges only.

54. With this background, let us examine the issue of interpretation of term 'H T Tariff – I'. Perusal of clause 7 (a) of PPA and TNEB order BP (FB) no 59 dated 4.11.2000 would reveal that in both the provisions the term 'purchase of energy' from biomass based power stations has been used.

On the other hand in clause 10 of PPA providing for startup power from the grid, term ‘power’ has been used. For clarity purpose, relevant extract of both provisions are reproduced in the Table given below:

<p>The Appellant supplying electricity to the Respondent (BP (FB) NO. 59 dated 4.11.2000)</p>	<p>The Appellant drawing electricity from TNEB grid for startup power (Clause 10 (a) (i) of PPA)</p>
<p><i>The purchase price of energy received from the Power Projects ... shall not exceed 90% of the prevailing H.T.Tariff-I rate applicable for the Industrial consumers</i></p>	<p><i>10. a) i) Drawal of power from Board’s grid ... shall be charged at Board’s HT.Tariff I rate applicable for industrial consumers.</i></p>

55. Reading together these two clauses of the PPA, we arrive at the conclusion is that what the TNEB meant by HT tariff I in TNEB Order BP (FB) no 59 dated 4.11.2000 is the energy component of HT tariff I only. The State Commission while dealing with the issue has also reached the same conclusion. Relevant portion of the State Commission’s findings is reproduced below:

“5.6. Interpretation of the word “HT Tariff I” has to be contextual and read along with other relevant clauses of the PPA. Clause 10 (a) of the PPA is reproduced below:

“10. a) i) Drawal of power from Board’s grid as recorded by the import meter shall be charged at Board’s HT.Tariff I rate applicable for industrial consumers. Maximum Demand Charges shall be charged based on tariff Notified by the TNERC. Penal and other surcharges shall be levied 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 as per conditions imposed from time to time by the Board and TNERC.

ii) Power drawn from the TNEB grid for the purpose of the Bio-mass based power plant maintenance works, trial run of equipments, water works etc., shall be charged under Board’s H.T. Tariff III including M.D. charges based on tariff Notified by the TNERC from time to time.”

“5.7. Drawal of power from the Board’s grid for startup shall be charged at HT Tariff –I rate. The PPA specifically prescribes that maximum demand charges for start-up shall be charged as per the rate fixed by the TNERC. Similarly, power drawn for maintenance shall be charged at HT Tariff III rate. Here again, there is specific reference to maximum demand charges. It is

evident that the tariff for start up as well as maintenance specifically refers to the demand charges, whereas there is no such reference to demand charges for the purchase price of biomass based energy in the PPA.

5.8. Reading together the various clauses of the PPA, the inescapable conclusion is that what the TNEB means by HT tariff I is the energy component of HT tariff I.”

56. In the light of above discussions we concur with the findings of the State Commission. Question is answered accordingly

57. Summary of our findings.

- I. In the absence of mandatory approval of the State Commission, the PPAs executed between the Appellants and the Respondent TNEB, cannot be held as valid and binding on any of the parties.**
- II. Tariff determined by the State Commission vide its order No. 3 of 2006 is binding on the Appellants from the date of issue of said order i.e. from 15.5.2006.**

III. Reading together Clauses 7(a) and 10 (a)(i) of the PPA along with TNEB Order, we arrive at the conclusion is that what the TNEB meant by HT Tariff I in TNEB Order is only the energy component of HT Tariff - I .

58. In view of our above findings, we do not find any ground to interfere with the impugned orders of Tamil Nadu Electricity Regulatory Commission dated 23.10.2009. Hence, both the Appeals being devoid of merit are dismissed. However, there is no order as to cost.

59. Pronounced in the open court today the 26th July, 2011.

(V J Talwar)

Technical Member

(Justice M Karpaga Vinayagam)

Chairperson

INDEX : REPORTABLE/~~NON-REPORTABLE~~