

Before the Appellate Tribunal for Electricity  
Appellate Jurisdiction

Appeal Nos. 127, 200 and 201 of 2005

In the matter of :

Tamil Nadu Electricity Board  
800, Anna Salai,  
Chennai – 600002

Appellant

Versus

Neyveli Lignite Corporation Ltd.  
Block-I, NEyveli  
Cuddalore District  
Tamil Nadu

Respondents

Under Section 111 (2) of Electricity Act, 2003

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

Dated : 06<sup>th</sup> December, 2006

Counsel for the appellant (s): Mr. R. Venkataramani, Sr. Advocate, Mr. V. Krishnamurthy, Mr. P.R. Kovilan, Mr. V. Vasudevan, Mr. Ayyam Perumal, Mr. Vallinayagam, Ms. Vijayalakshmi & Ashok Panigrahi,

Mr. Sowmiya Narayanan (Consultant)

Counsel for the respondent(s): Mr. V. R. Reddhy, Sr. Adv., Mr. S.S. Choudhari, Mr. K. R. Shasi Prabhu, Sr. Adv., Mr. Krishnayan Sen, Mr. R. Chandrachud, Mr. Prasanth, Ms. Altaf Fatima, Mr. Sakya Singh Chaudhuri

Mr. R. Suresh, Mr. Ashish Verma (Rep. from NLC)

## Judgment

### Per Hon'ble Mr. A.A. Khan, Technical Member

The appellant namely, Tamil Nadu Electricity Board ('TNEB' for short) has preferred appeals being appeal Nos. 127, 200 and 201 of 2005, against the impugned orders passed by the Central Electricity Regulatory Commission (for brevity hereinafter called 'Central Commission'). While appeal No. 127 of 2005 has been filed against CERC order dated 04.08.2005 in petition no. 81/2005, the appeal no. 200 of 2005 has been filed against the CERC order dated 21.04.2005, passed in Review Petition No. 28/2005, and the appeal No. 201 of 2005 has been filed to challenge the CERC order dated 01.02.2005 in petition No. 194 / 2004. The matter relates to the determination of tariff for the periods 1997-2002 and 2002-04 for the supply of energy by the Neyveli Lignite Corporation ('NLC' for brief) a central public

sector undertaking to the appellant from its Thermal Power Stations – I (TPS-I). TNEB is the sole beneficiary of the power supplied by TPS-I since its inception. The issue lies in a narrow compass. We are required to determine as to whether the Return-on-Equity (ROE) of 12% is admissible as claimed by the appellant or 16% as insisted by the respondent, NLC for the determination of tariff.

### FACTS OF THE CASE

2. Since the NLC is owned by the Government of India, in accordance with the Section 79(i) (a) of the Electricity Act 2003, the tariff of electricity generated by the Thermal Power Stations of the NLC is to be determined by the Central Commission. The appellant and the respondent, as in the past, entered into a mutually acceptable agreement for supply of power by the ‘NLC’ from its TPS –I to TNEB for the period from 01.04.1997 to 31.03.2002 based on the pre-existing Bulk Power Supply Agreement (herein after called as ‘BPSA’) executed by the parties for the past period. Accordingly, BPSA, an agreement for supply of electricity from NLC’s TPS-I to TNEB applicable for the period from 01.04.1997 to 31.03.2002 was entered into on 09.03.2001. It may be pertinent to observe that after

expiry of the pre-existing agreement on 31.03.1997, it has taken 4 years to execute the agreement for supply of electricity for the period 01.04.1997 to 31.03.2002.

3. Clause 10.2 of the aforesaid agreement dated 09.03.2001 mentions the major parameters which also included ROE of 12% considered for calculation of tariff tabulated in clause 10.1. Clause 10.3 of the said agreement, an extract of which is as mentioned hereunder, also stipulates that the rates are also subject to further revision based on the directives / notifications if any that may be issued by the Central Government in regard to Return-on-investment amongst others.

*“10.3 The quantity of energy supplied between 6000 hours to 6150 hours shall be computed as per the method described in Annexure –III which shall also form an integral part of this Agreement. The above rates for supply of power shall be inclusive of all escalations during the period of the agreement but shall be exclusive of any statutory tax, duty, royalty, cess or levy etc. which may be imposed by the Central and/or State Government*

*and/or any local authority on production and/or consumption of lignite and / or generation and /or sale of electrical energy which shall be payable additionally through the monthly bills. The above rates are also subject to further revision based on the directives / notifications, if any, that may be issued by the Central / State Government or any other Central /State Regulatory Authorities competent to issued directives/guidelines in regard to Depreciation, Return on Investment or any other parameter. Foreign Exchange rate variation, Reimbursement of Income Tax shall be governed by Clauses 10.5 and Clause 16.*”

4. Further clause 15 of the aforesaid agreement provides for retrospective application of the terms and conditions of the agreement, beside making some terms effective from the date of signing of the agreement. The clause 15 of the agreement reads thus:

*“15. All the above provisions of the agreement excepting those relating to rebate and surcharges provided under*

*clauses 11.1, 11.3, and 11.4 shall be deemed to have come into effect from 01.04.1997 and shall be effective for 5 years from 01.04.1997 to 31.03.2002. In respect of Clauses 11.1, 11.3 and 11.4 the effective dates shall be the date of this Agreement.”*

5. Ministry of Coal, Government of India, the administrative Ministry of NLC issued a notification dated 03.12.1998 directing NLC to revise their power tariff to ensure a ROE of 16% in respect of all their existing Thermal Power Stations and also for all their mines w.e.f. 01.11.1998. The notification further states that the rate of return is valid till 31.03.2000 and thereafter any revision in tariff notification would be made by the Central Commission.
  
6. In the meanwhile, the Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2001 (for brevity hereinafter called as ‘Regulations – 2001,') which came into effect from 01.04.2001.

7. It is noted that the tariff based on the BPSA was charged @ 185.86 paise/kwh as on 31.03.2002 i.e. date of expiry of the agreement and based on the agreement between the parties the same tariff continued beyond 31.03.2002. Further, in order to operationalise the securitization scheme to securitize the outstanding dues payable by TNEB to Central Power and Coal Sector Undertakings, TNEB acknowledged its dues including the outstanding on account of additional 4% ROE towards NLC up to 30.09.2001.
  
8. On 29.03.2004 the NLC filed a tariff petition no. 33/2004 for the period 01.04.2002 to 31.03.2004 before the Central Commission. During the proceedings conducted by the Central Commission both parties agreed to opt out from the Regulations 2001 for tariff determination and decided to follow the terms in pre-existing BPSA for the past period. The Central Commission by order dated 31.08.2004 directed the parties to determine the tariff on the basis of terms and conditions of the BPSA considering the auxiliary consumption of 12% instead of 12.5% as agreed between them. The

- tariff was calculated on this basis afresh by the NLC resulting into fixing the rate @ 185.45 paise/kwhr.
9. TNEB has been regularly making payment inclusive of additional 4% ROE to NLC till August, 2004. However, when NLC intimated the aforesaid revised tariff and raised the bills based on it TNEB did not make full payment against the bills from September 2004 to November 2004 but paid only @ 174.71 paise/kwhr. This led to NLC filing a non-compliance petition no. 194 of 2004 dated 13.12.2004 before the Central Commission seeking directions to TNEB for payment of charges at the revised rates. Replying the petition applicant TNEB raised certain issues regarding the parameters taken for tariff calculation which, amongst others also included that the ROE taken would be 12% instead of 16% and the post-LEP (post-life Extension programme) capacity of Thermal Power Station –I would be taken as 600 MW instead of 540 MW.
  10. The Central Commission by order dated 01.02.2005 in petition no. 194/2004 while rejecting the TNEB's claim that ROE was to be paid at 12% and not 16% upheld the TNEB's contention that the Tariff has



to be determined taking capacity as 600MW. In the aforesaid order the Central Commission has also observed that there was nothing on record to support the claim of the TNEB that it was paying ROE at higher rate of 16% under protest.

11. The respondent, NLC, recalculated the tariff on the basis of 600 MW capacity and intimated the tariff of 182.05 paise/ kwhr to the appellant on 15.02.2005.
12. The appellant filed a Review Petition No. 28 / 2005 against the order of CERC dated 01.02.2005 before the Central Commission and the same was rejected by it on 21.04.2005.
13. The appellant filed a petition no. 81 of 2005 before the Central Commission for determination of tariff for the period 01.04.2001 to 31.03.2004 under Regulations, 2001 and the same was rejected on 04.08.2005 at the admission stage on the ground of *res judicata* as the order has already been passed for the determination of tariff for the same period.

14. The NLC, filed a petition No. 97/2005 before the Central Commission seeking direction to TNEB for making payments of the Bills to NLC @ 182.05 paise/kwhr. In view of the undertaking of TNEB's representative to pay the tariff @ 182.05 paise /kwhr the order passed by the Central Commission dated 18.10.2005 did not contain any direction for payment.
  
15. Aggrieved by the orders passed by the Central Commission the appellant has challenged the impugned orders dated 04.08.2005, 21.04.2005 and 01.02.2005 before this Tribunal.

### **DISCUSSIONS**

16. The disputes fundamentally hinges on the interpretation of terms of BPSA executed between the parties on 09.03.2001 and more particularly the clause 10.3 of the agreement and whether or not the appellant, TNEB, had raised objections/protests prior to 2003 against the inclusion of additional 4% ROE in the invoice dated 15.06.2001 preferred by the respondent, NLC. It may be pointed out that the appellant in its memo of appeal has submitted that the respondent has been charging ROE @ 16% which the appellant has been paying

under protest to avoid an additional surcharge of 15% per annum to which the respondent would be entitled if the appellant does not clear the bills of the respondent as per the penal provisions of tripartite agreement. The tripartite agreement refers to the securitization scheme under which the outstanding dues payable by TNEB to Central Power Sector and coal entities are securitized and in the process of its implementation TNEB acknowledged its dues including the outstanding arrears on account of additional 4% ROE towards NLC up to 30.09.2001. TNEB availed the benefit of up to 60% write-off of surcharge and interest payable on the over dues to the respondent, NLC. At a later stage for the subsequent one-time settlement the TNEB also acknowledged the dues payable to NLC arrived at by considering the additional ROE of 4% for the period from 01.10.2001 to 30.11.2003.

17. The TNEB's stated intent, on the one hand, is to acknowledge the dues inclusive of increased ROE from 12% to 16% for securing the benefit of securitization scheme and attempt to avoid additional surcharge under the penal provision but, on the other, to remain impervious to NLC's claim of 16% ROE for tariff determination. It is

not only unreasonable but also against business ethics for TNEB to adopt ROE of 16% in so far as it helps to secure benefit for itself but deny the same dispensation in determination of tariff for the supply of power by the NLC.

18. The appellant was asked by this Tribunal to submit the relevant documentary evidence in support of its claim of having raised the objections/protests against inclusion of additional 4% ROE in the invoice dated 15.06.2001 prior to 2003. It may be pertinent to mention here that the Central Commission after undertaking similar exercise has concluded in the impugned order dated 01.02.2005 that nothing was placed before it to show that the payments by the appellant, TNEB to respondent, NLC were made under protest even though a submission to that effect was made by the appellant before it.
  
19. The appellant has submitted an affidavit dated 24.04.2006 wherein it states that the amount released for the period 01.10.2001 to 30.11.2003 was under protest as per the minutes of meeting held on 22.12.2003 and placed at pages 374 to 379 of volume –I of the appeal

paper-book. It is to be noted that the securitization scheme provided one time settlement of outstanding dues payable by the TNEB to NLC up to 30.09.2001 and was worked out based on ROE of 16%. The aforesaid minutes of the meeting pertains to the negotiation for subsequent one-time settlement of dues for the period 01.10.2001 to 30.11.2003 and that too was computed based on additional ROE of 4%, both for TPS and Mine assets. The NLC, on the request made by TNEB, provided the similar concessions/incentive as for securitization of dues up to 30.09.2001 for the aforesaid period also and net amount payable by the TNEB to NLC of Rs. 191.62 crores was reconciled and the agreement was reached between the parties that the amount will be paid in 10 installments from January, 2004.

20. Further, the pending court cases against the orders of CERC, referred to in the minutes of the meeting, which both parties were at liberty to pursue, have no bearing on NLC's claim of 16% ROE based on the terms of BPSA. As a matter of fact the pending court cases relate to appeal against the order of the Central Commission dated 21.12.2000 passed in petition nos. 4/2000; 31/2000; 32/2000; 34/2000; 85/2000; 86/2000 and 88/2000 for determining the norms leading to order for

availability-based tariff and Regulations 2001. It is not appropriate to link it with the terms and conditions of the BPSA. The appellant's reliance on the aforesaid minutes of the meeting to substantiate its claim of protests before release of payment of invoice inclusive of additional 4% ROE is, therefore, misplaced and rejected.

21. It is pointed out that the BPSA signed between the parties having expired on 31.03.1997, the new BPSA to be effective from 01.04.1997 for a period of 5 years could only be executed between the parties nearly 4 years later on 09.02.2001. Further the Ministry of Coal, Government of India, issued a notification dated 03.12.1998 directing NLC to revise its power tariff to ensure a return on equity of 16% in respect of its TPSs and Lignite Mines with effect from 01.11.1998. Further as per Section 43A(2) of the Electricity Supply Act 1948 applicable on the relevant time provides as follows:

*43A(2). Terms, conditions and tariff for sale of electricity by Generating Company:-*

*(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the plant load factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette.*

*Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned.*

Also Sections 62 and 79 of Electricity Act 2003 provide that tariff determinations and regulations thereto of generating companies owned or controlled by the Central Government are to be done by the Central Commission. Thus, at the relevant time, the respondent being a generating company, wholly owned and controlled by the Government of India, statutorily was obliged to effect sale of electricity to the appellant only on the terms and conditions and tariff as may be determined by the Central Government. We are of the opinion that the aforesaid direction is binding on NLC and it, being wholly owned by the Government of India, is not competent to negotiate the parameter of 16% of ROE with its bulk power purchaser for which specific statutory direction under special notification was issued by the Government of India. Any deviation from it, in our opinion, would vitiate BPSA rendering it unlawful under section 23 of the Contract Act 1872.

22. As the date (i.e. 01.04.1997) from which the newly executed BPSA was to be made effective was earlier than the date (i.e. 01.11.1998) from which ROE of 16% was applicable, it necessarily required computation of tariff schedule separately based on 12% ROE and 16% ROE along with the associated financial parameters, effective for the



periods 01.04.1997 to 31.10.1998 and 01.11.1998 to 31.03.2002 respectively, and its amalgamation into a single BPSA would have not only made documentations for the agreement avoidably cumbersome but also vulnerable to mis-interpretation.

23. The appellant has submitted that the first tariff proposal dated 30.04.1998 based on 16% ROE was submitted by the NLC which allegedly, sequel to negotiations, was re-worked on the basis of 12% ROE and re-submitted subsequently. The examination of the documents furnished has revealed that firstly, the ground for resubmission of tariff proposals was on account of factors other than the increased ROE and secondly, in any event it was required to be done as admittedly the applicable ROE on the commencement date of the tariff period (i.e. 01.04.1997) was 12% and not 16%. The ROE of 16% was to come into effect only from 01.11.1998. The reason advanced by the Senior Counsel for the Respondent that the tariff rates were fixed on the basis of 12% ROE since, on the one hand, Clause 15 of the BPSA provided that the agreement would be deemed to come into effect from 01.04.1997 and, on the other, immediately after executing BPSA, Clause 10.3 of the agreement enabled raising

of supplementary bills for the arrears of additional ROE, sounds plausible. The Sr. Counsel has further submitted that after execution of the BPSA documents, the NLC raised the supplementary invoice on account of additional 4% ROE, and no objection was raised by the TNEB for increased rate of ROE and the payment was made against the invoice. He further averred that the appellant also paid subsequent bills on higher rates of ROE up to August, 2004 without raising any objections.

24. In order to support the plea that the dispute over the increased ROE existed since the beginning phase of the negotiations for BPSA, the appellant has also made reference to an internal office note of 27.08.2001 seeking TNEB's internal approval of the recommendations made by the securitization Expert Group headed by Dr. M.S. Ahluwalia, Member (Energy) Planning Commission on liquidation of arrears to Central Power Sector Undertakings at pages 87 to 103 of the Volume-II of the appeal paper-book. It is true that it contained increase of ROE from 12% to 16% w.e.f. 01.11.1998 as a disputed item but the objection was limited to ROE not being linked

to Debt-Equity ratio and has nothing to do with the terms and conditions of the BPSA governing the determination of tariff.

25. In order to further establish the veracity of the claim made by the appellant brought out in para 23 above that the respondent had first submitted its tariff proposal dated 30.4.1998 based on 16% ROE and after alleged negotiations it had re-submitted the proposal dated 07.01.1999 based on 12% ROE, it may be pointed out that the letter of revised proposal dated 07.01.1999 contained the following paragraph:

*“The rates have been worked out at 12% ROE & Internal Resources (IR) for both Mines and Thermal Power Station. As per the Govt. of India, Ministry of Coal direction (Copy enclosed for reference), rate of return has been increased to 16% from 12% for both Mines and Thermal effective from 01.11.1998. Consequently, the power cost will increase by 5.45paise/Kwhr”.*

The proposal contrary to the claim, mentioned that while it is based on ROE of 12%, the same has since been increased to 16% by the directions of the Ministry of Coal, Govt. of India effective from 01.11.1998 and also indicated that the power cost on account of that will increase by 5.45 paise/Kwhr. Subsequently, NLC's letter dated 31.05.1999 while making reference to the NLC's earlier letter dated 07.01.1999 also makes a reference to TNEB's letter dated 18.02.1999 seeking reduction in the rates and certain clarifications. The examination of the TNEB's letter dated 18.02.1999 to NLC does not make any reference to the issue of ROE. It only indicates how the rate has been linked. The letter states that :

*“ the above rates are worked out at 12% ROE/IR. As already pointed out in our letter dated 07.01.1999 for some of the assets, cost, return etc . are proposed to be claimed by NLC as and when commissioned basis (reference Ann-I to the letter dated 07.01.1999)”.*

The letter also indicated that there was no avenues left for reduction in the rates. A letter dated 23.06.1999 was sent by NLC to TNEB for expediting the approval of the proposal. The aforesaid exchange of

correspondences prior to signing of BPSA on 09.03.2001, indicate that on being intimated by NLC, the TNEB had not raised any objection to computation of tariff based on ROE of 16% from 01.11.1998 as directed by the Government of India. The conduct of the parties demonstrated their understanding of the terms and conditions of BPSA and the respondent NLC appeared assured that the impact of the increased ROE on the tariff shall be taken care of by the Clauses 10.3 and 15 of the BPSA.

26. In summary, it appears to us that the strategy adopted for signing of the new BPSA by the parties has been to first negotiate and finalize items of capital base, operating parameters and elements of fuel pricing effecting the tariff of the Thermal Power Station-I, while at the same time adopt the parameters such as depreciation, return on equity etc. regulated by the notifications/directives of the concerned statutory authorities as base parameters, implemented in the pre-existing BPSA for tariff computation. Subsequent to the signing of the new BPSA the adjustments in the tariff on the basis of the validly modified parameters contained in Clause 10.3 is allowed in terms of Clause 15 of the BPSA.

27. In view of the above, we dismiss the appeal Nos. 127, 200 and 201 of 2005.

( A.A. Khan )  
Member Technical)

(Justice Anil Dev Singh)  
Chairperson

Dated : 6<sup>th</sup> December, 2006