

**BEFORE THE TAMIL NADU ELECTRICITY REGULATORY
COMMISSION**

1st August 2007

PRESENT:

Thiru S. Kabilan - **Chairman**

and

Thiru B.Jeyaraman - **Member**

D.R.P.NO.3 OF 2007

M/s. Hi-Tech Carbon (A unit of Aditya Birla Nuvo Limited)
K-16, Phase II,
SIPCOT Industrial Area,
Gummidipondi (PO)
Thiruvallur District 601 201

.. Petitioner

Vs.

Tamil Nadu Electricity Board,
Rep. by its Chairman,
No.800, Anna Salai,
Chennai 600 002.

- Respondent

The above petition coming up for final hearing on the 13th June 2007, the Commission upon perusing the petition and the affidavit filed in support thereof and the counter affidavit of the Respondent and all other connected records of the case and upon hearing the arguments of both sides and having stood over for the consideration of this Commission till this day, hereby pronounces the following

ORDER

1. Prayer of the Petitioner

The Petitioner prayed for classification of power generation of its plant into suitable category, and give directions to the Respondent to enter into Power Purchase Agreement with the Petitioner.

2. Contentions of the Petitioner

- (a) The Petitioner submitted that they are manufacturers of Carbon Block which is the major raw material for production of rubber products including tyre and that during the manufacturing process of Carbon Block, waste heat gas are generated and conserved by the Petitioner for generation of steam and Electricity. The Petitioner stated that the Steam and Electricity generated from such gases is partly used in the manufacture of Carbon Black and the balance power is exported to the Respondent and to the Petitioner's sister concerns in the State of Tamil Nadu.
- (b) The Petitioner operate a total generating capacity of 16.5 M.W. with 3 generating sets. The generating sets are of capacity of 2.5 M.W. and 6 M.W. Presently 6 M.W. Turbine Generating set has been dedicated for Captive use in manufacturing of Carbon Black in the same campus. The balance 2 Generating sets of 2.5 M.W. and 8 M.W. are synchronized with State Grid for export of power to Respondent as well as to its sister concerns in Tamil Nadu.
- (c) The Respondent through their Letter No. CE/PPPSE/PP/ EE1/ AEE1/ CPP/ F HI-TECH 14 MW/ D 078/07 dt.13.02.2007 has shown keen interest in purchase of additional power and called the Petitioner for negotiations on 15.02.2006.
- (d) Thereafter the Respondent has issued a letter of offer regarding sale of additional power by the Petitioner to the Respondent through Lr. No. CE/ PPP/ SE/ PP/ EE1/ AEE1/ CPP/ F.HI-TECH 14 MW/ D078/ 07, dt. 27.02.2007 showing the terms and conditions for purchase of additional power. In para 5 of the said letter it has been stated "TNEB also informed that since the above pricing has been arrived based on the negotiations,

between the TNEB and the Company, no premium in price will be considered based on the status of plant (CPP / Co-gen CPP) and be decided by TNERC.”

- (e) The Petitioner is continuously following up with the Respondent since 10.11.2004 (Annexure-V) for finalization of PPA for additional power supply but unable to get results.
- (f) The Respondent officials after examining all the above submissions made by the Petitioner finally informed the Petitioner that they were not in a position to decide about the classification and status of the Petitioner’s power plant.
- (g) The petitioner is co-generating power from recovery of waste heat gas available from Manufacturing process of Carbon Black, and consuming power captively less than 51%, therefore, not qualifying under the definition of captive generating plant as defined U/S 9 of Electricity Act 2003 and notified by Government of India under Rule GSR (379 (E))
- (h) Therefore the Petitioner seeks for classification of power generation in its plant into suitable category and notification on tariff accordingly.

3. Contentions of the Respondent

- (a) The Captive Generating Plant of M/s. Hi-Tech Carbon was established in accordance with the provisions of G.O. Ms.No.48 dated 22.04.1998 issued by Government of Tamil Nadu i.e. prior to enactment of the Electricity Act 2003 and the Rules in 2005. At present there are three generators available in the plant with capacities of 2.5 MW, 6 MW and 8 MW.
- (b) The respondent respectfully submit that Power Purchase Agreement was executed for 8.5 MW capacity (2.5 MW + 6.0 MW) on 22.03.1999 by

TNEB for purchase of surplus power from the power plant treating it as CPP. As per the PPA (for 6 + 2.5 MW) the sale rate in the first year of agreement is Rs.2.25 per unit with increase of 5% every year upto the financial year 2007-08. The period of PPA is for 15 years and the rate is to be reviewed from 01.04.2008.

- (c) Based on the representation of the Company for sale of power from their 8.0 MW plant, TNEB in letter dated 10.11.2004 has agreed to purchase power generated from the 2.5 MW generator @ Rs.3.01 / unit for the first 17.5 MU sold from the generator and for the balance energy sold from this machine is to be paid @ Rs.2.32 / unit. The rate for the power generated from the new 8 MW generator was fixed at Rs.2.32 for a period upto 31.3.2008 in letter dated 10.11.2004. Thereafter, it was agreed that the rate of purchase will be escalated by 2.5% per annum. The rate of power purchase from the 2.5 MW generator was frozen at Rs.3.01 per unit even though the applicable rate of purchase was Rs.3.16 / unit for the year 2005-06 as per PPA since TNEB was experiencing difficulties in purchasing power at a higher rate for which the Government of Tamil Nadu has also been approached for approval of the frozen rate at Rs.3.01 / unit.
- (d) The Company has agreed to sell an additional 14 MW of power from their new plant under execution at Gummidipoondi vide their letters dated 31.10.2006 and 20.11.2006. The petitioner was requested in respondent's letter dated 23.01.2007, to attend price negotiation meeting on 27.01.2007. The Respondent by letter dated 2.2.2007, communicated the minutes of the above meeting in which the following has been recorded "After detailed discussions about the proposed plant of 14 MW

capacity and various other issues related to the Plant TNEB has offered a firm rate of Rs. 2.32 per unit. The Company promised to revert back after considering their cost analysis shortly.”

- (e) The petitioner in their letter dated 06.02.2007 has offered a revised rate of Rs.3.10 and requested to invite them for negotiations to explain in person about details of their offer. The petitioner was requested by letter dated 13.2.2007 to attend the price negotiation meeting taking into account of the communication sent to them by the Respondent Board in letter dated 3.2.2007. Negotiations were conducted with the Company on 15.2.2007. TNEB offered a rate of Rs.2.32 per unit for sale of energy from the 14 MW plant and informed the company that, if there is any increase in HT tariff rate on energy for industrial service due to tariff revision from the present rate of Rs.3.50 per unit, in such case 80% of the increase in tariff over and above the present rate of Rs.3.50 per unit will be added to the TNEB's offer of Rs.2.32 per unit. The Company was informed that this increased rate will come into force from the date of enforcement of new tariff order.
- (f) Since the Company has not given their acceptance even after a lapse of two months for the same, in Board's letter dated 24.4.2007 the Company was informed that, if the Company fails to furnish their acceptance within seven working days from the date of receipt of the letter, it will be construed that the Company is not interested in selling power to TNEB and TNEB's offer will stand automatically cancelled. The dead line for furnishing reply by the Company ended on 3.5.2007. Therefore, the offer of the respondents on escalation of purchase rate whenever there is increase in HT industrial tariff will not be honoured by TNEB as the aforesaid petitioner deliberately refused to give their acceptance.

- (g) The Company in their letter dated 2.5.2007, received on 5.5.2007 has requested for issuance of suitable modified offer by the Board for their acceptance and entering into a Power Purchase Agreement.
- (h) The Company had installed an additional 8.0 MW capacity and offered to sell the entire energy from this additional generator at the negotiated rate communicated in Board's letter dated 10.11.2004. As the draft PPA for the revised working was being prepared, the Ministry of Power, Government of India issued the notification of Rule 3 on 8.6.2005. Further, as per the draft consultative committee paper on Captive Generating Plants issued by this Hon'ble Commission it also proposed to adopt the GOI norms.
- (i) The petitioner in their letter dt.25.5.2005 has requested the respondent to give permission for wheeling of power to their sister concern M/s. Ultra Tech Cement Limited, Arakkonam plant. Consequent to enactment of the Electricity Rules 2005 on 8.6.2005, it was decided to examine the Company's request as per the provisions of the Electricity Rules 2005. Hence the Company was requested in letter dated 18.8.2005 to furnish the details regarding the percentage of equity shares held by the captive user (s) and percentage of aggregate electricity generated in their plant determined on annual basis and consumed for the captive use.
- (j) The Company furnished the particulars in their letter dt.26.12.2005. It was also found that the sister concerns of the Company M/s. Hi-Tech Carbon namely M/s. Grasim Industries, and M/s. Tanfac do not have any equity participation as prescribed by the Act. Besides the two companies do not consume minimum 51% energy generated by M/s. Hi-Tech Carbon i.e. both the conditions for eligibility criteria to continue as a Captive

Generating Plant are not satisfied as of now. As such the Company cannot be treated as Captive Power Plant and has to be treated like a generating Company only. Hence, TNEB decided to treat the Company as a Generating Company. However, as there is no specific mechanism contemplated as to how the CPP plant has to be treated as generating plant commercially such as billing adjustment procedure and generation adjustments, etc. the execution of PPA was getting delayed.

- (k) The petitioner has approached TNERC in letter dated 9.10.2006 requesting Commission's help for classification of power generation in their plant into suitable category and notification on tariff accordingly. The Hon'ble Commission in letter dated 19.10 2006 called for the remarks of the respondent on the representation of the petitioner.
- (l) The TNERC in letter dated 11.5.2007 was pleased to inform the respondent that the Commission has directed the Company to file a petition before the Commission for redressal of their grievance and if the company files the petition then TNEB would be the respondent. The petitioner has accordingly filed this dispute resolution petition seeking Commission's directions for classification of their plant in to suitable category and notification on tariff accordingly.
- (m) The respondent submit that –
 - (i) the generation from this plant is done based on the waste heat recovery method.
 - (ii) the Electricity Act 2003 classify only two category of generating companies under sections 2 (8) and 2 (28) i.e. Captive Generating Plant and Generating Company only.

- (iii) the Rule 3 of the Electricity Rules 2005 stipulates the qualifying requirement for the Captive Generating Plants.
 - (iv) neither the Electricity Act 2003 nor the Electricity Rules 2005 specifies any special status for the captive co-generation plants i.e. the Company necessarily has to satisfy the pre-requisites for the status as the Captive Generating Plants under the Electricity Rules 2005; and
 - (v) the petitioner does not consume the minimum of 51%, which has been admitted by the petitioner in para 11 of the petition.
- (n) The Board has entered into PPA during 1999 and the same will be in force for the period of 15 years from the date of execution. However there exist clause 3.23 in the agreement which reads as follows:
- “The Company shall also bound by all provisions of IE Act 1910, Supply Act 1948 & IE Rule 1956 as amended from time to time and also the G.O. Ms.No.48 (Energy) dt.22.4.1998 and amendments thereon.”
- As per the above clause the Company is bound by any change in law / Rule made subsequent to entering into PPA. The Electricity Act 2003 came into force after entering into PPA. The Electricity Rules 2005 came in to effect on 8.6.2005. Hence the Company would automatically come under new law / Rules. As per the Electricity Rules 2005, the Company has to consume minimum of 51% of the energy generated for their own use or otherwise the company will loose their status as Captive Generating Plant and will be treated as Generating Station only. Hence the respondent Board decided to treat the company as Generating Company and not as a Captive Generating Plant.
- (o) In view of the above foregoing reasons and in as much as the Generating Company cannot be classified as a Captive Co-generation Plant, the

question of payment of premium in tariff does not arise, and, in this case TNEB has to negotiate the tariff, enter into PPA and file the same before the Regulatory Commission for its approval.

4. Issues

There are five issues, which arise for consideration in the instant case. They are as follows:

- (i) Whether the Petitioner can be treated as CPP based on G.O. Ms.48 dt.22.4.98 and they may be permitted to wheel energy to their sister concerns M/s. Tanfac and M/s. Grasim Industries as per the agreement in force though the requirements of 26% equity share holding and 51% minimum consumption should be satisfied were not in force at the time of signing PPA.
- (ii) whether the CPP status may be withdrawn since the petitioner company has not satisfied the conditions stipulated in Electricity Rules 2005 with effect from 8.6.2005 (the date of issue of Rules 2005) and the petitioner company may be treated as a generating company with effect from 8.6.2005 and energy pumped into the grid may be treated as energy sold to TNEB from a generating station at a negotiated price.
- (iii) whether the petitioner company may be permitted to wheel energy from their plant to their sister concern M/s. ULTRA TECH CEMENTS, Arakkonam since the Company has not substantiated their claim that the end user namely M/s. ULTRA TECH CEMENTS is having any stake of ownership in their plant.
- (iv) Whether the petitioner company has to be treated as a co-generation plant or not.

- (v) Whether the CPPs with whom PPAs have already been signed already prior to enactment of the Electricity Act 2003 shall also be governed by the Electricity Act 2003 and the Electricity Rules 2005 in determining the status of CPPs.

5. Findings with reference to first point in issue

With reference to the first point in issue, it may be stated that the status of CPP was conferred on the Company under G.O. Ms. No.48 dt.22.4.1998. The Electricity Act 2003, which came into force on 10th June 2003 would not have retrospective effect, so as to adversely affect the status of their Company as CPP. The said Act and the Rules made thereunder, would apply prospectively from 10th June 2003. Further, it may be stated that it is a settled proposition of law that vested rights accrued to Petitioner Company prior to the date of commencement of the said Act cannot be taken away by the Act unless there is a specific provision in the Act to that effect. The Petitioner Company will have to be permitted to wheel energy to their sister concerns viz. M/s. Tanfac and M/s. Grasim Industries as per the terms and conditions of the agreement dated 22.03.1999 which is now in force for 15 years.

6. Findings with reference to second point in issue

With reference to the second point in issue, viz. whether the CPP status may be withdrawn since the petitioner company has not satisfied the conditions stipulated in Electricity Rules 2005 with effect from 8.6.2005, it may be stated that the petitioner company has got vested right to CPP status as per G.O. 48 dt. 22.4.1998. The Electricity Rules 2005, which came into force on 8.6.2005 cannot take away the vested right to CPP status of the petitioner company which has accrued to the petitioner company prior to the enactment of the aforesaid Rules and Act. In this context, the following extracts from the Commentary on Interpretation of Statutes (Ninth Edition) by N.S. Bindra at page 224 would be relevant.

“12 Vested rights are preserved

(a) Vested rights are not presumed to be abrogated

There is a presumption against the taking away of a vested right by any fresh legislation and a construction which involves the taking away of vested rights ought not to be adopted if the words of the enactment are open to any other construction: “

From the above, it would be seen that the right of the petitioner to the status of CPP as accrued under G.O. 48 dt.22.4.98, which is prior to the date of commencement of the Act viz. 10th June 2003 cannot be taken away by the Act and the Rules made thereunder. Further as per cl. 3.23 of the PPA dt.22.3.1999, the petitioner Company is bound by G.O. 48 dt.22.4.98. From cl. 3.25 of the said PPA it is seen that the said PPA would be in force for 15 years from the date of agreement. In view of the above specific provisions in the PPA, the petitioner company is even now entitled to the CPP Status as conferred under the said G.O.48. The CPP status cannot be withdrawn in view of the aforesaid Rules which came into force subsequent to the date of issue of G.O. 48 as well as the said PPA.

7. Findings with reference to third point in issue

With reference to the third point in issue, viz. whether the petitioner company may be permitted to wheel energy from their plant to their sister concern M/s. ULTRA TECH CEMENTS, Arakkonam, it may be stated that as per G.O.48, which is applicable to the Petitioner Company, the energy can be used by the sister concerns of the owner of the Captive Power Generation. As already stated above, the right to Captive Power Producer status, which is a vested right accrued to the petitioner company prior to enactment of the Act, cannot be taken away.

As per TNEB's letter dated 10.11.2004 addressed to the Petitioner, TNEB had agreed for purchase of power vide para (3) and for wheeling from 8 MW plant vide para (4) of the letter. In this connection, the following portion in the commentary

on the Indian Contract Act by Singhal & Subrahmanyam's (Fourth Edition 1999) at p 263 and at p 266 would be relevant.

“(v) Absence of a specific contract in writing. Contract can be ascertained otherwise – Where there is no specific contract in writing, or some material terms have not been incorporated in the written contract, the contract or the material terms, may be ascertained from other documents.”

“The Act does not prescribe any formalities for agreements, save in the case of agreements referred to in Section 25, sub-sections (1) and (3), or in section 28, Exception (2) and leaves open to the parties to make their contracts, either orally or in writing.”

From the above it would be seen that the letter dt. 10.11.2004 creates contractual obligation on the Board in regard to wheeling of energy.

In view of the above position, the petitioner company will have to be permitted to wheel the energy to its sister concern M/s. ULTRA TECH CEMENTS, Arakkonam.

8. Findings with reference to fourth point in issue

With reference to the fourth point in issue, whether the petitioner company has to be treated as a co-generation plant or not, it may be stated that the Learned Counsel for Petitioner contended that the Petitioner Company is a Co-Generating Plant and Order No.4 dt.15.5.06 treated Co-Generating Plant as a separate category. He further contended that clause 4 of Order No.4 treated Captive Generating Plant and Co-Generating Plant independently. He also stated that the new plant of the Petitioner Company would be governed by Order No.4. The Learned Counsel for Respondent while referring to para 11 of the petition argued that the Petitioner Company have admitted that they are not Captive Generating Plant. He further contended that though the Petitioner Company may be classified as a Co-Generating Plant, they are not entitled to any premium. With reference to the above contention, it

may be stated that the Petitioner Company in the course of manufacturing process of Carbon Black is generating steam and electricity. As such, the petitioner company is a Co-Generating Company falling within the definition of "Co-Generation" in section 2 (12) of the Electricity Act 2003. As such the petitioner company is governed by Order No.4 dt.15.5.2006.

9. Findings with reference to fifth point in issue

With reference to the fifth point in issue, whether the CPPs with whom PPAs have already been signed already prior to enactment of the Electricity Act 2003 shall be governed by the Electricity Act 2003 and the Electricity Rules 2005 in determining the status of CPPs, it may be stated that the Electricity Act 2003 cannot have retrospective effect so as to affect the transactions and agreements entered into prior to the date of commencement of the said Act, i.e. 10th June 2003. As already stated above the right to CPP status as conferred under G.O. 48 prior to the enactment of the said Act which is a vested right cannot be taken away by the said Electricity Act and Electricity Rules. As per cl.4 of Order No.4 dt.15.5.2006, all the existing contracts and agreements in regard to Captive Generating Plant between the CCP holders and distribution licensee signed prior to the date of issue of the said order would continue to remain in force. However, fresh PPAs. executed after 15.05.2006 should be in conformity with the provisions of the said order No.4 dt.15.5.2006.

10. Conclusion

In the above circumstances, it is hereby directed as follows:

- (i) The Petitioner Company in regard to the matters governed by existing PPA dated 22nd March 1999 should continue to be governed by the terms and conditions of the said agreement and the Petitioner Company should be treated as CPP as per G.O. 48 dated 22.4.1998.

(ii) In regard to execution of fresh PPA, the petitioner company should be treated as Co-Generating Plant and they would be governed by Order No. 4 dated 15.5.2006 with the amendments made thereto.

(iii) The Petitioner Company would be entitled only to the benefits conferred under Order No.4 dated 15.5.2006 with the amendments made thereto as a Co-Generating Plant and not as a Captive Generating Plant.

Pronounced in the Open Court by this Commission on 1st August 2007

**Sd.....
(B. JEYARAMAN)
Member**

**Sd.....
(S. KABILAN)
Chairman**

/True Copy/

**Secretary
Tamil Nadu Electricity Regulatory Commission**