

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar

.... Chairman

and

Thiru K.Venkatasamy

.... Member (Legal)

I.A. No.1 of 2021
in
Review Petition No.3 of 2021
in
D.R.P. No.23 of 2020

M/s.Grace Infrastructure Pvt. Ltd.
Rep. by its Chairman & Managing Director
Mr.A.L.Shah
A-5, Industrial Estate
Thattanchavady
Pondicherry – 605 009.

.... .Review Petitioner /Petitioner
(M/s. Rugan & Arya
Advocate for the Petitioner)

Vs.

1. TANGEDCO
Rep. by its Chairman cum Managing Director
144, Anna Salai
Chennai – 600 002.
2. The Director (Finance)
TANGEDCO
No. 144, Anna Salai
Chennai – 600 002.
3. The Chief Engineer (NCES)
TANGEDCO
No. 144, Anna Salai
Chennai – 600 002.

4. The Superintending Engineer
TANGEDCO
Tirunelveli Electricity Distribution Circle
Tirunelveli – 627 011.
5. The Superintending Engineer
TANGEDCO
Theni Electricity Distribution Circle
Theni – 625 531.
6. The Superintending Engineer
TANGEDCO
Dindigul Electricity Distribution Circle
Dindigul – 624 306.

...Respondents
(Thiru M.Gopinathan,
Standing Counsel for Respondents)

Dates of hearing : **24-08-2021; 14-09-2021; 05-10-2021;
26-10-2021 and 16-11-2021**

Date of Order : **19-01-2022**

The Review Petition No.3 of 2021 in DRP No. 23 of 2020 came up for final hearing on 16-11-2021. The Commission upon perusing the affidavit filed by the petitioner and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in R.P.No. 3 of 2021 in D.R.P.No.23 of 2020:-

This petition in R.P. No.3 of 2021 in D.R.P. No.23 of 2020 has been filed to review/modify the observation in para 6.1 of the order dated 06.07.2021 in D.R.P.No. 23 of 2020 that the petitioner has not denied their liability in respect of the demand for Rs.4,44,25,923/-, and instead may consider adding that the question regarding the petitioner's liability for the sum of Rs.4,44,25,923/- may be

left open. However, *without prejudice to the petitioner's contentions*, the Respondents, *for the present*, may be given liberty to withhold such sum of Rs.4,44,25,923/- and may be directed to pay the balance as claimed in the Petition within the time already specified in the order.

2. Prayer of the Petitioner in I.A. No. 1 of 2021 in R.P.No. 3 of 2021 and D.R.P.No.23 of 2020:-

The prayer of the petitioner in I.A. No. 1 of 2021 in R.P.No. 3 of 2021 and D.R.P.No.23 of 2020 is to waive payment of fees for the Review Petition No.3 of 2021 in D.R.P.No. 23 of 2020 and consequently order a refund of the fee of Rs.8,09,613/- paid by the Petitioner for this Review Petition.

3. Facts of the Case:-

This petition has been filed under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 43 of the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations for review of the order dated 06.07.2021 passed by the Commission in Petition D.R.P.No. 23 of 2020.

4. Contention of the Petitioner:-

4.1. In the matter of M/s. Grace Infrastructure Pvt. Ltd. vs TANGEDCO, D.R.P.No.23 of 2020, the Commission, after hearing both sides, was pleased to pass an order dated 06.07.2021.

4.2. In the said order, under the headings "Findings of the Commission:-" in para 6.1, it is observed as follows:

“6.1. We have considered the rival contentions. Except for setting up the defence of financial difficulty, the respondent has not set out any cogent reasons for non-settlement of bills but has set out a brief defence for deduction of Rs.4,44,25,933/- by placing reliance on the order of the Commission in TNERC/MO-04-5/RPO/Dt. 14-09-2017 for revising the bill for APPC. The petitioner, too has not totally disowned the said liability and merely stated in para 15 of the petition that the said communication having been received during the lock down period and having had no access to the books of accounts at that point of time, a letter was issued as a preliminary reply without prejudice to finalization of accounts at petitioner's end. However, the petitioner claims the entire amount of Rs.80,96,12,127.60 (Rs.80,81,31,929 + Rs.14,80,198.65) and did not dispute the liability for the sum of Rs.4,44,25,933/- during the course of further hearings on the above amount and place any records in support of its defence. Hence, we are of the view that the payment of Rs.4,44,25,933/- by the respondent to the petitioner is an admitted fact by both parties and accordingly we hold that the petitioner is not entitled to be paid this part of the total claim made.”

4.3. However, the petitioner wishes to bring to the attention of the Commission, para 14 of the petition, which reads as follows:

“14. The Petitioner submits that at this juncture, the Petitioner had received a letter dated 19.05.2020 from the 4th Respondent, Superintending Engineer, Tirunelveli EDC Circle, making a bald demand of Rs.4,44,25,933/-, allegedly payable by the Petitioner. The Petitioner submit that the contractually agreed to rate cannot be unilaterally reduced. Without prejudice to the same, the Petitioner further submits that in the said letter NO calculations or justifications for arriving at such sum of Rs.4,44,25,933/- is provided and it is also conspicuous that there is no reference to any contract or the specific Windmill Units with respect to which such rate was allegedly reduced. Thus such demand, without even a proper statement of accounts as to how the alleged sum of Rs.4,44,25,933/- was arrived at as due and payable by the Petitioner, is arbitrary and not maintainable. Further, vide the said letter, it has also been unilaterally decided that such sum of Rs.4,44,25,933/- will be recovered from the pending bills of the Petitioner. However, the Petitioner submits that such action cannot be legally sustained.”

4.4. Thus, if the above extracted para 14 is read with para 15 of the petition, it is clear that the Petitioner has in fact disputed their liability for the sum of Rs.4,44,25,933/-.

4.5. A copy of the reply dated 16-06-2020 which has been exhibited shows that the petitioner disputed its liability of the claim of Rs.4,44,25,933/- of the Respondents vide letters dated 16-06-2020 and 14-07-2020.

4.6. Similarly, in the copy of legal notice dated 05-11-2020 which has been exhibited in para 6 of that notice, the Counsel for the Petitioner had clearly disputed the demand of Rs.4,44,25,933/-. The said para is extracted below for ready reference:

“6. In this scenario, our Client had received a letter dated 19.05.2020 (under Ref 1) from one Mr.P.Selvaraj, Superintending Engineer, Tirunelveli EDC Circle, making a bald demand of Rs.4,44,25,933/-, allegedly payable by our Client. At the outset, our Client is advised to submit that the contractually agreed to rate cannot be unilaterally reduced. Without prejudice to the same, our Client further states that in the said letter NO calculations or justifications for arriving at such sum of Rs.4,44,25,933/- is provided and it is also conspicuous that there is no reference to any contract or the specific Windmill Units with respect to which such rate was allegedly reduced. Thus such demand, without even a proper statement of accounts as to how the alleged sum of Rs.4,44,25,933/- was arrived at as due and payable by our Client, is arbitrary and not maintainable. Further, vide the said letter, it has also been unilaterally decided that such sum of Rs.4,44,25,933/- will be recovered from the pending bills of our Client. However, our Client is advised to state that such action cannot be legally sustained. Our Client reserve their right to take separate legal action for the same.”

4.7. Pending the above petition, a fresh claim has also been filed on 05.07.2021 vide filing No. 88/2021 by the Petitioner, making further claims against the very same respondents. In that Petition also the Petitioner has clearly denied and disputed the said demand of Rs.4,44,25,933/-.

4.8. Only because the Respondents did not put forth any arguments to press for their demand of Rs.4,44,25,933/- the Petitioner did not put forth specific counter-arguments.

4.9. The observation in para 6.1 of the order dated 06.07.2021 in D.R.P.No. 23 of 2020, is thus made under a mistake of fact and hence this review.

4.10. The Petitioner has filed a Petition to waive the Court Fee in the Review Petition. Without prejudice to that the Petitioner pays a Court Fee of Rs.8,09,613/- being 10% of the Court Fee paid in D.R.P. No. 23 of 2020 under Regulation 6 (iv) (8) (v) of Tamil Nadu Electricity Regulatory Commission, Fees and Fines Regulations, 2004.

5. Petition filed by the Petitioner for Waiver of fees in I.A. No.1 of 2021 in R.P. No.3 of 2021 in D.R.P. No.23 of 2020:-

5.1. The Petitioner had filed D.R.P. No. 23 of 2020 before the Commission to direct the Respondents to forthwith pay to the Petitioner a sum of Rs.80,81,31,929 (towards principal and interest calculated till 30.11.2020 plus Rs.14,80,198.65 (towards interest calculated from 01.12.2020 till date of filing) being the amount due to the Petitioner.

5.2. In the said D.R.P. No. 23 of 2020, the Petitioner had paid a court fee of a total of Rs.80,96,122/-.

5.3. After hearing both sides, the Commission passed an order on 06.07.2021.

5.4. With regard to certain observations made in the Findings of the Commission in the said order dated 06.07.2021, the Petitioner has preferred the present Review Petition.

5.5. The Petitioner is not seeking any additional claim or modification in the claim amount in this Review Petition but is presently seeking only to modify certain observations made in the order, on a mistake of fact.

5.6. The Petitioner is advised that since this is only a review of order to rectify a mistake of fact, the Petitioner need not pay any fees and that this petition will come under Regulation No. 6 (8) (i) of TNERC Fees and Fines Regulations, 2004 for filing the present I.A. However, to avoid any delay, the Petitioner, without prejudice, has paid a court fee of Rs.8,09,613/- for this Review Petition under Regulation No. 6 (8) (v) of the said Regulations, though the same is not applicable to the present Review Petition. Notwithstanding the same, the Commission also has the power under Regulation 3 (IV) of the said Regulation to waive any fee payable.

6. Memo filed by the Petitioner on 25-10-2021:-

6.1. The Petitioner had filed D.R.P.No. 23 of 2020 before the Commission to direct the Respondents to forthwith pay to the Petitioner a sum of Rs.80,81,31,929/- (towards principal and interest calculated till 30.11.2020) plus Rs.14,80,198.65

(towards principal and interest calculated till 30.11.2020) being the amount due to the petitioner.

6.2. On 06.07.2021, the Commission was pleased to pass an order as follows:-

“..... subject to Paras 6.1 and 6.3 TANGEDCO is directed to verify the claim made by the Petitioner again and after deducting the amount if any, already paid and settle the same within 30 days from the date of this order.

6.3. The present Review Petition is filed to review the said order only with reference to an observation made by the Commission.

6.4. The Petitioner sent two letters of demand notice 30.07.2021 and 12.08.2021, the Respondents have not made any payment.

6.5. On 05.10.2021, when the Review Petition came up for hearing, the Commission made an observation that the order dated 06.07.2021 shall be complied forthwith.

6.6. The Petitioner again sent letter dated 07.10.2021 demanding payment of Rs.56,50,72,206/- (Rs.60,94,98,139/- less Rs.4,44,25,933/-).

6.7. However till date the TANGEDCO has not complied with the order passed dated 06.07.2021 and the observation made by the Commission on 05.10.2021.

6.8. The Commission may direct the TANGEDCO to comply at once with the order dated 06.07.2021 passed in D.R.P.No. 23 of 2020, after withholding a sum of Rs.4,44,25,923/- without prejudice to the Petitioner's contentions in the Review Petition.

7. Findings of the Commission:-

7.1. The short question which arises in this Review Petition is whether the stand of the review petitioner that the observation of the Commission in para 6.1 of the order dated 06-07-2021 in D.R.P. No. 23 of 2020 is a mistake of fact and requires review and grant relief sought for in the present petition. For the purpose of easy reference, the para 6.1 of the order in D.R.P. No. 23 of 2020 is reproduced:-

“6.1. We have considered the rival contentions. Except for setting up the defence of financial difficulty, the respondent has not set out any cogent reasons for non-settlement of bills but has set out a brief defence for deduction of Rs.4,44,25,933/- by placing reliance on the order of the Commission in TNERC/MO-04-5/RPO/Dt. 14-09-2017 for revising the bill for APPC. The petitioner, too has not totally disowned the said liability and merely stated in para 15 of the petition that the said communication having been received during the lock down period and having had no access to the books of accounts at that point of time, a letter was issued as a preliminary reply without prejudice to finalization of accounts at petitioner's end. However, the petitioner claims the entire amount of Rs.80,96,12,127.60 (Rs.80,81,31,929 + Rs.14,80,198.65) and did not dispute the liability for the sum of Rs.4,44,25,933/- during the course of further hearings on the above amount and place any records in support of its defence. Hence, we are of the view that the payment of Rs.4,44,25,933/- by the respondent to the petitioner is an admitted fact by both parties and accordingly we hold that the petitioner is not entitled to be paid this part of the total claim made.”

7.2. It is the contention of the review petitioner that the observation of the Commission to the effect that the petitioner herein did not dispute the liability to the extent of Rs.44,25,933/- is not factually correct and is a mistake of fact. To

substantiate the same, the petitioner referred to the averments in para 14 of its affidavit filed in D.R.P. No. 23 of 2020 which reads as follows:-

“14. The Petitioner submits that at this juncture, the Petitioner had received a letter dated 19.05.2020 from the 4th Respondent, Superintending Engineer, Tirunelveli EDC Circle, making a bald demand of Rs.4,44,25,933/-, allegedly payable by the Petitioner. The Petitioner submit that the contractually agreed to rate cannot be unilaterally reduced. Without prejudice to the same, the Petitioner further submits that in the said letter NO calculations or justifications for arriving at such sum of Rs.4,44,25,933/- is provided and it is also conspicuous that there is no reference to any contract or the specific Windmill Units with respect to which such rate was allegedly reduced. Thus such demand, without even a proper statement of accounts as to how the alleged sum of Rs.4,44,25,933/- was arrived at as due and payable by the Petitioner, is arbitrary and not maintainable. Further, vide the said letter, it has also been unilaterally decided that such sum of Rs.4,44,25,933/- will be recovered from the pending bills of the Petitioner. However, the Petitioner submits that such action cannot be legally sustained.”

7.3. It is further the contention of the review petitioner that the aforesaid para 14 in its affidavit in D.R.P. No. 23 of 2020 if read with para 15 of the same affidavit would make it clear that the petitioner did dispute its liability for the amount of Rs.4,44,25,933/-.

7.4. The petitioner has also taken us through para 6 of its legal notice dated 05-1-2020 issued to the respondent in which according to the petitioner, the claim under reference has been disputed. The relevant portions of the legal notice dated 05-11-2020 are reproduced here below:-

“6. In this scenario, our Client had received a letter dated 19.05.2020 (under Ref 1) from one Mr.P.Selvaraj, Superintending Engineer, Tirunelveli EDC Circle, making a bald demand of Rs.4,44,25,933/-, allegedly payable by our Client. At the outset, our Client is advised to submit that the contractually agreed to rate cannot be unilaterally reduced. Without prejudice to the same, our Client further states that in the said letter no calculations or justifications for arriving at such sum of Rs.4,44,25,933/- is provided and it is also conspicuous that there is no

reference to any contract or the specific Windmill Units with respect to which such rate was allegedly reduced. Thus such demand, without even a proper statement of accounts as to how the alleged sum of Rs.4,44,25,933/- was arrived at as due and payable by our Client, is arbitrary and not maintainable. Further, vide the said letter, it has also been unilaterally decided that such sum of Rs.4,44,25,933/- will be recovered from the pending bills of our Client. However, our Client is advised to state that such action cannot be legally sustained. Our Client reserve their right to take separate legal action for the same.”

7.5. The respondent, as we see from records, has not filed any counter affidavit or written submission and hence we proceed to deliver our findings on the basis of the submissions made by the Review Petitioner with reference to the observations of the Commission in its order dated 06-07-2021 in D.R.P. No. 23 of 2020, a part of which is sought to be reviewed herein.

7.6. Having given anxious consideration to the arguments advanced by the petitioner, we find no occasion arises for review of the orders passed in D.R.P. No. 23 of 2020. We are of the view that the petitioner has made a perfunctory reading of the para 6.1 of the order which is sought to be reviewed herein. It is to be noted that the order of the Commission in the para 6.1 has not restricted its reasoning for the purpose final conclusion only to the question as to whether the petitioner disputed its liability or not for Rs.4,44,25,933/- but the reasoning extends also to and encompasses the failure on the part of the petitioner to place any record in support of its defence. Thus, there are two parts in regard to reasoning for final findings, namely, (a) the failure to dispute liability (b) failure to place any material record.

7.7. It is the stand of the review petitioner that the review should succeed for the reason that there is enough material record on evidence to prove that the petitioner disputed liability. Here, the petitioner has failed to see the subtle distinction between disputing and objecting. There is no dispute with regard to the fact that the petitioner objected to the demand dated 19-05-2020 made by the Superintending Engineer, Tirunelveli EDC vide its letter dated 16-06-2020, 14-07-2020 and 05-11-2020. The objection of the petitioner to the demand rests primarily on the ground that no calculation was provided for the disputed amount and the deduction was unilateral. More importantly, as per the communication dated 19-05-2020 of the respondent to the petitioner, objection or enquiry, if any, be intimated to the respondent within 7 days from the date of the issuance of letter dated 19-05-2020. Be that as it may, the letter dated 19-05-2020 cannot be said to be unilateral as contended by the petitioner. The following portions of the communication dated 19-05-2020, in this regard would be relevant:-

“Based on the TNERC orders under ref (1) & (2) cited, the instruction has been issued by the CFC / Revenue under ref (3) cited with regard to APPC rate in respect of sale to board WEGs commissioned under Renewable Purchase Obligation (generally referred as REC category) for the financial year from 2012-13 to 2017-18.

The TNERC has issued the orders by fixing the APPC rate for the above category of WEGs for the financial year 2018-19 vide ref (4) cited. The applicable APPC rate for the WEGs commissioned under the RPO regulation for the financial year 2018-19 is as follows,

- c) *WEGs commissioned under the RPO Regulation availing Accelerated Depreciation benefit - 2018-19- Rs.2.10/-*
- d) *WEGs commissioned under the RPO Regulation not availing Accelerated Depreciation benefit- 2018-19 - Rs.2.145/-*

As per the ref (4) & (5) cited, the billing rate per unit has to be revised for your monthly generation unit for the financial year 2018 -19.

It is informed, that an amount of Rs.4,44,25,933/- (Rupees Four Crores Forty Four Lakhs Twenty Five Thousand Nine Hundred and Thirty Three only) will be recovered from your pending outstanding bills.

In this regard, objection or enquiry if any, it may be intimated to the undersigned within 07 days.”

7.8. As may be seen from that the additional claim is based on the order of the Commission and hence the argument that that demand is unilateral fails to impress us. The argument that the demand is not sustainable for the reason that no calculation was furnished is not acceptable as the contents of the communication dated 19-05-2020 would suffice for understanding the basis of the claim. Hence, to reject the entire claim solely on the basis that no calculation was furnished does not find favour with us. However, the respondent could have furnished the calculations as sought for by the petitioner for the satisfaction of the petitioner.

7.9. We are deliberating at length the contents of the orders in D.R.P. No. 23 of 2020 only to demonstrate that this is not a fit case for review and in doing so, we are not in any way re-appreciating the evidence all over again nor it is our intention to do so. It is to be noted that in a dispute resolution proceeding, the ultimate decision rests on the way the evidence is sought to be let in and strengthened and the observation of the Commission that the petitioner did not dispute the liability cannot be read in a narrow fashion solely with reference to the objections made by the petitioner to the demand under reference. The disputing of claim carries a broad meaning unlike an objection which is too narrow and hence, the order of the Commission which is sought to be reviewed herein cannot be confined to a narrow interpretation and the intent of the order has to be gathered as a whole.

7.10. Though the petitioner objected to the demand under reference, we fail to see any great endeavour on the part of the petitioner to dispute the same with material records or putting forth in clear terms as to how the contents of the letter dated 19-05-2020 which places reliance on the Commission's orders are erroneous. Further, except for raising objection to the demand, there did not seem to be any firm resolve on the part of the petitioner to let in strong evidence and rebut the claim or by strengthening the arguments during the course of hearing. It is only for the said reason that the impugned order reasons out that the petitioner did not dispute the liability. Further, under the RTI regime, the petitioner had all the opportunity to get copies of the records relating to the demand under reference and it is not known why the same was not resorted to and thereafter the papers filed as evidence before the Commission. All these go to show that the petitioner did not dispute the liability but was only voicing objections all the time to the effect that no calculation was provided and that the demand was unilateral without solid evidence.

7.11. As stated above, the two grounds relied upon by the petitioner, namely, (a) no calculation was furnished and (b) the demand was unilateral have to fail for the reason that though calculation was not provided with mathematical accuracy, the broad basis on which the demand was made and furnished in letter dated 19-05-2020 and even if it was not sufficient, the petitioner could have obtained the records through RTI. Secondly, the demand cannot be said to be unilateral as it was done on the basis of the order of the Commission on which ground no serious arguments were advanced by the petitioner. Above all, the petitioner could have immediately

moved for dispute resolution before the Commission without delay, if it had a fair case and the delay in moving the Commission is also inexplicable.

7.12. Seen in the above backdrop of events, we have no hesitation to hold that the observations in para 6.1 of the order in D.R.P. No.23 of 2020 do not call for review and hence the review fails. However, the respondent is directed to furnish the exact calculation for the amount of Rs.4,44,25,933/- over and above the reasoning set out in the letter dated 19-05-2020. Correspondingly, the prayer for waiver of court fee also fails.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**