

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

PRESENT:-

Thiru.S.Kabilan ... Chairman
Thiru.K.Venugopal Member
and
Thiru.S.Nagalsamy Member

D.R.P. No. 11 of 2011

Mr.G.Rajendran
M/s.G.R.Thanga Maligai
Rep. by its Proprietor
No.136, Usman Road
T.Nagar
Chennai – 600 017.

.... Petitioner
(Thiru. Rahul Balaji, Advocate for Petitioner)

Vs.

1. Tamil Nadu Electricity Board
Rep. by its Chairman (TANGEDCO)
144, Anna Salai
Chennai – 600 002.

2. The Chief Engineer / NCES
Tamilnadu Generation & Distribution
Corporation Limited
144, Anna Salai
Chennai – 600 002.

.... Respondents
(Thiru.R.Selvakumar, Advocate for Respondents)

Dates of hearing: 4-3-2011 and 12-7-2011

Date of Order : 12-7-2011

D.R.P.No.11 of 2011 came up for final hearing before the Commission on **12-07-2011**. The Commission upon perusing the above petitions and other connected records and after hearing both sides passes the following:-

ORDER

Prayer in D.R.P.No.11 of 2011:-

1. To call for the records of the Second Respondent comprised in its letter No.CE/NCES/SE/EE/WPP/Aee2/F.M/s.GRT/D2094/10, dated 19-7-2010 and the subsequent letter dated 29-11-2010, bearing Letter No.CE/NCES/SE/EE/WPP/AEE2/F.M/s.GRT/D.2197/10 and quash the same as being arbitrary and illegal and contrary to the earlier orders passed by this Hon'ble Commission and consequently direct the Respondents to act upon the letter of termination issued by the Petitioner as early as on 5-7-2006 by treating it on the basis of the order dated 29-5-2009 passed by the Hon'ble APTEL in Appeal No.40 of 2007 and consequently refund a sum of Rs.33,77,554/- being the sum collected illegally from the Petitioner with interest at the rate of 18% p.a. from the date of payment by the Petitioner till date of refund by the Respondents and refrain from collecting any charges contrary to the said order.

Facts of the case :-

2. The Petitioner is a proprietary concern engaged in the jewellery business. The Petitioner is presently operating jewellery stores all across the State of Tamil Nadu and Puducherry.

3. In the year 1995, the Petitioner proceeded to establish Wind Energy Generators ("WEGs) at K.Krishnapuram Village, Palladam Taluk, Coimbatore District, after applying and obtaining the First Respondent Board's permission for such installation and to sell the surplus energy generated therefrom to the First Respondent Board, after adjusting against the Petitioner's captive consumption. The Petitioner and the First Respondent Board entered into a general agreement with respect to the WEGs on 2-4-2000 followed by their Supplemental Agreements on 19-9-2009, dealing with the terms and conditions of transfer of power generated by the Petitioner to the First Respondent after adjusting the energy on unit to unit basis for self-use, on payment of necessary charges.

4. As per the agreement, the Petitioner was liable to pay Rs.1.50/- per unit of adjustment being the difference between the commercial tariff and industrial tariff. Accordingly the Petitioner has been paying the said difference amount every month as per the monthly CC bill pertaining to HT SC No.2337 of the Petitioner in Chennai raised by the Superintending Engineer, Chennai Electricity Distribution Circle, Central. This arrangement continued until July 2001, when unit to unit adjustment was made. In the year 2001, the First Respondent Board issued a Circular dated 26-5-2001 followed by B.P.No.194 dated 10-7-2001, whereby the First Respondent Board unilaterally divested the Petitioner's right under the Electricity (Supply) Act, 1948 as well as the agreement entered into between the parties to adjust the power generated from its WEGs in its

commercial service connections. The First Respondent Board took the stand that the power generated by the Petitioner was entitled for adjustment for HT industry service and not HT commercial service and the Petitioner was permitted to adjust the power wheeled from its wind mill in its commercial service only on payment of the difference between the commercial operation and the industrial operation in respect of the commercial service of the Petitioner.

5. The Respondents had collected a sum of Rs.33,77,554/- in respect of the HTSC No. 2337 of G.R.Thanga Maligai Jewellery, Chennai for the period from 2001-2002 to 2009-2010. Consequent upon the Respondent finally agreeing to enter into a fresh Energy Wheeling Agreement in 2010, the Petitioner is currently enjoying unit to unit adjustment.

6. The Circular dated 26-5-2001 and B.P. No. 194 dated 10-7-2001 came to be challenged by M/s. SAS Hotels Pvt. Ltd. which owned WEGs and which is similarly placed as the Petitioner, before the Commission, in M.P.No.13 of 2004. During the pendency of the said proceeding, the Commission, in a Suo Motu proceeding, passed Order No.3 dated 15-5-2006 wherein the TNERC, inter-alia, held that the Act does not provide any restriction for self-use of energy by a generator in regard to service category. Therefore, the generator can adjust the energy on unit to unit basis for self-use in any HT service.

7. As regards the applicability of the Order No.3, dated 15-5-2006, it was held by the Commission in para 4 of the said order as follows:-

“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 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”.

8. On 26-6-2006 by setting aside the Circular dated 26-5-2001 and B.P. No.194 dated 10-7-2001 the Commission directed the First Respondent Board to refund the excess amount collected from M/s.SAS Hotels Pvt Ltd. on the basis of the circular and B.P.

Contention of the Petitioner:-

9. The Petitioner was in any event entitled to avail the benefit under the General Order No. 3 dated 15-5-2006 in the Commission’s Suo Motu proceeding, like all other similarly situated generating companies and thereby to seek rearrangement or modification of the existing arrangement and to enter into a fresh arrangement for wheeling and banking. Such modification in the wheeling

and banking arrangements has been made as a matter of course in respect of several generating companies.

10. The Petitioner submitted a proposal for windmill rearrangement / modification / to the Respondent on July 5, 2006, stating the existence of the General Order No. 3 dated 15-5-2006 and that the Petitioner is eligible to adjust the power generated from its WEGs against the consumption in HT SC No.2337 in G.R.Thanga Maligai without paying any difference amount of Rs.1.50 per unit by entering into a new agreement in line with General Order No.3 dated 15-5-2006 issued by the Commission.

11. The petitioner requested the Respondents to (i) terminate the existing agreements entered with Tamil Nadu Electricity Board; and (ii) enter into a new wheeling agreement with Tamil Nadu Electricity Board in line with General Order No.3 dated 15-5-2006 issued by the Commission to adjust the power generated from the Petitioner's WEGs against the HT S.C. No. 2337 of Petitioner's jewellery store. The Petitioner made utmost efforts to stop levying this arbitrary and illegal difference, which is contrary to the General Order No. 3 dated 15-5-2006. The Petitioner was given to believe that since M/s.SAS Hotels and Enterprises Limited, Chennai – 600 017 a similarly situated consumer / generator had already raised the issue and the matter was pending final adjudication, it would be treated in the same manner and it should await the outcome of the proceedings.

12. Pursuant to the Order dated 29-5-2009 passed by the Hon'ble APTEL in the case of M/s. SAS Hotels and Enterprises Limited, Chennai – 600 017 the petitioner issued another reminder dated August 5, 2009 to the Second Respondent seeking to refund the excess collected difference amount in line with the decision arrived at by APTEL in Appeal No. 40 of 2007. The said request has been rejected by the Second Respondent by Letter No.CE/NCES/SE/EE/WPP/Aee2/F.M/s.GRT/D2094/10, dated 19-07-2010 i.e. after keeping the Petitioner in darkness for a period of more than 11 months, stating the following:-

“2.0. In this connection, I am directed to state that the decision arrived at by the APTEL in Appeal No.40 of 2007 dated 29-5-2009 is not applicable to the case on hand, among other things, in as much as the facts involved in the said appeal and your case are different in many aspects, as the APTEL has held that termination of agreement is necessary to avail the benefit of unit to unit adjustment in any HT Service Connection as per Order No.3, dated 15-5-2006 in terms of Section 42 (2) of the Electricity Act, 2003 providing from Open Access and as you have not chosen to terminate the agreement in force and to execute a fresh agreement you are not entitled to avail the said benefits provided for by the TNERC”.

3.0. In view of above, I am directed to inform you that your request in this regard is not feasible of compliance”.

13. The Petitioner sent a reply to the second Respondent vide a letter dated 5-8-2010, stating that the Petitioner had made the necessary representation to terminate the agreement in force and to execute a new agreement in line with the

Order No.3 dated 15-5-2006 issued by the Commission, as early as on 5-7-2006 and therefore requested the Second Respondent to refund the excess difference collected contrary to the decision arrived at by the Hon'ble APTEL in Appeal No. 40 of 2007. The second Respondent sent a reply in Letter No. CE/NCES/SE/EE/WPP/AEE2/F.M/s.GRT/D.2197/10, dated 29-11-2010 stating that as the existing agreement is not terminated for availing of the benefit of the Order No. 3 dated 15-05-2006, the request in this regard is not feasible of compliance.

14. The second Respondent has followed the Commission's Order No. 3 dated 15-5-2006 in respect of other similarly placed parties as that of the Petitioner and granted modifications / adjustments / realignments. The Second Respondent has adopted a irrational discriminatory approach towards the Petitioner which is violative of Article 14 of the Constitution of India.

15. The Respondents are violating the orders of the Commission in M.P. No.13 of 2004 and the subsequent order dated 29-5-2009 passed by the Hon'ble APTEL in Appeal No. 40 of 2007 in M/s. SAS Hotels and Enterprises Limited, Chennai – 600 017 by continuing to demand charges contrary to the express ruling and failing to refund the excess amounts collected. The order of the Hon'ble APTEL is a judgment which would lie to the benefit of all such similarly situated persons.

16. The attitude and conduct of the Respondents in issuing the impugned order tantamounts to nullifying not only the order passed by the Commission in M.P. No. 13 of 2004 but also the Order No.3 dated 15-5-2006 passed by the Commission in the Suo Motu proceedings which was subsequently upheld by an order dated 29-5-2009 passed by the Hon'ble APTEL in Appeal No. 40 of 2007 in M/s. SAS Hotels and Enterprises Limited, Chennai-600 017. By such wholesale rejection of the orders passed by the Commission, the position of the Petitioner has been rendered worse than what it was during the short life of circular dated 26-5-2001 and B.P. No.194 dated 10-7-2001.

17. The Petitioner has been denied its statutory right of adjustment and refund of the sum lawfully owed to the Petitioner for its captive generation under the guise of non-termination of the agreement, which was requested to be terminated as early as on 5-7-2006.

Contentions of the Respondents in Counter Affidavit :-

18. The Petitioner has installed wind mill with HT S.C.No.145 in Coimbatore Electricity Distribution Circle/South area. As per the agreement entered between the Petitioner and TNEB, the wind energy generated was permitted for adjustment in HT SC No.2337 of Chennai Electricity Distribution Circle, Central. On 25-6-2001, the TNEB has decided to stop wheeling of wind energy to HT commercial services since financial loss arose out of adjustment of generated wind energy to commercial services such as Rs.5.00-Rs.3.50=Rs.1.50 per unit.

Hence a circular has been issued to stop wheeling of wind energy to HT commercial services and the companies were given option to wheel the wind energy to their HT industrial services on unit to unit basis.

19. The HT commercial industries have represented to the TANGEDCO to permit adjustment of wind energy to the commercial service and a meeting was held on 13-6-2001 with TNEB officials and M/s. SAS Hotels and Enterprises. M/s. SAS Hotels and Enterprises have agreed that if the wheeling of wind energy to commercial services is permitted they are ready to pay the difference in charge between HT industrial tariff and HT commercial tariff. Based on the above meeting, B.P.No. 194, dated 10-7-2001 has been issued providing for adjustment of wind energy to HT Commercial services on payment of difference in charge of HT industrial tariff and HT commercial tariff. Accordingly, the HT commercial services were permitted for adjustment and the companies have paid the difference amount.

20. The agreement executed between the Petitioner and the Respondent TANGEDCO is bi-lateral agreement. As per the orders of the Commission, the existing agreement would continue to remain in force, since the agreement has been executed prior to 15-5-2006. In case of M/s.SAS Hotels & Enterprises, the company instead of representing to the TANGEDCO for terminating the existing agreement filed a petition before the Commission. The Hon'ble Appellate Tribunal for Electricity in Appeal No. 40 of 2007, filed by TANGEDCO has

decided that the representation of M/s. SAS Hotels & Enterprises is itself, a termination of agreement and ordered to refund the difference in amount collected from the company i.e. from the date of the representation.

21. Eventhough the Commission was pleased to issue Order No.3 dated 15-5-2006, the TANGEDCO has implemented the same only on 22-8-2007 and the difficulties in implementing the same has been brought to the notice of the Commission. Whoever represented to migrate to the new agreement to avail the benefit of the Order No.3 dated 15-5-2006 were permitted to execute the agreement in line with Commission's Order No.3 dated 15-5-2006. As per records there is no such representation, dated 5-7-2006 said to have been made by the Petitioner to the Respondents.

21. The Petitioner has represented only on 5-8-2009. In view of the position that the earlier agreements were in force without termination, the Petitioner cannot allege discrimination citing the generators who switched over to Order No.3.

23. The Petitioner will be eligible for the benefit of Order No.3 dated 15-5-2006 of the Commission only after the termination notice which can be reckoned as from 5-8-2009 and not from any earlier date since the Petitioner has represented to the TANGEDCO only on 5-8-2009 after implementation of the Commission's Order No. 3 dated 15-5-2006 by TANGEDCO. The Petitioner in

his letter dated 5-8-2009 has claimed relief on par with the decision in M/s. SAS Hotels & Enterprises, the party Respondent in Appeal No. 40 of 2007 and the Petitioner has not stated that it has made representation dated 5-7-2006 to the Respondent Tamil Nadu Electricity Board of its intention to come over to Order No. 3 dated 15-5-2006. Therefore even if the Petitioner has made the representation dated 5-7-2006 no relief can be sought for from it in view of the same is hit by laches besides hit by law of limitation.

Order and Direction:-

24. The Petitioner claims that he submitted the letter on 5-7-2006 to the TNEB seeking termination of the agreement. The Tamil Nadu Electricity Board has denied that any such letter was received by them. The Petitioner's Counsel during arguments contended that between 5-7-2006 and 5-8-2009, the date on which he made the second representation there were oral contacts with Tamil Nadu Electricity Board and as the case was sub-judice in Appellate Tribunal for Electricity, the Petitioner did not pursue the matter. On 5-8-2009 they preferred the next representation to the Tamil Nadu Electricity Board for termination of agreement. Strangely, even that letter did not refer to the previous correspondence dated 5-7-2006. Therefore we tend to accept the statement of Tamil Nadu Electricity Board that the letter dated 5-7-2006 was not received by them.

25. The Tamil Nadu Electricity Board is willing to grant the benefit of unit to unit adjustment from 5-8-2009, the date of second representation. In the absence of proof of the Petitioner for having delivered the letter dated 5-7-2006, it is fair that the benefit is conceded from 5-8-2009 only. The Petitioner should submit his claim within a month of this order. The Respondents are directed to settle the claim within a period of two months thereafter either by adjustment against future bills or by direct payment.

26. As regards the question of interest, if Tamil Nadu Electricity Board has realized excess payment from the consumer from 5-8-2009, Tamil Nadu Electricity Board is liable to pay interest for enjoying the excess money. The Petitioner claims 18% but the Commission has been generally awarding 12% interest in a large number of cases. Therefore, 12% would be just and fair. The interest will be applicable from 5-8-2009 till the date of payment by Tamil Nadu Electricity Board or by adjustment in future tariff bills of the consumers.

Appeal:-

27. An appeal under section 111 of the Electricity Act, 2003 against this order shall lie to the Appellate Tribunal for electricity within a period of 45 days.

(Sd.....)
(S. Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

(Sd.....)
(S.Kabilan)
Chairman

/ True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**