



**THE 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 B. Jeyaraman** - Member  
**and**  
**Thiru R. Rajupandi** - Member

**M.P. No. 27 of 2008**

Indian Wind Energy Association (INWEA)  
PHD House, 4<sup>th</sup> Floor  
Opp. Asian Games Village  
Siri Fort Road, New Delhi – 110 016. .... Petitioner

Vs.

The Chief Engineer, NCES  
Tamil Nadu Electricity Board  
800, Anna Salai, Chennai – 600 002. .... Respondent

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The above petition namely M.P.No. 27 of 2008 came up for final hearing before the Commission on 15.07.2008. The Commission upon perusing the above petition and the counter affidavit of the Respondent Board and all other connected records of the case and upon hearing the arguments of both sides passes the following

**ORDER DATED 19<sup>th</sup> SEPTEMBER 2008**

## **1. Prayer of the petitioner**

- i) To clarify as regards non-applicability of Infrastructure Development Charges levied by TNEB on Wind Energy Developers in accordance with Wind Tariff Order of Commission dated May 15, 2006.
- ii) To direct TNEB to set aside its circular BP (FB) No.146 dated July 4, 2005 as contravention of Commission's Wind Tariff Order dated May 15, 2006.
- iii) To direct the Tamil Nadu Electricity Board to refund the amount collected from various Wind Energy Developers under the heads Infrastructure Development Charges (IDC) in pursuance of its circular BP (FB) No. 146 dated May 15, 2006.
- iv) To direct the Tamil Nadu Electricity Board not to collect the said charge henceforth from the Wind Electricity Generator.

## **2. Contentions of the petitioner**

- (a) The Commission has issued Order No.3 dated May 15, 2006 in the matter of power purchase and allied issues in respect of Non-Conventional Energy Source based Generating Plants and Non-Conventional Energy Source based Co-Generation plants, which was amended by the Commission in its Order No.5 dated May 18, 2006.
- (b) In the above said Orders the Commission has extensively dealt with the issue of evacuation facilities and applicability of various charges including tariff for sale of power by wind energy generators to TNEB.
- (c) The Commission has not approved levy of any 'Infrastructure Development Charge (IDC)' by TNEB on wind energy generators under the said order. Further, it is understood that the Commission has neither approved levy of such charges under any of its orders nor issued any regulations empowering TNEB to levy such charges.
- (d) TNEB continues to levy 'Infrastructure Development Charges' to the extent of Rs. 28.75 Lakh per MW for all wind energy generators in its circular ref. BP (FB) No. 146 dated July 4, 2005.

- (e) The levy of such Infrastructure Development Charges without express approval from Commission amounts to overreaching of regulatory powers of the Commission.
- (f) As per Order No. 3 dated 15.05.2006 it is the responsibility of STU to have enough spare capacity in all the transmission corridors for the power flow and ensure maximum grid availability. The TNEB/STU has been directed by the Commission to create enough transmission infrastructure.

### **3. Contentions of the Respondent Board**

- (a) In order to realize the revenue, for having developed some evacuation facilities dedicated for wind energy, the Respondent Board collects Infrastructure Development Charges on Deposit Contribution Works (DCW) basis based on the expenditure incurred towards the same.
- (b) The Board issued a BP (FB) 251, Dated 28.10.96 and BP (Ch) No. 8, dated 09.01.97 for collecting the Infrastructure Development Charges.
- (c) The cost of power transformer, breaker, structure materials and land cost have increased over the years. Besides, the wind energy has to flow through 110 KV & 230 KV system which is more expensive. Therefore, the Infrastructure Development Charges was enhanced to Rs. 25.75 lakhs from Rs. 15.75 Lakhs. A Board order BP (FB) No.92, dated 21.08.2004 was therefore issued enhancing the amount.
- (d) M/s. Madras Steel Re-Roller Association filed a Writ Petition No. 33992 / 2004 before the Hon'ble High Court, in which the TNERC is the second respondent. The case is not listed and is pending. Further there is no interim stay order granted by the Hon'ble High Court.
- (e) In BP (FB) No.146, dated 04.07.2005, the Infrastructure Development Charges was enhanced from Rs. 25.75 lakhs to Rs.28.75 lakhs per MW. But the Commission stayed the operation of above BP. Thereafter collection of Rs.28.75 lakhs was stopped and the previous rate of Rs.25.75 lakhs per MW is being collected.

- (f) Even though the ARR was not filed, the Respondent Board filed a petition TP 1 / 2005 before the Commission and furnished all the details, such as Annual Statement of Accounts for financial year 2003-04, 2004-05 and 2005-06, Balance Sheet etc. and prayed the Commission to determine the transmission charges, wheeling charges, Cross Subsidy surcharge. Based on which the Commission issued Order No. 2 dated 15.05.2006.
- (g) It is submitted that, the Respondent Board has been collecting the Infrastructure Development Charges not only from 15.05.2006, but also prior to 15.05.2006.
- (h) Even though a wind mill is generating electricity, it is not possible for a single generator to create, operate and maintain the Sub-Station and lines as per section 10 of the Electricity Act, 2003. For this reason, the Respondent Board is creating the required evacuation facilities. For having created the above evacuation facilities, the Respondent Board is collecting IDC charges on DCW basis.
- (i) As per the Order No.2, dated 15.05.2006, the approved Transmission and Distribution loss is 10%. But the 5% rate fixed in the Order No.3 has not even covered the loss portion of 10%. These above losses were some how compensated through collection of Infrastructure Development Charges only. If no transmission charges and no Infrastructure Development Charges are to be collected then it will affect public interest and the Respondent Board cannot serve the public efficiently.
- (j) By extending certain benefits to Wind Energy Generators such as power factor incentive, adjustment of energy, the Board incurs a heavy loss. These are compensated to some extent by way of collection of Infrastructure Development Charges, collection of Scheduling & System Operation Charges, Long Term Open Access Agreement fees.
- (k) The power purchase rate fixed based on the project cost attracts some percentage of supervision charges to the Respondent Board. The same was collected by the Respondent Board in the form of infrastructure development charges.

- (l) The wind developers can evacuate their wind power immediately after erection of wind mills without depending on the Respondent Board for creating the infrastructure.

#### **4. Issues**

The following issues arise for consideration viz.

- i) Whether Order No.3 dated 15.05.2006 issued by the Commission authorizes the levy of Infrastructure Development Charges (hereinafter referred to as IDC)?.
- ii) Whether the BP Nos. 251 dated 28.10.96 , 8 dated 09.01.97 , 92 dated 21.08.2004 and 146 dated 04.07.2005 issued by the Respondent Board in regard to levy and collection of IDC from WEG can be said to be in accordance with the Electricity Act, 2003 (Act 36 of 2003) (hereinafter referred to as 2003 Act)?.
- iii) What would be the relief that can be granted to the petitioner?.

#### **5. Findings of the Commission with reference to first point in issue**

With reference to first point in issue, it is to be noted that Order No.3 dated 15.05.2006 does not provide for the levy and collection of IDC from NCES generators. As per the said Order No.3 dated 15.05.2006, the WEG is required to bear the costs of interfacing lines, switch gear, metering and protection arrangement. As per section 39 (2)(c) of the Act, it is one of the functions of STU to ensure development of an efficient co-ordinated and economical system of Intra State Transmission Lines for smooth flow of electricity from a generating station to the local load centers. As per section 39(2)(d)(i) of the Act, the STU has to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges.

#### **6. Findings of the Commission with reference to the second point in issue**

As per section 7 of the Electricity Act, 2003 (Act 36 of 2003) any generating company may establish, operate and maintain a generating station without obtaining a license under the Act if it complies with the technical standards relating to connectivity with the grid referred to in section 73 (b) of the Act. Section 10(1) of the Act provides that the duties of a generating company shall be to establish, operate and maintain generating station, sub-station and dedicated transmission lines connected therewith in accordance with the

provisions of the Act or the rules or regulations made thereunder. As per section 10(2), a generating company may supply electricity to any licensee in accordance with the Act and the rules and regulations made thereunder and may subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer. So far as generating companies are concerned, the TNEB as a SLDC can collect such fees and charges as authorized under section 32(3) of the Act which reads as follows:

“(3) The State Load Despatch Centre may levy and collect such fees and charges from generating companies and licensees engaged in Intra State Transmission of electricity as may be specified by the State Commission.”

Besides the said section 32(3) of the Act, there is no other provision in the Act which authorizes the TNEB to levy and collect any fees or charges from the generating companies. The levy of IDC is not authorized under the Act or under any of the Regulations made thereunder or any Orders issued under the Act by the Commission. In the counter affidavit of the TNEB, the TNEB has not referred to any provisions of the Act or Orders issued by the Commission in which it has been authorized to levy and collect the IDC.

The definition of “open access customer” in regulation 2(i) of TNERC – Intra State Open Access Regulations, 2005 (hereinafter referred to as OA Regulations) includes a generating company (including captive generating plant) or a licensee, who has availed of or intends to avail of open access. Regulation 9 of OA Regulations specifies the various charges payable by a generating company which has availed or which intends to avail open access. The IDC which is levied and collected by TNEB from the generating companies is not at all specified in the said regulation 9 of the OA Regulations. Order No.2 dated 15.05.2006 which provides for transmission charges, wheeling charges, gross subsidy surcharge and additional surcharge payable by open access customer does not authorize the levy of IDC upon generating companies.

In view of the above position, BP 92 dated 21.08.2004 and 146 dated 04.07.2005 issued by the Respondent Board after the notification of Electricity Act, 2003 in regard to the collection of IDC from the NCES generators cannot be

said to be in consonance with the provisions of the Act and the regulations made thereunder. All the BPs are violative of section 32(3) of the Act and the regulations specified by the Commission.

### **7. Findings of the Commission with reference to the third point in issue**

As per section 174 of the Act, the provisions of the Act shall have overriding effect over any other law for the time being in force or any instrument. The BP 92 dated 21.08.2004 and 146 dated 04.07.2005 issued by the Respondent Board cannot prevail over the Act and the regulations of the Commission and Order No.3 dated 15.05.2006. As per section 32(3) of the Act, the Respondent Board in the capacity as SLDC can levy and collect the IDC from the NCES generators only if such levy and collection is authorized by the Commission under any of the regulations specified by the Commission. As per the proviso to section 31(2) of the Act, the STU shall operate as the State Load Despatch Centre until a Government Company or any authority or corporation is notified by the State Government. As per section 39(1) of the Act, the State Government may notify the Respondent Board or a Government Company as the State Transmission utility. BP Nos. 251 dated 28.10.96, 8 dated 09.01.97 were issued prior to the commencement of the Act i.e 10<sup>th</sup> June 2003. BPs Nos. 92 dated 21.08.2004 and 146 dated 04.07.2005 were issued subsequent to the said date 10.06.2003. The Respondent Board have usurped the powers of the Commission as conferred under the said section 32(3) of the Act according to which it is only the Commission which has got the power to specify regulations authorizing the levy and collection of any fees or charges from NCES generators. The Respondent Board has no jurisdiction to issue the said BPs 92 dated 21.08.2004 and 146 dated 04.07.2005 in contravention of section 32(3) of the Act referred to above. The Respondent Board should have approached the Commission by a separate petition for the approval of the levy and collection of IDC from the NCES generators. As already stipulated in Order No.3 dated 15.05.2006, the NCES generators have to bear only the costs of interfacing lines, switch gear, metering protection arrangement and related other equipments upto the inter connection point. As per section 86 (1)(b) of the Act, the Commission

shall regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensee or from other sources through agreements for purchase of power for distribution and supply within the State. As per section 86(1)(e) of the Act, the Commission shall promote Co-Generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with grid and sale of electricity to any person. As per section 32(3) of the Act, it is only the Commission which has to specify the levy and collection of fees or charges in so far as generating companies are concerned. The BP Nos. 92 dated 21.08.2004 and 146 dated 04.07.2005 are liable to be set aside. The Respondent Board is restrained from collecting the IDC from the NCES generators.

**8. Findings of the Commission with reference to the contentions of the Respondent Board raised in their counter affidavit.**

At para 3 of the counter TNEB has stated that the Respondent Board collect IDC on DCW basis for having developed some evacuation facilities dedicated for wind energy. In the said paragraph 3, TNEB has also stated that they are collecting the IDC based on the expenditure incurred by them. The above averment in paragraph 3 of the counter is contradictory with the averment made by TNEB in para 21 of the counter wherein TNEB has stated that the wind developers can evacuate their wind power immediately after evacuating of power without depending on the Respondent Board for creating the infrastructure. Further as already stated above, section 32(3) of the Act which is the only provision which contemplates levy of charges or fees upon generating companies does not authorize the levy of IDC. At para 12 of counter, TNEB has stated that the IDC is collected as the wind mill generator cannot create, operate and maintain sub-stations as per section 10 of the Act. In regard to this averment, it is to be noted that as per section 10(1) of the Act it is the duty of the generating company to establish, operate substation. The expression “duty” occurring in section 10(1) of the Act would clearly indicate that the generating companies are legally bound to establish and operate substations. It is not open

to the generating companies to delegate their statutory duty as conferred under section 10(1) of the Act to the Respondent Board. Further it is to be noted that so far as generating companies are concerned, they can avail the transmission and distribution net works of the Respondent Board by paying wheeling and transmission charges for the conveyance of electricity generated by them to third parties without the need to establish sub-stations. At para 10 of the counter, TNEB has stated that based on the petition namely TP No.1 of 2005, the Commission has issued Order No.2 dated 15.05.2006. With reference to the above averment, it is to be noted that the said Order No.2 does not provide for the levy of IDC upon generating companies. At para 16 of the counter, TNEB has stated that the transmission losses are to be compensated to some extent by the collection of IDC. With reference to the above averment, it is to be noted that as per the Commission's views / decisions under issue no.7 under the heading "Transmission and Wheeling Charges and line losses" at p 51 of Order No.3, 5% of energy has been fixed for wind energy generators towards transmission and wheeling charges which include the line losses in kind." The question of collecting the IDC for compensating the transmission losses will not arise. At para 19 of the counter, TNEB has stated that by way of compensation for conferring upon the WEG certain benefits such as adjustment of energy to HT services, deemed demand charges etc., in Order No. 3 dated 15.05.2006, the IDC is collected. With reference to the above averment, it is to be noted that Order No.3 does not provide for such levy of IDC. At para 20 of the counter, TNEB has stated that IDC is collected by way of supervision charges. With reference to the above averment it is to be noted that as per section 32(2)(d) of the Act the TNEB as SLDC can exercise supervision and control over the Intra State Transmission System. Section 32(3) of the Act which empowers the SLDC to levy and collect such charges or fees from the generating companies as may be specified by the State Commission does not contemplate the levy of IDC. The OA Regulations do not contain any specific provision for the levy of IDC upon open access customers which include generating companies availing open access.

At para 21 of the counter, TNEB has stated that the wind developers can evacuate their wind power immediately after erection of wind mills without depending on the Respondent Board for creating the infrastructure. If the wind developers are evacuating their wind power without depending on the Respondent Board for creating the infrastructure, then there is no justification for the levy of IDC. Further as already stated above, section 32(3) of the Act and the OA Regulations do not provide for the levy of IDC. It is only this Commission which has got the power to levy IDC under the Act.

### **Conclusion**

It is directed as follows

- (i) The BP Nos. 92 dated 21.08.2004 and 146 dated 04.07.2005 are set aside with effect from the date of filing the petition as they are violative of section 32(3) of the Electricity Act, 2003 and the regulations made by the Commission under the said Act and Order No.3 dated 15.05.2006.
- (ii) The Respondent Board is restrained from collecting the IDC from the NCES generators and they are permitted to collect only the actual cost of interfacing lines, switch gear metering, protection arrangement and related other equipments upto the inter connection point as stipulated in Order No.3 dated 15.05.2006.
- (iii) This Order shall have prospective effect. There would be no refund of any excess amount paid by the NCES generators since they have acquiesced in the payment of IDC and since they have also deposited the IDC and allowed the Respondent Board to execute the works on DCW basis without any protest.

With the above observations M.P.No. 27 of 2008 is finally disposed off. There is no order as to costs.

**Pronounced in the open court by this Commission on 19<sup>th</sup> September 2008.**

(Sd.....)  
**(R. RAJUPANDI)**  
Member

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

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

/ Certified Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission