

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

Thursday, the 24th day of April 2008

PRESENT :

Thiru S. Kabilan - **Chairman**

Thiru B. Jeyaraman - **Member**

and

Thiru R. Rajupandi - **Member**

M.P. No. 5 / 2008

Tamil Nadu Spinning Mills Association
No.24, 11th Cross Street
Thiruvalluvar Nagar, Spencer Compound
Dindigul - 624 003.

..... Petitioner

Vs

Nil Respondent

The above petition namely M.P.No. 5 of 2008 came up for final hearing before the Commission on 24th April 2008. The above petition was orally dismissed by the Commission. In pursuance of the above oral order of dismissal, the Commission passes the following detailed

ORDER DATED 24th APRIL 2008

1. Prayer of the petitioner

The prayer of the petitioner is to (i) review the TNERC's Intra State Open Access Regulations 2005 and to remove regulations 9(4)(a), 12(b) and 12(f) of the said Regulations.

(ii) to rescind Order No. 2.2 dated 10.12.2007 with immediate effect.

(iii) to issue an interim order restraining the TNEB from insisting the CGP holders from executing the EPA / EWA until further orders till the inconsistencies as pointed out in paragraph 19 of the petition are removed ; and
(iv) to condone the delay, if any in filing the review petition as it is not intentional.

2. Contentions of the petitioner

Most of the members of the Petitioner Association have installed wind electric generators (WEGs) at feasible locations and are drawing power to their destination of their own use at the spinning mills by paying wheeling charges as fixed by the Commission. The Commission by its notification dated 24.06.2005 has issued the Open Access Regulations which came into force on 03.08.2005 onwards. The Commission has issued Order No. 2.2 dated 10.12.2007 fixing the scheduling and system operation charges for long term Open Access Customers and the said order has come into effect from 10.12.2007 onwards. The Commission has also issued Order No. 3 dated 15.5.2006 in the matter of power purchase and allied issues in respect of Non-Conventional Energy Sources based Co-Generating Plants which has come into force from 15.5.2006 onwards. As per the said Order No. 3, TNEB has to frame and file a model energy purchase agreement (EPA) and energy wheeling agreement (EWA) for the vetting and approval of the Commission. It is presumed that the Commission has vetted and approved a draft EPA and EWA. The text of EPA / EWA has not been made available to the CGP holders for offering their remarks and in the absence of the same, some clauses are found included which are not only considered against the interest of CGP holders but also found inconsistent with the Electricity Act, 2003 while referring to regulations 9(1)(a), 9(4)(a), 12 (b), 12(f) and 19 of the TNERC's Intra State Open Access Regulations 2005 (hereinafter referred to as Impugned Regulations). The petitioner suggested certain corrections to be made in the above regulations. The petitioner seeks for a review of the above regulations. Hence this petition.

(a) The impugned regulations referred to above will have to be reviewed by the Commission.

- (b) Order No. 2.2 dated 10.12.2007 which is inconsistent with the Electricity Act, 2003 should be rescinded with immediate effect.
- (c) Instead of having a common EWA for both direct customer and Open Access Customer, a separate EWA may be allowed to be drafted by the TNEB and the same can be vetted and approved by the Commission. Three separate agreements namely the one for those who are selling the power from their wind energy generators to TNEB, another for those who are wheeling the power for captive use at their consuming end and the third one for those who are having WEGs and willing to sell power to any other Open Access Customers may be ordered to be drafted for vetting and approval by the Commission.
- (d) While referring to Sections 32 (3), 42(2), 42(4) and 86 (1) (a) of the Electricity Act, 2003 the petitioner stated that the State Commissions are empowered to determine the wheeling charges and surcharges thereon alone and they are barred from fixing any other charges if open access has been permitted to a category of consumers under section 42.
- (e) The Commission has committed an error by issuing the Order No. 2.2 dated 10.12.2007 to permit the SLDC to collect scheduling and system operation charges, under section 32(3) of the Electricity Act, 2003. Hence, the above order needs to be rescinded in pursuance of the restriction available under section 86(1)(a) of the Electricity Act, 2003 by reviewing the order in pursuance of section 94(f) of Electricity Act, 2003 read with regulation 43 of TNERC - Conduct of Business Regulations 2004, as it is an error apparent on the face of the record.

3. Points in issue

The following points in issue arise for consideration namely.

- (a) Whether the Intra State Open Access Regulations 2005 can be reviewed so as to remove regulations 9(4)(a), 12(b) and 12 (f) of the said Regulations.
- (b) Whether the Order No. 2.2 dated 10.12.2007 can be reviewed.

- (c) Whether an interim order can be issued restraining the TNEB from compelling the CGP holders to execute EPA / EWA.
- (d) Whether the delay in filing the review petition can be condoned.

4. Findings of the Commission

(a) First Point in issue:

The first point in issue is whether the open access regulations can be reviewed by the Commission. As per section 94(1)(f) of the Electricity Act, 2003 (Act 36 of 2003), the Commission has got the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908 (Act 5 of 1908) in regard to reviewing its decisions, directions and orders. The Open Access Regulations which were made by the Commission under section 181 of the Electricity Act 2003 are outside the purview of the said section 94(1)(f) of the Act which is confined only to decisions, directions and orders of the Commission. In the case of **West Bengal Electricity Regulatory Commission Vs. CESC Ltd.**, (2002(7) Supreme 206), the Hon'ble Supreme Court has held the view that the validity of regulations framed by the Commission under section 58 of the Electricity Act, 1998 cannot be considered by the High Court under section 27 of the 1998 Act. The following observations of the Hon'ble Supreme Court at para 43 would be relevant.

“First of all, we notice that the High Court has proceeded to declare the regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore it has become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power.”

In view of the above decision of the Hon'ble Supreme Court, the Commission in exercise of its powers under section 94 (1)(f) cannot review the Open Access Regulations which have become a part of the Electricity Act. It is only the High Court in exercise of its powers conferred under Article 226 of the Constitution of India which can consider the validity of Open Access Regulations in a Writ Petition filed by any aggrieved party.

(b) Second Point in Issue:

The second point in issue is whether the Order No. 2.2 can be reviewed. With reference to above point in issue it is to be noted that under regulation 43(1) of the TNERC Conduct of Business Regulations 2004 the grounds for review have been stipulated. As per the said regulation 43(1), any decision, direction or order of the Commission can be reviewed on the ground that such decision, direction or order was made under a mistake of fact or ignorance of any material fact or any error apparent on the face of the record. None of the above grounds is cited in the instant case so as to warrant a review of the said Order No. 2.2 dated 10.12.2007. Further, in this context it is to be noted that the said Order No. 2.2 is a statutory order issued by the Commission in exercise of the statutory powers mentioned in regulation 25(4) of Open Access Regulations which enables the Commission to deal with any matter or exercise any power or function under the Act for which no regulation has been framed by the Commission in a manner as it thinks fit. There is no ground for the Commission to review its own Order No.2.2.

(c) Third Point in Issue:

The third point in issue is whether an interim order can be issued restraining the TNEB from compelling the CGP holders to execute EPA / EWA. It is to be noted that as per clause 10.10 of Order No. 3 dated 15.5.2006, the NCES generators shall sign an EPA with distribution licensee for a period of twenty years for sale of power. As per clause 10.11 of the said Order No. 3, the NCES generators / third party buyer of power and the concerned distribution

licensee shall sign an EWA for the purpose of wheeling of power from the NCES generators to the third party buyer of CGP power. In the said Order No. 3, in the said clauses 10.10 and 10.11 it has been made clear that it is not intended that the Commission would approve EWA for each NCES generators individually. The petitioner is aware of the said provisions of the said Order No. 3. The Commission in its orders dated 14.5.2008 issued in M.P.No. 7 of 2007 has held that in case of the members of the petitioner association exercising their option to come under the said Order No. 3, they have to sign the new EPA and EWA. In view of the above position, the TNEB cannot be restrained from insisting on the execution of EPA & EWA by the members of the petitioner association who opt to come under the said Order No. 3.

(d) Fourth Point in Issue:

The fourth point in issue is whether the delay in filing the review petition can be condoned. In regard to this point in issue, it is to be noted that the prayer of the petitioner is for review of the Intra State Open Access Regulations which are subordinate legislation made by the Commission under section 181 of the Act. Section 94(1)(f) of the Act provides for review of decisions or orders or directions of the Commission. Section 94 does not talk about review of Regulations. Since the Commission is not empowered to review its own Regulations, condonation of delay is irrelevant.

(e) At paragraph 15 of the petition, the petitioner has stated that the State Commissions are empowered to determine the wheeling charges and surcharges thereon alone and they are barred from fixing any other charges if Open Access has been permitted to a category of consumers under section 42. In support of the above contention, the petitioner has referred to sections 32 (3), 42(2), 42(4) and 86(1)(a) in paragraph 14 of the petition. In regard to the above contention, it is to be noted that the petitioner has lost sight of Section 86(1)(g) of the Electricity Act, 2003 which empowers the Commission to levy fee for the purposes of the Act. The expression “for the purposes of the Act” occurring in the

said section would justify the levy of Rs. 5000/- as registration fee and Rs. 50,000/- as long term Open Access Agreement fee and Rs. 1000/- per day as system operation charges prescribed in the Open Access Regulations.

(f) During the arguments, the petitioner contended that the captive user who is availing the Open Access for his own use is not a Open Access Customer. He further contended that the petitioner being a generator and availing the distribution net works of TNEB for wheeling energy to his own captive use is not a Open Access Customer. With reference to the above contention, it is to be noted that the definition of "Open Access Customer" in regulation 2(i) of the Open Access Regulations, includes a generating company (including captive generating plant) who has availed of or intends to avail of Open Access. If the captive generator uses the distribution net works of TNEB for the purpose of wheeling energy to his own destination, then he is clearly an Open Access Customer. Further, the above contention is inconsistent with the pleading of the petitioner in paragraph 22 of the petition wherein the petitioner has conceded that those who are wheeling the power for captive use at their consumer end is covered by the three categories of Open Access Customers. The petitioner in the said para 22 of the petition has contended that three separate agreements satisfying the terms and conditions for three category of consumers may be ordered to be drafted for vetting and approval of the Commission.

(g) At paragraph 4 of the petition, it has been contended by the petitioner that since clause 11 of the OA Regulations specifies the phasing, the said OA Regulations should come into effect fully by 30th December 2008. The above contention is not correct in the case of the petitioner association, as it is seen from para 1 of the petition that most of the members have installed WEG at feasible locations and are drawing power to their destination of their use. As per clause 11(e), a person covered by a policy relating to Captive Generation or generation through non-conventional energy sources shall be eligible to avail open access for their use irrespective of contract demand. In view of the said clause 11 (e) of the Open Access Regulations the members of the petitioner association can avail OA irrespective of contract demand.

(h) At para 7 of the petition, it has been contended by the petitioner that some of the clauses of the EPA / EWA are inconsistent with the Electricity Act, 2003. The petitioner has not indicated in the petition as to which of the provisions of the EPA / EWA are inconsistent with the provisions of the Act. The execution of the EPA / EWA by the NCES Generator is made mandatory only by clauses 10.10 and 10.11 of Order No. 3 dated 15.5.2006.

(i) At para 11 of the petition, it has been contended that in order to execute the new EWA, they have to pay fees and charges to the extent indicated in the OA Regulations. With reference to the above contention, it is to be noted that for the collection of system operation charges, there is no condition for execution of new agreement as the above charges are collected only after the execution of OA agreement.

(j) At para 18 of the petition, it has been contended that when CGP holder is wheeling the energy for his own captive use to the destination of his own use by using open access, only wheeling charges are applicable and no other charges can be levied. Regarding this, it is to be noted that as per the definition of 'Open Access' in section 2 (47) of the Act, open access means, the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by a person engaged in generation. The definition of 'Wheeling' in section 2 (76) of the Act, means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under section 62. Since in the case of wheeling of energy by a CGP holder for his own use, the transmission lines are involved, the transmission charges in addition to the wheeling charges are payable by the CGP holder.

(k) At para 19 of the petition, in the table, it has been contended that the transmission charges appearing in Regulation 9 (1) (a) are not applicable when open access system comes into effect. With reference to the above contention, it is to be noted that the finding given above with reference to para 18 would equally hold good to this contention also.

5. Conclusion

There cannot be any review of the Intra State Open Access Regulations 2005 which is statutory regulation as they fall outside the scope of review under section 94(1)(f) of the Electricity Act, 2003 (Act 36 of 2003) read with regulation 43 (1) of TNERC Conduct of Business Regulations 2004. The Order No. 2.2 dated 10.12.2007 cannot be reviewed as there is no mistake of fact or ignorance of material fact or error apparent on the face of the record relating to the said Order No. 2.2 dated 10.12.2007. The Commission has got the power to issue the said Order No. 2.2 dated 10.12.2007 in exercise of the statutory powers conferred upon it under regulation 25(4) of the Open Access Regulations 2005. M.P.No. 5 of 2008 is accordingly dismissed without costs.

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

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission