

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

PRESENT:

ThiruM.Chandrasekar

.... Chairman

and

Thiru.K.Venkatasamy

.... Member (Legal)

D.R.P. No.6 of 2016

Kaveri Gas Power Ltd.
5, Ranganathan Garden
Anna Nagar
Chennai – 600 040

..... Petitioner
(ThiruVinod Kumar
Advocate for the Petitioner)

Versus

1. Tamil Nadu Generation and
Distribution Corporation Ltd.
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.
2. The Superintending Engineer
Nagapattinam Electricity Distribution Circle
The Tamil Nadu Generation and Distribution
Corporation Limited
No.36, Sadayappar East Street
Nagapattinam – 611 001.

....Respondents
(ThiruM.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 13-08-2019; 05-09-2019; 24-09-2019;
22-10-2019; 26-11-2019; 28-01-2020;
13-10-2020; 03-11-2020; 15-12-2020;
05-01-2021; 12-01-2021; and 19-01-2021

Date of Order : 06-07-2021

The DRP No.6 of 2016 came up for final hearing on 19-01-2021.The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in DRP No.6 of 2016:-

The prayer of the petitioner in the instant petition is to-

- (i) declare that the omission to pay Rs.1,32,28,680/- by the Respondent, on the amounts refunded to the Petitioner pursuant to the order dated 24.9.2012 passed by the Hon'ble APTEL in A.P.No.40 of 2012 as contrary to the provisions of the Act and Regulations made thereon;
- (ii) direct the Respondents to pay the Petitioner interest calculated at 16.50% p.a. in terms of the Act and the Regulations on the amount refunded and;
- (iii) Pass such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the case.

2. Facts of the Case:-

The present petition is filed under Section 86 (1) (f) of the Electricity Act, 2003 read with Regulations 16 and 48 of the TNERC Conduct of Business Regulations 2004 for a declaration that the omission towards the payment of the interest by the Respondent for the amounts ordered to be refunded as per the orders of the Commission on the petitions filed namely D.R.P. No.13 of 2011 and as per APTEL's order on A.P.No.40 of 2012 allowing the prayer that

the petitioner should be treated as a short term open access customer "STOA", is contrary to the provisions of the Act and Regulations made thereon and to direct the Respondents to make such payment of interest as per the Act and Regulations made thereunder.

3. Contention of the Petitioner:-

3.1. The Petitioner Company is involved in the business of setting up of power plants and generating electricity. The Petitioner had set up a 17.5 MW natural gas based captive power plant at Maruthur Village, Mayiladuthurai Taluk in Tamil Nadu.

3.2. The Petitioner had been supplying power to captive and third party end consumers on payment of transmission charges, wheeling charges and system operation charges as an "STOA" customer from 25.5.2006. The Petitioner had initially wanted to set up a 17.5 MW power plant based on the commitment from Gail (India) Ltd. for supply of 1 lakh SCMD natural gas. However, when the quantity of gas supplied by the Gail (India) Ltd. was reduced to 35000 SCMD, the size of the plant was subsequently reduced to 6.79 MW as per the orders of the TNERC in DRP No.1 of 2008. Subsequently, on 4.10.2008, an EWA was entered for a period of three years from the date of execution of the agreement. The Petitioner wrote to TANGEDCO through a letter dated 15.2.2011, stating that since the term of the EWA was only for three years, it should be treated as an STOA customer. The Respondent failed to consider the request of the Petitioner regarding STOA status and continued to treat the Petitioner as a LTOA

customer. By notices dated 25.2.2011 and 4.3.2011, LTOA charges were levied on the Petitioner for the past period from 25.5.2006 to 22.9.2007 and a sum of Rs.1,14,48,425/- was demanded from the Petitioner.

3.3. The Petitioner filed a DRP No.13 of 2011, challenging the notices dated 25.2.2011 and 4.3.2011. The Petitioner had also sought that it be treated as a STOA customer and had consequently sought refund of the excess amounts collected from the Petitioner by treating the Petitioner as LTOA customer. The Commission, by its order dated 28.12.2011, held that the Petitioner was not liable to pay the sum of Rs.1,14,48,424/-. However, the Petitioner's prayer for refund of excess amounts on account of wrongly treating the Petitioner as LTOA customer was rejected by the Commission.

3.4. The Petitioner filed Appeal No.40 of 2012 before the Hon'ble APTEL challenging the rejection of the prayer, for refund of excess amounts on account of wrongly treating the Petitioner as LTOA customer. The Hon'ble APTEL by its order dated 24.9.2012, allowed the appeal and directed for the refund of the excess amounts collected from the Respondent from 19.10.2007 to 3.10.2008, wherein the Petitioner was erroneously treated as a LTOA customer.

3.5. The effect of the twin orders, viz. DRP No.13 of 2011 and Appeal No.40 of 2012 was that a total amount of Rs.1,95,47,518/- was payable to the Petitioner as intimated by SE/Nagai EDC in his Lr. No. SE/NEDC/NGT /AO/RCS/AS/F.Refund- Kaveri/D/649/12 dt.21.11.2013. The said sum was

paid to the Petitioner on 25.1.2014. While refunding the said amount, the 2nd Respondent omitted to pay interest on the amount, which is a statutory right provided under the contours of the Electricity Act, 2003. Section 62 (6) of the Electricity Act, reads as follows:-

“(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

3.6. Furthermore, Regulation 10 of the TNERC (Terms and Conditions for Determination of Tariff Regulations 2005 reads as follows:

“10. Refund of excess amount:- The licensee shall recover the charges as per the tariff determined by the Commission. If any licensee recovers the charges exceeding the tariff determined by the Commission, the excess amount shall be refunded to the person who has paid such excess charges along with interest equivalent to the bank rate notified by the Reserve Bank of India.”

3.7. As per the above provisions of the Act and Regulations made thereunder the excess amount recovered should be refunded by the Respondents along with interest as specified by the RBI.

3.8. Based on the aforementioned provisions, the Petitioner made various requests for the payment of interest in Lr.No.KGPL/NEDC/Interest on Refund/2015 dt.21.5.2015 followed by reminders on 20.08.2015 and even on 10.3.2016 on the amounts refunded. Despite numerous requests, the 2nd Respondent paid no heed whatsoever to the requests of the Petitioner and therefore, the Petitioner is constrained to file the present petition. The interest @ of 16.50% p.a. to be paid on the amounts refunded for the months of October 2007 to September 2011 is Rs.1,32,28,680/-

4. Contention of the Respondents:-

4.1. The Petitioner has been treated as a Short Term Open Access customer from 19.10.2007 to 3.10.2008 as per order of the Hon'ble APTEL in Appeal No.40 of 2012 and also order of the TNERC in R.A.No.3 of 2013 dated 21.2.2012. The excessively collected amount i.e., difference in Long Term Open Access Charges and Short Term Open Access Charges has been refunded to the tune of Rs.90,81,789/- (Rs.73,54,125/- + Rs.17,27,664/-) after deducting the payable amount of Rs.2,08,353/- to the Petitioner on 25.1.2014 & 7.5.2015 respectively. The above payment was made without prejudice to the verdict of the Hon'ble Supreme Court of India in Civil Appeal No.8190 of 2011 in TANTRANSCO vs. M/s. OPG Energy Private Limited case which is binding on the petitioner also and further similar cases in Civil Appeal No.8189 of 2011 & 95 of 2013 are also pending in the Hon'ble Supreme Court of India. The relevant portion of the order of Hon'ble APTEL in Appeal No.40 of 2012 is reproduced below:-

“(54)The Respondent No.1 is liable to refund the excess amount collected from the Appellant from 19.10.2007 to 03.10.2008 wherein the Appellant was erroneously treated as a Long Term Open Access Customer.

55. In view of our findings, the impugned order is liable to be set aside as the Appellant has to be treated as a Short Term Open Access Customer. Accordingly, the State Commission is directed to pass the consequential order regarding the refund of the amount in terms of our findings referred to above.”

4.2. The Commission in R.A.No.3 of 2013 passed the following on 21.2.2013, the relevant portion of which reproduced below:

“It may be seen from the aforesaid directions of the ATE that the appellant in the said appeal namely Kaveri Gas Power Ltd. has to be treated as a short term open access customer. As directed by the Hon'ble ATE, the Commission hereby passes this consequential order further directing the TANGEDCO to treat the company as a short term open access customer

and refund the excess amount collected from the appellant, namely, Kaveri Gas Power Ltd. for the period from 19.10.2007 to 3.10.2008."

4.3. The Petitioner had originally applied for Open Access under Long Term Open Access for wheeling of energy and paid the Registration Fees and Agreement Fees on 6.12.2007. The Petitioner was paying all the Open Access charges during the period as Long Term Open Access Customer without any objections. The Petitioner knew that it was coming under Short Term Open Access and the charges were being paid without any objection / protest.

4.4. In a similar matter, a Civil Appeal is pending before the Hon'ble Supreme Court of India in Civil Appeal No.8190 of 2011 filed by TANTRANSCO challenging the order dt.1.3.2011 passed by the Hon'ble APTEL in Appeal No.113 of 2010. However, without prejudice to the pending civil appeals in similar matter, the principal amount (difference between LTOA and STOA) was refunded to the petitioner. Therefore, the claim made by the petitioner towards interest is not fair. If at all the Civil Appeals end up in favour of the respondents, the principal amount got refunded by the petitioner itself has to be remitted by the Petitioner.

5. Rejoinder filed by the Petitioner:-

5.1. As regards the contention of the Respondent that the payments were made without prejudice to the outcome of certain purported proceedings pending before the Hon'ble Supreme Court, the Petitioner is not a party to such proceedings and the outcome of such proceedings cannot bind the Petitioner. Admittedly, the order of the Hon'ble APTEL in Appeal No.40 of 2012 has not been challenged. The order passed by Hon'ble APTEL in Appeal No.40 of 2012 having become final, the

Respondents cannot rely on any other proceedings to which the Petitioner is not a party to deny the relief sought by the Petitioner.

5.2. The contention of the Respondents that in the event of the civil appeals being decided in favour of TANGEDCO, the Petitioner will be required to remit the amounts refunded to it, is without basis.

5.3. The outcome of proceedings in which the Petitioner is admittedly not a party cannot in any manner adversely affect the Petitioner. No amount will be required to be remitted by the Petitioner.

5.4. In terms of the provisions of the Act and applicable regulations, the Respondents are duty bound to refund the amount along with interest. The Respondent has not set out any tenable objection in the Counter Affidavit to deny the relief sought by the Petitioner.

6. Written submission of the Petitioner:-

6.1. The Petitioner had set up a 6.79 MW Captive Power Plant located at Maruthur Village, Mayiladuthurai. A wheeling approval was granted to the Petitioner on 24.5.2006 for 17.5 MW. No duration was mentioned in the approval regarding its validity. Although, the wheeling approval was for 17.5 MW, since the installed capacity of the plant was only 6.79 MW, approval for parallel operations was granted on 18.2.2006 for 6.79MW.

6.2. The Intra State Open Access Regulations 2005 were notified on 3.8.2005.

The Commission issued Tariff Order dated 15.5.2006, for transmission and wheeling charges. Hence, on 24.5.2006, which was the date of the wheeling approval, the Open Access Regulations and the tariff order were in force. However, the then TNEB did not implement the tariff order and the then prevailing practice of deducting 15% of the energy injected into the grid, towards wheeling and transmission, was continued.

6.3. In October 2007, when TNEB wanted to implement the tariff order dated 15.5.2006, the Petitioner filed DRP 1 of 2008 seeking reduction of capacity mentioned in the wheeling approval to 6.79 MW. This Petition was ordered by the Commission on 15.7.2008 and the wheeling approval was directed to be amended to 6.79 MW w.e.f. 19.10.2007. Thereafter, an energy wheeling agreement dated 4.10.2008 came to be executed for a period of 3 years.

6.4. The Petitioner wrote to TANGEDCO on 15.2.2011 requesting it to treat the Petitioner as a Short Term Open Access Customer (STOA), TANGEDCO did not heed to the request of the Petitioner and treated it as a LTOA customer and demand were made on the Petitioner for LTOA charges including the period from 25.5.2006 to 22.9.2007.

6.5. The Petitioner filed DRP No.13 of 2001 challenging the Respondent's demand and further prayed that Petitioner should be treated as a STOA customer and consequently sought refund of excess amounts collected by treating them wrongly as a LTOA customer. The Commission passed final order in the said DRP on 28.12.2011 and found that the Petitioner was not liable to pay Rs.1,14,48,424/-

but rejected the prayer for refund of excess amounts. The Petitioner filed an appeal No.40 of 2012 before the Hon'ble APTEL which was allowed by an order dated 24.9.2012, and it was held that TANGEDCO had to refund the excess amounts collected from the petitioner. The Hon'ble APTEL directed the Commission to pass consequential orders for implementing its order. This Commission, by order dated 21.2.2013, passed the consequential direction to TANGEDCO to refund the excess amounts collected from the Petitioner.

6.6. The net effect of the orders dated 28.12.2011 and 24.9.2012 is that the levy of LTOA charged by TANGEDCO was found to be contrary to the Tariff Order passed by the Commission. In compliance with the orders passed by the Hon'ble APTEL and the Commission a total amount of Rs.1,95,47,518/- was refunded to the Petitioner. While paying the amount to the Petitioner, TANGEDCO omitted to pay interest on the amount refunded a statutory right provided under the Electricity Act.

6.7. As per Section 62 (6) of the Electricity Act, 2003 and Regulation 10 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, the Respondent are liable to refund the amount along with interest equivalent to the bank rate. Despite the Petitioner requesting payment of the statutory interest, the Respondent did not pay it despite various requests made in writing to them.

6.8. Under Section 62 (6) of the Electricity Act, 2003 and Regulation 10 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, when a Licensee or generating company recovers a price or charge exceeding tariff

determined by the Commission, the excess amount is recoverable along with interest equivalent to the bank rate which will be without prejudice to any other liability incurred by the said licensee.

6.9. The Commission, by its order dated 28.12.2011 found fault with the Respondent for issuing the demand notices to the Petitioner and held the Petitioner was not liable to pay the same. Subsequently, the Hon'ble APTEL went on to hold that the treatment of the Petitioner as a LTOA customer was erroneous and that TANGEDCO was liable to refund the excess amounts collected from the Petitioner. The twin orders passed having become final and the Respondent having accepted that they had erroneously collected excess amounts from the Petitioner refunded the amounts. However, no interest was paid.

6.10. Open Access charges which are collected by the TANGEDCO are as per the tariff determined by the Commission. TANGEDCO does not have any right to collect these charges independent of the Tariff Orders of the Commission. The finding of the Hon'ble APTEL that the TANGEDCO had erroneously collected HTOA charges from the Petitioner instead of LTOA charges, clearly establishes that what had been collected from the Petitioner was not as per the tariff order. In such a scenario, Section 62 (6) of the Electricity Act, 2003 and Regulation 10 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, get automatically attracted and Respondent becomes liable to pay interest. Payment of interest in such a situation being a statutory mandate cannot be avoided by the Respondents.

6.11. The Petitioner claimed interest at 16.5% since Section 62 (6) of the Electricity Act, 2003 and Regulation 10 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, warrants payment of interest equivalent to the bank rate. The Respondents, being statutorily liable to pay interest at bank rate and not having disputed the said sanction letter issued by State Bank of India by the Petitioner is liable to pay interest at the said 16.5%.

6.12. The Respondents has taken the following stands to deny the statutory interest to the Petitioner:

- i) A stand that a Civil Appeal No. 8190 of 2011 filed by TANTRANSCO on a similar matter was pending before the Supreme Court and that any decision in the said matter will be binding on the petitioner.
- ii) That the Petitioner had initially applied for open access under LTOA and that they had paid registration fees, agreement fees and subsequent charges as a LTOA without any objection or protest. Therefore, the Respondents contention that they are stopped from contending that they were STOA.

6.13. The above stand taken by the Respondents is without any merit or justifications. The Petitioner was not a party to the proceedings in the Supreme Court. Further there has been no challenge to the order of the Hon'ble APTEL in Appeal No.40 of 2012. The said order of Hon'ble APTEL passed in the case of the Petitioner has become final and has been accepted by TANGEDCO. Therefore, the Respondents cannot rely on some other proceedings to deny the relief which the Petitioner is entitled under the statute.

6.14. In response to the second stand taken by the Respondents, the allegations of the Petitioner being charged as a LTOA due to their payment of registration fees and other charges were canvassed by the Respondent before the Hon'ble APTEL and all such contentions were completely rejected. The Hon'ble APTEL held that the Respondents could not have collected LTOA charges from the Petitioner. Hence, the Respondents cannot reagitate those aspects in the present petition.

6.15. The Respondents cannot deny its statutory liability. By not paying interest, the Respondents have acted contrary to the provisions of the Act and the Regulations.

7. Findings of the Commission:-

7.1. We heard both sides. The Petitioner has set up a 6.79 MW captive power plant (Gas based) at Maruthur village, Mayiladuthurai. A wheeling approval was granted to the Petitioner on 24.5.2006 for 17.5 MW. No duration was mentioned in the approval regarding its validity. Although, the wheeling approval was given for 17.5 MW, since the installed capacity of the plant was only 6.79 MW, approval for parallel operations was granted on 18.2.2006 for 6.79 MW.

7.2. The petitioner states that the Intra State Open Access Regulations, 2005 was notified on 3.8.2005 and the Commission issued Tariff Order dated 15.5.2006 for transmission and wheeling charges. Hence, on 24.5.2006, which was the date of the wheeling approval, the Open access regulations and the tariff order were in force. However, the erstwhile TNEB, did not implement the tariff order and the then prevailing practice of deducting 15% of the energy injected into the grid, towards wheeling and transmission, was continued.

7.3. The petitioner, in October 2007, when TNEB wanted to implement the tariff order dated 15.05.2006 filed D.R.P. 1 of 2008 seeking reduction of capacity mentioned in the wheeling approval to 6.79 MW. This petition was ordered by this Commission on 15.7.2008 and the wheeling approval was directed to be amended to 6.79 MW with effect from 19.10.2007. Thereafter, an Energy wheeling agreement was executed between the parties on 04.10.2008 for a period of 3 years.

7.4. The Petitioner wrote to TANGEDCO on 15.2.2011 requesting it treat it as a Short Term Open Access Customer (STOA). But the TANGEDCO did not accept the request of the Petitioner and treated it as a Long-term open access customer ("LTOA") and demand was made on the Petitioner for LTOA charges including the period from 25.5.2006 to 22.9.2007.

7.5. The Petitioner filed the D.R.P No. 13 of 2011 before this Commission challenging the Respondent's demand and further prayed to direct the respondent to treat the Petitioner's agreement as a STOA and consequently sought refund of excess amount collected by the respondent by treating the petitioner wrongly as a LTOA customer. The Commission passed its final order in the said D.R.P. 13 of 2011 on 28.12.2011 and found that the Petitioner was not liable to pay Rs.1,14,48,424/- but rejected the prayer for refund of excess amount. Hence, the Petitioner filed an Appeal No. 40 of 2012 before the Hon'ble APTEL, which was allowed by an order dated 24.9.2012 and it was held that TANGEDCO had to refund the excess amount collected from the Petitioner from 19.10.2007 to 3.10.2008. The Hon'ble APTEL also directed this Commission to pass consequential orders for implementing the said order. This Commission, by order

dated 21.02.2013, passed the consequential order in R.A.No.3 of 2013 directing TANGEDCO to refund the excess amounts collected from the Petitioner.

7.6. The Petitioner contends that the Hon'ble APTEL in its findings mentioned that the TANGEDCO had erroneously collected LTOA charges from the petitioner instead of STOA charges and thus the APTEL's observation clearly establishes that what had been collected from the Petitioner was not as per the tariff order. In such a scenario, Section 62(6) of the Electricity Act, 2003 and Regulation 10 of the TNERC's (Terms and Conditions for determination of Tariff) Regulations, 2005, get automatically attracted and Respondent become liable to pay interest and that payment of interest in such a situation being a statutory mandate cannot be avoided by the Respondents. The petitioner has, therefore, claimed interest @ 16.5% since section 62(6) of the Act and Regulation 10 of the 2005, Regulations warrant payment of interest equivalent to the bank rate.

7.7. Per contra, the respondent has contended that that the Petitioner had originally applied for Long Term Open Access for wheeling of energy and paid the Registration Fees and Agreement Fees on 06.12.2007 and that the Petitioner paid all the Open Access charges billed during the period as Long Term Open access without any objections. The Petitioner knew that it was coming under Short Term Open Access, but the charges were being paid without any objection / protest.

7.8. Further, the respondent states that in a similar matter, a Civil Appeal is pending before the Hon'ble Supreme Court of India in Civil Appeal No.8190 of 2011, dt.23.09.2011 filed by TANTRANSCO challenging the order dt.01.03.2011 passed

by the Hon'ble APTEL in Appeal No.113 of 2010. However,without prejudice to the pending civil appeals in similar matter, the principal amount (difference between LTOA and STOA) was refunded to the petitioner. Therefore, the claim made by the petitioner towards interest is not fair. If at all, the Civil Appeals end up in favour of the respondents, the principal amount got refunded by the petitioner itself has to be remitted back to the Respondent.

7.9. The Respondents further contends that if the TANTRANSCO succeeds in Civil Appeal No.8190 of 2011 filed before the Supreme Court of India, the petitioner's case will also have to be treated similarly and hence the respondent takes a stand that without prejudice to the pending of civil appeal in similar matter, the principal amount was fully refunded to the petitioner but on the question of interest remains firm that the same is not payable.

7.10.From the point of view of the petitioner as well as the respondent, we hadan occasion to consider a more or less similar case in D.R.P. No. 7 of 2016. In such context, we have to observe that a plain reading of section 62 (6) of the Electricity Act, 2003 read with regulation 10 of Terms and Conditions of Determination of Tariff Regulations, leaves no manner of doubt that it is obligatory on the part of the respondent to have ensured that the amount recovered in excess together with interest ought to have been refunded by it on its own after the receipt of such requestfrom the petitioner. Hence, we may profitably refer to section 62 (6) of the Act for adjudication of this issue. The phraseology employed in section 62 (6) is such that, it is the licensee who has to ensure that the amount charged as tariff is a correct one and make refund in deserving cases with interest.

The extract of the provisions 62(6) of the Electricity Act 2003 is, as below –

“62. Determination of Tariff –

XXXX XXXX XXXX

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

7.11. When the duty to ensure the correctness of the tariff rests with the licensee, the arguments that the petitioner initially sought open access under LTOA and paid charges thereto without any demur do not carry conviction. We find that the claim for interest was made as early as in 2015 by the petitioner vide letters dated 21-05-2015, 20-08-2015 and 10-03-2016 and hence, it cannot be also said that the petitioner was sleeping over his rights all along to come to the aid of the respondent. It is all the more important to note that the principle issue in question whether the licensee has charged excess price than the one prescribed in the Tariff Order attained finality when the Hon'ble APTEL passed orders in Appeal No. 40 of 2012. In such circumstances, it goes without saying that the right of the petitioner to claim interest was crystalized soon after the adjudication on the issue by the APTEL and in all fairness, interest also ought to have been paid simultaneously. In the absence of any challenge to the order of the APTEL upholding the demand for refund of excess recovery after adjudication, given the phraseology employed in section 62 (6) read with section 10 of Tariff Regulation of the Commission, there arose no necessity for a further clarification or petition for payment of interest as the said regulation explicitly provides for simultaneous payment of interest at the bank

rate along with the excess amount refunded. In all fairness, interest ought to have been settled by the respondent when the initial request was made by the petitioner. However, the respondent has come out with a different plea in the present case.

7.12. Let us now examine the same in the light of the defence set up by the respondent. The two principal contentions advanced on behalf of the respondents are (a) that the petitioner without any demur paid the charges applicable to LTOA customer and (b) A Civil Appeal filed by TANTRANSCO is pending before the Supreme Court of India and if it turns out to be in favour of TANTRANSCO, the same would be applicable to the present case as well.

7.13. We have considered the above contentions as well. In regard to the ground advanced by the respondent that the petitioner paid the charges applicable to LTOA without any demur and hence the question of refund or interest does not arise, we have to outrightly reject the same in line with our earlier decision in D.R.P. No. 7 of 2016 in which we clearly held that the duty to refund the amount charged in excess by the licensee shall be refunded on its own by the licensee in view of the express provisions in section 62 (6) of the Electricity Act, 2003 read with Regulation 10 of the Tariff Regulation 2005 of the Commission. Hence, it needs no reiteration to say that the defences set up by the respondent are too fragile to accept.

7.14. It is to be noted that insofar as the present case is concerned, the order passed in Appeal No. 40 of 2012 by APTEL has become final and on this score, we are in agreement with the contention of the petitioner. It is to be further noted that there is no stay against the orders of the APTEL in Appeal No. 40 of 2012, much less that no appeal has been filed against that order of Hon'ble APTEL and hence,

there is no impediment in making payment on interest claim in view of section 62 (6) of the Electricity Act, 2003 read with Regulation 10 of Tariff Regulations of the Commission.

7.15. On the contention that in the event of TANTRANSCO succeeding before the Supreme Court, the same ratio would become applicable to the present case too, we have to observe that the respondent has not mentioned as to whether any order of stay against the orders of Hon'ble APTEL in Appeal No.113 of 2011 has been granted in the Civil Appeal. In our view, the respondent has not clearly demonstrated the applicability of civil appeal, to the case in our hand by stating as to whether the stay is subsisting in the proceeding before the Supreme Court. However, in the absence of the same, we presume that there is no stay in the proceedings before the Supreme Court and proceed to decide the matter based on available records. The incidental question which arises for consideration is whether the appeal filed by TANGEDCO will have any bearing on the present case at the present stage. We are of the view that the said question has to be answered only in the negative for the reason that having failed to prefer an appeal against the order of APTEL before Supreme Court and the said order of APTEL having become final, the reliance placed on the pendency of appeal filed by TANTRANSCO cannot be accepted. If at all the respondent is of the view that TANTRANSCO has the fair chance of success before Supreme Court, nothing prevented the respondent herein to arrange to file an appeal against the order of APTEL and further arrange to tag the same with the appeal filed by TANTRANSCO. In such circumstances, the mere pendency of appeal filed by TANTRANSCO will not be of avail in the instant case. Further, when the principal

amount has already been paid to the Petitioner, there is no reason to withhold the interest payable on such amount on the ground of such pendency.

7.16. In addition to the same, we have to observe that a judicial order cannot be passed in anticipation of a likely happening and a valid plea for refund cannot kept in abeyance on speculative grounds. As far as we are concerned, we find that the legal position on the question of right to interest as of today is in favour of the petitioner. Gleaned from any angle, we cannot agree to the plea of the respondents. Accordingly, the petition has to be allowed.

7.17. In the result, the petitioner is entitled to the claim as interest in view of section 62 (6). But we cannot agree to the rate of 16.5% sought by the petitioner without there being any evidence as to the rate of bank interest that prevailed at that time as the section 62 (6) itself provides only the prevailing bank rate. Hence, the respondent shall pay interest to the petitioner at the bank rate which was prevailing during the relevant periods.

In the light of the above, the prayer of the petitioner is allowed to the extent indicated above.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission