

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. R. Rajupandi - Member

and

Thiru K. Venugopal - Member

**IN THE MATTER OF VIOLATION OF SECTION 42 OF THE ELECTRICITY ACT, 2003 AND
INTRA STATE OPEN ACCESS REGULATIONS 2005 BY THE MEMBER (GENERATION),
TAMIL NADU ELECTRICITY BOARD**

Suo-motu Proceedings No.4 of 2009

Dates of hearing : 1-4-2009
3-12-2009

Date of order : 6-1-2010

In the above matter the Commission after hearing
Thiru K. Balasubramanian, Member (Generation) passes the following

ORDER Dated 6th January 2010

I. The lower limit of open access prescribed in Clause 11 of the Intra State Open Access Regulations 2005 notified by the Tamil Nadu Electricity Regulatory Commission in terms of Section 42 (2) of the Electricity Act, 2003 is 1 MW. The Member (Generation), Tamil Nadu Electricity Board lowered this limit to 0.5 MW on 2nd January 2009 in the case of M/s. Saheli Exports Pvt. Ltd and M/s. Kanishka Steel Industries Limited, as communicated in his letters CE/dir/PP/EE/ABT/D.2/09 and CE/dir/PP/EE/ABT/D.4/09.

II. A show cause notice was served on 28th January 2009 on Thiru K. Balasubramanian, Member (Generation) for contravention of Clause 11 of the Intra State Open Access Regulations 2005. The notice sought to impose punishment under Sections 142 and 146 of the Electricity Act, 2003 with a direction to file the reply by 9th February 2009. He filed a petition on 2nd February 2009 seeking time of four weeks. He was granted time upto 23rd February 2009. He again filed a petition on 18th February 2009 seeking extension of time by another four weeks from 23rd February 2009. The Commission granted time upto 2nd March 2009. The petitioner was intimated that if no reply was received by the due date, the Commission would proceed exparte. He submitted his reply to the show cause notice on 2nd March 2009.

III. He justified the contravention on grounds of severe power shortage prevailing in the State. He argued in his letter as follows-

“It is further submitted that the Electricity Act, 2003, 39.2(d) (i) interalia reads

*To provide non discriminatory open access to its transmission system for use by
(i) any licence or generating company on payment of the transmission charges.*

I humbly submit that this provision casts a duty on the State Transmission Utility to grant non discriminatory open access to the generating companies to use the lines on payment of charges and therefore in compliance with the said provision of law, the Board as a State Transmission Utility had granted open access to the generating companies for less than 1 MW, the provision does not anywhere restrict the grant of open access for less than 1 MW.

It is submitted that Section 39(2) (d)(ii) deals with the grant of open access to any consumers and that such open access shall be provided by the State Commission under sub section (2) of Section 42. Since the Board has not granted open access to the consumers it is respectfully submitted that the Board has not violated sub-section (2) of Section 42 of the Act.

It is also submitted that regulation 11 of the Intra State Open Access Regulations 2005 framed as envisaged under Section 181 of the Act relates to sub-section (2) of Section 42 since the grant of open access as a transmission licensee to the generating companies does not come under sub-section (2) of Section 42 and regulation 11, it is humbly submitted that there is no violation of the open access regulation also.”

IV. The Commission perused the explanation contained in the show cause notice but was not satisfied with the reply. He was directed to appear before the Commission on 1st April 2009. He appeared and defended his position maintaining that there is no violation of the regulations of the Commission. He prayed that the Commission may be pleased to drop the proceedings. Orders were reserved by the Commission.

V. Subsequently, the Member (Generation) of TNEB addressed a letter on 13th April 2009 to the Secretary of the Commission, as though the Commission is an executive authority, intimating that he is taking steps to obtain the opinion of the Advocate General of Tamil Nadu and requested the Commission to defer further action.

VI. This was followed by a letter of the Chairman of the Tamil Nadu Electricity Board on the 18th April 2009 enclosing the opinion of the Advocate General of Tamil Nadu on the above subject. The relevant paragraphs of the opinion are extracted below:

“10. A reading of this clause shows that the State Commission has framed regulation for the grant of open access to H.T. consumers with a load of 1 MW and above as required by the newly added 5th proviso to sub-section 2 of Section 42 of the Act and the State Electricity Regulatory Commission has rightly not framed any regulation with respect to power load less than 1 MW or otherwise it would have been in contravention of the fifth proviso to Section 42(2) of the Act.

11. The change in law read with other provisions stated supra, it could be seen that no restriction is imposed on the distribution licensees to grant open access to any consumer, at any time the power required when it does not exceed one Megawatt.”

In short, the learned Advocate General opined that the distribution licensee is empowered to grant open access to any consumer for a demand less than 1 MW.

VII. On 23rd April 2009, the Commission, in pursuance of Clause 27 (1) of the Conduct of Business Regulations 2004, addressed the Central Electricity Regulatory Commission for seeking the opinion of the Attorney General of India on the powers of State Commission under Section 42 of the Electricity Act, 2003.

VIII. While the Commission was examining the legal position as clarified by the Advocate General of Tamil Nadu and when the matter was sub-judice, the Chairman of Tamil Nadu Electricity Board on 17th July 2009 went ahead unilaterally with a further reduction in the lower limit for open access from 0.5 MW to 0.25 MW.

IX. The opinion of the Attorney General of India was received by the CERC on 30th September 2009 and communicated to the Commission on 29th October 2009. This opinion was served on the Member (Generation) on 19th November 2009 by the Commission in accordance with Clause 27 (4) of the Conduct of Business Regulations 2004. He was informed that further arguments on the basis of the fresh material would be heard on 3rd December 2009.

X. He appeared before the Commission on 3rd December 2009 and submitted an additional statement dated 2nd December 2009. The relevant paragraphs are extracted below:

“6. It is my humble submission that the open access provided to consumers whose demand is 1 MW and less by the Electricity Board has to be treated an action in line with the intention of the legislation very particularly on par with the reason for introducing the said fifth proviso to sub-section (2) of Section 42 of Electricity Act, 2003.

10. It is submitted that in the absence of any such regulation specifically prohibiting the licensee Board from granting open access to such consumers whose demand is 1 MW and less, the TNEB considering the Electricity Act, 2003 in its entirety and particularly its obligation to provide non-discriminatory open access to its transmission system for use by any licensee or any generating company or any consumers and

based on (legal) advice, the TNEB had permitted open access to such consumers whose demand is 1 MW and less.

11. *It is submitted that in the absence of any regulations having been framed by TNERC specifically prohibiting the TNEB from permitting open access for a demand of 1 MW and less, the action of the TNEB in having granted open access for a demand of 1 MW and less to the consumers cannot be termed as a contravention or violation of the provisions of Section 42 (2) of the Electricity Act, 2003 or the regulations made namely, the Intra-State Open Access Regulations, 2005. It is further submitted that the TNEB acted in good faith under the bonafide impression that there is no bar either in the Act or in the regulations to permit open access for a demand of 1 MW and less.*

13. *It is therefore submitted that in the absence of provisions either in the Electricity Act, 2003 or in the Intra State Open Access Regulation, 2005 specifically prohibiting the licensee from permitting open access to the consumers for a demand of 1 MW and less, it cannot be said that the Board has contravened the provisions of the said Act or the said Regulations. All those actions that were taken by the Board in this regard were in good faith and in larger public interest of the consumers of the State of Tamil Nadu.*

16. *In view of the circumstances stated above, it is humbly prayed that this Hon'ble Commission may be pleased to drop further proceedings contemplated, if any, against me (Member (Generation) / TNEB) in the interest of justice.*

17. *However, if in any case this Hon'ble Commission comes to the conclusion that the Licensee Board had violated any of the provisions of the Electricity Act, 2003 or the Intra State Open Access Regulations, 2005 in this respect, the undersigned tenders unconditional apology to this Hon'ble Commission and humbly prays this Hon'ble Commission may be pleased to drop further proceedings and thus render justice."*

XI. The gist of the opinion of the learned Attorney General of India is that State Commissions have unhindered powers to introduce open access to all consumers. This is subject only to the condition that for consumers, whose demand exceeds 1 MW, open access has to be introduced within five years of 27th January 2004. For all other consumers, whose requirements are less than 1 MW, the State Commissions continue to

be charged with the duty of providing open access in such phases and subject to such conditions as they deem fit . Incorporation of the fifth proviso does not restrict the powers of the State Commissions. The State Commissions can make regulations for introduction of open access to consumers whose demand is 1 MW and less.

XII. The Member (Generation) argues that since Clause 11 of the Intra State Open Access Regulations 2005 of the Commission prescribes open access for 1 MW and above, the TNEB has stepped in to fill the gap for demand of less than 1 MW. We need to note here that when he lowered the limit below 1 MW, the opinion of the Advocate General was not available to him. He acted first and three months later went on to obtain the opinion of the Advocate General. He further advances the plea that the State Transmission Utility is empowered under Section 39 (2) (d) (1) of the Electricity Act, 2003 to provide open access to a generating company. His plea is specious. We observe that Section 39 (2) (d) (1) shall be read in conjunction with Sections 2 (47) and 42 (2), which confer the authority of introducing open access on State Commissions. The crucial issue for determination is whether the Member (Generation) is empowered under the Electricity Act, 2003 to alter the lower limit of open access prescribed by the State Commission. Section 42(2) of the Electricity Act, 2003 is emphatic that the State Commission shall introduce open access in such phases and subject to such conditions as may be specified. It is evident that the State Commission alone has the power to introduce open access as per the scheme of the Electricity Act, 2003. All that the Section 42 commands is that the State Commission shall introduce open access within one year of the appointed date. The fifth proviso of Section 42(2) further commands that a State Commission shall within five years of 27th January 2004 introduce open access to all consumers with a demand for power exceeding 1 MW. The Tamil Nadu Electricity Regulatory Commission has complied with this proviso by enacting Clause 11 of the Intra State Open Access Regulations 2005. It is the business of the State Commission and State Commission alone to lower the limit of 1 MW in such phases and subject to such conditions as the Commission may deem fit.

XIII. The Member (Generation) has contended that the open access was lowered by them below 1 MW in public interest. We would like to record here that public interest is not the preserve of the distribution licensee alone. The

State Commission is equally charged with this task. Instead of filing a petition before the State Commission for lowering the limit below 1 MW, the Member (Generation) decided to usurp the power of the State Commission conferred by Section 42(2) of the Electricity Act, 2003 and illegally lowered the limit. At no stage, did the State Commission give any indication that it is unwilling or disinclined to lower the limit of open access below 1 MW. The entire judicial process has been short circuited by the Member (Generation).

XIV. The inescapable conclusion of the Commission is that the Member (Generation) has arrogated to himself the powers of the Commission and illegally granted open access to generators for a load of 0.5 MW for third party sale. The illegality is compounded by the fact that during the pendency of the proceedings before the Commission, the Chairman, TNEB chose to lower the limit for open access from 0.5 MW to 0.25 MW. The Commission believes that these acts constitute flagrant violations of the Electricity Act, 2003 and the Intra State Open Access Regulations 2005, which need to be visited with severe penalty.

XV. The Commission would like to recollect its orders dated 16th May 2008 relating to the contravention of the Order No.2 dated 15-5-2006 and Order No.4 dated 15-5-2006 of the Commission by the then Member, (Generation) of the TNEB.

“14 (1) Section 142 of the Act provides for penalty upto Rs. one lakh for each contravention and Rs. six thousand per day for continuing contravention. Section 146 provides for criminal prosecution of those charged with contravention. The Commission would like this case to be an example for all licensees and generators, who dare to contravene the orders of the Commission, deliberately and wilfully. On two previous occasions, the TNEB has been let off without any penalty for non compliance of the orders of the Commission. It is time to impose an exemplary penalty on those who seek to defy the authority of the Commission. As this is the first case of penalty, the Commission decides to limit the penalty to Rs.ten thousand each on Member (Generation) and Chief Engineer (Private Power Project). The fine shall be paid within thirty days of the order. The Commission does not wish to seek criminal prosecution of the offenders this time.”

XVI. It is obvious that the functionaries of the distribution licensee have not mended their ways. They persist in their attempts to defy and dare the Commission. Such tendencies and attitudes need to be put down ruthlessly. In view thereof, the Commission decides to impose a fine of Rs. twenty thousand on the Member (Generation). The fine shall be deposited with the Commission within sixty days of the order. Although the wanton violation would justify criminal prosecution, the Commission reserves this option for a future occasion.

XVII . **Appeal:**

An appeal against this order lies to the Appellate Tribunal for Electricity as per Section 111 of the Electricity Act, 2003 within a period of forty-five days.

Pronounced in the open court on this 6th day of January 2010.

(Sd.....)

**(K. Venugopal)
Member-II**

(Sd.....)

**(R. Rajupandi)
Member-I**

(Sd.....)

**(S. Kabilan)
Chairman**

/ True copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**