

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

R.A. No. 1 of 2011

M/s.TMT Muthammal Textile Mills Ltd.
Viraleemalai
Kulathur Taluk
Pudukottai.

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

Vs.

The Chairman
Tamil Nadu Electricity Board
144, Anna Salai
Chennai.

.... Respondent
(Thiru.PH. Vinod Pandian,
Advocate for Respondent)

R.A. No. 2 of 2011

National Textile Corporation Limited
HTSC No. 15
Kalayarkoil
Sivagangai.

.... Petitioner
(Thiru S.Ramesh Kumar,
Advocate for Petitioner)

Vs.

The Chairman
Tamil Nadu Electricity Board
144, Anna Salai
Chennai.

.... Respondent
(Thiru.PH. Vinod Pandian,
Advocate for Respondent)

R.A. No. 3 of 2011

M/s. Southern India Mills Association
41, Race Course Road
Coimbatore – 18.

... Petitioner
(Thiru N.L.Raja
Advocate for Petitioner)

Vs.

The Chairman
Tamil Nadu Electricity Board
144, Anna Salai
Chennai.

.... Respondent
(Thiru P.H.Vinod Pandian,
Advocate for Respondent)

**Dates of hearing: 14-9-2011, 3-11-2011, 16-11-2011
and 25-11-2011**

Date of Order : 28-12-2011

R.A. No. 1 of 2011 (M/s.TMT Muthammal Textiles Mills Ltd.), R.A. No.2 of 2011 (M/s.National Textiles Corporation Ltd.) and R.A.No.3 of 2011 (M/s.Southern India Mills Association) relate to common issue namely re-opening of the cases of the above Petitioners in the above cases in view of the orders dated 9th August, 2011 issued by the Hon'ble Appellate Tribunal for Electricity in A.P. No. 23 of 2011 and I.A. Nos. 36 and 37 of 2011 (in the case of M/s.TMT Muthammal Textiles Mills Ltd. Vs. TNEB and others). Since the above RA Nos. 1 and 3 of 2011 relate to the common issue, they were clubbed. The Commission upon perusing the above petitions and other connected records and after hearing both sides passes the following:-

COMMON ORDER

1.0. Orders dated 9th August, 2011 issued by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 23 of 2011 and I.A. Nos. 36 and 37 of 2011 and orders dated 10th August 2011 in Appeal Nos. 79 and 80 of 2011 and order dated 19-8-2011 in Appeal No. 120 of 2011:-

1.1. In the orders dated 9-8-2011 issued by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 23 of 2011, the point for consideration is whether the Commission is justified in restricting the benefit of order dated 7-9-2010 issued by the Commission in M.P. Nos. 6 of 2010, 9 of 2010, 17 of 2010 and D.R.P. No. 9 of 2010 to the period from and after 17-8-2010. In the impugned order dated 7-9-2010 which has been remanded to the Commission for re-consideration, the Commission has considered the question as to whether the supply of electricity to a consumer from captive power plant or wind power or third party purchases has to be subtracted from the Tamil Nadu Electricity Board quota as per the Restriction and Control Measures introduced in the order of the Commission dated 28-11-2008 in M.P. No. 42 of 2008.

2. Impugned order of the Commission:-

The findings of the Commission in the impugned order is reproduced below for reference:-

“4. Findings of the Commission

- 4.1. *The present batch of petitions have drawn the attention of the Commission to certain distortions in the application of the Order of the Commission in SMP No.1 of 2009. This batch consists of both consumers and generators. The issues pertain to consumers. That order provided for subtraction of the demand and energy supplied through captive or third party sources from the base demand and base energy. Power cut was applied on the remaining portion. This method effectively reduces the power available to the consumer from third party sources. The present order is aimed at redressing the imbalance.*

- 4.2. *The TNEB has expressed a concern that whereas the share of the TNEB in the base demand is a constant figure, the Order of the Commission in SMP No.1 of 2009 renders the TNEB component of the base demand a variable figure depending on the declaration of the captive consumer. There is merit in the contention of the TNEB, which needs to be addressed*

- 4.3. *This can be addressed by fixing the burden on TNEB at a constant figure. The TNEB component of the base demand and base energy are fixed. Power cut is applied on this component.*

4.4. *The consumer is at present permitted to utilise power from captive sources. The present order would enable a consumer to purchase power from third party sources as well. Procurement of power by a consumer through Open Access is protected by the Electricity Act, 2003. The role of the licensee is limited to that of a carrier. Procurement through Open Access will be treated as an additionality. The ceiling, upto which a consumer can utilise power including the TNEB quota demand, captive power and third party purchase would be the sanctioned demand. In such a situation, there would be no need for advance declaration by the consumer of procurement of captive power as stipulated in SMP No.1 of 2009 or procurement of third party power as stipulated in the Interim Order dated 17-8-2010. As the TNEB had allowed procurement of power upto the sanctioned demand in their communication dated 17-7-2009 “procedure for allowing third party sale / purchase under intra state open access”, there should be no difficulty in allowing the consumer to procure power upto the sanctioned demand.*

4.5. *The equivalent demand brought in by the consumer from captive and third party sources should be subtracted from the maximum demand recorded by the meter of the consumer. Balance would be the demand actually supplied by the TNEB. If this figure exceeds the quota demand of the TNEB, the consumer would be liable to pay excess demand charges at the rates stipulated in the order of the Commission in M.P.No.42 of*

2008. Similarly, the energy purchased from captive and third party sources would be subtracted from the total energy consumed by the consumer. The balance would be deemed to be the energy actually supplied by the TNEB. If this quantum exceeds the energy quota of the TNEB, the consumer would be liable to pay excess energy charges at the rates stipulated in the order of the Commission in M.P.No.42 of 2008.

4.6. To summarise, the present order enables a consumer to consume power upto sanctioned demand including TNEB quota demand and procurement of power from captive sources and third party sources. The need for advance declaration of the consumer for procurement of power through open access is dispensed with for the purpose of this order.

4.7. This order shall come into force from 17-8-2010.”

3. Appeals filed before Hon’ble Appellate Tribunal for Electricity:-

The Petitioners in the above R.A. Nos.1 to 3 of 2011 filed separate appeals before the Hon’ble Appellate Tribunal for Electricity alleging that the above impugned order dated 7-9-2011 issued by the Commission will come into effect from 17-8-2010 but fixing of the said date was without adducing the reasons in the said impugned order eventhough the said order is a clarifactory order while clarifying the earlier order passed on 28-11-2008.

4. Orders passed by Hon'ble Appellate Tribunal for Electricity:-

4.1. The Hon'ble Appellate Tribunal for Electricity in Appeal No. 23 of 2011 (M/s.TMT Muthammal Textile Mills Ltd. Vs. TNEB and others) Petitioners in R.A. No. 1/2011 passed the order on 9-8-2011 setting aside the impugned order dated 7-9-2011, the following operative portion of the said order dated 9-8-2011 would be relevant:-

“We notice, as pointed out by the learned counsel for the Appellant, that there are no reasons given in the impugned order as to why the order has to come into effect from 17-8-2010 eventhough the earlier order was passed on 28-11-2008 and the order in S.M.P. No. 1 of 2009 had been passed on 28-10-2009.

Under these circumstances, we deem it fit to set aside the impugned order on this issue and remand the matter directing the State Commission to consider and decide the said question as to when actually this order will come into effect and what are the reasons for the same. Accordingly ordered. The State Commission is directed to dispose of the matter within one month from the date of the receipt of this order after hearing the Appellant and the parties concerned. In the meantime, the Appellant is directed to pay the admitted current bills.

Accordingly, the appeal is allowed”.

4.2. In Appeal Nos. 79 and 80 of 2011, the Hon'ble Tribunal for Electricity passed an order dated 10-8-2011 which is similar to the above order dated 9-8-2011 in the case of M/s. National Textile Corporation Ltd., the Petitioner in R.A. No. 2 of 2011.

4.3. In I.A. No. 135 of 2011 in D.F.R. No. 742 of 2011 filed by M/s. Southern India Mills Association, the Petitioner in R.A. No. 3 of 2011, the Hon'ble Appellate Tribunal for Electricity (APTEL) passed an order dated 19-8-2011 which is similar to the order dated 9-8-2011 extracted in paragraph 1-4 above.

5. Follow-up action by the Commission:-

5.1. All the above orders of Hon'ble APTEL were received by the Commission on different dates. All the above R.A. Nos. 1 to 3 of 2011 were registered on 5-9-2011 and taken on file on 14-9-2011. All the above R.A.Nos.1 to 3 of 2011 were clubbed together and a common hearing was held on 14-9-2011 and the Petitioners were directed to file copies of the petitions filed before APTEL after serving the same on the Respondent who have been directed to file counter. Pursuant to the above orders of the Commission, the Respondent, TANGEDCO (formerly TNEB) filed a common counter to all the above R.A.Nos.1 and 3 of 2011 on 3-11-2011.

6. Contention of the Respondent in the common counter dated 3-11-2011:-

a. The order of the Commission in S.M.P. No.1 of 2009 dated 28-10-2009 renders the TNEB component of the base demand a variable figure depending on the declaration of the captive consumer, whereas the share of the TNEB in the base demand was a constant figure.

b. To redress the imbalance, the order dated 7-9-2010 was issued which enabled the consumer to consume power upto sanctioned demand including TNEB quota demand and procurement of power from captive sources and third party sources. The need for advance declaration of the consumer for procurement of power through open access was dispensed with.

c. The prayer for adopting the calculations of demand and energy quota with retrospective effect as per the directions of Hon'ble High Court and the Commission cannot be complied with due to the following reasons:-

- (i) The orders were issued as a correction to the existing formula adopted which had affected a certain number of consumers. By and large there was no dispute from other consumers. The said revision of date has been sought for by consumers who want to delay the payment actually due from them and circumvent the penalty levied thereof, though TANGEDCO is at a disadvantage in view of the earlier calculation the issue has to be closed at some time.
- (ii) Any order is issued with a prospective effect the claim for retrospective effect cannot be complied with.
- (iii) The penalty has been levied in accordance with the rules in existence at the relevant time. Any change in the calculation would lead to total disorder in the billing and collection procedure.

- (iv) The Respondent would incur a huge loss of Rs.30 crores approximately if the instruction is given in retrospective effect and Rs.14 crores approximately with prospective effect.
- (v) The actual demand was more than the anticipated normal and peak hour utilization. Hence TANGEDCO was compelled to purchase power from outside sources at a higher rate in order to cater to the needs of these consumers. Thus TANGEDCO had spent huge amount to purchase power. Hence the penalty levied cannot be rolled back.

7. Common final hearing held on 25-11-2011 for the above R.A. Nos. 1 to 3 of 2011:-

7.1. On 25-11-2011, the Commission heard the learned counsels for the Petitioners and the Respondents.

7.2. The limited question before the Commission is whether the date of relief should be 17-8-2010 or an earlier date. The Learned Counsel for the Petitioner Thiru.N.L. Rajah argued that TNEB itself had brought down the open access limit to 500 KVA on 30-12-2008 and again to 250 KVA on 17-7-2009. The TNEB order also stated that consumer can procure upto the sanctioned demand. The TNEB instructions permitted the consumer to go upto the sanctioned demand. The Petitioner pleaded that in view of TNEB's own position on 30-12-2008 and 17-7-2009 the TNEB should be bound by their statement and therefore they are

eligible for procurement above 500 KVA from 30-12-2008 and 250 KVA from 17-7-2009 upto the sanctioned demand.

7.3. The learned Counsel for the Petitioner Thiru. Rahul Balaji stated that the issue arose on account of the instructions issued by the TNEB dated 25-11-2009 consequent to the Suo Moto Proceedings No. 1 of 2009.

7.4. The learned Counsel for TNEB submitted that retrospective implementation of the order of the Commission dated 7-9-2010 earlier than 17-8-2010 would impose severe financial hardship of Rs.30 crores on the TNEB. To the question as to why then the TNEB brought down the open access from the limit of 1 MW to 500 KVA on 30-12-2008 and further down to 250 KVA on 17-7-2010 and permitted the consumer to go upto the sanctioned demand by third party purchase, the learned Counsel for TNEB did not have an answer.

8. Finding of the Commission:-

8.1. The parties were heard.

8.2. The Commission in its Order dated 7-9- 2010 in MP Nos. 6 of 2010, 9 of 2010 and 17 of 2010 and DRP No 9 of 2010 made certain changes to the restriction and control measures based on the prayer of the petitioners who happened to be consumers as well as generators. To understand the whole issue it is necessary to traverse the entire part of restriction and control measures under taken in Tamil Nadu since. The first Order issued in this regard

is the order dated 28-11-2008 in MP No. 42 of 2008. The R & C measures came into effect from the date of issue of this Order. The Memorandum issued by TNEB on 1-11-2008 and 17-11-2008 were the basis for deciding the excess demand and excess energy charges leviable on such of those consumers who exceed the quota fixed for them.

8.3. Many consumers approached the High Court of Madras with regard to treatment of wind energy generators at par with captive generators. The TNEB had also admitted before the High Court to treat both these classes of generators at par.

8.4. Consequent to the Orders of the High Court of Madras, the Commission initiated Suo-motu Proceeding SMP 1 of 2009 and passed an Order on 28-10-2009 paving the way for wind energy generators to be treated at par with the other captive generators.

8.5. Be that as it may, there were many writ petitions and appeals filed before the High Court of Madras and Appellate Tribunal for Electricity respectively from time to time. The major development in the interim period is the arrangement for providing Electricity to willing consumers during peak as well as off peak period at a charge to be paid by such consumers in the form of reliability charge. This was enabled by an Order of this Commission dated 5-1-2010 and this was available up to the period 31-5-2010. The operation of reliability charge was

further extended by an Order of the Commission dated 19-10-2010 in MP No. 16 of 2010 from November 2010 to May 2011. The reliability charge was further extended between July 2011 and September 2011 by the Order of the Commission dated 12-7-2011 in MP No. 13 of 2011.

8.6. The Commission has also made Open Access available to all HT consumers in Tamil Nadu with effect from 17-2-2010 by issuing amendment to the Open Access Regulations. This enabled all HT consumers in the State to avail Open Access. It should be noted that all consumers of 112 KW and above are provided HT supply in Tamil Nadu. If a consumer having a sanctioned demand of 63 KVA opts for HT supply he shall be provided HT supply by the TNEB. In view of this it is to be recognized that all HT consumers became eligible for availing Open Access in the State of Tamil Nadu with effect from 17-2-2010.

8.7. Another important development is the waiver of cross subsidy surcharge by the TNEB (TANGEDCO) during the period of the power cut. There have been some writ petitions in this matter before the High Court of Madras.

8.8. From the above, it could be seen that the restriction and control measures have been evolving over a period of time since the initial Order was issued in November 2008 with various development such as (i) Providing parity between captive generators and wind generators in October 2009; (ii) Introduction of

supply of power beyond the quota on payment of reliability charges with effect from 5-1-2010 which has been extended further, from time to time; (iii) Introduction of Open Access to all HT consumers with effect from 17-2-2010 by way of amendment to the Open Access Regulations; and (iv) non-levy of cross subsidy surcharge for Open Access customers by the TANGEDCO. In fact the petitioners before this Commission in MP No. 6 of 2010, 9 of 2010 and 17 of 2010 and DRP No. 9 of 2010 have only assailed the TNEB's Memo dated 25-11-2009 and brought out that introduction of reliability power, Open Access, parity between various captive generators should increase the availability of power to the consumers but on the contrary the impugned instructions issued by TANGEDCO results in reduction in quota of TNEB with such changes thereby reducing the overall availability of power to consumers. The TNEB on its part has pointed out that in view of the Order of the Commission in SMP No. 1 of 2009 wherein declaration by the captive consumers makes the TNEB quota of base demand a variable figure.

8.9. Keeping in view the difficulties expressed by the petitioners who are consumers as well as generators and the licensee the TNEB / TANGEDCO, the Commission had to modify its Order on the very first day of hearing in these matters on 17-8-2010. The interim Order of the Commission issued on 17-8- 2010 is reproduced below:-

“The base demand as worked out by the TNEB on the basis of their Circular dated 17-11-2008 shall remain. Procurement through Open access which is protected by the Electricity Act 2003 may be treated as an additionality but limited to the sanctioned demand of the consumer. This

*has been admitted by the TNEB in their communication dated 17-07-2009
“Procedure for allowing Third Party Sale / Purchase under Intra State
Short Term Open Access”*

*The consumer should declare in advance one month prior to the billing
period for availing of Open access procurement. For example for a
billing period commencing from 27th September 2010, the declaration
should be made before 27th August 2010.*

*If the Open access procurement does not materialize to the extent
projected by the consumer, he will limit his drawal to the extent of actual
availability of Open access procurement.”*

8.10. Thereafter the detailed Order was issued on 17-9-2010. The issue regarding the date of effect of this Order which has been Ordered as 17-8-2010 is to be seen in the context of the above developments.

8.11. Petitions M.P. No.6 of 2010, M.P. No.9 of 2010, M.P. No. 17 of 2010 and D.R.P. No. 9 of 2010 were filed between February and April 2010. All these Petitions were bunched together since they dealt with the same issue. On completion of the pleadings the matter was listed on 17-8-2010. Since both the Petitioners and the Respondents expressed certain difficulties in the order issued by the Commission in S.M.P. No. 1 of 2009, the matter was examined. The Petitioners grievance was that with increase in the procurement of open access power, the quota of TNEB was going down. The grievance of the Respondent TNEB was that the declaration by the wind energy generators is making the TNEB's quota a variable figure which poses problem for them. Both these issues arose based on the order issued by the Commission in S.M.P. No. 1 of 2009. The Commission sought to address these issues in this order issued on

7-9-2010. Since the entire issue arose on the basis of the impugned clarificatory memo dated 25-11-2009 giving effect to the order in S.M.P. No. 1 of 2009, the cut off date in any case cannot go before the date of issue of the order in S.M.P. No. 1 of 2009 i.e. 28-10-2009. But the same has to be examined further in the context of the evolving scenario of R&C measures and relaxation provided in the same from time to time. Various developments took place in R&C measures since its introduction as narrated in paras 8.2. to 8.10. Open Access was made available by this Commission with effect from 17-2-2010 by way of amendment to the TNERC Open Access Regulations 2005. Therefore the HT consumers of Tamil Nadu could avail Open Access only after 17-2-2010. The cause of action arose only when Petitions were filed by the parties and difficulties raised by both sides were to be examined for issuing appropriate orders. On the first day of hearing on 17-8-2010, the Commission clarified the matter by pronouncing an Interim Order in the open court. The same order stipulated that if Open Access procurement does not materialize to the extent projected by the consumer, he will limit his drawal to the extent of actual availability of open access procurement. There was no further hearing between 17-8-2010 and 7-9-2010, when the final order was pronounced by the Commission. In the final order pronounced on 7-9-2010, the requirement of declaration by the consumer for procurement of power through Open Access was dispensed with. From this it could be observed that the order dated 7-9-2010 had two parts. One relating to procurement of power through Open Access going upto the sanctioned demand and the other dispensing with the advance declaration of consumer for

procurement of power through open access. These two parts of the orders have to have effect from the same date. The argument of the learned counsels for SIMA, M/s.T.M.T Muthammal Textiles Limited and M/s.National Textile Corporation Limited that one part of the order namely going upto the sanctioned demand shall have retrospective effect while the second part dispensing with the declaration having prospective effect is illogical. Therefore, the Commission is of the view that these two parts of the Order would have effect from the same date which shall be 17-8-2010 as already indicated in the combined orders dated 7-9-2010 in the concerned Petitions.

8.12. The three cases remanded by the Appellate Tribunal for Electricity for recording the reasons and deciding the effective date is disposed of by this order.

9. Appeal:-

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