

ORDER

1. Prayer of the Petitioner in D.R.P.No.7 of 2011:-

The prayer of the Petitioner in D.R.P.No.7 of 2011 is to direct the Respondent to refund the amount collected from the Petitioner from October 2009 to October 2010 towards long term transmission and wheeling charges totaling to Rs.1,03,07,484/- with interest @ 18% from the date when the amount was collected.

2. Facts of the case:-

The Petitioner previously filed D.R.P.No.33 of 2009 seeking cancellation of the long term wheeling approval of the Petitioner's plant with effect from 01-10-2010 and seeking refund of the amounts collected by the Respondent since October 2010 towards wheeling and transmission charges, together with interest at 18%.

2.1. The Commission in its order dated 17-08-2010 held as follows:-

"The Respondent Board is directed to cancel the wheeling approval dated 28-03-2005 granted to the Petitioner in respect of the Petitioner's power plant for supply to captive consumers with effect from 01-10-2009. The Petitioner is directed to file a separate petition furnishing details of the amounts collected from the Petitioner for the period after 01-10-2009 towards transmission and wheeling charges as per the wheeling approval dated 28-03-2005 as well as the break-up of short term Open Access charges levied for the same period".

2.2. The present petition is therefore being filed as per the directions of this Commission with the details of the amounts collected from the Petitioner for the period after 01-10-2009 towards transmission and wheeling charges as per the

wheeling approval dated 28-03-2005 as well as the break-up of short term Open Access charges levied for the same period.

3. Contentions of the Petitioner:-

3.1. After the issuance of the said order dated 17-08-2010, the Respondent Board continued to levy long term wheeling and transmission charges on the Petitioner till the month of October 2010 despite repeated requests from the Petitioner for not levying such charges. The Petitioner has been paying the said charges under protest.

3.2. It is relevant to point out that for the power supplied by the Petitioner to the Respondent Board through PTC, there cannot be any obligation to pay transmission charges as the delivery point for such supply is the plant bus at the Petitioner's plant switchyard i.e. point of interconnection of the Petitioner's plant system with the Respondent Board's system.

3.3. The Petitioner continued to supply 4 MW to the Respondent Board through PTC till May 2010. Thereafter in terms of the fresh tenders of the Respondent Board, the Petitioner contracted to supply 3 MW for the months of June 2010 to September 2010 and 7 MW for the month of October 2010. Hence the aforesaid quantities of power supplied to the Respondent Board with Petitioner's switchyard as the delivery point do not attract any transmission and wheeling charges.

3.4. For the period from October 2009 to October 2010, the Respondent has collected from the Petitioner a total sum of Rs.1,03,07,484/- (One Crore Three Lakh

Seven Thousand Four Hundred and Eighty Four only) as long term open wheeling and transmission charges.

3.5. The collection of the long term Open Access charges from October 2009 to October 2010 by the Respondent Board is illegal and contrary to the Regulations. The conduct of the Respondent Board in continuing to collect the long term charges for the months of August 2010 to October 2010 even after the order dated 17-08-2010 of this Commission shows absolute callousness and disrespect to the orders of the Commission on the part of the Respondent Board.

4. Hearing held on 04-03-2011:-

On 04-03-2011, the Commission admitted the petition and the Respondent was directed to file counter within four weeks.

5. Hearing held on 21-04-2011:-

In the hearing held on 21-04-2011, the Commission passes the following interim order namely

“The interim application of the Petitioner for impleading TAN TRANSCO in the place of TNEB is allowed. Further proceedings in D.R.P.No.7 of 2011 are kept in abeyance in view of the submission of the Learned Counsel for the TAN TRANSCO that the Appellate Tribunal for Electricity has advised such a course”.

6. Contentions as set out by the Respondent in their counter affidavit:-

6.1. From 01-10-2009 the transmission and wheeling charges were not collected as per the wheeling approval dated 23-08-2005. But transmission and wheeling

charges were collected as per revised wheeling approval dated 24-07-2006 in terms of Order Nos. 2 & 4 only as per provisions of Intra State Open Access Regulation, 2005. The amount whatsoever paid by the Petitioner after 01-10-2009 was collected by the Respondent for the Open Access provided to the Petitioner, which the Respondent is entitled to collect as per the existing order dated 24-07-2006. Incidentally in this case there is no agreement between the parties. However, the revised wheeling approval contemplates that Order Nos. 2 & 4 will be applicable. The Petitioner by its own conduct opted to pay the LTOA charges without any protest or demur and therefore not entitled to claim any amount by way of refund.

6.2. G.O.Ms. No.48, Energy Department dated 22-04-1998 provides for adjustments in kind (i.e. 15% for transmission and wheeling charges and losses) balance 85% to captive users wheeling it does not provide sale to trader / third party. Third party sale can be permitted by Board with certain conditions like the sale rate shall not be more than TNEB's rate etc. But TNERC's Order No. 2 & 4 provides for collection of transmission, wheeling and other charges, third party sale, CPP status verification as per Rule 2005 etc. Besides the Intra State Open Access, 2005 provides that the captive generator can supply to the third party customer without any restriction on tariff, therefore the generator is not subject to regulating mechanism.

6.3. The Commission may consider that in terms of order passed in D.R.P.No.33 of 2009, the Petitioner would be liable to pay the transmission and wheeling charges of 15% in kind only under G.O.Ms.48.

6.4. If the Petitioner disputes the proposition laid down in order in D.R.P. No. 33 of 2009 then the Petitioner ought to have filed an appeal as an Open Access customer under the Intra State Open Access Regulation, 2005. Having accepted the order passing D.R.P. No. 33 of 2009, the Petitioner has no legal ground to file an appeal to either claim any refund or register himself as a STOA customer. Instead the Petitioner has to pay the transmission and wheeling charges @ 15% in kind and then claim the refund of transmission and wheeling charges as per the provisions of Open Access Regulation.

6.5. The Petitioner company has been treated under G.O.Ms.No.48, as they have not executed an agreement under Electricity Act, 2003 / Open Access Regulation, 2005 / orders passed thereon. As they are yet to execute an agreement under Order No.2 & 4 till date, the Petitioner company should be treated under G.O.Ms.No.48 only until the execution of an agreement.

6.6. As per the provisions of G.O.Ms.No.48, the Petitioner company is not entitled to sell power to third party without any ceiling or sell power through trader. In such a case the entire generation has to be utilized either by captive users or sold to TNEB. Therefore, all the transactions made so far from 24-07-2006 have to be reworked under G.O.Ms.No.48 and settlement made accordingly.

6.7. An appeal has been filed before the Appellate Tribunal for Electricity against the order in D.R.P. No.33 of 2009 dated 17-08-2010 together with a petition to grant interim stay for implementation of order of D.R.P. No.33 of 2009 and to pass a fresh

order on the applicability of either G.O.Ms.No.48, Energy Department dated 22-04-1998 or Order No.2 & 4 to the 1st Respondent from July 2006 to till date.

6.8. By order dated 28-03-2011 the Appellate Tribunal for Electricity, New Delhi was pleased to admit the Appeal No.37 of 2011 against the order dated 17-08-2010 in D.R.P. No.33 of 2009 and notice has been issued to the Respondent.

6.9. In view of the ambiguity in the status of the Petitioner, pending disposal of the above appeal, the status of the Petitioner company could not be ascertained, hence the refund of transmission and wheeling charges could not be examined and processed. In the event of dismissal of Appeal No.37 of 2011 filed against D.R.P.No.33 of 2009, settlement has to be made as detailed above.

7. Contentions as set out by the Petitioner in the Rejoinder:-

7.1. In the absence of an energy wheeling agreement, the wheeling approval dated 28-03-2005 is the only basis for the charges collected from the Petitioner towards wheeling and transmission facility accorded to the Petitioner. The Respondent's contention to the contrary is denied. It is denied that the Petitioner has paid the long term open access after 01-10-2009 without any protest or demur. After 01-10-2009, the Petitioner has made payment of all long term open access charges demanded by the Respondent under protest as seen from the various letters written by the Petitioner.

7.2. The Respondent has been collecting transmission and wheeling charges in terms of Order No.2 of the Commission. In view of the specific clause in the

wheeling approval providing for revision of the wheeling charges as per the orders of the Commission, the contention of the Respondent in the counter affidavit that the Petitioner would be liable to pay transmission and wheeling charges of 15% in kind is without basis.

7.3. The contention of the Respondent is that the Petitioner not having filed an appeal against the order in D.R.P. No.33 of 2009 is not entitled to file the present petition claiming refund of the excess amounts collected since October 2009 is baseless. The further contention that the Petitioner ought to pay wheeling and transmission charges at the rate of 15% in kind and then claim refund of transmission and wheeling charges paid as per the provisions of the Intra State Open Access Regulations is entirely preposterous. The Respondent having collected the transmission and wheeling charges as per the rate prescribed in Order No.2 of the Commission for long term open access customers is estopped from making such averments.

7.4. The finding of the Commission that G.O.Ms.No.48, is applicable in the case of the Petitioner does not in any manner deprive the Petitioner of the benefits available under Order No.2 and 4 of the Commission which regulate the transmission and wheeling charges payable by the generating companies. Since the wheeling approval granted to the Petitioner in clear terms sets out that the transmission and wheeling charges payable in kind at the rate 15% of total units fed into the grid is subject to the revisions to be prescribed by this Commission, the revision in charges prescribed under Order No.2 is applicable to the Petitioner and the Respondent is not entitled to contend to the contrary. The contention of the Respondent that all

transactions relating to the Petitioner made so far have to be reworked under G.O.Ms.No.48 is denied as baseless.

7.5. There is no ambiguity in the Petitioner's status. The Respondent to suit itself is trying to misinterpret the order passed by the Commission. The D.R.P.No.7 of 2011 has been filed pursuant to the directions of the Commission and the Petitioner is entitled to refund of the amounts collected from the Petitioner since 01-10-2009 at the rate prescribed under Order No.2 in respect of Long Term Open Access Consumer.

8. Contentions of the Respondent in the reply affidavit to the Rejoinder:-

8.1. The Hon'ble Tribunal for Electricity has cleared the ambiguity in the status of the company i.e. whether the company is under G.O.Ms.No.48, Energy Department, dated 22-04-1998 or under Open Access Regulations, 2005 and held in the order dated 04-11-2011 that the company is under the Open Access Regulations, 2005.

8.2. The Respondent respectfully submits that the transmission and scheduling charges collected under LTOA for the period from 10/2009 to 10/2010 will be refunded to the company without any interest in as much as in the facts and circumstances of the case as stated above interest will not get attracted and that the wheeling order dated 28-03-2005 will be cancelled with effect from 01-10-2009 as per the directions of the Commission.

9. Reply affidavit of the Petitioner to the reply affidavit of the Respondent:-

9.1. The issues pointed out by the Respondents have been put to rest by the Appellate Tribunal for Electricity in its order dated 04-11-2011, which was filed by the Respondent against the order of the Commission in D.R.P. No.13 of 2009. The findings of the Commission in D.R.P.No.33 of 2009, that the Petitioner continues to be governed by G.O.Ms.No.48 dated 22-04-1998 has alone been set aside by the Appellate Tribunal for Electricity. Such interference by the Appellate Tribunal for Electricity has no bearing in the relief sought in the present D.R.P.

9.2. With regard to denial of interest, the Respondent cannot deny interest on the amounts due to the Petitioner. The Respondent collects interest from the Open Access consumers for any belated payment of wheeling and transmission charges. The Commission having categorically found that the wheeling permission granted to the Petitioner ought to be cancelled with effect from 01-10-2009 and the same having been upheld in appeal, the Respondent cannot take a stand that the Petitioner is not entitled to interest.

10. Findings of the Commission:-

10.1. The petitioner in their letter dated 24-9-2009 informed the Chairman, TNEB requesting to withdraw their captive status and reduce their long term transmission capacity from 8.81 MW to Zero MW and also intimated that effective from 24th September 2009, they would like to operate as a power generating company as per TNERC Order No.4 / dated 15.05.2006. Thereupon, the petitioner under protest had been paying the Transmission and scheduling charges and consistently they maintain their stand that they (Petitioner) no longer qualify for CPP status from 1st

October 2009 onwards – vide their letters dated 21.11.2009; 22.12.2009; 23.01.2010; 22.02.2010; 20.03.2010 and so on. On 30.09.2009, the Chief Engineer/PPP, TNEB had informed the Petitioner to approach this Commission, who in turn would fix up the required compensation for such relinquishment (of long term Open Access).

10.2. Subsequently, the Petitioner filed DRP No.33 of 2009 before this Commission for cancellation of wheeling approval dated 28.03.2005 and for refund of Transmission and wheeling charges collected from 1.10.2009 onwards. This Commission by its order dated 17.08.2010 disposed of the said DRP 33 of 2009 with a direction to the Board to cancel the wheeling approval dated 28.03.2009 entered between the Petitioner and the Board. The Commission has also directed the Petitioner to come up with break-up details of the amount collected after 1.10.2009 and the present DRP 7 of 2011 thus came to be filed before this Commission with the breakup details of the amount collected by the Board with a prayer for refund of the said amount collected from the Petitioner from October 2009 to October 2010 towards long term transmission and wheeling charges totalling Rs.1,03,07,384/- with interest at the rate of 18% from the date when the amount was collected. In the said DRP 33 of 2009 the Commission has also held that the provisions of the Open Access Regulation, 2005 is not applicable to the Petitioner for cancellation of wheeling approval granted to it and the Board is also not entitled to compensation under regulation 12 (h) of the Open Access Regulations.

10.3. Meanwhile the respondent Board has filed an appeal (Appeal No.37 of 2011) before the APTEL against the said orders of the Commission dated 17.08.2010 in

the said DRP 33 of 2009. The said Appeal has been disposed of by APTEL in its order dated 4.11.2011. In the said Appeal, APTEL has held that Open Access Regulation, 2005 is applicable to this case for cancellation of wheeling approval and no compensation is payable to the Board by the Petitioner for cancellation of wheeling approval entered by the Board with the Petitioner, since no case has been made out regarding stranded transmission and distribution capacity. The said order of the APTEL has not been taken up for further appeal. Hence the said orders of the APTEL will hold the field. As such the issue regarding cancellation of wheeling approval of the Petitioner with TANGEDCO with effect from 1.10.2009 has been given a quietus.

10.4. In D.R.P. No.7 of 2011, the Respondent TANGEDCO in its affidavit dated 30.07.2012 filed on 8.8.2012 in para 18 has stated as follows:-

“The Respondent respectfully submits that the Transmission and scheduling charges collected under the LTOA for the period from October 2009 to October 2010 will be refunded to the company without any interest in as much as the facts and circumstances of the case and as stated above interest will not get attracted and that the wheeling order dated 28.03.2005 will be cancelled with effect from 1.10.2009 as per the directions of the Hon’ble Commission.”

10.5. From the above averment of the respondent it is clear that the respondent is not disputing the refund of transmission and scheduling charges collected from the Petitioner from October 2009 to October 2010. The only point of dispute is regarding the payment of interest on the amount to be refunded.

10.6. The issue for consideration is whether the Petitioner is entitled for interest on the amount which they are entitled for refund by the Respondent and if so, at what rate. In an earlier case filed by the Petitioner in DRP 13 of 2009, claiming interest @ 18% from the date on which units of energy were deducted towards the wheeling and T and D losses till the date of remitting the units back to the Petitioner's account, this Commission rejected the claim. However on appeal in Appeal No.23 of 2010 the APTEL in its order dt. 9.7.2011 allowed interest @ 10%. The following portion of the orders of the APTEL would be relevant:

*“It is a settled law that the party is entitled to interest for the said amount.
..... However in the facts and circumstances of the case, we are
of the view that the appellant is entitled to interest @ 10% instead of 18%
as claimed by the Appellant.”*

10.7. Following the above said orders and also relying on the decision of the Supreme Court in Central Bank of India Vs. Ravindra reported in 2002 (1) SCC 367, the APTEL in its order dated 17.04.2012 in Appeal No.11 of 2012 also held that the Wind Power Generators are entitled for payment of interest on delayed payment from the Appellant (TNEB) for the energy received from the Generators. It is therefore clear that a person who is deprived of the use of money to which he is legitimately entitled for a particular period has a right to be compensated by way of interest. Keeping this view in mind and in view of the orders of APTEL referred to above, we are of the view that payment of interest @ 10% on the amount to be refunded to the Petitioner from the date when the amount was collected from the Petitioner towards long term transmission and wheeling charges for the period

October 2009 to October, 2010, is reasonable in the facts and circumstances of the case. We, accordingly, order payment of interest @ 10% in this case.

11. Appeal:-

An appeal against this order of the Commission shall lie before the Appellate Tribunal for Electricity under Section 111 of the Electricity Act, 2003 within forty five days from the date of receipt of this order by the aggrieved person.

(Sd.....)
(S.Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission