

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

**PRESENT:-**

**Thiru.S.Nagalsamy** .... **Member**

**and**

**Thiru.G.Rajagopal** .... **Member**

**D.R.P.No.41 of 2014**

M/s.Rajapalayam Mills Limited  
Represented by its General Manager – Electrical  
Mr.B.Velvendan  
Post Box No.01  
P.A.C. Ramasamy Raja Salai  
Rajapalayam – 626 117  
Virudhunagar District.

... Petitioner  
Thiru N.L. Rajah  
(Advocate for the Petitioner)

Vs

Tamil Nadu Generation and Distribution  
Corporation Limited (TANGEDCO)  
Rep by its Chairman & Managing Director  
144, Anna Salai,  
Chennai – 600 002.

.... Respondents  
Thiru P.H.Vinod Pandian  
(Standing Counsel for the Respondent)

**Date of hearing : 29-01-2014 and 28-04-2014**

**Date of order : 13-02-2015**

The above D.R.P.No.41 of 2014 came up for final hearing before the Commission on 28-04-2014. The Commission upon perusing the above petition and the connected records and after hearing both sides passes the following order:-

## ORDER

### **1. Prayer of the Petitioner:-**

The prayer of the Petitioner is to rectify the defect and error in the order dated 25-02-2013 passed by the Commission in R.A.No.4 of 2013 by directing that the date of effect of the order dated 07-09-2010 will apply to all consumers with sanctioned demand of 500 KW and above from 30-12-2008 and to all consumers with sanctioned demand of 250 KW and above from 17-07-2009 and consequently direct the Respondents to refund to the HT consumers accordingly and thus render justice.

### **2. Facts of the Case:-**

In the matter of R & C, the Commission, in order dated 25-02-2013 made in R.A. No.4 of 2013, after considering the order of APTEL dated 31-10-2012 in Appeal No.36 of 2012 etc. batch cases, ordered interalia as follows:-

*“it is hereby directed that the date of effect of the order dated 07-09-2010 of the Commission in M.P. No.6 of 2010, 9 of 2010 and 17 of 2010 and DRP No.9 of 2010 shall be 17-07-2009 i.e. the date on which the TANGEDCO permitted open access to HT consumers. Consequently, TANGEDCO is directed to effect refund to the HT consumers accordingly. This exercise shall be done with the period of two months from the date of the issue of this order”*

Contending that there is a defect and error in the said order of the Commission dated 25-02-2013 made in R.A. No.4 of 2013, the Petitioner has filed the present petition with the above prayer.

### **3. Contention of the Petitioner:-**

3.1. The Petitioner is a company having its spinning mill with High Tension Electricity Supply Connection bearing HT SC No.1 sanctioned with a maximum demand of 4,500 K.V.A.

3.2. The Appellate Tribunal for Electricity (APTEL) passed an order dated 31-10-2012 in Appeal Nos.36,37,49,50 and 55 of 2012 and an order dated 17-01-2013 in Appeal Nos.261 and 262 of 2012. The issue related to coming into effect of the facility of Open Access Regulations. Consequent to the aforesaid orders of APTEL setting aside the order dated 28-12-2011 of the Commission passed in R.A. Nos.1, 2 and 3 of 2011, the Commission was directed to pass consequential orders.

3.3. The subject matter of the aforesaid appeals was the final order passed by the Commission on 07-09-2010 in M.P.Nos.6, 9 and 17 of 2010 and D.R.P. No.9 of 2010 permitting all the HT consumers who are procuring power from captive sources and third party sources to get additional demand and energy quota over and above the demand and energy quota from the TNEB's source subject to the sanctioned demand. In the said order, the Commission restricted the benefits of the order with effect from 17-08-2010 i.e. the date of the interim order which was the subject matter of challenge before the Tribunal in the appeals under reference.

3.4. The question framed by the APTEL in the aforesaid appeals is as follows:-

*“Whether the State Commission is justified in restricting the benefit of the order dated 07-09-2010 passed by the State Commission earlier only from the date of the interim order dated 17-08-2010 and not before?”*

The relevant portions of the summary of findings of the APTEL are as below:-

**“51. Summary of our findings:-**

(i) xxx xxx xxx

(ii) *TNEB issued two memos dated 30-12-2008 and 17-07-2009 permitting to go up to the sanctioned demand by third party purchase to HT consumers with connected load upto 500 KW and 250 KW respectively. In the memo dated 17-07-2009 issued by the Chairman, TNEB it has been specifically stated that the purchaser can use the purchased power over and above the original quota fixed for him under restriction and control measures upto the sanctioned*

*demand. TNEB cannot take a contrary stand to its own memos dated 30-12-2008 and 17-07-2009.*

- (iii) In the order dated 07-09-2010, the State Commission after taking note of the memo dated 17-07-2009 from the Chairman, TNEB directed the TNEB to act in accordance with its own stand. Thus, the State Commission has erred in deciding the date of effect of its order to 17-08-2010.*
- (iv) The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board.*

*xxx xxx xxx .....*

3.5. The decision of the Commission in M.P.Nos.6,7 and 17 of 2010 and D.R.P.No.9 of 2010 was overruled by the APTEL and directions have been given that the date of effect of the Commission's order should be the date on which the TANGEDCO (formerly TNEB) issued the communication permitting the HT consumers to procure power on open access over and above the quota demand i.e. from 17-07-2009 and not 17-08-2010 which is the date of the interim order of the Commission.

3.6. Following the order of APTEL, the Commission decided to treat the direction of the APTEL in its order dated 28-12-2011 as a remanded matter and after considering the issues set out above, the Commission was pleased to pass an order as follows:-

*"In line with the directions of the Hon'ble ATE, it is hereby directed that the date of effect of the order dated 07-09-2010 of the Commission in M.P.No.6 of 2010, 9 of 2010 and 17 of 2010 and D.R.P. No.9 of 2010 shall be 17-07-2009 i.e. the date on which the TANGEDCO permitted open access to HT consumers. Consequently, TANGEDCO is directed to effect refund to the HT consumers accordingly. This exercise shall be done with the period of two months from the date of the issue of this order".*

3.7. A perusal of the above order shows that there is a defect and error in the order passed by the Commission on 25-02-2013 in R.A. No.4 of 2013. This is because from a perusal of the order of the APTEL dated 31-10-2012, the following are clear:-

- (i) The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when the third party purchase through open access was permitted by the Electricity Board.
- (ii) From 30-12-2008 third party power purchase is permitted for consumers with sanctioned demand of 500 KW and above.
- (iii) From 17-07-2009 third party power purchase is permitted for consumers with sanction demand of 250 KW and above.

3.8. The directions now passed by the Commission in R.A.No.4 of 2013 on 25-02-2013 merely directs that the order of the APTEL to be given effect from 17-07-2009. This is clearly an error and defect in the order of the Commission which appears to have crept in inadvertently and the same required to be rectified.

#### **4. Contention of the Respondent in the Counter Affidavit:-**

4.1. The Government of Tamil Nadu had implemented Restriction and Control measures on the usage of electricity to all industrial consumers in the State. Based on the order of the Government, a notice dated 01-11-2008 was communicated to all HT consumers containing following instructions for power cut.

##### **“1. HT SERVICES**

- a. The cut of 40% is on the base demand and energy for HT industrial and commercial services.*
- b. The base energy consumption for HT services will be the average of any three consecutive months advantageous to the consumer between the billing period from October 2007 to September 2008.*
- c. The base demand will be the highest maximum demand registered in any month during the period from October 2007 to September 2008.*

4.2. Pursuant to the representation from various HT consumers requesting fixation of quota as aggregate total of 60% of their TNEB supply and 100% of the power received from CPPs. The memo was issued on 17-11-2008 in connection with fixing the demand and energy quota for the HT consumers partially using power from CPPs and later the same formula had been adopted in respect of wind energy captive users also based on the order in S.M.P.No.1 of 2009 as stated below:-

*“Fixing of Energy quota:-*

- |       |                                                                                                           |       |
|-------|-----------------------------------------------------------------------------------------------------------|-------|
| (i)   | <i>Monthly base energy consumption as illustrated in working instructions dated 01-11-2008</i>            | A     |
| (ii)  | <i>In that the actual energy supplied (monthly average) for the above three months average by the CPP</i> | B     |
| (iii) | <i>The actual energy availed by consumer from TNEB</i>                                                    | A-B=C |
| (iv)  | <i>60% energy on C (C X 60/100)</i>                                                                       | D     |
| (v)   | <i>The quota fixed for energy</i>                                                                         | B + D |

*Fixing of Demand quota:-*

- |      |                                                                                            |   |
|------|--------------------------------------------------------------------------------------------|---|
| (i)  | <i>The base demand consumption as illustrated in working instructions dated 01-11-2008</i> | E |
| (ii) | <i>In that the calculated demand supplied for the energy for the month by CPP</i>          | F |

$$F = \frac{\text{Energy supplied by CPP in a month}}{\text{No. of days in the month} \times 24 \text{ hours} \times P.F.0.95}$$

- |       |                                                        |       |
|-------|--------------------------------------------------------|-------|
| (iii) | <i>The actual demand availed by consumer from TNEB</i> | E-F=G |
| (iv)  | <i>60% demand of G (G X 60 / 100)</i>                  | H     |
| (v)   | <i>The demand quota fixed</i>                          | F + H |

4.3. In continuation to the above, TANGEDCO had filed M.P. No.42 of 2008 before the Commission with regard to implementation of Restriction and Control of power supply and levy of excess demand charges and energy charges for the consumption of HT and LT consumers for exceeding quota and excess demand charges for HT consumers. The Commission had approved and directed that excess demand shall be charged at thrice the normal rate and excess energy consumption be charged at

thrice the normal rate for both industrial and commercial consumption with effect from 28-11-2008.

4.4. The memo dated 17-11-2008 had not been adopted with regard to fixation of quotas in respect of wind energy captive users at the time of introduction. Hence, the wind energy captive users have challenged the above order by way of filling Writ Petitions vide W.P.Nos.12448 of 2009 etc. before the High Court of Madras by praying to re-fix their demand and energy quota on par with the CPP users. The Respondent had also filed Writ Petition vide W.P.No.17331 of 2009 and W.P.No.17333 of 2009.

4.5. Consequent to the order of High Court in the said W.Ps., the State Commission initiated a Suo-Motu Proceedings No.1 of 2009 dated 28-10-2009 regarding the fixation of quota for wind energy captive users on par with other CCP users and the Commission has recognized and approved the formula contained in the Respondents Memo dated 17-11-2008 for re-fixing the demand and energy quota for the period from 12/2008 to 10/2009 and from 01-11-2009 all captive users, whether thermal or wind shall declare on the first day of every month, the energy proposed for captive use for the following month, which shall be considered as B and F for the purpose of fixing energy quota and demand quota respectively in the formula of the TANGEDCO dated : 17-11-2008. The energy so declared shall roughly be the monthly average generation. Further, from 01-11-2009, the peak hour power generation shall be eligible for peak hour utilization for every month subject to the limit of one-twelfth of annual peak hour generation.

4.6. The TANGEDCO had communicated the working illustrations to the field to fix the quota for CPPs (fossil fuel and wind) and the third party power vide letter dated 26-11-2009 as per the suo-motu order of the Commission. The Respondent had permitted third party power purchase for a transaction of 500 MW and above and 250 KW and above to HT consumers within Tamil Nadu vide memos dated 30-12-2008 and 17-07-2009, respectively. The purchaser / consumer can utilize the purchased power over and above the original quota fixed for him under the Restriction and Control measures. However, in any case, the consumer shall not exceed the sanctioned demand. The TNEB shall re-fix the energy and demand quota by adding the quantum of power purchased from the third party sources by the consumer.

4.7. The Commission in its order dated 06-01-2010 has stated 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.

4.8. M/s. Southern India Mills Association, M/s. Biomass Power Producers Association etc. have filed Miscellaneous Petitions vide M.P.No.9 of 2010 and M.P.No.6 of 2010 and 17 of 2010 and D.R.P. No.9 of 2010 interalia with contention as follows:-

- “e) Since the infrastructure facilities has already been created based on the sanctioned demand by the Tamil Nadu Electricity Board, it is but logical to allow purchase of power from third parties upto the sanctioned demand instead of restricting the same to the base demand”.

4.9. The Commission in order dated 07-09-2010 in M.P.Nos.6 of 2010, 9 of 2010 and 17 of 2010 and D.R.P.No.9 of 2010 I.A.Nos.1 and 2 of 2010 in M.P. No.9 of 2010 ordered as follows:-

*“The role of the licensee is limited to that of a carrier. Procurement through open access will be treated as an additionality. The ceiling limit upto which a consumer can utilize power including the TNEB quota demand, captive power and third party purchase would be the sanctioned demand.”*

Therefore, the TANGEDCO had permitted to reach the maximum demand over and above the quota demand upto sanctioned demand in respect of the HT consumers who are using partially TANGEDCO's power and power from sources such as captive, third party.

4.10. Aggrieved by the date of effect of the order dated 07-09-2010, some of the HT consumers, viz. M/s. TMT. Muthammal, NTC etc. have filed appeals before the APTEL. The APTEL remanded the matter to the Commission for fresh consideration with reference to the date on which the order dated 07-09-2010 would come into effect vide in its order dated 09-08-2011. The Commission had stated in its order dated 28-12-2011 that the order dated 07-09-2010 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 the consumer for procurement of power through open access. These two parts of the order have to have the same date.

4.11. The HT Consumer M/s. Asahi India Glass Ltd. and others have filed appeals before the APTEL vide A.P.No.36 and etc. of 2012 against the order dated 28-12-2011 passed by the Commission. The APTEL has passed the order in the said appeals that TNEB cannot take a contrary stand to its own memos dated 30-12-2008 and 17-07-2009 which specifically stated that the purchaser can use the purchased power over and above the original quota under R & C measures upto the sanctioned demand. Thus the Commission has erred in deciding the date of its order to 17-08-2010. Further stated that the date of effect of the order for third party purchase should not have been mixed up with the advance declaration by wind energy generators as they are two distinct issues.

4.12. Though the permission to go in for Third Party Power Purchase was granted by the Board, the orders of the Commission in S.M.P. No.1 of 2009 superseded all circulars issued by the Board prior to the orders in S.M.P. No.1 of 2009 and calculations were made as per the directions in S.M.P. No.1 of 2009. As the order passed by the Commission in S.M.P. No.1 of 2009 had become final and only modified on the date of interim order dated 17-08-2010, the orders can only be retrospective. Otherwise, orders passed in S.M.P. No.1 of 2009 would stand set aside without any appeal. Such an attempt to indirectly set aside an order of the Commission is not permissible under law.

4.13. The Commission in its consequential order has stated that the decision of the Commission in M.P.Nos.6,7 and 17 of 2010 and D.R.P. No.9 of 2010 was overruled by the APTEL and directions have been given that the date of effect of the Commission's order should be the date on which the TANGEDCO (formerly TNEB) issued the communication permitting the HT consumers to procure power on open

access over and above the quota demand i.e. from 17-07-2009 and not 17-08-2010 which is the date of the interim order of the Commission. In line with the aforesaid directions of the APTEL, the Commission directed that the date of effect of the order dated 07-09-2010 of the Commission in M.P. No.6 of 2010, 9 of 2010 and 17 of 2010 and D.R.P. No.9 of 2010 shall be 17-07-2009 i.e. the date on which the TANGEDCO permitted open access to HT consumers. The Commission further consequently directed TANGEDCO to effect refund to the HT consumers accordingly.

4.14. The Commission has not ratified and approved the action of TNEB for having permitted third party power purchase for a transaction of 500 KW and above to HT consumers in the State and gone one step further and punished the TANGEDCO vide the Commission's order dated 06-01-2010.

## **5. Findings of the Commission:-**

5.1. The prayer of the Petitioner is to rectify the defect and error in the order dated 25-02-2013 passed by the Commission in R.A.No.4 of 2013 by directing that the date of effect of the order dated 07-09-2010 will apply to all consumers with sanctioned demand of 500 KW and above from 30-12-2008 and to all consumers with sanctioned demand of 250 KW and above from 17-07-2009 and consequently direct the Respondents to refund to the HT consumers accordingly.

5.2. Against the prayer of the petitioner the argument put forth by the respondent is that the TNEB's Memo's dated 30-12-2008 and 17-07-2009 have permitted open access only for the third party power purchasers. In this connection, Section 42(2), 42(3), 42(4) is reproduced below:

**Section 42. (Duties of distribution licensee and open access):**

*(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

*Provided that <sup>1</sup>[such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:*

*Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :*

*Provided also that such surcharge and cross subsidies shall be progressively reduced <sup>2</sup>[\*\*\*] in the manner as may be specified by the State Commission:*

*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:*

*<sup>3</sup>[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]*

*(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .*

*(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

The Electricity Act 2003 does not differentiate the captive user and third party buyer in providing open access except the payment of surcharge in case of third party purchase. The role of the distribution licensee shall be that of a common carrier for non-discriminatory open access. Therefore, the contention of the respondent that they provided open access only to third party purchasers violates the provision of

“non-discriminatory” open access to the open access users as mandated by the Electricity Act 2003.

5.3. To analyse the prayer of the petitioner further, the relevant portion of the summary of findings of APTEL in its Order dated 31-10-2012 in Appeal No.36 of 2012 is reproduced below :

**“51. Summary of our findings:-**

- (i) xxxxxxxxx
- (ii) *TNEB issued two memos dated 30-12-2008 and 17-07-2009 permitting to go up to the sanctioned demand by third party purchase to HT consumers with connected load upto 500 KW and 250 KW respectively. In the memo dated 17-07-2009 issued by the Chairman, TNEB it has been specifically stated that the purchaser can use the purchased power over and above the original quota fixed for him under restriction and control measures upto the sanctioned demand. TNEB cannot take a contrary stand to its own memos dated 30-12-2008 and 17-07-2009.*
- (iii) *In the order dated 07-09-2010, the State Commission after taking note of the memo dated 17-07-2009 from the Chairman, TNEB directed the TNEB to act in accordance with its own stand. Thus, the State Commission has erred in deciding the date of effect of its order to 17-08-2010.*
- (iv) *The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board.*

In the above order, the words “*the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board*” are very significant. In line with the APTEL’s Order, the Commission in its Order dated 25-02-2013 in R.A.No.4 of 2013 directed that the date of effect of the Commission’s Order dated 07-09-2010 in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009. In this Order, the Commission took into account only one date i.e. 17-07-2009 the date on which the TANGEDCO permitted open access to HT consumers with sanctioned demand of 250 kW and above. However, as rightly pointed out by the petitioner, the TANGEDCO permitted

third party power purchase for the consumers with sanctioned demand of 500 kW and above with effect from 30-12-2008 and for the consumers with sanctioned demand of 250 kW and above with effect from 17-07-2009. These are two different dates on which the TNEB permitted open access for HT consumers with different sanctioned demand limits. The Commission accepts that the effective dates of Commission's Order in R.A.No.4 of 2013 should have been 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. Accordingly, in line with the direction of the Hon'ble Appellate Tribunal for Electricity, the Commission hereby directs that the date of effect of the order dated 07-09-2010 of the Commission in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. To that extent the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 has been modified. The other part of the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 holds good. Consequently, TANGEDCO is directed to effect refund to the HT consumers accordingly. This exercise shall be done within the period of two months from the date of the issue of this order.

#### **6. Appeal:-**

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd.....)  
**(G.Rajagopal)**  
Member

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

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission