

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

**PRESENT:**

Thiru S.Akshayakumar	....	Chairman
Thiru G.Rajagopal	....	Member
and		
Dr.T.Prabhakara Rao	....	Member

**M.P.No.12 of 2017**

Regen Powertech Private Limited  
7<sup>th</sup> Floor, KRM Plaza  
North Tower,  
No.2, Harrington Road  
Chetpet,  
Chennai – 600 031.

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

Vs.

Tamil Nadu Generation and Distribution  
Corporation Limited (TANGEDCO)  
Rep. by its Chairman and Managing Director  
NPKRR Maaligai,  
No.144, Anna Salai  
Chennai – 600 002.

...Respondent  
(Thiru M.Gopinathan  
Standing Counsel for TANGEDCO)

**Dates of hearing : 22-08-2017; 13-11-2017 and 31-01-2018**

**Date of Order : 13-03-2018**

The M.P.No.12 of 2017 came up for final hearing on 31-01-2018. After hearing the learned Counsels for both the parties and after perusing the records, the Commission passes the following:-

## ORDER

### **1. Prayer of the Petitioner in M.P.No.12 of 2017:-**

The prayer of the Petitioner in the above M.P.No.12 of 2017 is to issue appropriate directions in compliance with the amendment to rule 5 of the Income Tax Rules, 1962 and consequently re-calculate the tariff for windmills with accelerated depreciation benefit for the period from 01-04-2017 for the balance of the control period with respect to Tariff Order No.3 of 2016.

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

The petition has been filed by the Petitioner to re-calculate the tariff for windmills with accelerated depreciation benefit for the period from 01-04-2017 for the balance of the control period with respect to Tariff Order No.3 of 2016, consequent on the amendment issued to rule 5 of the Income Tax Rules, 1962.

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

3.1. The Petitioner had commissioned around 500 Wind Energy Generators (WEG) (1.5 M.W. per WEG having the capacity of 750 MW till 01-04-2017 and planning to commission around 100 to 150 Wind Energy Generators (WEG) (2 MW per WTG) to the capacity around 200 to 300 MW in the present year after 01-04-2017. Pursuant to the Comprehensive Tariff Order on Wind Energy dated 31-03-2016, the windmills with accelerated depreciation benefit were entitled to a tariff of Rs.3.70 per unit and windmills without accelerated depreciation benefit were entitled to a tariff of Rs.4.16 per unit.

3.2. An amendment to rule 5 of the Income Tax Rules vide the Income Tax (Twenty-ninth Amendment) Rules, 2016 has been effected. Consequently, in the case of a Domestic Company, which has exercised option under sub-section (4) of section 115BA, the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets entitled to more than forty per cent, shall be restricted to forty per cent, on the written down value of such assets. Accordingly, in the New Appendix I, in the table, in the second column against renewable energy devices, including windmills, the rate was changed to 40 per cent.

3.3. New Appendix I read with rule 5 of the Income Tax Rules, 1962 was amended to provide the highest rate of depreciation under the Income Tax Act, and was restricted to 40% with effect from 01.04.2017.

3.4. The Government of India had reintroduced the accelerated depreciation benefit for wind power from 1st April, 2014 and the Wind Energy Generators have the option of availing the accelerated depreciation benefits. Under the T.O. No.3 of 2016 issued by the Commission, the accelerated depreciation benefit has been determined on the basis of the methodology of cost plus, single part, levelised tariff. Clause 8 and 11 of the Tariff Order deals with the Wind Power Tariff and accordingly, for windmills with accelerated depreciation benefit, the tariff was fixed at Rs.3.70 per unit.

3.5. The Petitioner in terms of clause 11 of the Tariff Order No.3 of 2016 dated 31-03-2016, claimed accelerated depreciation benefit at the rate of 80% and was eligible for the tariff of Rs.3.70 with respect to financial year 2016-17.

3.6. However, as per the amendment to New Appendix I read with rule 5 of the Income Tax Rules, 1962, the rate of depreciation has been changed from 80% to 40% and this has come into force from 01.04.2017. The basis for fixation of tariff has therefore undergone a change from 01.04.2017 and in order to maintain the same tariff, the change that has occurred has to be taken into account and the tariff re-fixed for the balance of the control period. Since this is a Change in Law, there is need to take it into account and re-fix the tariff suitably to that extent.

3.7. For the above reasons, from 01.04.2017, the tariff applicable for accelerated depreciation benefit is liable to be changed on the basis of this amendment. Till 31.03.2017, the Petitioner is entitled to the tariff of Rs.3.70 and from 01.04.2017 onwards the rate has to be revised after taking into account the above amendment.

#### **4. Contentions of the Respondent:-**

4.1. The Commission notified the Power Procurement from New and Renewable Sources of Energy Regulations, 2008 in exercise of the powers under section 61 of the Electricity Act, 2003 (Central Act 36 of 2003) which stipulate that the State Electricity Regulatory Commission shall specify the terms and conditions for the determination of tariff. The regulations specify that the tariff determined by the Commission shall be applicable for a period as specified by the Commission in the tariff order and that the control period shall ordinarily be two years. It is submitted that within the control period, the tariff order cannot be revisited by a Miscellaneous Petition.

4.2. Regulation 4 of the Power Procurement from New and Renewable Sources of Energy Regulations, 2008 provides as follows:-

*"(1) The Commission shall follow the process mentioned below for the determination of tariff for the power from new and renewable sources based generators, namely:-*

- a) initiating the process of fixing the tariff either suo-motu or on an application filed by the distribution licensee or by the generator.*
- b) inviting public response on the suo-motu proceedings or on the application filed by the distribution licensee or by the generator.*
- c) (Omitted)*
- d) issuing general/specific tariff order for purchase of power from new and renewable sources based generators."*

4.3. The Commission initiated the process for issue of the next tariff order by floating a consultative paper on issue of "comprehensive tariff order on wind energy" on 25.9.2014, inviting comments/suggestions from stakeholders on various parameters related to determination of wind energy tariff and on other issues related to power purchase by the distribution licensee and open access and after due hearing issued the comprehensive Tariff Order No.3, dated 31.03.2016.

4.4. The tariff order issued by the Commission is based on the following legal provisions:-

Related Provisions of the Electricity Act, 2003

*"Section 3(1): The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.*

*Section 61: The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

- (a) ..... xxxx*
- (b) ..... xxxx*
- (c) ..... xxxx*
- (d). ..... xxxx*

- (e) ..... xxxx
- (l) .....xxxx
- (g) ..... xxxx
- (h) *the promotion of cogeneration and generation of electricity from renewable sources of energy;*
- (i) *the National Electricity Policy and tariff policy.*

*Section 62(1): The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-*

- (a) *supply of electricity by a generating company to a distribution licensee:*

*Section 62(2): The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

*Section 62(5): The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

*Section 63: Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*

*Section 86(1)(e): The State Commission shall promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;"*

4.5. Tariff/Pricing methodology specified in regulation 4 of the Power Procurement from New and Renewable Sources of Energy Regulations, 2008, provides as follows:-

*“(2) While deciding the tariff for power purchase by distribution licensee from new and renewable sources based generators, the Commission shall, as far as possible, be guided by the principles and methodologies specified by:*

- (a) *Central Electricity Regulatory Commission*
- (b) *National Electricity Policy*
- (c) *Tariff Policy issued by the Government of India*
- (d) *Rural Electrification Policy*
- (e) *Forum of Regulators (FOR)*
- (f) *Central and State Governments*

*(3) The Commission shall by a general or specific order, determine the tariff for the purchase of power from each kind of new and renewable sources based generators by the distribution licensee:*

*Provided where the tariff has been determined by following transparent process of bidding in accordance with the guidelines issued by the Central Government, as provided under section 63 of the Act, the Commission shall adopt such tariff.*

*(4) While determining the tariff, the Commission may, to the extent possible consider to permit an allowance / disincentive based on technology, fuel, market risk, environmental benefits and social impact etc., of each type of new and renewable source.*

*(5) While determining the tariff, the Commission shall adopt appropriate financial and operational parameters.*

*(6) While determining the tariff the Commission may adopt appropriate tariff methodology.”*

4.6. The Commission issued an amendment to sub-regulation (6) of regulation 4 of the power procurement from New and Renewable Sources of Energy Regulations, 2008 on 27.04.2009 that enabled the Commission to adopt appropriate tariff methodology for the Renewable Energy Sources based generation. Based on a detailed analysis of existing policies/procedures and commercial mechanisms, the tariff determined in a cost plus scenario has been found by the Commission to depend significantly on the following 10 operating and financial parameters:

1. Capital Investment
2. Capacity Utilization Factor
3. Operation and Maintenance expenses
4. Insurance cost
5. Debt-Equity ratio
6. Term of Loan and Interest
7. Life of plant and machinery
8. Return on Equity
9. Depreciation rate applicable
10. Interest and Components of Working Capital

4.7. It is submitted that some of the above 10 parameters may change during the control period of a tariff order. The Government of India has issued bidding

guidelines for power procurement from wind energy. Unless there are extraordinary conditions during the control period of a tariff order warranting a review, the normal method of change would have to await the next tariff order only. The Commission has decided and arrived the tariff based on the prevailing facts at the time of fixing the tariff and the tariff is fixed for the entire tenure of the control period and it is most relevant to state that the Commission has not provided for any change of law during the tenure of the tariff order. Further, it is submitted that control period for Tariff Order No.3 is going to be completed shortly on 31.03.2018.

4.8. It is submitted that the tariff fixed by a tariff order by the Commission is valid for 20 years and every change of circumstance cannot trigger for a review during the control period.

4.9. Without prejudice to the above, it is submitted that any changes to the tariff order during the control period can only be in extraordinary circumstances and can only be made prospectively. It is well settled that in a sale, the price should be known prior to the sale.

4.10. It is submitted that the circumstances set out in the Miscellaneous Petition do not warrant a review of the tariff order during the currency of the control period, more so as the period shortly ends on 31.03.2018.

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

5.1. We have carefully considered the arguments advanced by both sides on the question of issuing appropriate directions to re-calculate the tariff for energy from wind mills with accelerated depreciation benefit for the period from 01.04.2017 upto

the remaining control period with respect to Order No.3 of 2016. It is to be noted that granting the prayer as sought for by the petitioner would have the effect of change of tariff for part of the control period and therefore, it requires to be analysed with reference to the provisions in the Regulations of the Commission in regard to the Non-conventional sources. In this connection, we deem it fit and appropriate to refer to the following provisions of the power procurement from New and Renewable Energy Sources Regulations, 2008.

#### **Regulation 4 to 8:**

##### ***“4. Determination of tariff:-***

*(1) The Commission shall follow the process mentioned below for the determination of tariff for the power from new and renewable sources based generators, namely:-*

*a) initiating the process of fixing the tariff either suo motu or on an application filed by the distribution licensee or by the generator.*

*b) inviting public response on the suo motu proceedings or on the application filed by the distribution licensee or by the generator.*

*c) .....*

*d) issuing general / specific tariff order for purchase of power from new and renewable sources based generators.*

*(2) While deciding the tariff for power purchase by distribution licensee from new and renewable sources based generators, the Commission shall, as far as possible, be guided by the principles and methodologies specified by:*

*(a) Central Electricity Regulatory Commission*

*(b) National Electricity Policy*

*(c) Tariff Policy issued by the Government of India*

*(d) Rural Electrification Policy*

*(e) Forum of Regulators (FOR)*

*(f) Central and State Governments*

*(3) The Commission shall, by a general or specific order, determine the tariff for the purchase of power from each kind of new and renewable sources based generators by the distribution licensee. In case of small hydro projects with a capacity of more than 5 MW but not exceeding 25 MW capacities, Commission decide the tariff on case to case basis.*

*Provided where the tariff has been determined by following transparent process of bidding in accordance with the guidelines issued by the Central Government, as provided under section 63 of the Act, the Commission shall adopt such tariff.*

(4) While determining the tariff, the Commission may, to the extent possible consider to permit an allowance / disincentive based on technology, fuel, market risk, environmental benefits and social impact etc., of each type of new and renewable source.

(5) While determining the tariff, the Commission shall adopt appropriate financial and operational parameters.

(6) While determining the tariff the Commission may adopt appropriate tariff methodology.

#### **5. Charges for adjustment of wheeled energy:-**

The Commission may levy appropriate charges for adjustment of wheeled energy based on the load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area of generation/supply, the nature of supply and the purpose for which the supply is adjusted.

#### **6. Agreement and Control period:-**

The tariff as determined by the Commission by a general or specific order for the purchase of power from each type of renewable source by the distribution licensee as referred to in clause 4(3) shall remain in force for such period as specified by the Commission in such tariff orders. The control period may ordinarily be two years. When the Commission revisits the tariff, the revision shall be applicable only to the generator of new and renewable energy sources commissioned after the date of such revised order.

#### **7. Energy Purchase Agreement (EPA) and Energy Wheeling Agreement (EWA):-**

The distribution licensees shall file a model Energy Purchase Agreement (EPA)/ Energy Wheeling Agreement (EWA) after discussion with the generators / Open Access Customers for the approval of the Commission within one month of the issuance of tariff order by the Commission. Before 10<sup>th</sup> of succeeding month, the licensee / generator shall furnish the list of Energy Purchase Agreements executed during the preceding month and pay applicable fees as stipulated in the Tamil Nadu Electricity Regulatory Commission's Fees and Fines Regulations, 2004. The distribution licensees / STU shall sign an Energy Wheeling Agreement taking cognizance of the energy wheeling principles elaborated in the general or special tariff order.

#### **8. Issues related to captive use and third party sale:-**

While issuing the general or specific tariff order, the Commission may consider appropriate criteria/ procedure/parameters/charges for each type of new and renewable source, on the following issues, for sale of power to

*distribution licensee, captive use and third party sale of power by the new and renewable source generators.*

- 1) Applicable demand charges*
- 2) Applicable energy charges*
- 3) Grid availability charges*
- 4) Scheduling and system operation charges*
- 5) Transmission & wheeling charges and line losses*
  - (5A) Banking charges*
- 6) Reactive power charges*
- 7) Adjustment of peak and off peak power*
- 8) Power factor disincentive*
- 9) Payment of security deposit by the captive/third party user*
- 10) Billing and payment to the generators by distribution licensee*
- 11) Applicable open access registration fee and open access agreement fee*
- 12) Any other related issues”.*

5.2. It may be seen from the above that the tariff determined by the Commission for the non-conventional sources and the control period stipulated by the Commission are so inextricably linked that the revision of the tariff is possible only after the expiry of the control period. The control period, for the purposes of the regulations, can be said to be the period upto which the tariff for the non-conventional sources remains in force. On an analysis of the Regulations under reference, it may be noted that the Commission is guided by the principles and methodologies of the Central and State Governments only to the extent as far as possible and such guidance is only directory and not mandatory. It may be further noted that in determination of tariff for the non-conventional sources, the Commission has the powers to adopt an appropriate tariff methodology and also appropriate financial and operational parameters. Thus, the tariff is determined for these sources after taking into account, the technology, the fuel, the market risks, environmental benefits and social impact of each type of New and Renewable Source. It is conspicuous to note that the change of law cannot be one of the reasons for change of tariff during the control period as per these regulations.

5.3. A careful reading of the regulations under reference would amply prove that the control period cannot be altered without any justifiable reasons. As a natural corollary, the tariff which governs the control period also cannot be modified without any major factor making the supply of power an impossibility within the given tariff. We see that except for praying change of tariff on account of change of law, the petitioner has not come out with any event amounting to force majeure or supervening impossibility which would eventually lead to frustration of the contract.

5.4. If the prayer of the Petitioner is acceded to, it will destroy the concept of prescribing the "Control Period" altogether. The control period is fixed for the reason that the investor will decide as to whether, he could go ahead with the project with the assured tariff if his project is commissioned during the control period. If the tariff is altered during the control period as prayed by the Petitioner, it will dis-incentivise the project-proponents and destroy the investor's confidence. Further, if the tariff is to be changed during the control period, taking into account any new development like change in law as cited by the Petitioner in this case, the very same procedure which was followed while fixing the original tariff has to be followed, which is not practically possible. Any change in law or any new development in the sector will be taken care of and addressed while fixing tariff for the next control period.

5.5. In view of the same, we are not agreeable to the proposition for change of tariff on account of change of law. We are of the firm conviction that in the generic tariff fixation various issues faced by the generators and distribution licensees are taken into account in a generic manner and it is for the parties namely, the generators and the licensees to make effective adjustments within the tariff

determined for the entire control period and change of tariff is not permissible for a minor cause such as the present one. If such prayer is allowed, it would be counterproductive, since some or more of the parameters considered for determining the feed in tariff would undergo changes during the control period, for example interest rates are altered at regular intervals. Every time when one parameter undergoes change and the Commission proceeds to alter the tariff to reflect the changes, the sanctity for the control period would be entirely lost. Certainty of the tariff for the given period, viz, control period is an essential ingredient for the investors to commit investments. If the certainty factor is removed, the investors will have no visibility and cannot blindly invest on projects.

5.6. We have no hesitation in holding that neither control period which is stipulated for the non-conventional sources nor the tariff determined for such sources can be amended or varied in the normal circumstances except for force majeure and supervening impossibility. It is for the generators and the distribution licensee as the case may be to work out their obligations within the prescribed structure for the simple reason that tariff determined for the control period has to be seen in a broader perspective and minute detriment or benefit arising out of change of law or for that matter any other cause cannot be factored in to change the tariff unless there are circumstances which make the change of tariff or control period an inevitability. We do not see any case of inevitability or impossibility on the part of the petitioner herein to fulfil his commitment in supply of power on account of change of law which require modification of tariff as it is not the case of the petitioner that but for the change of tariff, the performance in regard to supply of energy within the present tariff would be

an impossibility or the contract has been totally frustrated on the ground of change of law. In the result, the petition is dismissed.

**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 .....)  
**(Dr.T.Prabhakara Rao)**  
**Member**

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

(Sd.....)  
**(S.Akshayakumar)**  
**Chairman**

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission