IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2021

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

W.A.No.3254, 3255 & 3163 of 2019
and connected M.Ps.

Tamil Nadu Electricity Consumers' Association,
Regn.No.181-8524/1998,
1st Floor, SIEMA Building,
8/4, Race Course,
Coimbatore – 641 018,
Represented by its President
Mr.S.R.Rabindar

..Appellant in W.A.No.3254 of 2019

Tamil Nadu Power Producers Association
(Regn.No.312/2017) (Old No.130/2004)
Temple Stemps 3rd Floor,
Block No.A Unit B 184-187, Anna Salai,
Little Mount Chennai – 15,
Rep.by its Authorised Signatory
Mr.D.Eswaramoorthy

..Appellant in W.A.No.3255 of 2019

The Spinning Mills Association
(Regn No.330/1997) 2 Karur Road
Modern Nagar, Dindigul – 632 001,
Rep.by its Chief Advisor
Dr.K.Venkatachalam

..Appellant in W.A.No.3163 of 2019

-Vs-

1.Tamilnadu Spinning Mills Association,
(Regn.No.330/1997),
#2, Karur Road, Modern Nagar,
Dindigul – 624 001,
Rep.by its Chief Advisor,
Dr.K.Venkata Chalam.

...1st respondent in W.A.Nos.3254 & 3255/2019

2.The State of Tamil Nadu,
Represented through the Principal Secretary,
Energy Department,
Fort St.George,
Chennai - 600 009.
...R1 in WA No.3163/2019/R2 in WA Nos.3254 & 3255/2019

3.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai - 600 002,
Represented by its
Chairman and Managing Director.
...R2 in WA No.3163/2019/ R3 in WA Nos.3254 & 3255/2019

4.State Load Despatch Center (SLDC),
144, Anna Salai,
Chennai - 600 002,
Represented by its Director - Operations.
...R3 in WA No.3163/2019 /R4 in WA Nos.3254 & 3255/2019

5.Tamilnadu Electricity Regulatory Commission,
19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai - 600 008,
Represented by its Secretary.
...R4 in WA No.3163/2019/ R5 in WA Nos.3254 & 3255/2019
..2 to 5 respondents in W.A.Nos.3254 & 3255/2019 &
respondents 1 to 4 in W.A.No.3163 of 2019

Common Prayer: Writ Appeals filed under Clause 15 of Letters Patent, against the order dated 30.07.2019 passed in W.P.No.11134 of 2018.

Prayer in W.P.No.11134 of 2018:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to calling for the records of the 1st respondent relating to the issuance of the impugned GO (Ms) No.37 dated 17.04.2018 of Energy (D1) Department and the Appended Notification and quash the same being ultra vires of the Electricity Act 2003 and consequently direct the respondents to permit the members of the petitioner association to avail open access power from all their captive WEGs and also to permit open access power for the requirements of the members of the petitioner association for less than 1MW capacity / requirement.

For Appellants : Mr.AR.L.Sundaresan, Senior Counsel for Mr.R.S.Pandiyaraj

For respondents : Mr.Vijay Narayan, Advocate General Assisted by Mr.K.Rameshuwar.

COMMON JUDGMENT

P.VELMURUGAN,J.

The present Writ appeals are filed against the common judgment passed by the learned Single Judge in W.P.Nos.11134 and 11135 of 2018.

2. Third Appellant Association is the Writ petitioner in W.P.No.11134 of 2018. The appellants association is a Registered Society bearing Reg.No.330 of 1997 under the Tamilnadu Societies' Registration Act, 1975. There are 625 spinning mills enrolled as members with the Association. The primary goal of the appellant association is to bring together all the important players including Government officials and multilateral agencies on a common platform to resolve problems that hinder the progress and development of the Indian Textile Sector including the matter of power, which is the main source for running the industries. For conversion of fiber into yarn, two main components are cost of power and cost of raw material. To keep an eye on the cost of power, most of the members have installed their own wind energy generators, commonly known as Windmills, at feasible locations and are wheeling power generated from such WEGs to their respective spinning mills, after paying the applicable wheeling, transmission and other charges, as fixed by the Tamil Nadu Electricity Regulatory commission through its various comprehensive tariff orders on wind energy.

3. The 3rd appellant herein is the writ petitioner and filed W.P.Nos.11134 of 2018 Batch. The learned Single Judge has disposed of the writ petitions batch with a direction to the Regulatory Commission that it shall take up the policy decision of the Government expressed in G.O.(Ms).No.37, Energy (D1) dated 17.04.2018, for consideration forthwith and complete the proceedings, within a period of 10 weeks from the date of receipt of a copy of the order.

4. The case of the appellants Association is that :-

(a) The appellants invested in Wind Energy Generators, captive generating plants for their own captive use based on the facilities provided under the Electricity Act 2003 and Electricity Rules 2005. Under the scheme of open access, they were paying open access charges to the TANGEDCO and SLDC, through various Tariff Orders.

(b) Out of the total installations of Wind Electric Generators (WEGs), to the extent of 8700 MW available in the State of Tamil Nadu, 3000 MW are owned by the spinning mills, having more than 30% stake.

© With the help of CGPs and WEGs, the members of the appellants association have strong financial and functional stakes the demand of power is being met out.

(d) G.O.(Ms).No.37 dated 17.04.2018 Energy (D1) Department, was issued by Government of Tamil Nadu, invoking the powers provided under Section 108 (1) of the Electricity Act, 2003 directing stoppage of Open Access to Consumers with less than 1 MW Demand.

(e) Section 181 of the Electricity Act, 2003 deals with powers of the State Commission. Section 86 of the Electricity Act 2003, enumerates the functions of the State Commission. The main challenge before the writ court is that while issuing the impugned G.O., the vital difference between the power and function of the State Commission was not rightly considered by the State Government.

(f) Section 108(1) of the Electricity Act is as follows:-

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

It is submitted that in view of the issuance of the impugned G.O.Ms.No.37 dated 17.04.2018 Energy (D1) Department. Open Access power for less than 1 MW requirement was prohibited. This denial of Open Access for consumers less than 1 MW load as contemplated in the impugned G.O., and Appended Notification, will force such consumers to take power, only from the Distribution Licensee, giving rise to monopoly which is clearly contrary to Section 60 of the Electricity Act 2003.

(g) The State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the State Commission being an independent statutory authority is not bound by any policy directions which hampers with its statutory functions.

(h) The impugned G.O., and the Appended Notification issued by the State Government being contrary to the provisions of the Electricity Act, 2003 is not binding on the State Commission.

(I) Section 42 of the Electricity Act 2003, envisages introduction of Open Access in a phased manner and once the open access is introduced for all consumers, irrespective of their load, it is the duty of the Utilities and the State Commission to ensure and to provide non-discriminatory open access to all consumers. Thus having been made available the Open Access to all consumers since 2010 onwards and to renewable energy from the beginning of the introduction of 2005 Regulations without any restriction, it is not legally permissible for the respondents to withdraw the said open access, to consumers having demand below 1 MW without any rationale.

(j) The appellants submit that No Objection Certificates, Approvals and Wheelings Agreements, have already been granted to the members of the appellant to get Open Access Power, even for below 1 MW requirement and the said No Objections Certificates, Approvals and Wheeling Agreements are valid till 31.03.2022.

(k) The real objective of the Electricity Act, is to benefit the consumer by a competitive pricing mechanism and the objective is being attempted to be filled through the open access system, as provided by the 4th respondent commission from 2010 onwards, by including the requirements of less than 1 MW consumers also, to make them eligible to source Open Access power. Therefore, any attempt to disturb the peaceful system going on for the past 10 years in the State, would make the State and the Industries to suffer for want of power.

(l) The impugned G.O., would lead to serious repercussions in the power management of the State and make many industries nonviable to function with the high cost power of the respondent TANGEDCO. Considering the interest of largest employment provided by industries like the members of the appellant, the impugned G.O., has to be reconsidered.

(m) The appellants would submit that after coming into force the Electricity Act, 2003, all matters relating to electricity were shifted from State Electricity Boards (SEBs) to State Electricity Regulatory Commissions (SERCs). With the introduction of Open Access System within the scope of the Act, such a facility was more strengthened and accordingly, the Electricity Act 2003 has made the entire areas of administration of electricity with a paradigm shift. Under Section 42(2) of the Electricity Act, 2003 the State Commission notified the TNERC-Intra State Open Access Regulations, 2005 on 24.06.2005 specifying the terms and conditions for intra state open access within the State of Tamil Nadu. Regulation 11 of the said

Regulations laid down the phasing of Open Access as under-

(n) The open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and these regulations. Having regard to operational constraints and other relevant factors, open access shall be allowed to customers as stated below:-

> "(e) A person covered by a policy relating to captive generation or generation through Non-Conventional energy sources shall be eligible to avail open access for their own use irrespective of contract demand.
> The amended Regulation of Rule 11 of 2005 Regulations with effect from 17.2.2010 enabled all the HT consumers irrespective of the load as the eligibility criteria for Open Access (cc) in the fourth and final phase, open access shall be allowed to all HT consumers irrespective of load."

5. The State Commission also introduced TNERC (Grid Connectivity and Intra State Open Access) Regulations 2014 . In such circumstances, the 1st respondent-Energy (D1) Department, vide G.O., refusing open access power for less than 1 MW requirement, is not correct.

6. The appellants would submit that the Honourable Supreme Court and Appellate Tribunal for Electricity have categorically held in many matters that the direction issued by the State Government under Section 108(1) are not binding for the State Electricity Regulatory Commissions.

7. According to the appellants, by issuance of the impugned G.O., the captive use of WEG power from the windmills of less than 1 MW capacity is now in danger as the G.O., directs to prohibit consumption of Open Access power for less than 1 MW requirement. Further, sourcing of open access power from other than utility sources is now in danger.

8. The State commission has issued a Suo Moto Proceedings after getting opinion from the learned Attorney General, Government of India, which opined that in the matter of open access, there could not be any requirement restriction either below 1 MW or above 1 MW. This Suo Moto Proceedings paved way to issue of Amendments to 2005 Interstate Open Access Regulations introducing as fourth phase for less than 1 MW requirements also from 2011 onwards. Subsequently by repealing the Intrastate Open Access Regulations 2005, 2014 Regulation was introduced. By the repeal savings clause, the rights made available in 2005 Regulation were saved. It is submitted by the appellants that as

the Chairman, Managing Director of TANGEDCO and the Energy Secretary are one and the same person, there is a conflict of interest involved and the impugned G.O., bring down the prohibition for less than 1 MW requirement is not good. The Electricity Act 2003 does not restrict anyway for below 1 MW requirements.

9. The writ petitions filed by the 3rd appellant and other petitioners was disposed of by the learned Single Judge of this court by order dated 30.07.2019 as follows:-

> “The petitioners are the beneficiaries of the Regulation 9(6) of the Tamil Nadu Electricity Regulatory Commission(Grid Connectivity and Inter-State Open Access) Regulations, 2014, which has given permission to them to avail open access facility, inspite of the fact that their power generation is less than 1 MW. By virtue of G.O.(Ms)No.37, Energy(D1) dated 17.04.2018, which is impugned before this Court, the Government has expressed its policy decision to withdraw the permission and to amend the regulation in line with Section 42(2) of the Electricity Act, 2003, which reads as follows:
>
> 42(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 (such open access shall be allowed on payment of a surcharge) in additional 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 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:
>
> (Provided also that the State Commission shall, not later than five years from the date of

commencement of the Electricity (Amendment) Act, 2003 (57 of 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).?

2. Writ petitions are filed expressing apprehension that they being generators of power less than 1 MW will be deprived of the open access facility, if the impugned G.O. is put to force. This Court ordered status quo while admitting the writ petitions.

3. In the counter, the State Government while justifying the reasons for issuing G.O.(Ms)No.37, Energy(D1) dated 17.04.2018, would state that when the State was suffering from shortage of energy, to encourage more generation of power, they extended the benefit of open access facility to the generators with less than 1MW capacity and now, having a better improvement in the power generation, they want to withdraw the said permission. In exercise of the power under Section 108 of the Electricity Act, 2003, the Regulation 9(6) of the Tamil Nadu Electricity Regulatory Commission (Grid Connectivity and Inter-State Open Access) Regulations, 2014 is sought to be amended, which will be in line with proviso (5) of Sub-Section (2) of Section 42 of the Electricity Act,2003.

4. A common counter is filed by the Tamil Nadu Electricity Regulatory Commission. In this counter, it is stated that the policy decision expressed by the State through G.O.Ms.No.37 is under consideration by the Commission. These writ petitions are filed pre-maturely, without ascertaining whether the Commission has accepted the policy or not. The Commission has to satisfy itself in the first instance whether the policy decision is within the statutory provisions of Act and it will be accepted only after following the procedure established under the statute. In view of the status quo ordered by this Court on 27.04.2018, the Regulatory Commission is unable to proceed. If the said status quo ordered by this Court on 27.04.2018 is vacated, the Commission will go ahead with the process of pursuing the policy decision expressed by the Government in G.O.(Ms)No.37, Energy (D1) dated 17.04.2018, and decide whether the Regulation 9(6) of the Tamil Nadu Electricity Regulatory Commission (Grid Connectivity and Inter-

State Open Access) Regulation, 2014 should be amended or not.

5. As far as the G.O.Ms.No.37 issued by the Government, the learned Additional Advocate General would submit that it is a policy decision of the State and under Section 108 of the Tamil Nadu Electricity Act, 2003, the State has a prerogative to take a policy decision and it will prevail upon the State Electricity Regulatory Commission. Further, the learned Additional Advocate General would submit that the policy decision of the Government is in tune with proviso (5) of Sub-Section(2) of Section 42 of the Tamil Nadu Electricity Act, 2003, and the petitioners cannot have any grievance over that.

6. However, the learned Senior Counsel appearing for the petitioners would submit that even if it is the policy decision, it must have the approval of the Regulatory Commission and the Regulation should be properly amended. Without amendment to the Regulation, the State cannot withdraw the permission extended under the Regulation.

7. In the said circumstances, these writ petitions are disposed of with a direction to the Regulatory Commission that it shall take up the policy decision of the Government expressed in G.O.(Ms)No.37, Energy(D1) dated 17.04.2018 for consideration forthwith and complete the proceedings, within a period of 10 weeks from the date of receipt of a copy of this order. No costs. Consequently connected Miscellaneous Petitions are closed. ”

10. The grounds raised by the appellant are that in the impugned judgment, the learned Single Judge has considered the appellants as generators, having capacities to generate less than 1 MW, whereas the fact remains that the petitioners/appellants are not generators, but they are open access consumers, receiving power from various generation sources including their own Wind Energy Generators. The observation of the learned Single Judge in paragraph 2 of the impugned order that the appellants/writ petitions being generators of power less than 1 MW will be deprived of the open access facility, if the impugned G.O., is put to force, is erroneous and that the appellants/writ petitioners are open access consumers and not generators.

11. The other ground raised is that the impugned G.O., has been passed without considering the fact whether the Government has the power to issue such an order or directing to the State Commission. The State Government has provided a Draft

Notification to be followed by the State Commission as how the amendment should come for the Grid connectivity and Intra State Open Access Regulations 2014 , which is beyond the scope of Section 108 of the Electricity Act 2003. It is stated that the present matter is falling under Section 181 of the Electricity Act 2003, wherein the State Government has no power to issue directions to State Commission. It is stated that State Commission is a quasi-judicial body and the State interfering with its independence is an external interference. Therefore, the impugned order passed is a vital error. The learned Single Judge given direction to the 4th respondent State Commission that it should take up the policy decision as expressed by the Government in G.O.(Ms).No.37 Energy (D1) dated 17.04.2018, for consideration forthwith and complete the proceedings. Since making Regulations is the matter to the powers of the Commission as provided under Section 181 of the Electricity Act, the Writ Petition ought to have allowed by the learned Single Judge. The Honourable Supreme Court issued various orders in connection with this issue and the learned Single Judge, without appraising the relevant judgments relating to the issuance of directions by the State Government under Section 108 of the Electricity Act, 2003, the impugned order passed is a serious error. It is the fact that the Intra State Open Access Regulations 2005 was amended during the year 2010 to accommodate the requirements of open access consumers having less than 1 MW load connectivity also, based on Suo Moto Proceedings No.4 of 2009 dated 06.01.2010 issued by the State Commission. Therefore the facility of availing Open access power for consumers having less than 1 MW requirement is available from 2010 and these facts have not been considered by the learned Single Judge. As such, the direction to the State Commission to act based on the policy directives of the State Government would lead to an unfair situation whereby the members of the appellant association even with less than 1 MW requirement who were availing power for all these 10 years. The learned Single Judge, without considering the Approvals, Wheeling Agreements etc directed the State Commission to pass orders. It is submitted that the power position in the State is neither excess to the requirement nor exactly matches with the demand. The appellant finally raised its ground that the members of the appellant who are even having less than 1 MW of connected load, are receiving Open Access power from the year 2010 from various sources of energy, based on the approvals granted by the State Load Despatch Center and TANGEDCO, by way of providing NOCs and Open Access approvals. Such approvals were provided by the authorities and are valid till 31.03.2022 in most cases and therefore, the members of the appellant are having windmills for their captive consumption and some of them are with less than 1 MW capacity, and therefore, the impugned G.O., seriously prejudice the continuing of availing captive power.

12. It is a matter of record that consequent to the directions of the learned Single Judge of this court passed in W.P.Nos.11133 to 11139 of 2018 relating to the policy directive issued by the Government to amend the Regulations of the Commission so as to provide open access only to consumers who require supply of electricity where the maximum power to be made available at any time exceeds one megawatt, the matter was taken up for hearing before the Tamil Nadu Electricity Regulatory Commission and notice in T.A.No.1 of 2019 dated 10.09.2019 has been issued to the appellant association members.

13. The learned Senior counsels appearing for the appellants would submit that the G.O. passed by the Government taking away the open access facility to the power generators who produce less than one Mega Watt is contrary to the provisions of the Electricity Act and only the Tamil Nadu Electricity Regulatory Commission alone has got the power to decide about the issue. It is further submitted that for granting benefits to the marginalised people and poorer sections, there are many methods available for the Government and the appellants need not be victimized for having generated the power and not allowed to utilize the same for their own use through the power grid. The Government had entered into an agreement with a solar power generator company belonging to Adani Group for purchase of power at the rate of Rs.7.00 per unit for a period of 21 years, whereas the Government is buying power from the appellants and others at the rate of Rs.2.00 per unit which would mean that TANGEDCO incurs a loss of Rs.5.00 per unit. It is submitted that spending of huge sums of money unnecessarily and unwantonly for buying power from other generators who supply power at nominal rate and also withdrawing the open access facility to the power generators who produce power less than one Mega Watt like that of the appellants could be avoided. In the Additional Affidavit, the appellant association submitted that due to the losses incurred by the TANGEDCO, it proposed to withdraw the facility of Open Access, so the respondent TANGEDCO could recover a portion from their losses, when the consumers having installed capacity of less than 1 MW are curtailed with Open Access Power and thereby they could increase their profits. It is stated that losses to TANGEDCO was due to various reasons like maladministration, purchase of high cost solar power etc and without being properly regulated by the State Commission, it cannot be attributable to the innocent consumers.

14. The learned Senior counsel further submits that 4th respondent Commission is continuing to buy the solar power at a high cost of Rs.7.01/unit in excess of the solar RPO requirement. The TANGEDCO in total deviation of the order dated 12.09.2014 restricting the solar power purchase only to the extent of Solar RPO of 0.05%, the 4th respondent commission has

committed a serious error and thereby the public interest as well as the interest of the public enterprise, namely TANGEDCO was taken into a heavy loss of several thousand crores. The estimated loss to TANGEDCO in having signed the PPAs in excess of their obligation to go for purchases of Solar Power @ Rs.7.01 would alone be Rs.28,439.50 crores for a span of 25 years calculated from 01.04.2016 onwards. it has provided temporary connectivity to 25 MW Solar Power Projects. Towards supply of power to free and subsidized categories of consumers, the 4th respondent State Commission has ordered the Government of Tamil Nadu to pay and reimburse subsidies in full.

15. It is submitted by the appellants that the 4th respondent commission on the request of TANGEDCO has ordered to waive off a sum of Rs.2500 crores as subsidy receivable from Government through its order in T.P.No.1 of 2017 dated 11.08.2017 for the year 2017-18. The appellant has challenged the said waiver under Section 111 of the Electricity Act 2003 before the Appellate Tribunal for Electricity [APTEL], in Appeal No.356 of 2017 and the matter is pending.

16. The 4th respondent Commission also approved a higher tariff rate of Rs.4.91 per unit for the purchase of 3330 MW of power from Private Thermal Plants. But one of the constituents of 3330 MW supplier M/s.Jindal Power Ltd., was also supplying power to TNEB, in another Medium Term PPA at the rate of Rs.4.72 has reduced the price to Rs.3.50 per unit. But it was considered by the Commission. Therefore, for the contracted period of 15 years, the Electricity Consumers of Tamil Nadu were constrained to pay an excess tariff to the tune of Rs.49,356 crores.

17. It is further submitted that the 4th respondent Commission also approved excess capital cost for M/s.SEPC Power Private Limited under P.P.A.P.No.5 of 2012 resulted in loss of Rs.4,140 crores to the TANGEDCO. Undue favoritism is shown to the Private Generator in P.P.A.P.No.2 of 2014 dated 13.02.2015 and made loss to TANGEDCO. The 4th respondent Commission has disallowed 176 crores units of power purchased by the TANGEDCO during the year 2015-16 due to higher transmission losses incurred by the TANGEDCO in purchasing the 176 crores units of Power. The disallowance is on the reason of account of additional power purchases, by incurring higher transmission losses and for other reasons like not following Merit Order Dispatch (MOD).

18. The TANGEDCO/TANTRANSCO have to file their respective Aggregate Revenue Requirement [ARR] before 30th November of each year for the respective current Financial Year both the TANGEDCO and the TANTRANSCO have not filed their ARR before 30.11.2017 & 30.11.2018.

19. The Open Access consumers are getting power for less than Rs.6/- per unit. The proposal to make to restrict the supply of Open Access power to consumers of 1 MW installed capacity, would force them to buy power only from TANGEDCO and the power cost would be increased and so they would be forced to close down their units due to the excess amount of power bills.

20. The learned Senior counsel appearing for the appellant association brought to the notice of this court the summary of State Wise Open Access Regulations where Open Access allowed less than 1 MW in Regulations (Captive/Others). The States where OA allowed less than 1 MW in Regulations (Captive/Others) are as under:-

S.No.	I.States where OA allowed less than 1 MW in Regulations (Captive/Others)
1.	Uttarakhan
2.	Bihar
3.	Gujarat
4.	Jharkhand
5.	Kerala
6.	West Bengal
7.	Tamil Nadu
8.	Sikkim
9.	Tripura
10.	Rajasthan
11.	Delhi
12.	Haryana
13.	Himachal Pradesh
14.	Uttar Pradesh
15.	Joint Electricity Regulatory Commission for the State Goa and Union Territories
16.	Madhya Pradesh
17.	Andhra Pradesh
18.	Telengana
19.	Karnataka
20.	Arunachal Pradesh
21.	Nagaland
22.	Jammu and Kashmir
23.	Orissa

Out of the above States, No limit specified were :- Kerala and West Bengal.

21. (a) The learned Senior Counsel also pointed out a decision given by the Appellate Tribunal for Electricity (Appellate Jurisdiction) [Chennai Circuit Bench] passed in Appeal No.92 of 2013 and I.A.No.151 of 2013. [Tamil Nadu Electricity Consumers' Association Versus 1.Tamil Nadu Electricity Regulatory Commission and another] and [Tamil Nadu Spinning Milss Association Vs. 1. Tamil Nadu Electricity Regulatory Commission and another]. In the said appeal, the Association of Electricity Consumers is against the Energy Policy of the Tamil Nadu Government and its directive issued to the State Commission and the impugned order dated 07.03.2013 notifying the various procedures and modalities for administration of the scheme and various other matters relating to the State Government's Solar Policy to be administered by the TANGEDCO. The members of the Associations and other High Tension (HT) consumers have been notified as obligated consumers in the impugned order fastened with obligation of Solar Purchase Obligation.

(b) While going through the above decision, it is seen that the Appellate Tribunal for Electricity examined various issues interwoven in the subject and referred to Section 108 of the Electricity Act, 108-Directions by State Government. The Tribunal was of the view that the State Commission has to be guided by the directions of the State Government u/s.108 only in discharge of its functions assigned under the Act. Such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act. The Act provides for specifying the purchase obligation from the renewable energy sources under Section 86(1)(e). Thus the directions of the State Government for Solar Purchase Obligation can only be considered by the State Commission in exercising its powers under Section 86(1)(e) of the 2003 Act. The Tribunal pointed out that the State Commission has simply tried to implement the directions of the State Government u/s.108 by passing the impugned order without considering its own functions and powers under the 2003 Act and its own Regulations notified under the Act.

(c) The Tribunal also considered its earlier judgment dated 04.10.2012 in Appeal No.200 of 2011 wherein the Supreme Court decision in the case of APTRANSCO Vs. Sai Renewable Energy Pvt. Ltd (2011) 11 SCC 34, was extracted, and the main point discussed is that

> "Section 12 of the Act vests the State Government with the power to issue policy directions on matters

concerning electricity in the State including the overall planning and coordination. All policy directions shall be issued by the State Government consistent with the objects sought to be achieved by this Act and accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to determination of the structure of tariffs for supply of electricity to various classes of consumers. "

" The State Government is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters."

In the decision of Polyplex Corporation Versus Uttrakhand Electricity Regulatory Commission in Appeal No.41, 42 and 43 of 2010, the Tribunal held that " The State Commission is independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Government (Commission) in the matter of determination of tariff. ....It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff".

(d) The Tribunal held that the findings in the above case would squarely apply to the present appeals as well. The State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the State Commission being an independent statutory authority is not bound by any policy directions which hampers with its statutory functions.

(e) Thus the Appellate Tribunal held that the State Commission has to be guided by the directions of the State Government u/s.108 of the Act only in discharge of the functions assigned to it under the 2003 Act. Such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act. The Act only provides for specifying the purchase obligation from the renewable energy sources under Section 86(1)(e). Thus the directions of the State Government for SPO can only be considered by the State Commission in exercise of its power under Section 86(1)(e) of the Act. Allowing the appeals and setting aside the impugned order, the Tribunal also held that the State Commission has simply tried to implement the directions of the State Government by passing the impugned order without considering its own functions and powers under the 2003 Act and its own Renewable Energy Regulations notified under the Act and its own Renewable

Energy Regulations notified under the Act and even without considering the other important issues raised by the objectors.

22. The learned Senior Counsel also cited a judgment of Delhi High Court in W.P.(C).No.4821/2020 reported in 2011 SCC Online Del.895 : (2011) 177 DLT 689. [Shri Nand Kishore Gard And another Vs. Government of NCT of Delhi and others]. In the matter of tariff approved by Delhi Electricity Regulatory Commission, petitioner challenged that the State Government could not have intervened after the tariff was determined by the Commissioner as the same is not permissible under any of the provisions of the Statute; the tariff fixation does not come within the ambit and sweep of a policy decision. After a decision has been taken by the Commission, the State Government has no authority to issue any direction or intervene in the matter. In that matter, the learned Attorney General submission was that "The State Commission shall be guided by such directions in matters of policy involving public interest" and, therefore, the State Government can only issue guidelines which would relate to a larger public interest in the field of social structuralism or any kind of benefit to a class but by no stretch of imagination can issue a command to the Commission not to issue a tariff order. After hearing the detailed submissions put forth on both sides, the Delhi High Court held that public interest is neither evident nor demonstrable. By the impugned communication, the State Government could not have prevented the Commission from exercising its statutory powers. The communication of the State Government is in the form of injunction, which is absolutely unquestionable, the State Government cannot issue. Holding so, the instruction given by the Sate Government was quashed.

23. We have carefully perused the entire documents placed on record and the arguments put forth on both sides.

24. The issue raised by the appellants is on the legality of the impugned GO and determining whether the impugned GO was ultra vires the Act. The learned Senior Counsel vehemently contended that since the 4th respondent -Tamil Nadu Electricity Regulatory Commission is a creature of statute whose functions are those specified under Section 108, it would not be in a position to rule on the legality of Government Order. Impugned G.O., is a colourable exercise of power in as much as it seeks to interfere with the absolute statutory right of Open Access for Captive Consumers guaranteed by Section 9 of the Act. The impugned G.O., seeks to interfere with the absolute right of open access granted to Non-Conventional Energy Generators for captive use which has been recognized from even prior to the Electricity Act, 2003 in Tamil Nadu. 86(1)(e) of the Act encourages Non-Conventional Energy and so impugned G.O., is

contrary to Tamil Nadu Electricity Regulatory Commission's Regulations.

25. It is further argued that Section 108 of the Act available to the State Government is only for the purposes of issuing policy directives to the TNERC for aspects that constitute its functions. Functions being those that are specifically covered under Section 86 while the power to frame Regulations for Open Access being one under Section 181 read with Section 42 of the Act which is clearly a Power of delegated legislation, is legally and statutorily distinct from a Function. The Power to frame Regulations cannot be termed to be a discharge of function but it is an exercise of power; no G.O., can be issued in that regard to direct a body to frame a Regulation in a particular manner. G.O., sought to make amendments in respect of Open Access Regulations is directly contary and contradictory to the provisions of Section 9 and 42 of the Act.

26. It is contended that TNERC(4th respondent Commission) already framed Regulations concerning Open Access and allowed open access without any limits in its last phase promulgated in 2010. So it cannot be rolled back or reimposed with restrictions. Impugned G.O.(Ms).No.37 of 2018 states that "The Chairman and Managing Director, TANGEDCO has therefore, requested the Government to issue a policy directive under sub section (1) of section 108 of the said Electricity Act, 2003 to amend regulation 9(6) of the Tamil Nadu Electricity Regulations Commission (Grid Connectivity and Intra State Open Access) Regulations, 2014 duly allowing open access to the consumers with a load of 1 MW and above in line with Section 42(2) of the said Electricity Act, 2003" The above request was on the basis that TANGEDCO has to allegedly spend on fixed charges to open access consumers by high cost power purchase and also compensate wind CPP consumers for banked power and loss of revenue affects low end consumers by tariff revision and prevents future developments to supply quality and cheaper power. According to the appellant the Revenue loss which allegedly arises out of persons establishing captive power plants can never be the basis for a policy directive as that would be directly in contravention of Section 9 of the Act which guarantees the right of establishing Captive Power Plants and consume the power generated therefrom at any destination of use.

27. It is specifically pointed out by the learned Senior Counsel for the appellants that a bare reading of the provisions of Section 108, Section 42(2) and Section 9 would go to show that the applicability of Section 108 is restricted to directions to the Commission in discharge of its functions. Functions are specified in Section 86. The Open Access

Regulations are those made in exercise of the delegated legislative power under the Act. The State Government cannot issue a Section 108 direction since such directions, if at all, can be issued only with respect to the functions under Section 86 of the Act.

28. The learned Senior counsel also pointed out that in the decision in the case of Nan Kishore Garg Vs. Government of NCT, Delhi and another 2011 SC online del 2366, wherein the court held that the Government passed orders without proper application of the law by squarely relying on the request made by the Distribution Companies.

29. The learned Senior counsel also submitted that proviso to Section 42 only guarantees open access above 1 MW, is wholly misconceived. The principal provision guarantees open access and directs it to be granted in phases. The proviso only mandates that the open access in phases is to be mandatorily granted within 5 years. i.e, by 2008 for categories above 1 MW. The imugned G.O. has been passed on the strength of proviso 5 to Section 42(2) of the Act. Such reliance is misplaced. While the proviso stipulates that open access must be granted for all open access consumers availing more than 1 MW, it does not specifically debar persons availing less than 1 MW of power from open access.

30. Per contra, the learned Advocate General placed reliance on the decision of the Honourable Supreme Court reported in (2014) 16 Supreme Court Cases 212 [Paschimanchal Vidyut Vitran Nigam Limited and others Vs. Adarsh Textiles and another]. In paragraph 22 of the said judgment, the Honourable Supreme Court reproduced Sections 62, 65 and 108 of the Electricity Act, 2003. Section 108 is relevant herein and therefore, it is reproduced as below:-

> " 108. Directions by State Government:- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
>
> (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government therein shall be final."

Learned Advocate General also pointed out paragraph 23 of the said decision wherein, it is held as under:-

> "23. It is apparent from a bare reading of the aforesaid provisions of the Electricity Act, 2003 and the Reforms Act, 1999 that in discharge of its

functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Section 65 and 108 of the 2003 Act that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission. "

31. It is the submission of the learned Advocate General appearing for the respondents that in the interest of the public only, in order to discharge the social obligation, the impugned order has been issued by the Government. Only to benefit the poorer section of the people, the impugned G.O has been passed by which availability of the open access to the power generators less than one Mega Watt is sought to be taken away only as per the procedure which would be decided by the Commission.

32. In reply to the contentions raised by the learned Senior counsel appearing for the appellant, the learned Advocate General argued that Government of Tamil Nadu has issued G.O. (Ms.).No.37 Energy (D1) Department, dated 17.04.2018 mainly on the grounds that the consumers are moving from third party sale to captive wheeling to avoid paying cross subsidy surcharge, leading to huge loss of revenue to TANGEDCO, which is increasing tremendously year by year. The TANGEDCO spend on fixed charges to the open access consumers by high cost power purchase and also to compensate the wind CPP consumers for their banked power.

33. The learned Advocate General further argued that loss of revenue of TANGEDCO indirectly affects low end consumers by tariff revision. It prevents future developments to supply quality and cheaper power to the public. In view of improved power situation prevailing at present and withdrawal of R & C measures in 2015 itself, there is no justification or reason to continue the existing regulations since the earlier directive, in G.O.(Ms).No.10 Energy (C3) Department dated 27.02.2009 was given in the public interest and when there was extraordinary deficit in the power situation, it is now inevitable to revert to the situation prior to 2009.

34. It is submitted that no other State has permitted open

access less than 1 MW and that the G.O.No.37 dated 17.04.2018 was an expression of Government's policy under Section 108 of the Electricity Act, 2003 and it is for the TNERC to consider and form an opinion on the same in the light of the provisions and powers under the Electricity Act, 2003 and to proceed appropriately.

35. It is also submitted that Government of Tamil Nadu was constrained to issue the policy directive in G.O.No.37 dated 17.04.2018 in view of the position that the consumers are enjoying the unintended benefits even after the object and purport of the earlier policy direction in G.O.No.10 dated 27.02.2009 ceased to exist and thereby causing huge recurring losses to the distribution licensee and consequential continued revenue losses from them are to be loaded on the general public through retail distribution tariff which will affect the common man.

36. The further submission put forth by the learned Advocate General is that the Open Access consumers are unjustly enriching at the cost of ordinary consumers. The generators supplying to subsidizing creamy layer Open Access consumers with less than 1 MW and they are comparing themselves with TANGEDCO which is supplying power to both subsidizing and other low end consumers requiring electricity for residential, commercial, agricultural and industrial etc. Such comparison of the appellants is an illusion.

37. The differentiation between HT consumers having more than one MW and less than one MW are reasonable differnetia and that G.O.No.37 dated 17.04.2018 is the expression of policy of the Government and hence, it is for the TNERC to consider in the light of the statutory provisions and powers conferred under the Electricity Act, 2003 and also the prudent practice in electricity sector in India.

38. It is further stated that the policy directive in G.O.No.37 dated 17.04.2018 came to be issued in public interest only after the position that TNERC was not taking up the issue when it was approached by the distribution licensee. In such circumstances, Writ petitioners had approached this court prematurely even much before the TNERC taking any decision on the policy directive. The Writ appellants inspite of the reasoned common order of the learned Single Judge in writ petitions directing the TNERC to consider the policy directive and take a decision, have approached this court by way of Writ Appeals without any reason and more particularly to prevent the statutory authority/TNERC from considering the policy directive in the light of the Electricity Act, 2003 coupled with judicial directive to do so.

39. It is further stated by the learned Advocate General that the issuance of the policy directive is only a first step and any person aggrieved can always have a remedy under the statute. In order to thwart the TNERC from exercising its powers on the policy directive, the Writ appellants have stated irrelevant issues to side track the issue from the main. In such circumstances, the stand of the writ appellants that the Government of Tamil Nadu is not vested with powers to issue policy directive u/s.108 is not correct. As contained in G.O.No.37 dated 17.04.2018, obviously, the earlier policy directive in G.O.No.10, dated 27.02.2009 while extending the concession would have to be held as without the authority of law. On that score not only the the Government but also the Open Access consumers are not entitled to be continued with Open Access for less than one Mega Watt, and that any person aggrieved obviously having a remedy once a final decision is taken and as such they are not entitled to any Writ of Certiorari in the absence of any right much less any legal right and as such the writ appeals are without any sum and substance. Unless and until the TNERC is allowed to consider the issue and a decision arrived at in accordance with law, no writ much less a Certiorari would lie and as such the Writ Appeals are liable to be dismissed in the interest of justice.

40. Having heard the learned counsel on both sides extensively, we find it proper to appreciate the stand taken by the learned counsel appearing for the appellants and the State as well as the issue involved in the writ appeals.

41. The core question arises in the present Writ Appeals is as to whether the Government has got power to issue the impugned G.O.(Ms.) No.37 dated 17.04.2018 Energy (D1) Department.

42. The learned Senior counsel for the appellants mainly contend that since the State Commission is the statutory authority, it has got independent statutory power and the Government has no authority to interfere with the functions of the State Commission. The State Commission make regulations in consistent with the Tamil Nadu Electricity Act and the rules generally carry out the provisions of the Act. Accordingly, Tamil Nadu Electricity Regulations Commission (Grid Connectivity and Intra State Open Access) Regulations, 2014, is a comprehensive Regulation governing the Grid Connectivity and Open Access. The Regulations themselves are made in exercise of the delegated legislative power under the Act and therefore, State Government cannot issue a direction under Section 108 of the Act to frame Regulations in a particular manner. If at all to give directives to the State Commission, it can be issued only with respect to the functions under Section 86 of the Act. In as much as the Government passed G.O.(Ms.).No.37, Energy (D1)

dated 17.04.2018, is without proper application of law. Proviso 5 to Section 42 only guarantees Open Access to all consumers who require a supply of electricity and therefore, it cannot be taken that for consumers above 1 MW only and the open access is available for all consumers and restricting to above 1 MW is is wholly misconceived. Proviso 5 only mandates 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, but it does not specifically debar consumers availing less then 1 MW power from Open Access.

43. On the other hand, the learned Advocate General mainly contend that in the interest of public only, in order to discharge the social obligation, the impugned G.O has been issued only to benefit the poor section of the people. The impugned G.O., has been passed by which availability of the Open Access to the power generators less than one MW is sought to be taken away only as per the procedure which would be decided by the Commission and the State Government has every power to guide the State Commission and it is for the State Commission to act as per the Statute. The G.O is thus within the powers of the State Government and it does not violate any statutory provisions. G.O.(Ms.)No.37 dated 17.04.2018 is an expression of Government's Policy under Section 108 of the Electricity Act, 2003 and it is for the State Commission to consider and form an opinion on the same in the light of the provisions and powers under the Electricity Act and proceed appropriately.

44. The Writ Petitioner without waiting for the outcome of the constitution of the State Commission approached the writ court, which is premature. Learned Single Judge also rightly considered the provisions of law and also considered the contentions of the writ petitioners as well as the Government and rightly dismissed the writ petitions filed by the Power Producers Association. It is observed by the learned Single Judge that after consideration of the Policy decision for approval by the State Commission, if any person aggrieved, they can get the remedy in the manner known to law.

45. The appellants have stated that they have invested in wind energy generator plants for their own capital use based on the facilities provided under the Electricity Act 2003 and TNERC (Grid Connectivity and Intra State Open Access) Regulations 2014, in the scheme of Open Access and they are paying Open Access charges to the TANGEDCO through its various comprehensive tariff orders on wind energy. According to the appellants, the core of the Electricity Act 2003 is open access. Open Access is

the concept that turns the Act's twin objectives of increasing private participation in the power industry and creating a self sufficient power industry with minimal State intervention and therefore, the State Government cannot seek to read one proviso of the Act in isolation and seek refuge under the same and therefore, the G.O., is not in consonance of the Act.

46. In order to give answer to the queries raised in these writ appeals i.e., as to whether the impugned G.O., is ultra vires of the Electricity Act or within the powers of the State Government, it is relevant to extract the following provisions of the Tamil Nadu Electricity Act and also the TNERC-Intra State Open Access Regulations, 2005.

> Section 2(47), 9, 39, 42, 82, 86 (1)(a) (e) (4), 108, 181 of the Electricity Act, 2003 reads as follows:-
>
> "Section 2(47) :- "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."
>
> Section 9. Captive generation:- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:
>
> Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.
>
> [Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licencee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.
>
> (2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

Section 39. State Transmission Utility and functions: - (1) The State Government may notify the Board or a Government company as the State Transmission Utility.

Provided that the State Transmission Utility shall not engage in the business of trading in electricity.

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the State Transmission Utility shall be -

(a) to undertake transmission of electricity through intra-State transmission system; (b) to discharge all functions of planning and co-ordination relating n relating to intra-State transmission system with -

(i) Central Transmission Utility;

(ii) State Governments;

(iii) generating companies;

(iv) Regional Power Committees;

(v) Authority;

(vi) licensees;

(vii) any other person notified by the State Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges ; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the State Commission:

2[***]

The words "and eliminated" omitted by Act 26 of 2007, Sec.5 [w.e.f. 15th June 2007] Provided also that the manner of payment and utilisation of the surcharge shall 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.

Section 42. Duties of distribution licensee and open access:-

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(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 1[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 2[***] 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:

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.]

Section 82 Constitution of State Commission---

(1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employee thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

Section 86 : Functions of State Commission: --- (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

....

(e) promote co-generation 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;

Section 108. Directions by State Government:- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the

State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

Section 181. Powers of State Commissions to make regulations: --- (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

(a) to (o).....................

(p) reduction 2[***] of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;

Regulation 3 (p), (q) and 9 (1) and (6) of the Tamil Nadu Electricity Regulatory Commission, Grid Connectivity and Intra-State Open Access Regulations, 2014, Notification No. TNERC/GC & ISOA/11/2, Dated 13-03-2014 reads as follows:-

"3. Definitions.-

(a) to (o) ....

(p) "Open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with these regulations and includes long-term open access, medium-term open access and short-term open access ;

(q) "open access customer" means a consumer, trader, distribution licensee or a generator who has been granted open access under these Regulations ;

....

9. Eligibility for Open Access and conditions to be satisfied.-

(1) Subject to the provisions of these Regulations, the licensees, generating companies, captive generating plants and consumers shall be eligible for open access to the intra-State transmission system of the State Transmission Utility or any transmission licensee on payment of transmission and other charges as may be determined by the Commission from time to time.

(2) to (5) ....

(6) Open Access shall be allowed to the intra state transmission system subject to the satisfaction

of the conditions contained in the Act and in these Regulations. Having regard to operational constraints and other relevant factors, open access shall be allowed to all EHT & HT consumers within their contracted demand subject to the terms and conditions of supply. In case of generation of electricity from new and renewable sources, open access shall be allowed as specifically permitted by the Commission in its relevant regulations/orders in force.”

The legality of G.O., involved in the present Writ Appeals is G.O.Ms.No.37. For better understanding, the said G.O.(Ms.)No.37 Energy (D1) Department dated 17.04.2018 is extracted as hereunder:-

Government of Tamil Nadu

ABSTRACT

Energy Department - Open access to the consumers with a load of one MW and above in line with section 42(2) of the Electricity Act, 2003 – Amendment to regulation 9(6) of the Tamilnadu Electricity Regulatory Commission (Grid connectivity and intra-State Open Access) Regulations, 2014 - Issuances of Policy directive under Section 108 of the Electricity Act, 2003 to the Tamilnadu Electricity Regulatory Commission - Orders – Issued.

Energy (D1) Department

G.O.(Ms) No.37
Dated:17.04.2018

விளம்பி, சித்திரை 4
திருவள்ளுவர் ஆண்டு 2049

Read:

1. D.O.letter No.11111/A1/2008, Energy Department dated 10.11.2008.
2. G.O (Ms.) No.10, Energy (C3) Department, dated 27.02.2009.
3. G.O.(Ms.) No.79, Energy (C3) Department, dated 11.07.2012.
4. Letter received from the Chairman and Managing Director, Tamilnadu Generation and Distribution Corporation Limited, Letter No. CE/Comml./ SE/EE/R&C/AEE2/F.OA with 1MW & above/D.138/17, dated 10.07.2017, 23.11.2017 and 20.01.2018.

*****

Order:

The Tamilnadu Electricity Regulatory Commission had notified the Tamilnadu Electricity Regulatory Commission-Intra-State Open Access Regulations 2005 as per the provisions of section 181 of the Electricity Act, 2003, (Central Act 36 of 2003) wherein, open access was allowed to all existing High Tension consumers and new applicants with a load of one mega watt and above. Due to critical power situation that prevailed in Tamilnadu during 2008, there was a deficit in addition to purchasing power from other States. Hence Restriction & Control measures were introduced to High Tension Industrial and Commercial consumers on base demand and energy with peak hour restriction with effect from 01.11.2008.

2. In accordance with the TNERC's Intra-State Open Access Regulations, 2005 the Government vide D.O. Letter first read above, facilitated the private power produced within the State to supply power to the High Tension consumers within the State through open access with a quantum of 1 MW and above subject to the condition that such third party sale will not involve cancellation of existing commitments on sale of power to Tamilnadu Electricity Board or any other consumer within the State in the interest of public. Accordingly, open access was permitted to the private generators on provisions of ABT meters. Based on the request from many other small scale HT industrial consumers and generators, third party sale transaction through intrastate open access was extended to the HT consumers up to 500 kW and above on 30.12.2008 and subsequently, to HT consumers up to 250 kW and above, i.e., from 17.02.2009, mainly to protect the public interest of the State. The Government of Tamilnadu, in the interest of public, invoked section 11 of the said Act vide the Government Order second read above duly directing the private generators to supply power either to TNEB or to the consumers within the state in order to harness the maximum power to this State. Consequently, the Hon'ble Tamilnadu Electricity Regulatory Commission amended regulation 11 of the TNERC-Intra-State Open Access Regulations 2005 with effect from 17.02.2010 enabling all the HT consumers irrespective of load, with effect from 18.02.2010 onwards within their sanctioned demand.

3. The Charmian and Managing Director, Tamilnadu Generation and Distribution Corporation Limited has, in the letter 4th read above, stated that in the interest of the public, the Cross Subsidy charges applicable to the above open access transactions were temporarily waived to the HT consumers for the purchased quantum of power up to their sanctioned demand until the Restriction & Control measures are lifted and subsequently, in the G.O. 3rd read above, the Government of Tamil Nadu authorized TANGEDCO to collect Cross Subsidy Surcharge from the HT consumers who are not availing TANGEDCO quota power fully or partially and purchase power from the outside sources. Further due to improvement of demand supply gap, the Restriction & Control measures were withdrawn with effect from 05.06.2015. The direction issued under sub-section (1) of section 11 of the said Electricity Act, 2003 was, therefore, withdrawn with effect from 01.06.2016. Further he has stated that the HT consumers were moved from third party sale transactions to captive wheeling, which leads to loss of cross subsidy surcharge and corresponding revenue loss to the TANGEDCO. In case of failure of generation to the open access consumers, TANGEDCO has to rescue the open access consumers by supplying power from the standby generation/spinning reserves of the TANGEDCO, for which the TANGEDCO has to spend on fixed charges to the generators and high cost power purchase if necessary for maintaining the grid discipline. Also there is no block to block adjustments to the open access consumers and their deviations in any block are absorbed only by the TANGEDCO through Unscheduled Interchange settlement. The Unscheduled Interchange amount paid by the TANGEDCO is not being passed on to the deviators within the State.

4. The Chairman and Managing Director, TANGEDCO, Chennai has also stated that section 42(2) of the said Electricity Act, 2003 mandates open access only to the consumers with demand above 1 MW, and that none of the States, except Tamilnadu offer open access to the consumers with less than 1 MW demand. A miscellaneous petition in this regard has already been filed in TNERC with the prayer to amend regulation 9(6) of the Tamilnadu Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 duly allowing open access to the consumers with a load of 1 MW and

above in line with section 42(2) of the said Electricity Act, 2003, which is yet to be admitted. The Chairman and Managing Director, TANGEDCO has, therefore, requested the Government to issue a policy directive under sub section (1) of section 108 of the said Electricity Act, 2003 to amend regulation 9(6) of the Tamilnadu Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 duly allowing open access to the consumers with a load of 1 MW and above in line with Section 42(2) of the said Electricity Act, 2003.

5. The Government have examined the proposal carefully, with reference to the following implications in allowing open access to consumers with demand less than one MW:

(i) The consumers are moving from third party sale to captive wheeling to avoid paying cross subsidy surcharge, leading to huge loss of revenue to Tamilnadu Generation and Distribution Corporation Limited, which is increasing tremendously year by year;

(ii) The Tamilnadu Generation and Distribution Corporation Limited has to spend on fixed charges to the open access consumers by high cost power purchase and also to compensate the wind CPP consumers for their banked power;

(iii) Loss of revenue to Tamilnadu Generation and District Corporation Limited indirectly affects low end consumers by tariff revision, and

(iv) Prevents future developments to supply quality and cheaper power to the public.

Further, it is considered that in view of the improved power situation prevailing at present and withdrawal of R&C measures in 2015 itself, there is no justification or reason to continue the existing regulations since the earlier directive was given in the public interest and when there was extraordinary deficit in the power situation, and hence it is now inevitable to revert to the situation prior to 2009.

6. The Government after careful examination have therefore decided to accept the proposal of the Chairman and Managing Director, Tamilnadu Generation and Distribution Corporation Limited and issue a policy directive under sub-section(1) of section 108 of the said Electricity Act, 2003 to amend the existing regulation 9(6) of the Tamil Nadu

Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 duly allowing open access to the consumers with a load of 1 MW and above in line with 5^{th} proviso to sub-section(2) of section 42 of the said Electricity Act, 2003 to the TNERC and hereby issue orders accordingly.

7. The appended notification will be published in the Tamilnadu Government Gazette Extraordinary dated the Seventeenth April 2018.

(By order of the Governor)

VIKRAM KAPUR,
Principal Secretary to Government (FAC).

APPENDIX

NOTIFICATION

In exercise of the powers conferred under sub-section (1) of section 108 of the Electricity Act, 2003 (Central Act 36 of 2003), the Governor of Tamilnadu hereby issues the following directions in public interest, namely:-

The existing regulation 9(6) of the Tamil Nadu Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 be amended in line with 5^{th} proviso to sub-section (2) of section 42 of the said Electricity Act, 2003 as follows:-

" (6) Open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and in these Regulations. Having regard to operational constraints and other relevant factors, open access shall be allowed to all EHT & HT consumers who required a supply of electricity where the maximum power made available at any point of time exceeds one mega watt".

VIKRAM KAPUR,
Principal Secretary to Government (FAC). "

47. So Section 9 of the Regulations stipulated the eligibility for open access and conditions to be satisfied. Section 42 of the Electricity Act says 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.

48. The appellants are users of 1 MW power. Proviso 5 to Section 42 restricts open access to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt. However, as per Section 108 of the Electricity Act, the State Government has got power to issue directions to the State Commission shall be guided by such directions in matters of policy involving public interest. So, in matters of policy involving public interest, based on powers guaranteed under Section 108 of the Electricity Act, the State Government issued G.O.(Ms.).No.37 dated 17.04.2018. Further, Section 42 proviso 5 of the Electricity Act does not stipulate or specifically debar persons availing less than 1 MW of power from open access. Therefore, the issuance of G.O.(Ms.).No.37 Energy (D1) dated 17.04.2018 by the State Government by way of directions is within the powers of the Government. As per Section 181 of the Electricity Act, the State Commission has got power to make regulations and it can also amend the regulations. So after considering the directions prescribed by the State Government, if necessary, the State Commission, by notification, make regulations consistent with the Act and it is provided under Sub Section (r) to Section 181 that such regulations may provide for all or any of the guidelines under Sub-section (5) of Section 42.

49. Chapter 3, Regulation 9 of TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014 gives eligibility for open access and conditions to be satisfied. Sub regulation 6 stipulates that open access shall be allowed to the intra-State transmission system subject to the satisfaction of the conditions contained in the Act and in these regulations.After considering all the facts and circumstances, State Commission can amend the Regulations after the approval of the Regulatory Commission and Regulation. Aggrieved party in respect of such statute of TNERC, can challenge the same. Therefore, the learned Single Judge, has rightly stated that the TNERC to take up the policy decision of the Government expressed in G.O.(Ms).No.37, Energy (D1) dated 17.04.2008 for consideration and forthwith complete the proceedings.

50. Learned Advocate General would submit that G.O. (Ms). No.37 dated 17.04.2018 issued is the policy directive in exercise of the powers conferred under Section 108 of the Act. State Government has got every power to give directions to the State Commission in the interest of the consumers. A combined reading of the above said provisions and particularly Section 108 and Section 86 of the Act make it clear that the State Government issued impugned G.O., in exercise of the powers conferred to it and is not ultravires of the Act. Therefore, a reading of the above said provisions would go to show clearly that the State Government has got power to issue policy directions.

51. Section 108 of the Electricity Act stipulates the directions by State Government and that in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Section 181 of the Act speaks about powers of State Commissions to make regulations and it says that the State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act. A reading of Section 181 of the Act coupled with proviso 5 to Section 42 would make it clear that the impugned G.O., is not ultravires of the Act. State Government has got power to give directions to the State Commission. No doubt, the State Commission, being an independent statutory authority, it can take decisions on its own, considering the directions given by the State Government. Ultimately, the Commission has to decide while making amendment in the Regulations, in the interest of public and in consistent with the Act, make amendments in the main Regulation to implement the directives of the State Government but it cannot deviate the provisions of the Act. As far as directions issued in G.O., is concerned, it is not mandatory and it is purely discretionary on the part of the TNERC on acceptability of the directions issued by the State Government since the State Commission is independent statutory body.

52. It is submitted by the appellants in their typed set of papers that the State Government had entered into an agreement with a solar power generator company for purchase of power at the rate of Rs.7.00 per unit for a period of 21 years, whereas the Government is buying power from the appellants and others at the rate of Rs.2.00 per unit which would mean that TANGEDCO incurs a loss of Rs.5.00 per unit. In this regard, we would like to state that now, due to change of circumstances, the TANGEDCO along with TNERC as well as the State Government, is to reconsider the Agreement already entered into and if it is found that the agreement entered into is for any extraneous consideration or the purchase of power involve vast

discrimination resulting in loss to the TANGEDCO, then the State Commission and State Government have to cancel the same and while entering into future agreements, the State Government as well as TANGEDCO shall try to avoid the discrimination in the purchase of power from the generator companies.

53. The main object of the State Commission is to implement the Act and it is for the State Commission to decide on the directives as it as an independent statutory authority. So before the TNERC taking up the issue to consider the policy directive, the writ appellants approached this court by way of writ petition prematurely. The learned Single Judge, rightly held that the writ petitions are filed prematurely, without ascertaining whether the Commission has accepted the policy or not, and therefore, disposed of the writ petitions with a direction to the Regulatory Commission that it shall take up the policy decision of the Government expressed in G.O.(Ms.).No.37, Energy (D1) dated 17.04.2018 for consideration forthwith and complete the proceedings.

54. On going through the entire records placed before this court on either side and the order of the learned Single Judge, we are of the view that the order of the learned Single Judge does not require any interference and the writ appeals are liable to be dismissed. As pointed out by the learned Single Judge, the appellants are having remedy under the statute after taking final decision by the Tamil Nadu Electricity Regulatory Commission and hence, no prejudice would be caused to the appellants.

55. It is to be pointed out herein that in consequent to the directions of the learned Single Judge given in W.P.Nos.11133 to 11139 of 2018 etc batch cases, relating to the policy directive issued by the State Government to amend the Regulations of the Commission, the matter was taken up for hearing before the Tamil Nadu Electricity Regulation Commission on 05.09.2019. Notice was given to all the parties in the writ petitions on 10.09.2019 for the parties to enter their appearance through counsel or in person on 17.09.2019. It is the matter of record that after receiving notice, the writ appellants approached this court by way of present writ appeals. In view of the dismissal of the present writ appeals, this court directs the Tamil Nadu Electricity Regulatory Commission, to take up the matter for hearing, issue notice and proceed with the matter for deciding the policy directive issued by the Government. The Commission shall take into consideration the directions issued by the State Government and the submissions that are going to be made on the side of the appellants herein, analyse it and complete the proceedings as per the directions of the learned Single Judge.

56. With the above observation, the Writ Appeals are dismissed. The order passed by the learned Single Judge in W.P.No.11134 of 2018, dated 30.07.2019 is confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

nvsri

To

1.The Principal Secretary,
Energy Department,
Fort St.George,
Chennai - 600 009.

2.The Chairman and Managing Director,
Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), 10th Floor, 144, Anna Salai,
Chennai - 600 002.

3.The Director - Operations,
State Load Despatch Center (SLDC),
144, Anna Salai, Chennai - 600 002.

4.The Secretary,
Tamilnadu Electricity Regulatory Commission,
19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai - 600 008.

+2ccs to M/s.L.Jai Venkatesan, Advocate Sr No.41603

W.A.Nos.3254, 3255 & 3163 of 2019

RGN (CO)
PR (27/10/2021)