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W.P.No.17556 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2022

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THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

W.P.No.17556 of 2010
and M.P.Nos.1 to 4 of 2010

M/s.Suguna Poultry Farm Ltd.,
5th Floor, Jaya Enclave, 1057,
Avinashi Road, Coimbatore.

... Petitioner

Vs.

1. The Tamil Nadu Electricity Regulatory Commission,
19-A, Rukmini Lakshmipathy Salai,
(Marshall's Road), Egmore,
Chennai - 600 008.
Rep. by its Secretary.

2. The Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai - 600 002.

3. The Superintending Engineer,
Udumalpet Electricity Distributio Circle,
Tamil Nadu Electricity Board,
Udumalpet.

... Respondents



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PRAYER: The Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the third respondent in its notice Lr.No.SE/UEDC/UDT/AO/REV/HT/AS/AS1/F BOABAUDIT/2010 dated 19.07.2010 for the period between 11/2009 and 03/2010 for a sum of Rs.18,78,122/- (Rupees Eighteen lakhs seventy eight thousand and one hundred and twenty two only) towards levy of excess demand charges without adding the deemed demand for third party purchase of energy by the petitioner and quash the same as illegal, arbitrary and without authority of law and direct the third respondent to permit the petitioner to avail the deemed demand for the energy purchased from the third party also over the above the Quota demand fixed by the third respondent.

For Petitioner : M/s.Rahul Balaji

For Respondents : M/s.Abdul Kalam
Standing Counsel

ORDER

The learned counsel for both the parties submit that the issue involved in this Writ Petition is squarely covered by the order of this Court in ***W.P.No.No.15873 of 2010, dated 14.12.2021***, which reads as follows:-



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“The facts and circumstances narrated by the petitioner in the present writ petition are similar to that of the issues considered and decided by the Tamil Nadu Electricity Regulatory Commission in D.R.P.No.41 of 2014 dated 13.02.2015. Thus the issues are not more res integra and the petitioner is entitled to get the benefits pursuant to the orders passed by the Tamil Nadu Electricity Regulatory Commission. Further, the 1st order passed by the Tamil Nadu Electricity Regulatory Commission in M.P.Nos.6 of 2010, 9 of 2010 and 17 of 2010 and D.R.P.No.9 of 2010 dated 07.09.2010 and paragraph 4.4 provides findings of the Commission which reads as under:

'4.4 The consumer is at present permitted to utilise power from captive sources. The present order would enable a consumer to purchase power from third party sources as well. Procurement of power by a consumer through Open Access is protected by the Electricity Act, 2003. The role of the licensee is limited to that of a carrier. Procurement through Open Access will be treated as an additionality. The ceiling, upto which a consumer can utilise power including the TNEB quota demand, captive power and third party purchase would be the sanctioned demand. In such a situation, there would be no need for advance declaration by the consumer of procurement of captive power as stipulated in SMP.No.1 of 2009 or procurement of third party power as stipulated in the Interim Order dated 17.08.2010. As the TNEB had allowed procurement of power upto the sanctioned demand in their communication dated 17.07.2009 'procedure for allowing third party sale/purchase under intra state open access', there should be no difficulty in allowing the consumer to procure power upto the sanctioned demand.'



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2.Considering the above proposition, the Regulatory Commission subsequently passed an order in D.R.P.No.41 of 2014 and the relevant portion of the order stands extracted here under

'5. Findings of the Commission:-

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

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

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

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

Provided that 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:



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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:

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

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

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



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

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

'51. Summary of our findings:-

(i) xxxxxxxxxx

(ii) TNEB issued two memos dated 30-12-2008 and 17-07-2009 permitting to go up to the sanctioned demand by third party purchase to HT consumers with connected load upto 500 KW and 250 KW respectively. In the memo dated 17-07-2009 issued by the Chairman, TNEB it has been specifically stated that the purchaser can use the purchased power over and above the original quota fixed for him under restriction and control measures upto the sanctioned demand. TNEB cannot take a contrary stand to its own memos dated 30-12-2008 and 17-07-2009.

(iii) In the order dated 07-09-2010, the State Commission after taking note of the memo dated 17-07-2009 from the Chairman, TNEB directed the TNEB to act in accordance with its own stand. Thus, the State Commission has erred in deciding the date of effect of its order to 17-08-2010.



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(iv) *The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board.*

In the above order, the words 'the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board' are very significant. In line with the APTEL's Order, the Commission in its Order dated 25-02- 2013 in R.A.No.4 of 2013 directed that the date of effect of the Commission's Order dated 07-09-2010 in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009. In this Order, the Commission took into account only one date i.e. 17-07-2009 the date on which the TANGEDCO permitted open access to HT consumers with sanctioned demand of 250 kW and above. However, as rightly pointed out by the petitioner, the TANGEDCO permitted third party power purchase for the consumers with sanctioned demand of 500 kW and above with effect from 30-12-2008 and for the consumers with sanctioned demand of 250 kW and above with effect from 17-07-2009. These are two different dates on which the TNEB permitted open access for HT consumers with different sanctioned demand limits. The Commission accepts that the effective dates of Commission's Order in R.A.No.4 of 2013 should have been 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. Accordingly, in line with the direction of the Hon'ble Appellate Tribunal for Electricity, the Commission hereby directs that the date of effect of the order dated 07-



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09-2010 of the Commission in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. To that extent the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 has been modified. The other part of the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 holds good. Consequently, TANGEDCO is directed to effect refund to the HT consumers accordingly. This exercise shall be done within the period of two months from the date of the issue of this order.

6. Appeal:-

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

3. In view of the proposition considered and laid down, the present writ petition also require consideration. Accordingly, the impugned order passed by the third respondent in proceedings dated 30.06.2010 is quashed and the respondents are directed to comply with the directions issued by the Tamil Nadu Electricity Regulatory Commission in the subject matter.

4. With these directions, this writ petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed."



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2. In line with the order passed by this Court in W.P.No.15873 of 2010, dated 14.12.2021, this Writ Petition is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

22.02.2022

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To

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M. GOVINDARAJ, J.

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