

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 228 of 2017

Dated : 4th December, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Kamachi Industries Limited,
Formerly known as Kamachi Sponge &
Power Corporation Ltd.,
No. 39, Anna Salai,
ABC Trade Centre, III Floor,
Chennai – 600002.

.... **APPELLANT**

Versus

1. **Tamil Nadu Generation and Distribution Corporation Limited,**
Represented by its Chief Financial
Controller/Revenue,
144, Anna Salai,
Chennai – 600002.
2. **Tamil Nadu Electricity Regulatory Commission,**
TIDCO Office Building
Represented by its Secretary
No. 19-A, Rukmani Lakshmipathy Salai,
Marshalls Road, Egmore,
Chennai.

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Parichita Chowdhury
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. S. Vallinayagam
Ms. S. Amali **for R-1**

Mr. Sethu Ramalingam
Mr. S. Alagesan **for R-2**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. In this case, the impugned order is dated 29.07.2016 on the file of Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as “**TNERC**” or “**Commission**”). In the Petition, the Petitioner – Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as “**TANGEDCO**”) was seeking clarification on the issue involved, i.e. “whether normal transmission and wheeling charges as notified by the Commission for conventional fuel based generators can be collected from fossil fuel based co-generating plants?”
2. The background in filing of M.P. No. 09 of 2015 which is narrated in brief as under:

- Originally on 15.05.2006, TNERC passed an order in Petition No. 3 in respect of Non-Conventional Energy Sources (hereinafter referred to as “**NCES**”) based generators. Further, by an order No.4 dated 15.05.2006, TNERC passed orders in respect of fossil fuel based conventional power plants and so also fossil fuel based co-generation plants and then fixed transmission and wheeling charges.
- Similarly on 27.04.2009, TNERC in order No. 2 passed orders in respect of biomass based generator plants and fixed transmission and wheeling charges.
- On 06.05.2009, TNERC passed orders in respect of bagasse based co-generators by fixing transmission and wheeling charges.
- On 31.07.2012, TNERC in order Nos. 6, 7 & 8, pertaining to wind energy generators, passed orders so far as bagasse based co-generation plants as well as biomass based power plants.
- On 11.12.2014, the 1st Respondent-TANGEDCO sought clarification before the Respondent-Commission as to whether normal transmission and wheeling charges as notified by the Respondent-Commission for conventional fuel based generators can be applied to fossil fuel based co-generating plants?
- In M.P. No. 9 of 2015, on 29.07.2016, the Respondent-Commission held that transmission and wheeling charges as notified by the

Commission in respect of fossil fuel based generators could be collected from fossil fuel based co-generating plants. They also made it clear that there shall not be any recovery for back period from such of the fossil fuel based co-generating plants where single charge in kind is collected as transmission and wheeling charges based on orders dated 15.05.2006 in order No. 3.

3. Aggrieved by the same, the Appellant is before this Tribunal contending that the dispensation given in the order dated 15.05.2006 continued to be applied to the Appellant and the other fossil fuel based co-generators even though the State Commission had passed orders on 31.07.2012 in respect of wind, biomass and bagasse based generators.

4. The impugned order came to be passed when the 2nd Respondent-TANGEDCO sought clarification in M.P. No. 9 of 2015. The State Commission directed TANGEDCO to publish its petition on website giving 15 days' time for objections and then held that the normal transmission and wheeling charges have to be paid by fossil fuel based co-generators. The said order being impugned is unsustainable since it is contradictory to Section 61(g) and 86(1)(e) of the Electricity Act, 2003 (hereinafter referred to as "**the Act**") and so also Section 64, 62 and 171 of the Act, apart from contravening the provisions of Regulation 16(i), 16(ii) and Regulation 21 of

the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.

5. According to the Appellant, at the very least, the Respondent-Commission was expected to follow the process that was followed while passing the order dated 15.05.2006. There are only 34 MW fossil fuel based co-generators who operated at 33 KV level and 56.3 MW fossil fuel based co-generators above 33 KV level; therefore with that small number, it would not be difficult for the State Commission to send individual notices to the stakeholders and also to publish the petition in the newspaper and its website calling for public comments. The Appellant contends that in the normal course, it is possible to check the website of the State Commission and not the website of TANGEDCO, especially by the stakeholders. This is so, especially in the light of the practice of charging the transmission and wheeling charges in kind was being continued from 2006 onwards.

6. According to the Appellant, the procedure for issuance or amendment to a tariff order is clearly set out in Section 64 of the Act, which is totally ignored. Public views were taken for determination of tariff charges. But in the present case, based on a clarification petition at the instance of TANGEDCO, the impugned order was passed without hearing the stakeholders. Similarly, Section 171 of the Act is totally ignored, which deals with the mode of service to be carried out in a particular

manner. This procedure is contemplated as a protection to the consumers which is a mandate. This Section 171, according to the Appellant, also maintains importance of natural justice, i.e. right to be heard before passing the orders. Further, Section 171 deals with the prescribed term 'service' as 'means of delivery of notice, order or document' which is totally violated by the Respondent-Commission is the stand of the Appellant.

7. So far as Regulations (Conduct of Business) of TNERC, which refer to initiation of proceedings and serving of notices and process to be followed by the Commission is concerned, according to the Appellant, the State Commission, in this case, has totally ignored the procedure of publication of petition inviting comments from the public or any person who would be affected by the impugned order. The service of notice is totally ignored. Similarly, publication of the petition in a newspaper which has wide circulation is also completely ignored is the stand of the Appellant.

8. The Appellant further contends that in the order dated 15.05.2006, the Commission has given clear reasoning why 3% and 7% were fixed as transmission and wheeling charges. But while passing the impugned order, there is no such discussion and reasoning. Under the garb of a clarification, the impugned order is passed which is totally against the procedure contemplated under Sections 86(1)(e) and 61(g) of the Act,.

Therefore, they have sought for setting aside the order and remand of the case for proper hearing and disposal of the same on merits.

9. The 1st Respondent-TANGEDCO opposes the grounds of Appeal in brief as follows:

10. According to the 1st Respondent, Order dated 15.05.2006 came to be passed holding that co-generation, as per Section 86(1)(e), has to be promoted. The Commission opined that since fossil fuel based co-generation plants are also the customers of open access, the transmission and wheeling charges are to be regulated by open access Regulations issued by the Commission. Therefore, separate transmission and wheeling charges have been fixed for CGP co-generation plants, i.e. 3% of transmission and wheeling charges in kind for distance within 25 kilo meters and 7% of transmission charges in kind for distance beyond 7 kilo meters. This came to be approved in principle by Government of Tamil Nadu by GO dated 08.10.2008. Tamil Nadu Transmission Corporation Limited (“**TANTRANSCO**”) and TANGEDCO came to be incorporated and they started functioning with effect from 01.11.2010. TANTRANSCO filed application for determination of transmission charges before the State Commission. This petition came to be registered as TP No.2 of 2011 and was admitted on 25.11.2011 with a direction to upload the petition on the

website on the same day. Public hearing, in terms of procedure, was conducted.

11. On 30.03.2012, the Respondent-Commission determined the intra-state transmission tariff and other related charges for all consumers of intra-state transmission lines of TANTRANSCO by fixing transmission charges of Rs.6483 per megawatt per day. This was uniform to all types of consumers who availed open access of the intra-state transmission system. The Commission, vide separate orders, provided concessional transmission and wheeling charges so far as wind, bagasse, and biomass based power plants and co-generation plants on 31.07.2012. There was no order providing concession in transmission and wheeling charges for any other category of generators except the above three category of generators.

12. According to 1st Respondent-TANGEDCO, based on Order No. 4 dated 15.05.2006, the wheeling and transmission charges are collected. MP No. 9 of 2015 came to be filed by 1st Respondent before 2nd Respondent-Commission seeking clarification whether normal transmission and wheeling charges, which was notified by the Commission for conventional fuel based generators can be collected from the Appellant i.e. fossil fuel based co-generating plants. On the petition, Commission directed the DISCOM to host the petition on its website for clear 15 days

seeking objections. Meanwhile, 1st Respondent-TANGEDCO filed another petition MP No. 10 of 2015 before the Commission seeking clarification pertaining to collection of Grid support charges for backup power during the outage of generating plant. This petition was also taken up for hearing along with MP No. 9 of 2015 and a similar direction to host the petitions on TANGEDCO's website came to be made.

13. In terms of directions of the Commission, the two petitions were web hosted on 19.12.2015. No suggestions or objections, whatsoever, were received from public and other stakeholders so far as MP No. 9 of 2015. Pertaining to MP No. 10 of 2010, objections from M/s. The Southern India Mills' Association, M/s. Tamil Nadu Electricity Consumers' Association were received. Two other entities i.e., Tamil Nadu Spinning Mills Association and M/s. Ind-Barath Powergencom Limited filed impleadment applications. Therefore, 1st Respondent contends that the Appellant cannot take the defence of not having proper notice of petition No. 9 of 2015 on account of web hosting of the petition on the website of DISCOM.

14. 1st Respondent further contends that in terms of CERC Regulations, all applications are to be posted on the website of respective petitioners and not on the website of CERC. Posting of the application for clarification on the website of TANGEDCO was on the directions of the 2nd Respondent-Commission which is in terms of Conduct of Business

Regulations of the 2nd Respondent-Commission. In terms of the above direction, after posting the petition on the website, 2nd Respondent-Commission proceeded to clarify that transmission and wheeling charges are to be collected by DISCOM in respect of fossil fuel based generators and fossil fuel based co-generators. Accordingly, the Appellant was directed to pay Rs.72 Lakhs for the period between 29.07.2016 to 26.02.2017.

15. 1st Respondent-TANGEDCO also placed on record that on request of the Appellant, Grid connectivity agreement is also terminated and the same was accepted by TANGEDCO. The Appellant is not connected to Grid any more. Therefore, the 1st Respondent contends that question of paying future transmission and wheeling charges would not arise so far as the Appellant is concerned. The present grievance of the Appellant is for the past period as stated above.

16. 1st Respondent-TANGEDCO further contends that after re-organization of Tamil Nadu Electricity Board as TANTRANSCO, the Appellant cannot rely on Order No.4 dated 15.05.2006 and seek exemption from paying relevant tariff pertaining to transmission and wheeling charges governing the relevant period as stated above. The tariff orders of Regulatory Commission are uniformly applicable to all

generators using the transmission network of TANTRANSCO with effect from 2012 onwards.

17. They further contend that, 2nd Respondent-Commission granted concessional transmission and wheeling charges specifically only in respect of 3 (three) categories of generators in terms of Orders No. 6, 7 and 8 of 2012. Except these three, no other category of generator is enjoying the benefit of concessional transmission and wheeling charges.

18. 1st Respondent-TANGEDCO further contends that once the Appellant was aware of the fact that order No. 2 of 2012 by which transmission and wheeling charges were revised, it must be within the knowledge of the Appellant that the revised practice of payment of wheeling and transmission charges in kind in respect of all generators prior to the order dated 30.03.2012 was revised. Therefore, the Appellant cannot plead ignorance of tariff order passed by the Regulatory Commission from 2012 onwards. Even otherwise, 2nd Respondent-Commission granted relief by applying relevant transmission and wheeling charges for the period from 29.07.2016 to 26.02.2017 and did not apply the charges applicable from 30.03.2012.

19. 1st Respondent-TANGEDCO further contends that after incorrect charges/tariff is collected, it is within the regulatory powers of the

Commission to rectify the said mistake. Every generator is expected to be aware of every tariff order passed by Regulatory Commission from time to time and they cannot plead ignorance. All orders, Government notifications pertaining to tariff concessions etc. are always web hosted on the website of TANGEDCO. Therefore, the Appellant cannot plead ignorance of the website since all consumers of HT and domestic connections do visit the website regularly.

20. With the above submissions, 1st Respondent-TANGEDCO seeks dismissal of the Appeal.

21. Written submissions of 2nd Respondent-Commission are as under:

22. According to this Respondent-Commission, the grounds raised in the Appeal by the Appellant are not tenable for the following reasons:

23. They contend that the following facts are required to be noticed:

“(a) Impugned order is in tune with the scope of Section 86(1) (e) as clarified by the Hon’ble Tribunal in its Full Bench Judgment dated 02 Dec 2013 in Appeal No. 53 of 2012.

(b) Co-generation plants are entitled for connectivity and sale of electricity for any person. These issues are not germane to the present proceedings.

- (c) *There cannot be any parity between non-conventional energy sources and Fossil fuel because un-likes cannot be treated alike.*
- (d) *Premium of 10% has been extended to fossil fuel based co-generation plants over Captive Generation Plants. Table at page 184 of the Appeal refers.”*

24. With regard to the contention raised in the Appeal pertaining to Section 62 and 64 of the Act, 2nd Respondent submits as under:

“..... As regards the filing under section 64, it is submitted that the Commission has suo-motu powers to initiate proceedings under Regulation 16 of the Conduct of Business Regulations and therefore, the non-filing of petition under section 64(1) is not a valid ground to set aside the impugned order. In this connection, it is relevant to state that this Hon’ble Tribunal itself has held that the Tariff petition can be initiated on suo-motu basis and hence, the necessity to wait for the petition under section 64(1) from a licensee or distribution licensee does not arise. It is submitted that all the Transmission orders consequent to the formation of TANTRANSCO have been issued either under section 64 or on suo-motu basis and therefore, are perfectly valid in law.”

25. Pertaining to issuance of notice, 2nd Respondent-Commission contends that subsequent to formation of TANTRANSCO, a need arose

for inviting intra-state transmission tariff separately and accordingly was complied with in terms of Order No.2 of 2012 dated 30.03.2012. Concessions came to be granted through separate orders dated 31.07.2012 pertaining to wind, bagasse and biomass. This clearly indicates that all other utilities which were not covered by the concessions ought to be under intra-state transmission tariff determined, vide Order No.2 of 2012. Therefore, there was no need for TANGEDCO to seek any clarification.

26. 2nd Respondent-Commission further contends that the impugned order has neither withdrawn any right/concession enjoyed by the Appellant nor it has fastened any liability against the Appellant. By a clarification, it has only removed misconception on the part of TANGEDCO. Order No.2 of 2012 was passed after complying with necessary procedure including publication in newspapers, public hearing etc. Therefore, there was no need for such procedure since impugned order only reiterated the earlier tariff fixed in terms of Order No. 2 of 2012 dated 30.03.2012.

27. Further, 2nd Respondent-Commission contends that according to Regulation 21(1)(e) of Conduct of Business Regulations, service of notice may be in any manner as considered appropriate by the Commission apart from the manner prescribed under Clauses (a) to (d) of Section 21(1). Therefore, the Respondent-Commission opines that hosting of

petition on the website by TANGEDCO was appropriate and sufficient. Apart from that, the case was listed 4 (four) times between February 2015 and 28.01.2016. Proceedings of MP No.9 of 2015 was published in the cause lists of the Respondent-Commission with reference to subject matter of clarification 'whether transmission and wheeling charges for conventional fuel based generators can also be collected from fossil fuel based co-generating plants'. Therefore, according to 2nd Respondent-Commission, it is improbable that the Appellant – a fossil fuel co-generator did not look at the website of the Respondent-Commission during the above said period.

28. According to 2nd Respondent-Commission, the contention of the Appellant that order dated 15.05.2006 in Order No.4 of 2006 was neither amended nor revoked is incorrect. By Order No.2 of 2012 dated 30.03.2012, Order dated 15.05.2006 was modified and transmission tariff was granted from time to time. 2nd Respondent-Commission further contends that if the Appellant was aware of the tariff orders pertaining to wind, bagasse and biomass generators dated 31.07.2012, it is strange that the Appellant did not notice the order dated 30.03.2012 in Order No.2 of 2012.

29. With the above averments, 2nd Respondent-Commission has sought for dismissal of the Appeal.

30. We heard Appellant and Respondents at length. We have gone through the relevant pleadings and also submissions.

31. The point that would arise for our consideration is “**whether the impugned order in the Appeal warrants interference?**”

32. The Appellant mainly relies on order dated 15.05.2006 pertaining to non-conventional energy generators and again another order pertaining to fossil fuel based conventional power plants so also fossil fuel based co-generation plants pertaining to transmission and wheeling charges. According to them, by virtue of orders dated 27.04.2009 and 06.05.2009, TNERC passed different orders fixing transmission and wheeling charges pertaining to biomass and bagasse based generation plants.

33. According to the Appellant, since Respondent-Commission did not mention in its order dated 31.07.2012 pertaining to fossil fuel based generators - conventional and non-conventional, they contend that the dispensation given in the order dated 15.05.2006 continued to them so far as transmission and wheeling charges and the same got fortified since no such charges were collected from them in spite of order dated 31.07.2012. The Appellant also contends that Respondent-Commission had to adopt the process while passing the impugned order.

34. According to them, since their number is only 34 MW which are operated at 33 KV level and 56.3 MW which are above 33 KV level, there ought to have been individual notices to the stakeholders apart from publishing the petition in newspapers and the website of the Commission calling public comments. Their main defence is that there was no possibility to check the website of TANGEDCO; but there was every possibility of checking the website of the Commission especially by the stakeholders.

35. The transmission and wheeling charges which are in dispute before us is for the period between 29.07.2016 to 26.02.2017. According to Appellant, it should be in terms of Order No.4 dated 15.05.2006. According to Respondent-Commission, the transmission and wheeling charges has to be in terms of clarificatory order that normal transmission and wheeling charges, as notified by Commission for conventional fuel based generators, is applicable to fossil fuel based co-generating plants.

36. Much prior to reorganization of Tamil Nadu Electricity Board (“**TNEB**”) by GO No. 114 dated 08.10.2008, the directions in the order dated 15.05.2006 under which some benefit was extended to fossil fuel based CGPs like the Appellant, was in force. What is relevant is what happened subsequent to reorganization of TNEB as a holding company – Tamil Nadu Electricity Board Ltd. and two subsidiary companies namely,

TANTRANSCO and TANGEDCO. TANTRANSCO started functioning from 01.11.2010. On its functioning, TANTRANSCO sought for determination of transmission charges before the State Regulatory Commission on 17.11.2011. This petition was admitted and registered as TP 2 of 2011 with a direction to upload the petition on the website on the very same day. The said application also came to be published in the newspaper as per Regulation 7 (2) of Tariff Regulations. Comments and suggestions were sought from stakeholders. It was placed before the Advisory Committee on 27.01.2012 and public hearing was conducted at 4 (four) different places of Tamil Nadu. Subsequently, on 30.03.2012, the Regulatory Commission determined intra-state transmission tariff and other related charges for all consumers of intra-state transmission lines of TANTRANSCO. By virtue of this order, the charges were fixed at Rs.6483 per MW per day. Transmission and wheeling charges were uniform for all types of consumers who availed open access of the intra-state transmission system.

37. However, by separate orders in Orders No. 6, 7 & 8 of 2012 on 31.07.2012, concessional transmission and wheeling charges were passed so far as wind, bagasse and biomass based co-generation plants. Admittedly and apparently, no such concessions in transmission and

wheeling charges were extended to any other category of generators except the above said three categories of generators.

38. It is also relevant to mention that in Order No. 6 of 2012 pertaining to wind energy generators, the Respondent-Commission, at Para 8.33 held as under:

“8.3.3 Commission in its order No. 1 of 2012 and 2 of 2012 has fixed Transmission Charges of Rs.6483/MW/day and wheeling charges of 23.27 paise/kWh. Now that the TNEB has been unbundled, charging a single charge in kind as transmission and wheeling charges is not implementable. Therefore, it has been decided to fix transmission and wheeling charges in terms of rupees/paise as in the case of conventional power.”

39. The requirement of seeking clarification from the Respondent-Commission arose, because the 1st Respondent was collecting transmission and wheeling charges based on Order No.4 dated 15.05.2006. Therefore, it became imperative for the 1st Respondent to seek directions under Section 86(1)(A) of the Act, read with Regulations 47, 48 and 54 of the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations.

40. It is pertinent to mention here that at the relevant time, MP No. 10 of 2015 also came to be filed by the 1st Respondent seeking clarification

on collection of Grid support charges for backup cover during the outage of generating plant. Both the petitions were listed on 05.10.2015 and similar direction to host the petition on the website of TANGEDCO was issued. Both were web hosted on 19.12.2015. Apparently, none filed any suggestions or objections so far as MP No. 9 of 2015 is concerned. However, in MP No. 10 of 2015, M/s. The Southern India Mills' Association, and M/s Tamil Nadu Electricity Consumers' Association filed suggestions and two others namely, Tamil Nadu Spinning Mills Association, and M/s Ind-Barath Powergencom Limited sought impleadment. This clearly indicates that it is quite common for stakeholders to see the website of the 1st Respondent-TANGEDCO. Before passing the impugned order, proceedings in MP No. 9 of 2015 came to be hosted on the website of the Respondent-Commission on four occasions.

41. As on today, the Appellant has requested for termination of its Grid connectivity. The charges required to be paid pertain to a past period. Once TANTRANSCO was established, use of transmission network of TANTRANSCO has to be regulated by the relevant tariff orders of the Regulatory Commission from 2012 onwards.

42. It is relevant to note that once the Regulatory Commission passed the tariff orders in Orders No. 6, 7 and 8 of 2012 extending concessional

charges only in respect of three types of generators, which clearly indicate that no other generator was entitled for such concession on transmission and wheeling charges. The Appellant and similarly placed generators were aware of this order dated 30.03.2012 whereby intra-state transmission tariff and other related charges for all consumers of intra-state transmission lines of TANTRANSCO were fixed. Therefore, one cannot say that the Appellant was not aware of the fact that the said order revised practice of payment of transmission and wheeling charges in kind in respect of all generators. Over and above this, the Order dated 31.07.2012 made it further clear that such concession was extended only to wind, bagasse and biomass based power plants.

43. The Appellant cannot take undue advantage of the fact that 1st Respondent sought clarification; therefore, they get a vested right in the matter. In the impugned order, the Regulatory Commission only clarified that fossil fuel based generation plants are liable to pay in terms of tariff order of the Regulatory Commission that was passed in order No.2 of 2012. Even otherwise, the Appellant was not saddled with the liability of paying charges from 30.03.2012. It is only for the period from 29.07.2016 to 26.02.2017. Even if we presume that wrong tariff is applied by TANGEDCO, the Regulatory Commission cannot be found at fault for rectifying the same on the application of 1st Respondent.

44. In the light of the above discussion and reasoning, we are of the opinion that all contentions raised by the Appellant, both on the issue of no proper notice and on merits, are untenable. Accordingly, the Appeal is dismissed answering the point raised in negative against the Appellant.

45. No order as to costs.

46. Pronounced in the Open Court on this **4th day of December, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

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REPORTABLE / NON-REPORTABLE

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