

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 28th Day of January 2025

PRESENT:

Thiru K.Venkatesan

.... Member

and

Thiru B.Mohan

.... Member (Legal)

R.P.No.2 of 2024

in

M.P. No. 28 of 2023

M/s.Techno Electric and engineering Company Ltd.
1B, Park Plaza,
South Block,
71, Park Street,
Kolkata – 700 016.

**... Petitioner
(Thiru.Rahul Balaji)**

Versus

1. Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Represented by its Chairman & Managing Director,
10th Floor, 144 Anna Salai,
Chennai – 600 002.

2. Chief Financial Controller (General)
144 Anna Salai,
Chennai – 600 002.

**... Respondents
(Thiru.N.Kumanan and
Thiru.A.P.Venkatachalapathy
Standing Counsel for TANGEDCO)**

This Review Petition stands preferred by the Petitioner M/s.Techno Electric and Engineering Company Ltd., with a prayer to delete the following sentence in paragraph 4.9 of the order:

- (i) “However, there are certain incidental issues, which though not agitated in the prayer, finds mention in the averments of the petitioner which also requires resolution to give quietus to all pending issue. Accordingly we proceed to discuss them.”
- (ii) Delete the entirety of paragraph 4.10 and amend the directions in paragraph 4.15 (a)
- (iii) 4.15 (b) of the order as follows:

“a) TANGEDCO is directed to make payments to the petitioner at the full APPC rate without applying any cap whenever the APPC rate does not breach the preferential tariff determined payable to WEG for that corresponding year.

b) Whenever the APPC rate breaches the preferential tariff determined by the Commission, the TANGEDCO is directed to make payments to the petitioner at the 75% of the preferential tariff fixed by the Commission payable to WEG for that corresponding year.”

This Review petition coming up for final hearing on 08-10-2024 in the presence of Thiru.Rahul Balaji, Advocate for the Petitioner and Tvl.N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Respondent and on consideration of

the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

ORDER

1. Contentions of the petitioner :-

1.1 The present petition is filed seeking review of the final order of the Commission in M.P.No.28 of 2023, wherein the Commission, allowed the petition in favour of the petitioner and, held that the action of the Respondent in seeking to automatically extend the direction of resorting to SECI price for fixation of 75% cap at para 5.6.3 of the Tariff Order No.8 of 2020 dated 07.10.2020 of the Commission, which was solely meant for unutilised banked energy to APPC, is patently illegal and violative of tariff orders of the Commission thereby deciding the principal issue in favour of the petitioner and against the Respondent. The petitioner, having succeeded on the merits of the matter, with regard to the challenge to the Impugned Letter and the consequential directions passed by the Commission regarding the payment of the full APPC price, is largely satisfied with the order but has preferred the instant Review Petition in regard to some of the observations and directions that finds place in the order, which according to the Review Petitioner are unconnected to the prayer made in the petition and quite contrary to the averments set out in the petition and thus have to be reviewed being error apparent on the face of record.

1.2. The principal ground for seeking a review is an error apparent on the face of the record, viz., an incorrect position set out in paragraphs 4.9 and 4.10 of the order under review, which are extracted hereunder for ready reference:

4.9. It is clear from the above, that the approval accorded for resort to SECI price for fixation of 75% cap is meant only for encashment price for unutilised banked energy of REC Generators and hence, we have no hesitation to hold that the automatic extension of the direction at para 5.6.3 of tariff order of the Commission which is meant for unutilised banked energy to APPC is patently illegal and violative of tariff orders of the Commission. Hence the main issue is decided against the respondent. However, there are certain incidental issues, which though not agitated in the prayer, finds mention in the averments of the petitioner which also requires resolution to give quietus to all pending issues. Accordingly we proceed to discuss them.

4.10. A point has also been made by the petitioner that the APPC rate is compared with that of the rate fixed during earlier years i.e., at the time of commissioning of the plant for each category of generators for the purpose of fixation of cap. We find nothing amiss with the said approach for the reason that in the present scenario where the APPC has already breached the preferential tariff to the point of no return, it is the preferential tariff at a capped ceiling of 75% which has become the vital factor in the payment to be made to the REC generators in lieu of actual APPC. In other words, the traditional concept of APPC no longer survives with the capped form of preferential tariff at 75% having taken over the field. It is pertinent to point out here that if capping of preferential tariff is not done with reference to the control period in which the plant was commissioned, it would lead to an anomalous situation where the generators who commissioned the plants with different capital cost and other overheads at different point of time would be treated equally and paid the same amount of capped preferential tariff which nothing but a new avatar of the APPC in the present scenario. This, in our view, would amount to discrimination among the generators inter se. Therefore it is our well considered view that for the purpose of payment of preferential tariff at 75% in lieu of APPC, the consideration of the date of commissioning of a generating unit as the crucial factor is the proper yardstick and the same cannot be faulted.

1.3. The consideration of an 'incidental issue' and the finding in paragraph 4.10, as also the consequential directions in paragraphs 4.15(a) and (b) require review. This error

may have arisen due to several petitions on similar issues being filed before the Commission, such as those by TATA Power Company Limited and Grace Infrastructure Private Limited.

1.4. It has been erroneously assumed that the petitioner has also made such submission. However, as a matter of fact, an examination of the averments and written submissions shows that no such position was taken by the petitioner. Rather, the petitioner has reiterated the dynamic nature of the APPC and its comparison with preferential tariff. In fact, such a statement could never have been made by the petitioner, and even if made by any party, could not have been accepted by the Commission, since that would run contrary to the Commission's own earlier orders in M.P.No.16 of 2011 dated 22.03.2012, M.P.No.22 of 2016 dated 28.04.2017, and the Hon'ble APTEL's Judgment in Appeal No.232 of 2017 dated 31.05.2019.

1.5. There is an acceptance of this apparent point made by the petitioner in paragraph 4.10, that the APPC rate is to be compared with the rate fixed at the time of commissioning of the plant for each category of generators, which the Commission has stated it accepts.

1.6. Comparing the APPC rate, being dynamic in nature, with the preferential tariff payable to wind generators for the corresponding year has been the consistent stand of the Commission, even in the earlier case of Simran Wind Project Limited v.

TANGEDCO, M.P.No.16 of 2011 dated 22.03.2012 and the EPA of the Petitioner dated 22.07.2011 in consonance with the same reads as follows:

Clause 5(d):

“The Distribution Licensee agrees to pay the average pooled cost of purchase as determined by the Hon’ble TNERC from time to time and which currently is Rs.2.54 per unit for 2012-13 as per Order No.TNERC/M.O.41/D/RPO/under REC Scheme.”

1.7. The regulatory amendment of capping APPC to 75% of the preferential tariff, as amended in 2013 vide Notification dated 21.01.2013, has also not provided for comparing such a preferential tariff of the control period in which the RE plant was commissioned. The Regulations do not allow for comparison of APPC with the preferential tariff of the control period when the RE plant was commissioned.

1.8. The directives of the Commission in paragraphs 4.15(a) and 4.15(b) regarding the comparison of APPC with the preferential tariff determined by the Commission for the control period in which the RE plant was commissioned are therefore without legal sanction and lack the authority of law, as they constitute a unilateral amendment of the RPO Regulations, apart from being contrary to its own orders and the judgement of the Hon’ble APTEL in Appeal No.232 of 2017.

1.9. Contending so, the Review Petitioner pray to review the order dated 09.07.2024 to the extent set out in the petition.

2. The substratum of the Counter affidavit filed on behalf of the Respondent :-

2.1. The REC Projects have to be paid at the APPC rate that is determined by the commission every year. The TANGEDCO has argued before the Commission as follows:-

- i. The APPC rate is a negotiable one
- ii. Fixed APPC rate of the year to be fixed one for 20 years
- iii. APPC rate should not cross the prevailing preferential tariff rate of Rs.2.75 per unit.

2.2. The very basic reason to request the Commission to put control over APPC rate is, that around 3000 MW of wind projects are under Rs.2.75 rate. If the generators switch over from preferential tariff to REC scheme, they can get the higher APPC rate than their existing preferential Tariff rate of Rs.2.75 per unit.

2.3. The petitioner compares the rates of the APPC rate of a year with the corresponding year preferential tariff rate and approached the Commission allegedly as per the liberty granted by the Hon'ble High Court of Madras in order dt.15.07.2016 in W.P.No.22097 of 2013 and further stated that the petitioner is entitled for the actual APPC rate.

2.4. The Commission nowhere stated that, the APPC rate of a year is to be compared with the preferential tariff rate fixed by the Commission for the control period in which the

RE plant was commissioned to ascertain whether the APPC rates crosses the preferential tariff rate. The APPC rate increased from Rs.2.37 to Rs.2.54 and as there was a possibility of it exceeding the prevailing preferential tariff rate of Rs.2.75/- and hence TANGEDCO requested the Commission to have a control over the APPC rate. The purpose of cap is that the APPC rate and the money value of component should be lower than the preferential tariff rate.

2.5. The Hon'ble Supreme Court of India in its Order dt.13.05.2015 in Civil Appeal No.4417 of 2015 in the case of Hindustan Zinc Ltd. Vs Rajasthan Electricity Regulatory Commission, mandated the adherence to RPO target and upheld the regulation of Rajasthan ERC that the captive consumers and the open access consumers are also duty bound to fulfil the RPO target fixed on them. Based on the above Hon'ble Supreme Court's order, the Gujarat ERC on 01.07.2015 has also amended the regulations to the effect that the consumers of captive generating plants and the open access consumers are also obligated entities.

2.6. The Hon'ble High Court has held that, the regulations which are framed by exercise of the powers under the Electricity Act have the same force as that of a statute. It is a policy decision, of course, in public interest. By operation of law, the rights created to a party under agreement can be annulled. The powers of the CERC under section 79 are administrative and the power under section 178 are legislative. Also, by exercising the legislative powers, the contractual terms can be overridden. The powers of the state

commission under section 181 is pari-materia to that of the Central Commission under section 178. Further, the judgment also clearly spells that the role of the regulatory Commission is twin fold, namely, (1) decision making and (2) specifying terms and conditions for determination of tariff. Therefore, the TNERC has the power not only to determine the tariff but also to impose conditions.”

2.7. Courts have consistently held that the Regulatory Commissions under the Electricity Act, 2003 are the statutory technical bodies, the fixation of tariff is legislative character and the same should be left to such statutory bodies. As stated already, the Hon’ble High Court of Madras, in W.P.No.22097 of 2013 has also upheld the powers of the Commission and, without actually going into the merit of the case, has remanded the matter to the Commission. Therefore, on a thorough analysis of the entire issue with reference to the statutory provisions including the National Electricity Policy, and in consideration of the established procedures and prudent practice in the electricity sector in India with due regard to the pleadings of the respondents that the APPC rate has exceeded the preferential tariff during the year 2013 itself, if the Commission arrives at a conclusion that the APPC rate has breached the preferential tariff, Commission may pass an order that the amendment to the RPO Regulations would be effective from 15.07.2013, the date on which it was notified in the Government Gazettee. In this case, as stated already, the APPC has already breached and as such there is no need for postponement. There is no statutory provision to postpone the regulations which have already come into force and implemented. However, the petitioner, on an isolated

reading of the directions of the Hon'ble High Court of Madras, has filed the above petition based on the incidental observations only. In other words, there is no bar for the Commission to go into the merit of the case and to come to a definite conclusion.

2.8. This petition is neither maintainable in law nor on facts. Inasmuch as the main petition itself is not maintainable, by dismissing the same, no prejudice will be caused to the petitioner. The balance of convenience is clearly in favour of the respondents.

3. Oral arguments advanced on either side heard. Records perused. Relevant provisions of law traversed. Written submissions placed on record on behalf of the Review Petitioner considered.

4. The short but the vital point that arises for consideration is as to whether the order in question deserve to be reviewed as contended by the petitioner and if so, to what extent.

5. Findings of the Commission :-

5.1. The question which arises for consideration in the instant Review Petition is whether the observations and directions of the Commission in the impugned order at para 4.9 and 4.10 fall within the scope of review contemplated under Regulation 43(1) of the TNERC Conduct of Business Regulation 2004. The review petitioner has fairly admitted that with regard to the main relief agitated in the M.P.No.28 of 2023 it has no grievance left and the grievance is only with reference to the incidental observation made in para 4.9 & 4.10 which are as follows :-

“4.9. It is clear from the above, that the approval accorded for resort to SECI price for fixation of 75% cap is meant only for encashment price for unutilised banked energy of REC Generators and hence, we have no hesitation to hold that the automatic extension of the direction at para 5.6.3. of tariff order of the Commission which is meant for unutilised banked energy to APPC is patently illegal and violative of tariff orders of the Commission. Hence the main issue is decided against the respondent. However, there are certain incidental issues, which though not agitated in the prayer, finds mention in the averments of the petitioner which also requires resolution to give quietus to all pending issues. Accordingly we proceed to discuss them.

4.10. A point has also been made by the petitioner that the APPC rate is compared with that of the rate fixed during earlier years i.e., at the time of commissioning of the plant for each category of generators for the purpose of fixation of cap. We find nothing amiss with the said approach for the reason that in the present scenario where the APPC has already breached the preferential tariff to the point of no return, it is the preferential tariff at a capped ceiling of 75% which has become the vital factor in the payment to be made to the REC generators in lieu of actual APPC. In other words, the traditional concept of APPC no longer survives with the capped form of preferential tariff at 75% having taken over the field. It is pertinent to point out here that if capping of preferential tariff is not done with reference to the control period in which the plant was commissioned, it would lead to an anomalous situation where the generators who commissioned the plants with different capital cost and other overheads at different point of time would be treated equally and paid the same amount of capped preferential tariff which is nothing but a new avatar of the APPC in the present scenario. This, in our view, would amount to discrimination among the generators inter se. Therefore it is our well considered view that for the purpose of payment of preferential tariff at 75% in lieu of APPC, the consideration of the date of commissioning of a generating unit as the crucial factor is the proper yardstick and the same cannot be faulted.”

5.2. It is the case of the petitioner that no such averment as seen in para 4.10 was ever made by the petitioner to the effect that APPC is being compared by TANGEDCO with that of the earlier years i.e., at the time of Commissioning of plants. Further, it is the case of the Review Petitioner that the prayer in the M.P. being to set aside only to the encashment of 75% cap for SECI price and not in regard to any other matter, the Commission should not have proceeded to discuss the issue of comparison of APPC rate with the rate fixed in the preferential tariff orders during the earlier years, i.e, at the

time of Commissioning of the plants. Thus, according to the petitioner, the decision of the Commission in M.P.No.28 of 2023 requires review as it is possibly an error due to the filing of several petitions on the similar issues before the Commission such as those by TATA Power and Grace Infrastructure. The petitioner further states that the directions given in sub paras (a) and (b) of para 4.15 of the order of this Commission dated 09.07.2024 in M.P.No.28 of 2023 are directly in teeth of the Judgment of Hon'ble Appellate Tribunal of Electricity in its judgment dated 31.05.2019 in Appeal No.232 of 2017. For the purpose of rendering decision in the present petition, we are not inclined to discuss as to whether the Commission dealt with the issues not raised in the averments of the petitioner. It is not necessary for the reason that it would suffice if it is decided simplicitor whether the impugned order is in consonance with the spirit of the judgment of Hon'ble APTEL or not. Accordingly, we proceed to examine the case for review vis-a-vis the judgment or APTEL.

5.3. Having given our anxious consideration to the plea for review, it is necessary to first examine the portions of the impugned order with reference to Regulation 43(1) of the Conduct of Business Regulation. The Section 43(1) of the Conduct Business of Regulation 2004, permits review of any decision, direction or order made under a mistake of fact or ignorance of material fact or any other error apparent on the face of record. Thus, essential ingredients are threefold, namely a) error apparent on the face of record, b) mistake of fact c) Ignorance of material fact which jointly or severally constitute a case for review.

5.4. The Regulation 43 (1) of the Conduct of Business Regulation 2004, read as follows:-

43 (1) The Commission may on its own or on the application of any of the persons or parties concerned within 30 days of the making of any decision, direction or order, review such decision, directions or orders on the ground that such decision, direction or order was made under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record.

5.5. The sum and substance of the Review Petition filed by the petitioner herein is that the directions given in sub paras (a) and (b) of para 4.15 of the order of this Commission dated 09.07.2024 in M.P.No.28 of 2023 are directly in teeth of the Judgment of Hon'ble Appellate Tribunal of Electricity in its judgment dated 31.05.2019 in Appeal No.232 of 2017, the relevant portions of which are reproduced below :-

“12.2 Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on year to year basis and the proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses over the rate of preferential tariff for that corresponding year.

12.3 The State Commission is directed to issue necessary instructions to respondent No.1 to make payment to the Appellant at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon at the rate provided for in the EPA from the date such capped tariff was effected by Respondent Discom until date of payment to the Appellant.”

5.6. It is the case of the review petitioner that the APPC rate being dynamic in nature, it has to be compared with the preferential tariff of the corresponding year to the year of fixation of APPC and not with the tariff prevailing in the control period in which RE plant was commissioned and to that extent, the directions (a) and (b) issued in paras 4.15 of the impugned order are required to be reviewed. However, according to the petitioner,

the direction (c) at para 4.15 of the impugned order, is in accordance with the directions of the Hon'ble APTEL.

5.7. Per contra, the respondent, in its counter affidavit, has sought to justify the fixation of cap on the APPC rate but has not explicitly disputed the grounds raised by the petitioner for review. A reading of the Counter affidavit does not bring out any objection to the review sought for by the petitioner but the counter affidavit seeks to justify only the cap imposed on APPC. Here, we are not concerned with the question of cap of the APPC but only the with review of the impugned order on the limited point with reference to the inconsistencies between para 4.15 (a) & (b) on the one hand and para 4.15(c) on the other hand and further to decide whether it is in consonance with the judgment Hon'ble APTEL. It is to be observed here that the counter affidavit does not address the basic points raised by the petitioner for review of the impugned order. Hence, insofar as the present case is concerned, we are inclined to decide the issue with reference to the grounds set out by the petitioner in the review petition.

5.8. In order to examine the case for review sought for by the petitioner, it is necessary to reproduce sub paras (a), (b) and (c) of para 4.15 of the order which is sought to be reviewed herein.

4.15. In fine, the following directions are given :

a) TANGEDCO is directed to make payments to the petitioner at the full APPC rate without applying any cap whenever the APPC rate does not breach the preferential tariff determined by the Commission for the control period in which the RE plant was commissioned.

b) Whenever the APPC rate breaches the preferential tariff determined by the Commission, the TANGEDCO is directed to make payments to the petitioner at the 75% of the preferential tariff fixed by the Commission for the control period in which the RE plant was commissioned.

c) Based on the records available with the Commission, the value of the dispute is quantified at an ad hoc claim of Rs.44,94,00,000/- which is subject to final confirmation by both side. The respondent is directed to pay the ad hoc sum of Rs.44,94,00,000/- to the petitioner within one month from the date of this order.

5.9. Having considered the submission of the review petitioner, it is to be seen whether there is any error apparent on the face of record or mistake of fact or ignorance of material facts which constitute a case for review. Let us first go into para 12.2 of the judgment of Hon'ble APTEL. A reading of the para 12.2 of the judgment of Hon'ble APTEL in Appeal No.232 of 2017 makes it clear that the APPC rate being a dynamic one, it shall be compared by the State Commission on year to year basis and the proposed cap would arise in the year in which APPC rate crosses over the preferential tariff of the corresponding year. As may be seen from the observations of Hon'ble APTEL at para 12.2 in Appeal No.232 of 2017, the expression "dynamic" read with another expression "corresponding year", would only mean that the APPC which is dynamic in nature shall be comparable only with the preferential tariff of the immediate corresponding year which is too dynamic. If the APPC which is dynamic in nature is to be compared with the preferential tariff pertaining to the year in which the RE plant was commissioned which is static, the dynamic nature of the APPC would lose its sheen as it would be far ahead or far below the preferential tariff of the earlier years in which the plant was commissioned. In other words, the dynamic nature of the APPC draws its very characteristic of dynamism only from its comparison with the preferential tariff of the

immediate corresponding year. If not for the same, it would not be dynamic but either far ahead or far below the preferential tariff fixed in different control periods.

5.10. It is to be observed here that going by the judgment of Hon'ble APTEL, the dynamic concept attached with the APPC rate has to be aligned only with another dynamic concept which is similar or analogous to the same. In such case, the APPC which is dynamic can go with or align only with the preferential tariff of the corresponding year to the year of fixation of APPC and not with that of the preferential tariff prevailing at the time of commissioning. The reasons are not far to seek as there is yet another good enough reason for the same. The preferential tariff loses its dynamic nature, becomes static and a thing of the past by the advent of the next control period. It could retain its dynamic nature only when it is aligned to the period in proximity to the year of fixation of APPC. We have to fairly admit that we fell in error in assuming that the "corresponding year" as occurring in the judgment of APTEL would only refer to the preferential tariff fixed in the control period in which the plant was commissioned unmindful of the fact that APPC which always remains dynamic and preferential tariff of the previous control period which becomes static after the arrival of the next control period cannot go together and only two dynamic factors i.e., APPC and the preferential tariff of the latest control period can go together. As a natural corollary, the view taken in the impugned order and the leeway given to the effect that APPC could be compared with any preferential tariff of previous control period going by the sole criteria of difference in capital cost among the different generators and the larger perspective of equality among

the generators falls foul as it is not in line with the judgement of APTEL and hits the very basic edifice of dynamic nature woven around the concepts of APPC and the preferential tariff fixed from time to time. Though preferential tariff is also dynamic as APPC, it becomes static upon the fixation of tariff in the next control period. This vital fact was glossed over and overlooked in the impugned order warranting a fit case for review.

5.11. More importantly, in para 11.25 of the judgment in Appeal No.232 of 2017 the Hon'ble Appellate Tribunal referring the comparison of 2006 preferential tariff with that of the APPC rate of 2013-2014 by the Commission proceeded to hold that the said exercise was a faulty one as being heterogeneous. Therefore, it could have never been the import of the decision of the Hon'ble APTEL to mean that the term "corresponding year" would refer to the next succeeding of the year in which the plant was commissioned. In the said circumstances, we have to necessarily hold that present review is maintainable as there was an error apparent on the face of record in regard to the observations in paras 4.15 (a) & 4.15 (b) of the impugned order on the question of interpretation of the expression "corresponding year". The expression, would by necessary implication, refer only to the year corresponding to the year of fixation of APPC rate and not to the corresponding year to the year of commissioning of the plant as per the judgment of Hon'ble APTEL. However, para 4.15(c) is in line with the orders of the Hon'ble APTEL and hence only a formal modification is required to be made to para 4.15 (a) and 4.15 (b) of the order under review.

5.12. One of the prayer sought for by the Review Petitioner is for deletion of the last sentence in para 4.9 and the entire para 4.10 of the order under review. Since this Commission has come to a conclusion that modification has to be done in sub-para (a) and (b) of para 4.15 of the order as indicated above, it is imperative that as a corollary the last sentence in para 4.9 and the entire para 4.10 of the order has to be deleted to facilitate clarity in the order.

5.13. Based on the preceding elaborate discussions and aforesaid findings this Commission decides that the order in question deserved to be reviewed for rendering substantial justice. Accordingly, the point is answered.

6. In the result, the review petition is allowed. The directions given in the sub para (a) & (b) of para 4.15 of the order dated 09.07.2024 passed in M.P.No.28 of 2023 shall stand modified as follows :-

(a) TANGEDCO is directed to make payments to the petitioner at the full APPC rate of the corresponding year without applying any cap whenever the APPC rate does not breach the preferential tariff determined by the Commission in the same / corresponding year.

(b) Whenever the APPC rate breaches the preferential tariff determined by the Commission, the TANGEDCO is directed to make payments to the petitioner at the 75% of the preferential tariff fixed by the Commission in the corresponding year.

(c) Further the last sentence in para 4.09 of the order beginning with the word
“However” and the entire para 4.10 are ordered to be deleted.

Parties directed to bear their respective costs.

(Sd.....)
Member (Legal)

(Sd.....)
Member

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**