BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 40 of 2007

Dated: 29th May, 2009

Coram: Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF:

Tamil Nadu Electricity Board
Through its Chairman
No. 800, Anna Salai,
Chennai ... Appellant

Versus

1. **SAS Hotels And Enterprises Ltd.**
   Through its Managing Director
   No. 3, Mangesh Street,
   T. Nagar,
   Chennai – 600 017

2. **Tamil Nadu Electricity Regulatory Commission**

... Respondents

Counsel for the appellant : Mr. Ramji Srinivasan,
Ms. Mandakini Singh
Mr. Anuj Aggarwal
Mr. Harsh Kaushik
Ms. Vartika Sahay

Counsel for respondents : Mr. G. Umapathy
Mr. Rohit Singh
Mr. A. Leo G. Rozario

Ms. Binu Tamta
Mr. Ranjit Kumar
Mr. Kamal Gupta
Ms. Nisha Narayanan

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is directed against the order dated 26.06.2006 passed by Tamil Nadu Electricity Regulatory Commission (hereinafter called the TNERC or the Commission) in M.P. No. 13 of 2004 titled "M/s. SAS Hotels & Enterprises Ltd. Vs. Tamil Nadu Electricity Board". The appellant is a statutory body constituted by Government of Tamil Nadu under the Electricity (Supply) Act 1948 engaged in the business of generation, transmission and distribution of electricity. The respondent No.1 is a company dealing with real estate business as well as running of hotels. Two of its hotels are Hotel Residency, Chennai and Hotel Residency, Coimbatore. In 1986, the appellant set up a wind farm at Mullaikadu. Keeping in view the requirement of these windmills for wheeling of power, the appellant vide B.P. Ms. (FB) No. 129 (Tech. Br.) during 1986 permitted private parties to install windmill generators for generating power for their own use. The appellant

also decided to permit wheeling of power generated by these windmill generators to the destination of their use through the transmission system of the appellant subject to costs as well as terms and conditions relevant for such wheeling. Subsequently, the appellant issued another order (Permanent) B.P. (Ch.) No. 199 dated 12.10.1989 laying down guidelines and procedures to be followed while installing windmills by private parties and their subsequent tie-ups with appellant's grid. Amongst other conditions laid therein it was specifically mentioned that the entire cost of interfacing of the windmills with the TNEB grid would be required to be borne by the private parties themselves. Banking facilities to such windmill generators were provided by another B.P. (Board proceedings / proceedings of the appellant) Ms. (FB) No. 123 (Tech. Br.), dated 29.03.1990. Further, guidelines were provided by another B.P. Ms. (Ch.) No. 4 dated 06.01.1993. The respondent No.1 vide a letter dated 06.07.1994 sought permission to install three wind electricity generators of 225 KW capacity for generating power at K.Krishnapuram Village at District Coimbatore and to permit the power so generated by them to their hotel premises at Chennai. The appellant permitted respondent No.1 to install three windmills of 225 KW capacities each and to transmit such portion of power generated by the windmills as agreed to the hotel premises of the respondent No.1 and its subsidiary companies. Vide an agreement dated 28.09.1994 the appellant permitted the respondent No.1 to install the windmills and agreed to buy the surplus portion of the

power offered by respondent No.1. The terms and conditions of the agreement entered into under section 44 of the Electricity (Supply) Act 1948 were amenable to amendment from time to time. The appellant had right to withdraw the approval given, without assigning any reason and without any liability to pay compensation. Clause 23 of the agreement further gave right to the appellant to vary from time to time, the tariffs, general and miscellaneous charges and the terms and conditions of supply under the agreement by special or general proceedings. The respondent No.1 installed more unit mills and another agreement dated 24.06.1996, a supplementary Agreement dated 28.10.1996 and three Supplementary Agreements dated 26.06.1997, were executed in respect of three Wind Electricity Generators of 250 KW capacity each. While supplementary agreement dated 28.10.96 contemplated utilizing the energy generated by Hotel Residency, Chennai at HTSC no. 2279, the three supplementary agreements contemplated utilization of the energy generated by the respondent No.1 by Hotel Residency, Coimbatore at HTSC No. 24. All the agreements also stipulated sale of surplus power to the appellant. Prior to entering into three Supplementary Agreements dated 26.06.1997, the appellant vide its order dated 28.05.1997 superseded all its previous orders and permitted the respondent No.1 to sell any surplus energy produced by them after adjustment towards its sister concerns, HTSC No. 22791 and HTSC No. 24 of the appellants. It may be stated here that the tariff structure of the

appellant defines two kinds of consumer categories based on their voltage use i.e. Low Voltage/Tension (LT) consumers and High Voltage/Tension (HT) consumers. Based on usage the consumers have been classified into 19 categories, two amongst being 'Commercial' and 'Industrial' consumers. The tariffs of 'HT commercial' consumers and 'HT industrial' consumers are different. 'HT industrial' consumers pay comparatively lower tariff. As per the TNERC's order dated 15.03.2003, 'HT industrial' tariff was Rs.3.50 per unit, whereas 'HT commercial' tariff was Rs.5/- per unit. The audit committee of the appellant raised objections to the practice of adjusting electricity produced by the wind energy generators against commercial units as wind energy was originally intended for industrial units. The adjustment was allowed for promotion of industrial units in the State but extending the facility to commercial units was causing huge revenue loss to the appellant. Keeping in mind the Audit objection and the legitimate revenue loss to the Board, the appellant passed an order vide its circular dated 26.05.2001 giving 15 days' notice to the Wind Energy Generators for dispensation with the adjustment facility in the commercial services. It was further stated that if the wind energy producers had no industrial Sister Concerns/Subsidiaries the wind energy could be purchased by the appellant Board at Rs.2.70 per unit. The respondent No.1 represented to the appellant to reconsider the said order, pursuant to a request, in a meeting organized to consider the prayer of the respondent No.1, the Director of the

respondent No.1 himself came up with an option to pay the differences between the 'HT industrial' tariff and 'HT commercial' tariff. The proposal was accepted by the Board and accordingly B.P. (Ch.) No. 194 dated 10.07.2001 was issued. Stating that the adjustment of wind energy could be permitted against 'HT commercial' connections, in respect of windmills set up prior to 12.04.2000, subject to payment of difference between 'HT commercial' and 'HT Industrial' Tariff prospectively. The respondent No.1 continued to take the facility of adjustment of the energy produced by its wind energy generators on these conditions. The respondent No.1 on 25.11.2004 filed a petition being M.P. No. 13 of 2004 before the Commission praying for reimbursement of sum of Rs. 69,52,194/- in respect of Hotel Residency, Chennai paid to the appellant towards the difference between the 'HT Commercial' and 'HT Industrial' tariff for the period May, 2001 to September, 2004 and a sum of Rs. 82,34,643/- in respect of Hotel Residency, Coimbatore paid similarly for the period July, 2001 to September, 2004. It also asked for direction to the appellant to permit wheeling of power from K. Krishnapuram to Hotel Residency, Chennai and Hotel Residency, Coimbatore in respect of HTSC No. 22791 and 24 as per agreement dated 23.06.96. The petition was opposed by the appellant. Meanwhile in accordance with provisions of section 42(2) of the Act, the Commission introduced open access in different phases subject to certain conditions and issued 'TNERC - Intra State Open Access Regulations 2005'. The Commission vide its

order No.2 dated 15.05.2006 determined Wheeling Charges @ 5% for Wind Energy. By order No.3 dated 15.05.2006, the Commission, inter alia, held that a generator can adjust the energy on unit-to-unit basis for self use in any HT service.

02) The Commission decided the M.P. No.13 of 2004 by the impugned order on 26.06.2006 holding that B.P. No. 194 dated 10.07.2001 and circular dated 26.05.2001 were invalid. It directed refund of the excess of commercial tariff over industrial tariff with effect from the date of filing of the petition and permitted respondent No.1 to adjust the energy produced by it in exercise of 'Right to Open Access' as envisaged under section 9(2) of the Act.

Impugned order:

03) The Commission observed that neither under the agreement dated 24.06.96, nor under the Electricity (Supply) Act 1948, any permission for transfer of power from the windmills to the hotels of the respondent No.1 was required. The Commission further observed that the variation to the agreement done by the Board would amount to appropriating the energy generated by the windmills which would be against the very essence of the agreements. So far as the appellant's objection to challenge the two B.Ps is concerned, the Commission observed that the respondent No.1 was not barred from challenging the two B.Ps. as it was not one of their suggestions that adjustment of energy be permitted

subject to payment of the difference between the 'HT commercial' and 'HT industrial' tariff. The Commission also held that the agreement could not be altered by issuing the two B.Ps. mentioned earlier, as clause 23 of the agreement did not contemplate varying the contents of clause 20 of the agreement relating to adjustment/billing. According to the Commission, the parties had entered into a bilateral agreement. The Commission further held that the appellant could terminate the agreement only in the event of breach of the agreement as contained in clause 27 of the first agreement dated 24.06.96. Consequently the Commission arrived at a finding that the circulars dated 26.05.01 and the B.P. dated 10.07.01 were not enforceable against the respondent No.1. Consequently the appellant could not retain the money realized by virtue of the B.P. dated 10.07.01 and granted an order to refund the amount collected w.e.f. the date of the petition. The Commission further directed the appellant to wheel power as per the agreement between the parties and the provisions of the Act. The respondent No.1 was allowed to take benefit of the Commission's order No.3 dated 15.05.06, which provided adjustments of wheeled energy to any HT connection, by terminating the existing agreements with the appellant.

Grounds for challenge:

04) The appellant has challenged the impugned decision of the Commission on the following grounds: As per clause 26 of the

agreement the appellant had the right to withdraw the approval given to the respondent No.1 without assigning any reason and without any liability to pay any compensation of any sort which the Commission ignored. There was no agreement between the parties for open access based on Open Access Regulations order dated 15.05.06 which itself was opposed to the tariff order dated 15.03.03 specifying separate tariffs for 'HT industrial' and 'HT commercial' consumption. Further the impugned order is contrary to the Open Access Regulations dated 15.05.06 as the wheeling charges provided therein is much higher than the 2% of the power adjustment as agreed to between the parties. The Commission also erred in holding that clause 23 of the agreement was not attracted to the case and the conditions of the agreement could not have been altered by the appellant by virtue of clause 26 and 23 of the agreement. The Commission also failed to notice that the BP dated 10.07.01 was issued only on the representation by respondent no.1.

05) The appeal is opposed by the respondent No.1 who supports the view of the Commission.

Decision with reasons:

06) Section 44 of the Electricity (Supply) Act 1948 which was in force at the relevant time required the previous consent in writing to the Board (the State Electricity Board like the appellant herein) to establish a new generating station or to extent any major unit or

plant. The appellant who wanted to set up wind energy generating station required permission under section 44 from the appellant Board. The first agreement was entered into between the appellant Board and the respondent No.1 on 28.09.94. It will be proper to extract a few portions of this agreement:

"1. …

2. …

3. …

4. …

5. …

6. …

7. In case where the consumption of the windmills is more than the generation during a particular month it will not be carried forward and billing will be done at an appropriate tariff in force from time to time. The firm agrees to pay the Security Deposit towards this before effecting supply to the windmill. The security deposit as well as other amounts that are required to be deposited from time to time shall be deposited by the firm forthwith on demand by the Board. Otherwise the supply to the windmill shall be cut off without further notice.

8. …

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13. …

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17. …

18. …

19. …

20) The firm agrees that the transactions between the firm and the Board will be settled on a monthly basis and the firm will be billed only for the net excess energy drawn by the firm from the grid at appropriate tariff in force from time to time. If the energy drawn by the firm is less than the power generated by the windmill then the excess energy generated will be adjusted in the next months account subject to the condition that the firm will be allowed to accumulate energy only for a maximum period of 3 months.

21. …

22. …

23. The firm agrees that the Board shall have the right to vary from time to time, the tariffs, general and miscellaneous charges and the terms and conditions of supply under the agreement by special or General Proceedings and the conditions relating to generation of electricity through windmills of the firm.

24. The firm shall also be bound by the provisions of the Indian Electricity Act, 1910, Electricity (supply) Act, 1948, Indian Electricity Rules, 1956 as amended from time to time.

25. The Board shall be at liberty to cancel the permission to operate the firm's windmill generator and to tie up with the Board's grid in case of breach of any of the terms of this agreement by the firm.

26. The Board reserves the right to withdraw the approval given at any time without assigning any reasons therefore without any liability to pay any compensation.

27. This agreement shall remain in force from the date of agreement by the firm till it is terminated. The agreement can be terminated by the firm at anytime by giving three months notice in writing to the Board expressing its

intention to do so the Board can terminate the agreement with the firm at any time by giving three months notice in case of breach of the terms of this agreement by the firm."

07) The supplemental agreement entered into on 28.10.96 follows the earlier agreement of 28.09.94. There was yet another agreement dated 29.06.96 which is worded similarly to the agreement dated 28.09.94.

08) The agreements would show that the necessity to enter into these agreements arose because of the necessity to obtain permission from the appellant Board. The respondent No.1 also wanted to wheel energy to the hotels. For this purpose the respondent No.1 required the facility of the transmission lines of the appellant Board. By the mutual agreements the respondent No.1 obtained the benefit of wheeling through the transmission lines of the appellant Board. By clause 23 the appellant Board reserved the right to vary the tariffs, generation and miscellaneous charges and terms and conditions of supply as well as the conditions relating to sanction for generation of electricity through the windmills. Clause 26 gave the appellant Board the right to withdraw the approval given at any time without assigning any reason. It is not correct to say that clause 23 cannot affect clause 20 of the agreement. Clause 20 deals with tariff, adjustments and billing. Clause 23 grants the Board the right to vary tariff, other miscellaneous charges as well as

other terms and conditions of supply. Clause 26 is more sweeping in as much as it permits the appellant to even withdraw the permission for setting up a new generating plant. Clause 27 permits the company/respondent No.1 to terminate the agreement by giving a notice of three months. The aforesaid clause shows that the Board while permitting the respondent No.1 to set up the windmills retained its rights to withdraw the permission at any subsequent stage. Further the appellant Board while agreeing to wheel energy from the windmills to the hotels retains the rights to unilaterally change the tariffs and the charges. The appellant Board relying upon clause No.23 withdrew its consent to wheel energy. This step was taken vide the circular dated 26.05.01 as the audit objection pointed out that the respondent No.1 was liable to pay for the energy consumed at 'HT commercial' rate whereas the energy was purchased from the mills at the 'HT industrial' rates. The respondent No.1 did not immediately challenge the circular of 26.05.01. Instead it made a representation to reconsider the circular. Following the representation there was a meeting of Mr.Thiru Ravi Appasamy Director of the respondent No.1 with the Chief Financial Controller/Revenue of the appellant on 13.06.2001. What transpired in the meeting is contained in the note prepared by the Board on that day. The note is extracted below:

"*TAMILNADU ELECTRICITY BOARD*

O/o CE/NCES,
Chennai-2.

NOTE:

Sub : Adjustment of wind energy generation in H.T. Commercial Services – Discontinuance – Clarification – Reg.

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In the Chairman's Memo No: CE/NCES/EE/2/F.Pvt. WF-Adj/D.75/2001, dt. 26-5-2001, instructions were issued stating that wind energy generated and adjusted against H.T.Commercial Service is not permissible under existing provisions and hence it should be stopped by giving 15 days notice to such wind mill developers. In case there is no existence of H.T.Industrial Service in respect of wind mill developers for adjustment, the Board has to purchase the wind power at Rs.2.70 per unit.

Based on the above instructions, SEs/Distribution have stopped adjusting the wind energy in H.T.Commercial Services. Many such wind mill developers have represented against this. One such wind mill developers, M/s. SAS Enterprises, in their letter dt.7-6-2001, have represented that they have 3 Nos. wind mills in 1994 and 9 Nos. in 1996 and the generated power is adjusted against their H.T.Commercial Services. They have requested to reconsider the issue and permit them to

adjust the wind mill generation against their H.T.Commercial Services.

Thiru Ravi Appasamy, Director of M/s. SAS Enterprises had a meeting with Chief Financial Controller/Revenue on 13-6-2001 and the EE/NCES has also participated in the meeting, since CE/NCES was away.

During the discussion, Thiru Ravi appasamy, represented that they have no H.T.Industrial Services Connection for adjusting the wind energy and they have invested the money on the wind mill based on the policy of the Board and power purchase agreement entered into with the Board and therefore, the existing practice should be continued since the investment made for generating wind energy is based on the directions of the Board. During discussion, he informed that the company is agreeable to pay the difference in unit rates between H.T.Commercial and Industrial tariffs, if permitted to adjust the wind energy against the H.T.Commercial Services. But he is not agreeable for selling the entire power to the Board at Rs.2.70 per unit since the agreement is to adjust the wind energy against their H.T.Commercial Services.

The subject was also discussed with CIAO who is of the opinion that since the Board has allowed the consumer to adjust the wind energy against the H.T.Commercial Services so far, the Board may examine the views of the consumer for allowing to adjust the wind energy against H.T.Commercial Services, duly collecting the difference in the rates between H.T.Commercial and Industrial tariffs.

The Board may insist the policy of non-adjustment of wind mill energy against the H.T.Commercial Services for the new wind mill developers. For the existing wind mill developers who are already getting their energy adjusted against commercial consumption as per the PPA already in force, the Board may allow to adjust the wind mill generation against the H.T.Commercial Services, provided the difference in the unit rates between H.T.Commercial and H.T.Industrial tariffs is borne by the consumers.

If approved, a draft clarificatory order to the Distribution Circles on, the above lines put up below may also be approved."

09) The impugned B.P. was issued only to give effect to what was agreed to in that meeting. This part of the facts has not been

disputed by respondent No1. The B.P. dated 10.07.01 incorporated the very terms and conditions as agreed to by both sides. It is true that the parties could have opted for executing another supplementary agreement. However, the agreements of 1994 and 1996 also permitted the change to be brought about by issuing an order from the office of the appellant Board. The change therefore is binding on the respondent No.1. The impugned B.P. dated 10.07.01 cannot be said to be invalid for any reason.

10) With the coming into force of the Act in 2003, the generating company became entitled, as a matter of right, to open access for wheeling the energy generated by it to the destination of its use. Section 42 of the Electricity Act 2003 requires a State Electricity Regulatory Commission to introduce open access subject to conditions like cross subsidies, charges for wheeling etc. The relevant provision, namely section 42(2) of the Electricity Act 2003 is extracted below:

> "*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 addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized 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.]"

11) The aforesaid provision provided a right to the electricity generator to have open access of the lines of the appellant for wheeling its power from the generating station to its hotels. Such right was subject to payment of wheeling charges and cross subsidy surcharge, if any. This facility was required from the date on which such right was introduced by the State Commission. The date of course has to be within one year from the appointed date i.e. 10.06.03. When the respondent No.1 filed the application M.P. 13 of 2004 before the Commission on 25.11.04 it had become entitled to open access. This entitlement does not automatically bring the agreement between the parties to an end. The respondent No.1 could have terminated the agreement by giving a notice of three months as provided in clause 27, extracted above. The respondent No.1 instead of serving the notice under clause 27 opted to get the relief by filing the application before the Commission. The application itself could be treated to be a notice of termination. The respondent No.1 therefore with effect from the date of termination of the contract asked for open access only on the payment of the wheeling charges as may have been prescribed by the Commission and was no more liable to pay the difference between the 'HT commercial' and 'HT industrial' tariff.

12) The Commission has directed refund of the money realized by the appellant Board by way of difference between the 'HT commercial' and 'HT industrial' tariff with effect from the date of filing of the petition, i.e. 25.11.04 to 15.05.06. The Commission simultaneously directed the appellant Board to permit wheeling of power from the windmills to the hotel. The Commission directed further that with effect from 15.05.06 its own order No.3 dated 15.05.06 regarding adjustment of wheeled energy is put to effect. However, the Commission further directed that before availing of the benefit of the order dated 15.05.06 it was necessary to terminate the already existing agreements.

13) The aforesaid provision replaced the contractual right of wheeling by a statutory right to open access to the lines of the appellant for wheeling power from the generating station to the destination of use. Such right is, however, subject to payment of wheeling charges and cross subsidy charge, if any. This facility, as a matter of legal right, was available from the date on which such right was introduced by the State Commission. The date of course has to be within one year from the appointed date i.e. 10.06.03. It can be said that when the respondent No.1 filed an application M.P. 13 of 2004 before the Commission on 25.11.04 it had become entitled to such open access although the Commission issued its order for unit to unit adjustment for self consumption only on 15.05.06. This entitlement does not automatically bring the

agreements between the parties to an end. In fact, the impugned order itself requires the existing agreements to be terminated before the benefit of the order dated 15.05.06 can be availed of. The respondent No.1 could have terminated the agreement by giving a notice of three months as provided in clause 27, extracted above, and seek open access under the Act. The respondent No. 1 instead of serving a notice under clause 27 opted to get a relief by filing an application before the Commission.

14) The Commission directed refund of money realized by the appellant Board by way of difference in 'HT Commercial' and 'HT Industrial' tariff with effect from the date of filing of the petition i.e. 25.11.04 to 15.05.06. The Commission simultaneously directed the appellant Board to permit wheeling of power from the windmills to the hotels. The Commission further directed that with effect from 15.05.06 its own order No.3 dated 15.05.06 regarding adjustment of wheeled energy would be put to effect. However, the Commission said that before availing of the benefit of the order dated 15.05.06 it was necessary to terminate the already existing agreements.

15) In view of our findings, the respondent No.1 is entitled to the benefit of open access under section 42(2) of the Act with effect from the date it asked for statutory right by terminating the contractual one. The respondent No.1 did not formally issue a notice of termination of the contracts before asking for a contractual right of

the open access. The filing of the petition before the Commission is an intimation of the decision of the respondent No.1 to terminate the contract. If the filing of the petition is treated as notice of termination, the contract between the parties, as amended by B.P. dated 10.07.01 would be deemed to have been terminated on 25.02.05. With effect from 25.02.05 the respondent No.1 would be entitled to get the power wheeled through open access as provided by 42(2) of the Act, subject to payment of wheeling charges. As disclosed in the order dated 15.05.06 wheeling charge as revised on 27.05.01 was 5% of the wheeled energy hence with effect from 25.02.05 while the respondent No.1 was entitled to recover the difference between the 'HT Commercial' and 'HT Industrial' tariff already paid by it, it is liable to pay the wheeling charges as per the extant rate.

16) Hence, the appeal is allowed in part. For the period commencing from 25.02.05, the respondent No.1 is allowed to recover the amount paid towards the difference between the 'HT Commercial' and 'HT Industrial' tariff for the energy wheeled subject to adjustment of the wheeling charges to which it is liable. The M.P. No. 13 of 2004 is decided on these terms.

17) Pronounced in open court on this ***29th day of May, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member