Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO. 93 of 2009

Dated: 8th January, 2010.

Present :Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. BAJAJ, Technical Member

In the matter of:

Tamil Nadu Electricity Board. …Appellant
144, Anna Salai,
Chennai-600 002.

Versus

1. Tamil Nadu Electricity Regulatory Commission
TIDCO Office Building,
19A, Rukmani Lakshmipathi Salai,
Masrshells Road,
Chennai-600 008.

2. Indian Wind Energy Association
PHD House,
4th Floor, Opp. Asian Games Villages,
Siri Fort Road,
New Delhi- 110 016.

… Respondents

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Ashok Panigrahi
Mr. Suvendu S. Dash
Mr. M.G. Ramachandran
Ms. Vartika Sahay

Counsel for the Respondent (s): Mr. Sanjay Sen

Mr. Achintya Dvivedi
Ms. Mandakini Ghosh
Mr. M. Mishra
Ms. Sikha Ohri
Mr. Matin Gupta
Mr. Samiron Borkatky

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

Tamil Nadu Electricity Board is the Appellant herein. This Appeal has been filed by the Appellant challenging the order passed by the Tamil Nadu State Electricity Regulatory Commission directing the Appellant not to collect the Infrastructure Development Charges (IDC) from the Indian Wind Energy Association, the Respondent herein.

The short facts are as follows:-

The Indian Wind Energy Association, the 2nd Respondent, herein filed a Petition before the State Commission praying for setting aside the circular issued by the TNEB in No. BP FP (146) dated 4.7.2005 by which the Infrastructure Development Charges (IDC) were imposed and for directing the TNEB to refund the amount already collected from the Wind Energy Developers under the head Infrastructure Development Charges mainly on

the ground that the said circular was not in accordance with the State Commission Wind Energy Tariff order dated 15.05.2006.

2. The case put forth by the Indian Wind Energy Association before the State Commission is as follows:-

"The State Commission by the order dated 15.5.2006 while fixing the wind tariff in the matter of power projects and allied issues in respect of Non-Conventional Energy Sources (NCES) based generating plant and NCES based co-generating plant, has not approved levy of IDC which has been claimed by the TNEB through the circular dated 4.7.2005. By the circular dated 4.7.2005 the TNEB has levied IDC to the extent of Rs. 28.75 lakhs on all wind energy generators. This is without the approval of the State Commission. This amounts to over ruling the regulations approved by the State Commission. Therefore, the circular dated 4.7.2005 is to be set aside".

The TNEB put forth its reply on these grounds which are as follows:-

i) The Board originally issued a circular No. BP 251 dated 28.10.1996 for collecting the IDC. The cost of power for

transformers, sub-stations, materials and line had increased over the years. Therefore, the IDC was enhanced to Rs. 25.75 lakhs from Rs. 15.75 lakhs through the order dated 21.8.2004. Then the cost of expenditure has further increased and the Board issued another circular dated 4.7.2005 enhancing the IDC from Rs. 25.75 to 28.75 lakhs per MW.

ii) Though the wind mills are generating electricity, it is not possible for a single generator to create, operate and maintain the Sub-station as per Section 10 of the Electricity Act, 2003. Therefore, the Board has created the regulations for evacuation facilities. For having created the evacuation facilities as agreed between the parties, the Electricity Board has been collecting IDC by DCW basis.

iii) By extending certain benefits to wind energy generators such as power feeders, incentive, adjustment of energy, the Board had to incur a heavy loss. These are compensated to some extent by way of IDC. This collection of amount is only in pursuance of a mutual agreement between the parties. Therefore, the approval for the same from the State Commission is not necessary.

4. The State Commission after considering the rival contentions urged by both the parties, allowed the Petition filed by Indian Wind Energy Association by the order dated 19.9.2008, holding that the Appellant, the Electricity Board has no jurisdiction to issue such circular imposing the IDC, in contravention of Section 32 (3) of the Act especially when the Board had not approached the State Commission by a separate Petition for the approval of the levy of IDC from the Non-Conventional Energy Source generators. This order passed by the State Commission has been challenged in this Appeal.

5. The learned counsel for the Appellant, TNEB, would make the following submissions while assailing the order impugned by the State Commission:-

i) Since the electricity produced by the wind mills was smaller compared to the conventional source of energy and because of the fact that the generation of electricity is seasonal, the private operators could not extend facilities to evacuate the electricity and hence as a historical necessity, the TNEB had to take the responsibility of erecting the separate sub stations and power transformers exclusively for the cluster of wind generators in that region. This was established long prior to the passing of the Electricity Act, 2003. So the

proportionate cost of these sub-stations and associated incoming transmission lines was being collected from the wind energy developers from 1993 onwards in the name of IDC. The price fixed through the circular has been periodically enhanced, as the Board had to collect the IDC from the wind developers periodically.

ii) There is no necessity for the Appellant, the Board, to erect the sub-station and power transformers and transmission lines at that place. Since the wind turbine manufacturers wanted to do business, they requested the Appellant for erection of power transformers for evacuation of the power generated by the wind mills. Based on this request and the ground realities, the Appellant, erected sub-stations, transformer and lines on being agreed by the wind developers that they would pay the infrastructure cost. Accordingly, the circulars have been issued from the year 1993.

iv) By the order dated 15.5.2006, passed by the State Commission, the various benefits have been given by the Appellant to the wind developers, the Board has to incur a very heavy loss. If the IDC amount is not collected from the wind developers, who are the beneficiaries, the Board will be put to heavy loss and the functioning of the Appellant will be highly affected.

v) The tariff order passed on 15.5.2006 can not be made applicable to the present claim made by the wind energy mills associations. As a matter of fact, the State Commission has failed to appreciate that it is the wind developers, who are the power generators, approached the Appellant to establish the sub-stations and strengthen the lines at that place and only on agreeing that the payment for the infrastructure will be made and in that context only, the Appellant, by incurring its own expenditure had established sub-stations, though it is the duty of the power generators to establish and maintain the same under Section 10 (1) of the Act as their own.

6. In reply to the above contentions the learned counsel for the Respondent No. 2, Indian Wind Energy Association would make the following submissions.

i) The learned counsel for the Appellant, Board, has merely stated that under Section 10 of the Electricity Act, the generating company has the duty to establish, operate and maintain the lines, sub-stations etc. and the cost of such lines should be

borne by the generating companies only but the Appellant had made their investment by erecting the sub-stations by incurring their own expenditure and therefore, they are entitled to recover the cost from the developers by imposing the IDC. Thus on perusal of Section 10 of the Act and also the policy report of the Forum of Regulators, it is quite clear that the inter connection point in the case of renewable energy is the HV side of the pooling sub-station and therefore, the very basis of the Appellant's submission is on a wrong foundation.

ii) From the recommendations of the Working Group, it is clear that the evacuation cost for renewable energy generation should be part of the capax plants and has to be addressed through ARR. So the logic and legality of the obligation on the part of the licensee to provide suitable measures of connectivity with the grid. The creation of the Appellant sub-station and connection to pooling sub-station with the grid sub-station by the licensee is a suitable measure towards the connectivity with the grid.

iii) Admittedly, in the present case the Appellant Board has not approached the State Commission for approval of the IDC.

Unless this process is followed, the charges levied by the licensee are liable to be declared illegal. In support of this contention, the learned counsel for the Respondent has cited (2009) 3 SCC 754.

7. Bearing in mind the rival contentions urged by the learned counsel for both the parties, let us deal with the issue now.

The issue is this:-

"Whether the Appellant is entitled to collect the IDC from the Wind Developers without getting the approval of the same from the State Commission?"

i) Prior to passing of Electricity Act 2003, TNEB was the sole custodian and the authority for all functions with respect to generation and transmission of electricity in the state. The wind mills are developed in small villages in two districts namely Tirunelveli and Udumalpet. There were no developmental activities. Since the electricity produced by the wind mills were smaller compared to the Conventional Source of Energy, the small private operators in this sector could not erect facilities to evacuate

the electricity generated into the state transmission units. Admittedly, the Appellant is not duty bound to erect sub-station/power transformers at those places. This is purely the duty of the Wind Developers to erect the same at the expenditure incurred by them under Section 10 of the Act. However, the Appellant had to take on the responsibility of erecting separate sub-stations for power transformers executed for the benefit of the small size wind generators in that region as requested by them. Thus erection and functioning of the sub-station were historical necessity. Depending upon the wind mills capacity, the expenditure for erecting the sub-stations were collected from the wind generating companies on the basis of that proportionate cost in the name of IDC. These facilities extended by the Board were not part of the intra state transmission system. In order to streamline the collection of cost uniformly, the Appellant originally fixed the cost @ Rs. 15.75 lakhs per MW and collected from the Wind Developers. In 2004-05 the wind capacity addition was increased. Then, the Appellant, Board was forced to evacuate the wind power over 230 KV network. In that process the Board had to erect 230 KV/110 KV sub-stations in those districts which

were probable wind generator areas. The cost of establishments of a one 110/33 KV sub-station with associated 33 KV feeder lines worked out to Rs. 21.75 lakhs. Similarly, the cost of establishing a 230/33 KV sub-station together with associated 33 KV feeder lines works out to Rs. 18 lakhs per MW. Thus totally it works out to around Rs. 40 lakhs per MW. Though the requirement varies with the wind mills, the Appellant, Board collected the energy cost @ Rs. 28.75 lakhs per MW towards IDC. Even before the enactment of the Electricity Act, 2003 the Board, which was the sole custodian of generation, had to carry out the contractual obligation of erecting the sub-station.

ii) Under Section 10 (1) of the Act, it is the duty of the generating company to establish, operate and maintain the generating stations. As per Section 3 of the Electricity Act, 2003, the Central Government has to announce a tariff policy from time to time. Accordingly, the Govt. of India had issued a tariff policy. As per this, the Central Electricity Regulatory Commission (CERC) has to issue the regulations for the power procurement. Accordingly, the Central Commission on 16.09.2009 framed the Non-Conventional Energy Source Regulation, 2009. As per these regulations, the

inter-connection point means the inter face point of energy generating facility with the transmission system or the distribution system as the case may be. Accordingly, the inter connection point of the Appellant is 110 KV level for 33/110 KV sub-station and 230/33 KV sub-station. Thus, it is clear that as per Section 10 (1) and as per Central Commission regulations, it is the duty of the generating companies to carry out the works of erecting sub-station and allied inter connection lines. But as agreed by the parties concerned the Appellant erected the power transformers/transmission lines at his own cost for the benefit of wind generating companies. In order to permit NCES energy, the Appellant took the pain to complete the above work and therefore collected the proportionate cost as IDC from the wind developers since the small wind developers could not execute, erect and maintain the transmission network. This expenditure incurred by the Appellant can not be included in the tariff as it is a burden on the general public. It can not be disputed that evacuation beyond the inter connection point is the responsibility of State Transmission Utility. Similarly, evacuation of power before the inter connection point is the responsibility of the generating

company. If the evacuation work up to inter connection point is carried out by the generator and bring the 110 KV line to connect the consumers to the electricity 110 KV grid, then the Appellant will have to carry out the erection work beyond 110 KV point.

iii) It is the responsibility of the generating company to erect sub-station by line and bring the same to connect to TNEB. The term duty occurs in Section 10 (1) clearly indicate that the generating companies are legally bound to establish and operate sub-station.

iv) The filing of Aggregate Revenue Requirement (ARR) with the State Commission is entirely for a different purpose. The ARR is to ensure that the tariff to the consumers of the Appellant for recovery of its expenses besides generating revenue. It has nothing to do with the levy of IDC, which is completely turned out of the contractual obligation of the two parties.

8. The reliance placed by the State Commission on Section 86 (1)(b) of the Electricity Act is not correct, in so far as the facts of the present case is concerned. Section 86 (1)(a) provides for determination of tariff for generation, supply and transmission and wheeling only. It does not speak about any determination of infrastructure facilities which

was provided by the Appellant as and when the generator appeals to the Appellant Board for the purpose of evacuation of power especially in the absence of any necessity for the Appellant board to establish any sub-station etc.

9. Let us now refer to the specific findings given by the State Commission for giving a direction to TNEB not to collect any IDC in the future. According to the State Commission the finding is as follows:-

"Section 32 (3) of the Act which is the only provision which contemplate the levy of charges does not authorize levy of infrastructure development charges. Regulations do not contain any specific provision for the levy of development charges upon open access customers which includes generation companies. The wind developers are allowed to evacuate their wind power without depending on the Respondent Board for creating infrastructure. Therefore, there is no justification for levy of infrastructure development charges".

10. It is not disputed that IDC have been collected by the Electricity Board to establish the sub-station, inter connecting lines and transformers. The circular issued in 1993 as well as other circulars issued in the

subsequent period and other records would clearly show that only at the request of the wind developers the Appellant, Board, erected sub-stations and transformers to provide benefit to the generators. On the basis of these circulars, the payments have been made. No challenge has been made on the said payment before any forum earlier.

11. Having held that under Section 10 of the Indian Electricity Act, 2003, it is the duty of the generating companies to erect, maintain and execute works, the State Commission can not go back and find that the Appellant is not entitled to collect the IDC from the generators on the basis of the incorrect reading of the Section 32 (3) of the Electricity Act, 2003.

12. As indicated above, the mandate of Section 10 (1) of the Act can not be over looked, since it is the bounden duty of the generating companies to establish, operate and maintain the sub-stations. If the evacuation work after the inter connection point is carried out by the generators as per Section 10 (1) and bring the 110 KV inter connection line or 230 KV inter connection line, as the case may be, to connect the same to the Appellant's 110 KV or 230 KV grid, then the Appellant will have to take care of the evacuation work beyond 110 KV or 230 KV inter connection point by installing a bulk

at the inter connection point. In view of the above situation, the expenditure has been incurred by the Appellant for establishing, operating and maintaining the sub-stations on behalf of the generators to do the evacuation work up to the inter connection point. The Generating Company is liable to pay the said expenditure to the Appellant in the name of IDC fixed by the Appellant through various circulars as per the mutual arrangement and mutual agreement between the parties.

13. In view of the above, the impugned order dated 19.9.2008 is incorrect in law and therefore the same is liable to be set aside. Accordingly set aside. The Appellant is entitled to continue to collect IDC from the generators so long as the facility is availed of by the generators, as per the circular.

14. The Appeal is allowed. No order as to the cost.

(H.L. Bajaj)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 8th January, 2010.

INDEX: Reportable/Non-Reportable.