

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar

.... Chairman

and

Thiru K.Venkatasamy

.... Member (Legal)

T.A. No.4 of 2021

Sree Rengaraj Ispat Industries P. Ltd.
SIPCOT Industrial Growth Centre
Perundurai – 638 052
Repd. by its Director S.Shyam Sundar

.... Petitioner
(Thiru S.P. Parthasarathy
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation Distribution and Corporation Ltd.
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.
2. The Chief Finance Controller / Revenue TANGEDCO (Accounts Branch)
144, Anna Salai
Chennai – 600 002.
3. The Superintending Engineer
Erode Electricity Distribution Circle
TANGEDCO
Erode – 638 009
4. Tamil Nadu Transmission Company (TANTRANSCO)
144, Anna Salai
Chennai – 600 002.

5. State Load Dispatch Centre
C/o. TANTRANSCO
144, Anna Salai
Chennai – 600 002.

.... Respondents
(Thiru M.Gopinathan
Standing Counsel for R1 to R3 and
Thiru Anil Kumar, Standing Counsel for
R4 and R5)

Dates of hearing : **12-01-2021; 02-02-2021; 02-03-2021;
16-03-2021 and 30-03-2021**

Date of Order : **29-06-2021**

The T.A.No.4 of 2021 came up for final hearing on 30-03-2021 and the Commission upon perusing all documents connected with the above case and after hearing the submissions of both the parties, passes the following:-

ORDER

1. Prayer of the Petitioner in T.A. No.4 of 2021:-

The main prayer of the petitioner in this T.A. No. 4 of 2021 is to call for the records of the 3rd Respondent's impugned demands dated 30-04-2020 bearing Lr. No. SE/EEDC/A/Cs.Br./DFC/AO/AAO/HT/AS/F.HT 379 (MTOA Ch-Transco)/R.No. 82/20 and dated 30-05-2020 bearing Lr. No. SE/EEDC/A/Cs.Br./DFC/AO/AAO/HT/AS/F.HT.379/(MTOA Ch-Transco)/R.No.116/20 seeking to levy Open Access Charges for the period April, 2020 and May 2020 respectively and to quash the same to the extent of the period of lock down as notified by the Central and State Governments for the period when there was no utilization of the Transmission and

Distribution infrastructure of the Respondents for the Medium Term Open Access due to force majeure conditions and pass such further or other order(s) as deemed fit.

2. Facts of the Case:-

2.1. The petitioner has filed a Writ Petition in W.P. No.8429 of 2020 before the Hon'ble High Court, Madras with the following prayer to call for the records of the 3rd Respondent's impugned demands dated 30-04-2020 bearing Lr. No. SE/EEDC/A/Cs.Br./DFC/AO/AAO/HT/AS/F.HT 379 (MTOA Ch-Transco)/R.No. 82/20 and dated 30-05-2020 bearing Lr. No. SE/EEDC/A/Cs.Br./DFC/AO/ AAO/HT/AS/ F.HT.379/(MTOA Ch-Transco)/R.No.116/20 seeking to levy Open Access Charges for the period April, 2020 and May 2020 and to quash the same to the extent of the period of lock down as notified by the Central and State Governments for the period when there was no utilization of the Transmission and Distribution infrastructure of the Respondents for the Medium Term Open Access due to force majeure conditions and pass such further or other order(s) as deemed fit.

2.2. The Hon'ble High Court, in a batch of cases in W.P. No. 7737, 7738, 7739, 8415, 8429, 8484 and 9321 of 2020 has passed a Common Order on 17-09-2020 as follows:-

“(a) The issues involved in these writ petitions viz., whether the petitioners are liable to pay the open access charges during the lock-down period under the Grid Connectivity and Intra-State Open Access Regulations, 2014 and under the Agreements entered into between the parties, are referred to the TNERC and the TNERC is directed to adjudicate upon hearing the parties and pass final orders.

(b) the TNERC shall issue notice to both the petitioners as well as to the respondents herein and fix a date and direct them to submit their written submissions and also hear the counsel appearing on either side, if they insist for oral arguments also.

(c) the TNERC shall pass final orders within a period of four weeks from the date of commencement of the proceedings and

(d) the protection given by this Court while passing interim orders on 12-06-2020 shall continue until final orders are passed by TNERC. Thereafter, the orders passed by TNERC shall determine the liability of the petitioners.”

Pursuant to the above orders of the Hon'ble High Court, this Commission has treated the affidavit filed in the Writ Petition as Transferred Application and issued notice to all parties and heard them also.

3. Contentions of the Petitioner:-

3.1. The Petitioner is a company engaged in the generation of electricity using coal as a raw material and has set up its captive power plants in Perundurai with the capacity of 30 + 8 MW.

3.2. The said thermal power plants of the Petitioner company are both recognized captive generators and the Petitioner has been supplying power to over several captive consumers pursuant to the Medium Term Open Access Agreements entered into between the Petitioner and the 3rd Respondent.

3.3. The Petitioner entered into the Medium Term Open Access Agreement (“MTOA”) in respect for 26.3 MW of power dated 23-07-2019 to wheel the power generated by it to its captive consumers.

3.4. In light of the said MTOA's, the petitioner has been duly remitting all of the charges payable by it for the effective and efficient use of the grid and transmission lines owned and operated by the 5th respondent, such as Transmission and Wheeling

charges, Scheduling and System Operation charges, Grid Support charges, Transmission loss etc.

3.5. These charges are fixed and levied for utilization of the transmission and distribution infrastructure and has been fixed for normal operational times.

3.6. The Electricity Act, 2003 was introduced with the objective of delicensing the power sector thereby increasing private participation. The Act also envisages a gradual reduction in the involvement of the State Governments in all aspects of the power sector. Even the regulation of the power sector was to be performed by independent State Electricity Regulatory Commissions.

3.7. Keeping with the above objective, the 2003 Act introduced the concept of “Open Access” and the same is defined in Section 2(47) as follows:

“Open Access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

3.8. Section 39 of the 2003 Act reads as follows:

39(2) The functions of State Transmission Utility shall be –

(a) ...

(b) ...

(c) ...

(d) *To provide non-discriminatory open access to its transmission system for use by-*

(i) *any licensee or generating company on payment of the transmission charges; or*

(ii) *any consumer as and when such open access is provided by the State Commission under Sub-Section(2) of Section 42, on*

payment of transmission charges and a surcharge thereon, as may be specified by the State Commission.

- (iii) *Provided that such surcharge shall be utilized for the purpose of meeting the requirement of current level of cross-subsidy:*
- (iv) *Provided further that such surcharge and cross subsidy shall be progressively reduced in the manner as may be specified by the State Commission:*
- (v) *Provided also that the manner of payment and utilization of surcharge shall be specified by the State Commission:*
- (vi) *Provided also that surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use”.*

3.9. Clause (d) of Sub-section (2) of Section 39 of the Act, while dealing with the functions of State Transmission Utility (for short 'STU') requires it to give non-discriminatory open access for use by any licensee or generating company on payment of the transmission charges or any consumer, after open access is provided by the State Commission under Sub-section (2) of Section 42 of the Act on payment of transmission charges and surcharge thereon as may be specified by the State Commission.

3.10. As per clause (2) of section 9, every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use.

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may

be: Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

3.11. The levy of open access charges is primarily to compensate the state transmission utilities ('STU') such as the 5th Respondent herein for allowing such captive generators to use the common grid for supply of power to captive consumers.

3.12. The Agreements for the Medium Term Open Access require payment of charges for Open Access for utilization of the Transmission and Distribution infrastructure under the various heads, viz. Transmission Charges, Scheduling Charges, System Operation Charges and Wheeling Charges. For the purpose of this petition, that none of the activities for which the charges are levied were conducted during the period subject matter of the petition, wherein the petitioner is submitting that such charges are not leviable.

3.13. Early March, 2020 India was faced with having to combat the global pandemic COVID-19. Given the high infection rates and no available vaccine to curb the spread of the virus, the Central Government was constrained to impose a nationwide lockdown starting March 24th 2020.

3.14. The Ministry of Home Affairs, Union of India issued notification bearing No.40-3/2020-DM-I(A) along with Guidelines by exercising its powers under Section 10(2)(I) of the National Disaster Management Act, 2005 in which all industrial establishments were directed to be completely shut down. The said notification was to take effect from 25th March 2020 and stay in force for a period of 21 days, when issued.

3.15. The Petitioner Company being an industrial establishment was forced to close

all of its operations in its Perundurai thermal power plants, especially since, all of the Petitioner's captive consumers shut down their operations. Therefore, there was absolutely no demand for electricity. Naturally, there was no generation of electricity by the Petitioner company during the last week of March, 2020 and consequently no electricity was transmitted to any consumer.

3.16. The given situation is one that falls within the meaning of force majeure as defined in clause 1(a) of the MTOAs:

“Force Majeure” means any event which is beyond the control of the parties to this agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or could not be prevented and which substantially affect the performance of either party such as but not limited to:

- (i) Natural disasters (earthquake, hurricane, floods);*
- (ii) Wars, riots, civil commotions and other upheavals;*
- (iii) Grid / distribution system's failure not attributable to the parties hereto;”*

3.17At clause 13, the said MTOA also stipulates that no party is liable for the claim of any loss or damage when the said party has failed to act due to an act of force majeure:

13. Force Majeure:

Both the parties shall ensure compliance of the terms and conditions of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of the failure to carry out the terms of the agreement to extent that such failure is due to force majeure. But any party claiming the benefit of this clause shall satisfy the other party of the existance of such event(s);

3.18.The Petitioner Company immediately issued a letter dated 06-05-2020 and 27-05-2020 to the 4th Respondent stating that the petitioner would be unable to perform its

obligation under the MTOAs in the given circumstances. The Petitioner also stated that the situation at hand is one that falls within the scope of the force majeure clause contained in the MTOAs, thereby releasing the petitioner from its obligations under the contract which provides for such payment in view of the prevailing force majeure conditions.

3.19. There has been no electricity generation or transmission during the last week of March 2020, i.e. March 25th 2020 to March 31st 2020 and thereafter from April 1st to April 30th and it was continuing. Therefore, there cannot be any levy of open access charges in as much as the Petitioner has not used the grid for any supply of electricity.

3.20. The Tamil Nadu Electricity Regulatory Commission (TNERC) has come to issue an order dated 04.05.2020 in S.M.P.No.2 of 2020. In the said order, the TNERC has permitted the 1st Respondent Distribution Licensee to collect monthly minimum charges from HT consumers equal to only 20% of the contracted demand since the operations stood suspended. Further, the said order also does away with the requirement to prove that the industrial establishment was indeed under lockdown by obtaining necessary certificates since the lockdown order is applicable throughout the country. The Demand Charges for a consumer are equivalent conceptually to the Open Access charges for a generator / captive consumer. Therefore, notwithstanding the full waiver available due to force majeure conditions, atleast the 80% reduction ought to have automatically been granted.

3.21. There has been no generation or transmission using the grid of the 5th Respondent State Transmission Utility or the Distribution system of the Distribution licensee, the Petitioner ought not to be mulcted with such charges. It is clear that the

Petitioner company could not generate any electricity in light of the direction dated 24.03.2020 issued by the Ministry of Home Affairs, Union Government. Consequently, the Petitioner company is not liable to pay any open access charges for the period March 25th 2020 to March 31st 2020 and thereafter from April 1st to April 30th in view of the continued lockdown till 17th May 2020. The impugned demands dated 30.04.2020 to be modified and the other Demands dated 30.05.2020 and therefore liable to be set aside.

3.22. The Petitioner being a captive generating plant is vested with the positive right to open access and the same cannot be denied by any action of the Respondents by demanding charges when they are not payable.

3.23. The impugned demand letters has failed take into consideration the fact that there has indeed been no generation of electricity by the Petitioner Company since March 25th 2020 in view of the Nation Wide Lockdown directions issued by the Ministry of Home Affairs on 24th March 2020 and extended subsequently by the Central and State Governments. Consequently, there was no transmission of electricity through 1st and 5th Respondent owned grid to the Petitioner's captive consumers. Therefore, the Petitioner is not liable to pay any open access charges.

3.24. The impugned demands fail to recognize that charges by their very nature, unlike taxes can be paid only when the actual service or activity takes place and thus in the absence of the activity having been done and no service being provided, such charges cannot be levied.

3.25. The 4th Respondent has failed to understand the object of the Open Access

charges is to compensate the 1st and 5th Respondent for the use of its electricity grid, distribution network and transmission lines by the Petitioner Company for transmitting the electricity generated by it to its captive consumers. When there has been no such transmission or distribution given a complete shutdown of all generation activities, such charges cannot be levied for the said period of shut down of operations.

3.26. The 4th Respondent has failed to take into consideration the Petitioner's letter dated 06-05-2020 and 27-05-2020 in which the Petitioner has duly informed the 4th Respondent that all of its generation activities have been shut down due to the lock down order dated 24th March 2020.

4. Contentions of the Respondents:-

4.1. Whether the COVID-19 lockdown is a Force Majeure event or not is not the issue. The real issue is whether the Force Majeure would get attracted in the instant cases to deny the TANTRANSCO the legitimate demands raised towards charges such as transmission, Scheduling & System Operation charges payable in terms of 2014 Regulations and MTOA Agreement. In this regard, the expression/language employed in 2014 Regulations and Force Majeure clause in the MTOA Agreement, are extracted hereunder.

“...no party shall be liable for any claim for any loss or damage whatsoever arising out of the failure to carry out the terms of the agreement”.

4.2. The said clause is, certainly, not meant to evade the charges payable during the force of the agreement. In other words, it visualizes a situation of any loss or damage that may cause on such failure to carry out the terms of the agreement.

4.3. The MTOA Agreement is between the petitioner and the TANTRANSCO/TANGEDCO. In case of a failure to adhere to the terms and conditions of the MTOA agreement by a party, it is for the other party to compel the compliance and, in case, such failure falls within the Force Majeure clause, such party's failure is protected by Force Majeure clause and, consequently, the other party is restrained from claiming any loss or damage, if any.

4.4. The TANTRANSCO has not declared that the Generators / Writ Petitioners herein have failed to comply the terms and conditions of the MTOA Agreement. In the absence of such notifying of failure by the TANTRANSCO, to the Generators / Petitioners, the petitioner's letters immediately after lockdown are nothing but a self-serving one to evade the legitimate demand by sheer mis-interpretation of the provisions of law and contractual obligations. In the light of the above, the letter heavily relied on by the petitioner as if it had already notified has no legal basis and, in fact, if at all communicated to State Load Despatch Centre (SLDC), it can only be simply construed as a communication required to be provided by any Generator to the SLDC in all times of starting / stoppage of generation and injection into Grid, in terms of Tamil Nadu Electricity Grid Code Notification No.TNERC /GC / 13 /1 Dated 19.10.2005, Chapter 7 Para (3) – (iv) and nothing more. However, it is the case of the petitioner's that they have sent letters to the TANGEDCO's Superintending Engineer concerned and hence no sanctity can be given to those alleged communications.

4.5. The petitioner is aware of the order of the Commission in SMP No. 2 of

2020 dated 04.05.2020 which pertains to demand charges payable to the TANGEDCO by its HT consumers. The HT consumers and Associations representing them have approached the Commission, which is the statutory State Commission under the Electricity Act, 2003 and the Hon'ble TNERC has passed an order. Against which, the TANGEDCO has filed Appeal No. 102 of 2020 before the Hon'ble Appellate Tribunal for Electricity in terms of Section 111 of the Electricity Act, 2003 and the Hon'ble APTEL, on 18.05.2020, has fully seized of the entire matter, heard the Appellant / TANGEDCO, Respondent Associations and also two Intervener Associations and passed a detailed interim order, dated 18.05.2020 in Appeal No. 102 of 2020 and posted the Appeal for further hearing to 08.06.2020. In the meanwhile, in the said subject, WP (MD) Nos. 6162, 6166, 6208 and 6233 of 2020 came to be filed and the Hon'ble Madurai Bench of the Hon'ble High Court was pleased to categorically dismiss the contentions that the Writ Petitions are not maintainable and disposed the Writ Petitions on 26.05.2020 by a common order, *inter-alia*, holding that the Statutory Authorities under the Electricity Act, 2003 are competent.

4.6. Moreover, the MTOA agreement and the terms and conditions relied upon by the Petitioners were the verbatim the same as contained in 2014 Regulations framed by the Commission in exercise of its powers conferred under the Electricity Act, 2003 and as such has a statutory backing. If the Petitioners approach the Commission, the competent technical body under the Electricity Act, 2003 and the framer of the Regulations and the subject contract conditions, certainly, the Commission will be in a better position to appreciate the intention

including the practice followed in the energy sector in India.

4.7. The contention of the petitioner that the bills raised for the last week of March 2020 and the entire April 2020 month should be quashed since no power was generated or wheeled and transmitted is incorrect on the grounds that the transmission charges and the scheduling and system operation charges payable by the Petitioner are fixed in nature and is to be paid for the capacity allotted to the Petitioner as per the regulations. These charges do not vary with the quantum of generation.

4.8. Further, the Petitioner has not made payment towards the bills for Transmission charges, Scheduling and System Operation charges raised by the 3rd respondent for the month of April 2020.

4.9. The open access charges payable by the open access customers, are determined by the Commission based on the relevant Acts, Regulations, Policies etc., for the utilization of the transmission, distribution network and services of SLDC. The transmission charges are determined by the Commission in such a way that the total Aggregate Revenue Requirement (ARR) of TANTRANSCO for a year, as determined by the Commission, is recovered from all the Long Term and Medium-Term Open Access Customers. The transmission charges are fixed on the basis of per MW per day and the charge is fixed in nature. The contention of the petitioner that these charges have been fixed for normal operational times and this respondent has arbitrarily raised the bills levying open access charges for the lock down period for April 2020 and May 2020 is incorrect.

4.10. In respect of the averments in Para 8 to 12 that the provisions of Electricity Act 2003 and the perception of the petitioner about these provisions have only been mentioned. With regard to the averments in Para 13 it is stated that the petitioner has extracted the provisions of the Grid Connectivity and Open Access Regulation, 2014.

4.11. Chapter 5 Regulation 20 (2) of the very Grid Connectivity and the Intra-State Open Access Regulation 2014 reads as follows:-

“Existing Long-Term Open Access and Medium-Term Open Access customers (including existing distribution licensees and generating companies) shall share the Annual Transmission Charges (ATC) of the State Transmission Utility or transmission licensee, as determined by the Commission in the ARR for the relevant year, in the ratio of their allotted capacities. Transmission Charges payable by other Long-Term Open Access, Medium-Term Open Access and Short-Term Open Access customers to the STU or Transmission Licensee shall be determined as under:

$$\text{Transmission Charges} = \text{ATC} / (\text{ACs} \times 365) \text{ (in Rs. /MW/day)}$$

Where,

ATC = Annual Transmission Charges determined by the Commission for the transmission system of the STU/Transmission Licensee for the relevant year.

ACs = Sum of Capacities allocated to all Long - term and Medium - term Open Access customers in MW.”

4.12. From the above, it is evident that the transmission charges payable by the Open Access customers are based on the allotted capacity for the period agreed upon in the agreement executed between the Petitioner and this Respondent. The 5th Respondent's network was available for transmission of power during the subject lock down period. Hence levying of open access charges on the petitioner

for the agreed capacity of this subject period (i.e., Last Week of March and Whole of April) is correct.

4.13. Similarly, Scheduling Charges will have to be paid for the entire contract period since the generator is connected to the grid and has to declare the capacity to be scheduled every day even if DC (Declared Capacity) is zero and the SLDC has to monitor the generator company. The System Operation charges is fixed in MW/day basis and is being collected for making the infrastructure of SLDC available for the open access customers. These charges should also be paid for the allotted MW and fixed in nature and the contentions of the petitioner mentioned in para 15 and 16 are all matter of record.

4.14. As far as the respondent is concerned the obligation of providing the transmission network to the petitioner as per the terms and conditions of the agreement were complied with and the transmission network of this respondent was made available during the period disputed by the Petitioner without any interruption. The contention of the petitioner that there was absolutely no demand for electricity for his captive consumes is an issue between the petitioner and their captive users and this respondent is in no way responsible for any difficulties met out by the petitioner.

4.15. The petitioner cannot take shelter under the Force Majeure Clause in the agreement for the following reasons:

- Transmission and Distribution of Electricity comes under

essential service and it is the responsibility of the respondent to keep available the transmission network at any point of period mentioned in the agreement.

- Moreover, the COVID pandemic has not been declared as a criteria for invoking the Force Majeure Clause by any competent authority of the state which owns the Transmission Corporation Limited. Hence, this contention of the petitioner is liable to be discarded.

4.16. The Petitioner's contention in Para 21 are untenable. The claim of the Respondent is entirely governed by the Provisions of the Grid Connectivity and Intra-state Regulations 2014 and the contents of the agreement both of which are well within the knowledge of the Petitioner. Hence, the letter of the Petitioner was not replied. The charges payable by the Petitioner are fixed in nature and not based on the usage.

4.17. As per Regulation 59 of the Hon'ble TNERC's Terms and Conditions for Determination of Tariff Regulations 2005 the Transmission Tariff Charges comprises of the following components:

- a. Interest on Loan Capital
- b. Depreciation
- c. Operation and Maintenance expenses
- d. Interest on working capital and
- e. Return on Equity

4.18. As per the Regulation 61 of the above-mentioned Tariff Regulations notified by the Commission, it has been specified that full annual transmission charges

shall be recoverable at the target availability of 98%. In as much as the petitioner was fully available, the charges must be paid by the petitioner and other similar open access customers to enable the respondent to recover the entire charges. Out of 15 fossil fuel generators only 3 of them have paid for the bills raised for the month of April 2020.

4.19. The petitioner's sister concern TANGEDCO has also paid all the transmission charges to the Central Transmission Utility (Power Grid Corporation) for the power drawn from the Central Generating Stations on the same analogy that the transmission capacity has already been allotted to them.

4.20. The very order of the Commission mentioned by the Petitioner has been challenged by the TANGEDCO and the appeal is pending before the Hon'ble APTEL and the order is awaited.

4.21. The respondent has to honour all the financial commitments towards Project cost and Operation cost viz. Payment of interest charges for the project loans overhead cost like Employees cost, Administration related expenses, Repair and Maintenance and other day to day operational expenses, Interest on Working Capital and Repayment of Loan borrowed for construction of Transmission Projects. The revenue viz. Transmission charges for transmission activity and Scheduling and System Operation charges for the SLDC activities are the major source of revenue through which these commitments are to be honored by the 4th and 5th respondents.

4.22. For payment of interest to the lenders the respondent has not got any waiver of interest charges or any concession relating to financial charges for the loans availed for the development of the transmission network. Hence, the contention of the petitioner is incorrect, and the 5th respondent must levy all the open access charges for the lock down period also.

4.23. The contentions of the petitioner that it was under the impression that this respondent would consider their request in the letter dated 06.05.2020 has no relevance for this respondent as the impression of the petitioner is of his own.

4.24. The contentions of the petitioner that the invoices under question by this respondent is an act of extracting money from the petitioner is overreaching and not in good taste. The respondent has clarified and has given reasonable justification for having raised the invoices on the petitioner.

4.25. In the event of non-payment of the charges under dispute, the respondent will be forced to act in accordance with the provisions of the TNERC Grid Connectivity Regulations 2014 and with reference to the contents of the MTOA agreement dated 23.07.2019 executed between the petitioner and this respondent.

4.26. The grounds raised by the petitioner are all misleading and the petitioner has not made out any case for maintaining this Petition.

5. Common Written Submissions filed on behalf of the Petitioners:-

5.1. The Grid Connectivity & Intra State Open Access Regulations, 2014 and Agreement provide for a force majeure clause which covers the lockdown due to the ongoing Covid-19 pandemic.

a. The Covid-19 pandemic falls within the meaning of force majeure as defined in clause 1(a) of the MTOA, which provides as thus:

““Force Majeure” means any event which is beyond the control of the parties to this agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or could not be prevented and which substantially affect the performance of either party such as but not limited to:

(i) Natural disasters (earthquakes, hurricanes, floods);

(ii) Wars, riots, commotions and other upheavals;

(iii) Grid/distribution system’s failure not attributable to the parties hereto;”

b. At clause 13, the said MTOA also stipulates that no party is liable for the claim of any loss or damage when the said party has failed to act due to an act of force majeure:

“13. Force Majeure

Both the parties shall ensure compliance of the terms and conditions of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of the failure to carry out the terms of the agreement to extent that such failure is due to force majeure. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such event(s);”

5.2. The Open Access Regulations, 2014 specifically provide for Force Majeure

“46. Force Majeure. –

(1) Any event which is beyond the control of the parties to the open access agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either party such as, but not limited to, the following shall be classified as force majeure events for the purpose of these Regulations. - (i) natural disasters (earthquakes, hurricane, floods); (ii) wars, riots or Civil Commotions and other upheavals; and (iii) grid / distribution system’s failure not attributable to parties hereto.

(2) Both the parties to the open access agreement shall ensure compliance of the terms and conditions of the agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the open access agreement to the extent that such failure is due to force majeure. But, any party claiming the benefit of the force majeure shall satisfy the other party of the existence of such event(s)".

5.3. The lockdown due to the ongoing Covid-19 pandemic is a force majeure event and the same is not disputed by the Respondents. Furthermore, the Petitioner, vide its letter dated 06.05.2020 and further email dated 27.05.2020 had communicated their inability to perform its obligations under the MTOA in the given circumstances and requested to waive the Excess Open Access Charges for the relevant periods. Therefore, there cannot be a levy of open access charges in as much as the Petitioner has not used the grid for supply of electricity. The levy being in the nature of charges are use and services, during periods of force majeure due to a National disaster, there cannot be a levy of the charges since there is no provision of services or utilisation of the facilities.

5.4. The issue is now squarely covered by a judgment of the Hon'ble Madras High Court. In a recent decision of the High Court of Madras in R. Narayanan v. The Government of Tamil Nadu and Ors., W.P. (MD) No. 19596 of 2020 and W.M.P. (MD) Nos. 16318 and 16320 of 2020. The Nagercoil Municipal Corporation (Municipal Corporation) had conducted a public tender cum auction sale of licenses to occupy (License) shops in a bus stand. The petitioner therein was one of the successful bidders, who offered to pay a sum of INR 1,15,000 as

a monthly fee for the License (License Fee). The Municipal Corporation issued the License to the petitioner for a tenure of three years commencing from 1 November 2019. The petitioner paid one-year's License Fee in advance payment to the Municipal Corporation.

5.5. On 24 March 2020, the National Disaster Management Authority (NDMA) exercising its powers under Section 6(2) of the Disaster Management Act, 2005 issued an order directing all authorities to take measures to counter the spread of the global pandemic Covid-19 across the country. In pursuance of the directions issued by NDMA, the Government of Tamil Nadu (Government) issued orders which led to the closing of the bus stand and the petitioner's shop therein. Having been prevented from accessing the shop, the petitioner could not run his business when the restrictions were effective. After suffering from considerable economic losses, the petitioner decided not to renew his License even though there was a clause that permitted the same. In the meanwhile, the Municipal Corporation intended to adjust the License Fee paid in advance by the petitioner against the outstanding dues for the time that the shop remained closed. Therefore, the petitioner approached the Madras High Court (High Court) praying that the Municipal Corporation should entirely waive off the requirement to pay License Fee from 24 March 2020 till 6 September 2020 and further grant a partial waiver for the subsequent period. The respondents, i.e., the Government and the Municipal Corporation contended that the petitioner was contractually obligated to pay the License Fee and that any supervening events did not excuse him.

However, given the licensees' hardship, the Government passed an order (Order) to waive off payment of license fee from 1 April 2020 to 31 May 2020. Thus, the Government contended that the petitioner could not seek relief that travelled beyond the terms of the License and the Order.

5.6. The High Court held that there was a more significant reason to deem the lockdown as a force majeure event that would release the petitioner. It was emphasized that the petitioner in the instant matter, had not contracted with a private party, but the Municipal Corporation which was a state instrumentality vested with constitutional status. Since one of the parties in the present dispute was the State, the High Court decided that it would be justified in applying the principles of reasonableness and fairness. The High Court placed reliance upon the decision of the Hon'ble Supreme Court in the case of *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* wherein it was held that the State and its authorities have to act just, fair and reasonable in all their activities including the ones falling within the domain of contracts. The State could not indulge in rack-renting, profiteering and whimsical or unreasonable evictions or bargains. Similarly, in *Bharat Petroleum Corpn. Ltd. v. Maddula Ratnavalli*, the Hon'ble Supreme Court held that the State while acting as a landlord or a tenant, must act in a bona fide and non-arbitrary manner, when the same is likely to affect the right of others prejudicially.

5.7. Applying the ratio of the cases mentioned above, the High Court held that

the terms of License must be interpreted with regard to Article 14 of the Indian Constitution. The High Court further held that there was no merit in the contentions of the respondents as they themselves chose to treat the lockdown as a force majeure event by offering relaxations in the License Fee for the period from 1 April 2020 and 31 May 2020. The High Court reiterated that the reason for granting a waiver for April and May was economic hardship, which also held good for the entirety of the lockdown period. The respondents had directed the petitioner not to open the shop till 6 September 2020. Therefore, the High Court held that the petitioner was entitled to the benefit of complete waiver of License Fee from 1 June 2020 to 6 September 2020. Therefore, the petitioner was allowed to call upon the respondents to revisit the quantum of License Fee from the period after lifting the lockdown.

5.8. In the present case, the consumer Industries were directed to be closed during the lockdown, therefore the generators could not operate as there cannot be a consumer using any power. This situation was a direct result of the lockdown notifications. Therefore the present situation is directly covered by the decision of the Hon'ble Madras High Court.

5.9. The extent of the impact the lockdown has been recognised by this Commission.

- a. The Commission, after assessing the severity of the situation, issued an order dated 04.05.2020 in S.M.P. No.2 of 2020. In the said order, the TANGEDCO was permitted to collect monthly

minimum charges from HT consumers equal to only 20% of the contract demand since the operations stood suspended. Further, the said order also does away with the requirement to prove that the industrial establishment was indeed under lock down by obtaining necessary certificates since the lockdown order is applicable throughout the country. Therefore, since there was no transmission of electricity through the Respondents' grid to the Petitioner's captive consumers, the Petitioner is not liable to pay any open access charges.

- b. The said aspect therefore clearly recognises that lockdown restrictions would apply as a situation beyond the control of parties where minimum charges alone would be paid.
- c. In the present case, since there are no minimum charges payable, applying the same principle no charges would be payable. Such an interpretation would be consistent with the stand that the Hon'ble TNERC has already taken.

5.10. The nature of Open access is in the form of a charge and not fixed like a tax.

- a. The levy of Open access charges is primarily to compensate the state transmission utilities for allowing such captive generators to use the common grid for supply of power to captive consumers. Therefore, since the activities for which the OA charges are levied

were not conducted during the lockdown period due to a complete shutdown of all generation activities, such charges for the relevant period are not leviable.

- b. The demands of the Superintending Engineer fail to recognise that the OA charges, by their very nature, unlike taxes, can be paid only when the actual service or activity takes place and thus in the absence of the activity having been done and no service being provided, such charges cannot be levied.
- c. It is admitted by the Respondents that its entire consumer base have not used the grid or open access facilities in any manner during the lockdown due to Covid-19 pandemic, for the purposes of captive consumption due to the complete shutdown.
- d. The OA charges are not fixed charges. A bare perusal of the heads of charges such as System Operation charges, Scheduling charges etc. show that they are not fixed charges but are charges for the provision of open access facilities. Further, the levy of wheeling and transmission charges contemplates utilisation of the system. Pertinently, no provision in the Regulations or in the MTOA mandate that these charges are fixed in nature or are minimum charges and are to be paid under all circumstances. This is for the simple reason that the charges were never contemplated to be minimum or fixed charges such as in the case of a minimum demand or energy charge which a consumer has to pay.

- e. Even assuming, without admitting that the OA charges are fixed in nature, the issue at hand is that there existed a force majeure event that temporarily frustrated the very purpose of the Agreement and thereby, suspended the whole Agreement. This must be read with the fact that the only obligation of the Petitioner vis-à-vis its counter party was the payment of charges. Therefore, the petitioner would stand discharged from its payment obligations under the agreement, whether the charges are fixed or otherwise.
- f. Whether or not the charges are fixed in nature is irrelevant in so far as TANGEDCO and TANTRANSCO, vide the inclusion of such a force majeure clause in the regulations and the concerned agreement, have recognised that such charges can be suspended in force measure circumstances where the contract itself stands suspended by virtue of its purpose itself having been temporarily frustrated. There has admittedly been no provision of services or utilisation of facilities during the lockdown period and in such circumstances, any levy of charges would amount to unjust enrichment by TANTRANSCO.
- g. Further, there is no loss that is caused to the TANGEDCO/TANTRANSCO in real terms. The Tariff Charges are fixed on the basis of the ARR. The recoveries are therefore made on that basis by way of the monthly charges. If during any period the charges are not collected, it does not mean that the TANTRANSCO

is prejudiced as any accumulated recoveries would have to be added on to its ARR for future recoveries. Further, the TANTRASCO has itself benefited by way of reduced charges during lockdown as notified by the Ministry of Power and the grid authorities. Therefore there is in effect no real loss caused to the TANTRASCO.

- h. On the other hand if charges are collected even when there is no use, the same would be to the detriment of the generator which had been disabled from using the facilities and this would be wholly arbitrary and unreasonable.

6. Common Written Submission filed on behalf of the Respondents:-

6.1 The tariff determined by the Commission is only single part Tariff and it does not have any variable cost. The Commission has determined the LTOA Charges for FY2017-18 based on the ARR. The ARR is determined for the Transmission Business after deducting all miscellaneous Income and other Income. The contention of the petitioner that these charges have been fixed for normal operational times and the Respondent has arbitrarily raised the bills levying open access charges for the lock down period from 25th March 2020 is incorrect.

6.2 Chapter 5 Regulation 20 (2) of the Grid Connectivity and the Intra State Open Access Regulations, 2014 is extracted below:

"Existing Long-Term Open Access (LTOA) Customers and Medium-Term Open Access (MTOA) Customers (including existing distribution licensees and generating companies) shall share the Annual Transmission Charges (ATC) of the State Transmission Utility or transmission licensee, as

determined by the Commission in the ARR for the relevant year, in the ratio of their allotted capacities. Transmission charges payable by other LTOA, MTOA and STOA Customers to the STU or Transmission Licensee shall be determined as under:

$$\text{Transmission Charges} = \text{ATC} / (\text{ACs} \times 365) \text{ (in Rs./MW/Day)}$$

Where,

ATC = Annual Transmission Charges determined

The transmission charges shall be determined after following the procedure outlined in Chapter II ".

6.3. TNERC's Terms and Conditions for determination of Tariff Regulations, 2005 regulation 59 deals with the Transmission Tariff Charges which is extracted below:-

"59. Transmission Tariff Charges:

The tariff for transmission of electricity by a transmission system shall comprise recovery of annual transmission charges consisting of the following, computed as per the principles outlined in Chapter III of these Regulations.

- i) Interest on Loan Capital;
- ii) Depreciation;
- iii) Operation and Maintenance Expenses (O & M Expenses);
- iv) Interest on Working Capital a normative availability; and;
- v) Return on Equity:

The annual transmission charges computed as per the regulation shall be total aggregate revenue requirement of the STU/Transmission licensee. The following shall be deducted from the total revenue requirement.

a) Transmission Charges collected from the short term intra state open access consumers, captive power plant and generating stations using Non-Conventional Energy Sources.

b) Income from other business to the extent of portion to be passed on to the beneficiaries.

c) Reactive Energy Charges and Transmission Charges received from CTU for use of facilities of the licensee/STU.

Till such time a common transmission tariff is evolved to maintain consistency in transmission pricing framework in the interstate and the state transmission system of the monthly transmission charges payable by the Distribution licensee and other long term intra state open access consumers shall be based on the capacity allocated to each beneficiaries as detailed below:

$$\frac{TC - (a+b+c)}{12SCL} \times CL$$

Where TC = Annual Transmission Charges

a = Total transmission charges by the short term open access consumers

b = Income from other business to the extent of portion to be passed on to the beneficiaries

c = Reactive Energy Charges and Transmission charges received from CTU for use of facilities of the licensee / STU.

CL = Allotted capacity to the long-term transmission customers

SCL = Sum of allotted Transmission capacity to all the long term open access customers of the intrastate transmission system.”

6.4. The Commission has determined the LTOA Transmission Charges based on the allocated transmission capacity. The Transmission charges determined by the Commission are Rs./MW/Day which is as follows:

The approved transmission charges for LTOA/STOA

Sl. No.	Particulars	UoM	Formula	FY2017-18
1.	LTOA Transmission Charges	Rs./MW/Day	A	3037.30
2.	STOA Transmission Charges	Rs./MW/Hr	B = (A x 100%)/24	126.55

6.5. In the present petition, whether, the COVID-19 Lockdown is a Force Majeure event or not is not the issue. The real issue is whether the Force Majeure would

get attracted in the instant case to deny TANTRANSCO its legitimate demand raised towards minimum fixed charges such as transmission, scheduling and system operation charges payable in terms of Grid Connectivity and Intra State Open Access Regulations, 2014 and MTOA Agreement. In this regard, it is submitted that the expression/language employed in 2014 Regulations and Force Majeure clause in MTOA Agreement, are extracted hereunder:

Quote:

“.....no party shall be liable for any claim for any loss or damage whatsoever arising out of the failure to carry out the terms of agreement”

Unquote:

The above is very relevant. The said clause is certainly, not meant to deny the charges payable during the force of the agreement. In other words, it visualizes a situation of any loss or damage that may be caused on such failure to carry out the terms of agreement”.

6.6 The Petitioners are generators supplying power to captive consumers. The MTOA Agreement entered into with TANGEDCO/TANTRANSCO is for the parallel operation of the CGP holder's Captive Generating Plant and wheeling of energy (Power) from such Captive Generating Plant to the destination of use through *the* Transmission/Distribution network of the STU/Distribution Licensee.

6.7. The pleadings of the petitioners under the heading “Coronavirus (Covid-19) and Nation-wide lockdown” in the affidavits filed in support of the present petitions to be a Force Majeure Event is disputed.

6.8. Assuming but without admitting that the Covid-19 did constitute a Force Majeure Event, the MTOA/STOA does not entitle any benefit of waiver to the petitioners. *Clause 12/13 of the MTOA/STOA is specific excluding any claim for any loss or damage. The charges payable by the petitioners are detailed in Clause-6 of the MTOA/STOA. The MTOA/STOA does not stipulate suspension of the payment during Force Majeure Event. Taking into consideration the Covid-19 situation, the respondent had restricted its claim only to the charges payable under Clause-6(a) & (c) of the MTOA/STOA. The respondent has not claimed for any loss or charges as contained in Clause 6(b), (d) to (h), though they are entitled to. Since the Force Majeure clause contained in the MTOA/STOA is specific, the same has to be interpreted accordingly and the Petitioners are not entitled to general principles of Frustration of Contract as contained in Section 56 of the Contract Act. Further the infrastructure provided by the Respondent was available, the respondent continued to provide energy to domestic users and industries which were functioning. The Respondent alone cannot be mulcted with liability.*

6.9. *TANTRANSCO has not declared that the Generators/Petitioners herein have failed to comply with the terms and conditions of the MTOA Agreement. In the absence of such notifying of failure by the TANTRANSCO, to the Generators/Petitioners, the petitioners letter immediately after the announcement of lockdown are nothing but a self -serving one to evade the legitimate demand by sheer misinterpretation of the provisions of law and contractual obligations. In the*

light of the above, the letter notifying about their inability to Generate and supply to captive consumers or third parties due to lockdown, and heavily relied on by the petitioner as if it had already notified has no legal basis and, in fact, if at all communicated to State Load Dispatch Centre (SLDC), it can only be simply construed as a communication required to be provided by any Generator to the SLDC in all times of starting/stoppage of generation and injection into the Grid, in terms of Tamil Nadu Electricity Grid Code Notification No. TNERC/GC/13/1, dated 19-10-2005, Chapter 7 para (3)(iv) and nothing more. However, it is the case of the petitioner's that they have sent letters to the Superintending Engineer's concerned of TANGEDCO about stoppage of Generation. It is needless to state that the same will not absolve the petitioners from making payment as per the MTOA / STOA.

6.10. TNERC's Order in SMP No.2 of 2020, dated 4-5-2020, pertains to the demand charges payable by the HT Consumers. The HT Consumers and Associations representing them have approached the Commission, which is the State Commission under the Electricity Act, 2003 and the Commission has passed an Order. TANGEDCO filed an Appeal before Hon'ble Appellate Tribunal for Electricity (APTEL) vide Appeal No. 102 of 2020 and the Appeal is still pending before Hon'ble APTE L.

6.11 Clause No. 6 of MTOA Agreement deals with the "Charges". The same is extracted below:

- a) Transmission and Wheeling Charges - Transmission and Wheeling Charges shall be payable by the CGP holder as per the order of the Commission for the time*

- being in force;*
- b) *Losses to be paid in kind - The CGP holder agrees to compensate the average loss from the point of injection to the point of drawal as per the order of the Commission for the time being in force;*
- c) *Scheduling ad System Operation Charges - These Charges shall be payable as per the Order of the Commission for the time being in force;*
- d) *Grid availability/Grid Support Charges:*
- i) *In case of outage of generator the power drawn by the Captive Generating Plant for startup and other purpose shall be charged at the rate fixed in the Commission order for the time being in force;*
- ii) *When the scheduled generation is not maintained by the CGP holder and when the drawl by the captive user from the Transmission/Distribution network is more than the generation in the Captive generation plant, the charges shall be as per the orders of the Commission.*

6.12. The Aggregate Revenue Requirement of TANTRANSCO for the MYT Period from FY 2016-17 to FY 2018-19 have been approved by the Commission and the Commission has also determined the Transmission Charges in its Order in T.P. No. 2 of 2017, dated 11-08-2017. The Transmission Tariff is a single part tariff and only the minimum Fixed Charges as applicable and no variable charges are demanded or collected for the allotted transmission capacity.

6.13 In the Tariff Order, the Commission has considered the total Allotted Transmission capacity for the system as a whole and as per 5.3.3 the Allotted Transmission capacity considered by the Commission for the FY 2017-18 is show in the following Table:-

Sl. No.	Particulars	Allotted Capacity for TANGEDCO	Allotted Capacity for LTOA (MW)	Total Allotted Capacity (MW)
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		(MW)		
1	Wind (Non-REC)	2188	5130	7319
2	Biomass (Non-REC)	218	-	218
3	Co-generation (Non-REC)	659	-	659
4	Solar (Non-REC)	1529	-	1529
5	Own Thermal Stations	6987	-	6987
6	IPP	814	-	814
7	CGS	6156	-	6156
8	CPP	74	-	74
9	Wind (REC)	432	412	844
10	Biomass (REC)	2	10	12
11	Solar (REC)	-	25	25
12	State Own Co-gen	155	-	155
13	Long Term Power Purchase through bidding	3330	-	3330
14	Grand Total	22545	5577	28122

6.14. In the above Tariff Order, based on the total Allotted Capacity, the Commission has determined the LTOA Transmission Charges as follows:-

Table 5.3.4: Approved LTOA Transmission Charges for FY 2017-18

Sl. No.	Particulars	UoM	Formula	FY 2017-18
1.	Net Revenue Requirement	Rs. Crore	A	2,470.88
	Allotted Capacity			
2.	Wind (Non-REC)	MW	B	7,319
3.	Bio-mass (Non-REC)	MW	C	218
4.	Co-generation (Non-REC)	MW	D	659
5.	Solar (Non-REC)	MW	E	1,529

6.	<i>Other Sources</i>	<i>MW</i>	<i>F</i>	18,398
7.	Grand Total	MW	G	28,122
8.	<i>Number of Days</i>	<i>No.</i>	<i>H</i>	365
9.	Transmission Charges	Rs./MW/Day	$I = (A \times 10^7) / (40\% \times B + 50\% \times C + 60\% \times D + 30\% \times E + F) \times H$	3,037.30

6.15. While determining the final price of transmission charges, the Commission considered all expenses that has to be recovered from the customers and reduced the "other income" from such expenses and finally calculated the transmission charges to be recovered from the end customers by dividing the Annual revenue requirement by the Allotted transmission capacity in the system by duly considering the promotional measures to encourage the(Non-REC) wind, solar, Biomass and Co-gen Energy in the State of Tamil Nadu.

6.16. The Transmission Charges determined by the Commission is for allotted capacity of the transmission system network. The transmission charges so derived by the Commission is applicable to all LTOA/MTOA and STOA customers of the State.

6.17. *The Open Access charges are payable by the Petitioners for the MTOA Agreement period for the allotted transmission capacity for the generator and the following charges are being collected viz, transmission charges (fixed charges), wheeling charges for wheeling power to the consumers utilizing the distribution network (variable in nature based on the energy wheeled), scheduling*

and system operation charges for the SLDC function.

6.18. The Transmission charges, Scheduling and system operation charges are also paid by TANGEDCO and TANTRANSCO is raising monthly Invoice for the capacity approved for the TANGEDCO in the Tariff Order dated 11-8-2017 and the same is being regularly paid by TANGEDCO even during the COVID-19 Lockdown period.

6.19. Further, in the G.O. (Ms). No. 152, dated 23-3-2020, G.O.(Ms.) No.172, dated 25-3-2020 and G.O. (Ms.) No.193, dated 15-4-2020, the Generation, transmission and Distribution of Electricity is under exempted category. During the disputed period, only the above Petitioners' and two other Petitioners' viz. MIS. Kamachi Industries Limited and M/s. Tulsyan NEC Ltd., have filed the Writ Petition challenging the levy of Open Access Charges during the COVID-19 Lock Down Period referring to the Force Majeure Clause in the MTOA Agreement and Pandemic situation before the Hon'ble High Court of Madras, Madras Bench and M/s. Arkay Energy (Rameswaram) Ltd., before the Hon'ble Madurai Bench.

6.20. The recovery of the ARR of TANTRANSCO for each financial year is mainly through the collection of Transmission Charges for the allotted capacity in the Intra State Transmission Network of TANTRANSCO. TANTRANSCO has collected the Transmission charges as it is fixed charges and the Transmission Network was fully available at the time of COVID -19 Lock down Period. Since, the above generators are captive in nature, the generation of

electricity and usage of electricity is between the generator and the captive Consumers and it has no relevance on the part of TRANSMISSION Licensee, TANTRANSCO being a STU.

6.21. The TANGEDCO has also paid the Transmission charges during the COVID -19 Lockdown Period as the payment of transmission charges is fixed in nature for the capacity allocated only and it does not matter whether the lines are used or not.

6.22. This respondent has to honour all its financial commitments towards Project cost and Operation cost viz. Payment of interest charges for the project loans and overhead cost like Employee cost, Administration and related expenses, Repair and Maintenance and other day-to-day operational expenses, Interest on Working Capital and Repayment of Loan borrowed for construction of Transmission Projects. The revenue viz. Transmission charges for transmission activity and Scheduling and System Operation Charges for SLDC activities are the major source of revenue through which these commitments are to be honoured.

6.23. For payment of interest to the lenders, this respondent has not got any waiver of interest charges or any concession relating to financial charges for the loans availed for the development of the transmission network. Hence, it is requested that the Open Access charges are to be paid by the Petitioners' even during the Lock-down period for the reasons submitted above.

6.24. Some Petitioners' have paid the Open Access charges under protest and certain OA customers have not paid the OA Charges. Hence, while considering the pleas of the Respondents' for the unpaid amount, the interest as per the Open Access Regulations as per clause 36 'Late Payment Surcharge' may be awarded as the disputed period as per the Stay Order dated 12-06-2020 of the Hon'ble High Court of Madras is between 25-03-2020 and 30-04-2020.

6.25. If the prayer of the above Petitioners is considered, then the burden due to non-payment of the transmission charges and Scheduling and System Operation charges will be loaded on the other customers of TANTRANSCO as there will be shortfall in recovery of the Revenue for the FY2019-20 and FY2020-21 which is not justifiable.

6.26. The Petitioners' by filing the above petition, on one hand, denying the legitimate demand towards the transmission charges by TANTRANSCO and on the other hand passing on the power to share the cost on all other OA customers. Particularly to TANGEDCO (being a single major customer of TANTRANSCO). As per TANTRANSCO's Tariff Order dated 11-08-2017, TANGEDCO's allotted capacity is 22545 MW out of the total capacity of 28122 MW as the transmission charges payable to TANTRANSCO will be loaded in the ARR of TANGEDCO which will ultimately pass on to all consumers. Both are impermissible, either in law or on equitable consideration.

7. Findings of the Commission:-

7.1. The present proceedings have arisen out of the transfer of Writ Petition made by the Hon'ble High Court of Madras vide its order dated 17-09-2020 in W.P.No.8429 of 2020 and connected Writ Petitions. It is necessary to set out the background of the case to understand the circumstances leading to the transfer of the present case to the Commission. The petitioner who was the Writ Petitioner before the High Court of Madras challenged the communication dated 30-04-2020 of the respondent, being the demand, for open access charges for April 2020 and May 2020 in respect of the petitioners Medium term open access agreement.

7.2. The petitioner is a generator who supplies power to various captive units through open access which involves payment of transmission charges and scheduling the system operation charges. However, in view of the lock down imposed by the Central and State Governments, there was a direction from the appropriate Government to cease work which encompasses generation of electricity also and hence the activities in the petitioner's plant came to a standstill. It was the case of the petitioner in the writ petition that there was an impediment by way of Government orders in utilizing the transmission lines of the TANTRANSCO and hence the levy of transmission charges for the period of locked down was unjustifiable. Consequently, the Hon'ble Single Judge stayed the demand notice issued by the TANGEDCO for the reason that the petitioner did not use the infrastructure between 25-03-

2020 and 30-04-2020, but left the question of Force Majeure open. Against the said interim order of stay, TANGEDCO filed an appeal in W.A. No. 597 of 2020 wherein it was held that the petitioner failed to avail alternative remedy and hence directed the petitioner to approach the Hon'ble Single Judge again. Pursuant to the same, the Hon'ble Single Judge vide order dated 17-09-2020 directed the petitioner to approach this Commission for adjudication of the issue. Thus, the matter has reached the Commission for adjudication. On a careful reading of the orders of the Hon'ble High Court, the sole issue which arises for consideration is whether the pandemic would fall within the meaning of Force Majeure as defined under the open access Regulations of the Commission in view of the communication dated 19-02-2020 issued by the Government of India.

7.3. The Petitioner has filed this petition praying to quash the demand letters dated 30-04-2020 and 30-05-2020 bearing ref. Lr. No.SE/EEDC/A/Cs. Br./DFC/AO/AAO/HT/AS/F.HT. 379(MTOA ch.-Transco)/R.NO.82/20 seeking to levy a sum of Rs.24,30,893/- for the entire month of April 2020 and Lr. bearing ref. No.SE/EEDC/A/Cs. Br./DFC/AO/AAO/HT/AS/F.HT. 379 (MTOA ch.-Transco)/R.NO. 116/20 levying a sum of Rs.25,11,923/- respectively on the Petitioner for Open Access charges for the whole month of May 2020 in respect of the Petitioner's Medium Term Open Access Agreement (MTOA) dated 23-07-2019 for 26.3 MW to wheel the power, when in fact there was no generation or transmission of electricity in view of the nationwide

lockdown due to the corona virus pandemic as notified by the Central and State Governments and consequently there was no use of the 1st and 4th Respondent's Transmission and Distribution infrastructure.

The contentions of the Petitioner in a nutshell are as follows:

7.4. The Petitioner Company entered into an "Energy Wheeling Agreement (EWA)" dated 26-11-2018 with the 2nd Respondent on behalf of the 1st Respondent herein the TANGEDCO, which is the State Transmission Utility and distribution licensee.

7.5. By virtue of the EWA dated 26-11-2018, the Petitioner Company acting as CGP Holder, has accepted the proposal for wheeling of energy from captive generating plant to destination of its captive consumers use of 26.3 MW through Licensee's Transmission / Distribution Networks.

7.6. As per the EWA as stated supra, interalia terms and conditions, Clause 6 and 7 pertains to 'Charges' and 'Billing'.

7.7. The Petitioner Company entered into a "Medium Term Open Access Agreement (MTOA)" dated 23-07-2019 with the 3rd Respondent on behalf of the 1st Respondent herein the TANGEDCO, which is the State Transmission Utility and distribution licensee.

7.8. As agreed by the parties, the 3rd Respondent shall raise bills for the net energy consumed by the captive user i.e. the Petitioner Company after

adjusting the wheeled energy at the rate as per the Orders of the Commission and for the Regulation for time being in force.

7.9. The 3rd Respondent shall raise bills on the charges payable towards start-up power and power drawn for other purposes, wheeling charges, excess demand and excess energy charges etc. as per the Orders of the Commission and for the Regulation for time being in force.

7.10. From the inception of the operation of the EWA dated 26-11-2018, the Petitioner Company has been very sincerely complying with the terms and conditions stipulated under contract.

7.11. The Petitioner Company has taken sincere efforts to settle all the bills raised by the 3rd Respondent and no outstanding except what that has been impugned in this present petition.

7.12. In light of the deadly ongoing pandemic (COVID 19) (Corona Virus), the very functioning of the Petitioner Company has come to a standstill, much like most other economic units.

7.13. To combat the exponential spreading of the virus, the governments both State and Centre had announced a complete lockdown which has been subsequently relaxed after a while only subject to stringent and rigid conditions.

7.14. In compliance with the decision of the Government in the interest of public health and as a methodology to combat deadly corona virus, the power plant was shut indefinitely from 25-03-2020. Such closure of the plant is not due to any lapse on the part of the Petitioner Company or deliberate default, but in an act in compliance with the law which was unexpected and beyond the control of Petitioner Company.

7.15. Closure of having been unforeseen, unexpected and has rendered the Petitioner an impossibility to perform, the Petitioner Company shall not be made liable to charges incurred during the said period by application of "Doctrine of Impossibility" and "Doctrine of Force Majeure".

7.16. As per Intra-State Open Access Regulations, 2014, the present closure of their plant comes under "Force Majeure" as described in Regulation 46, which is reproduced hereunder:-

"46. Force Majeure:-

*(1) Any event which is beyond the control of the parties to the open access agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either party such as, **but not limited to, the following shall be classified as force majeure events** for the purpose of these Regulations:-*

- (i) Natural disasters (earthquakes, hurricanes, floods);
- (ii) Wars, riots or civil commotions and other upheavals; and
- (iii) Grid / distribution system's failure not attributable to parties hereto.

(2) Both the parties to the open access agreement shall ensure compliance of the terms and conditions of the agreement. **However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the open access agreement to the extent that such failure is due to force majeure.** But, any party claiming the benefit of the force majeure shall satisfy the other party of the existence of such event(s)".

7.17. A bare perusal of the above said regulation, it leaves no room for doubt that the Force Majeure event shall not be limited to events like Wars, riots or civil commotions etc. but also covers Closures and lockdowns due to Global deadly pandemic such as this novel corona virus.

7.18. While the matter stood thus, as a matter of abundant caution, the Petitioner Company sent a representation to 3rd / 4th Respondent vide letter dated 06-05-2020 very elaborately explaining the details of the Janata Curfew and adumbrating the Force Majeure Clauses.

7.19. The said Representation was made seeking the 3rd / 4th Respondent not to levy open access charges for the lockdown period as the same is well protected by the Force Majeure Clause stipulated under the concerned EWA as well as the Electricity Regulations.

7.20. Nonetheless, much to the Petitioner's dismay and consternation, the 3rd / 4th Respondent without considering their representation stated supra and giving scant regard to the Force Majeure Clause in the EWA, has issued the Impugned Demand Notice letters dated 30-04-2020 and 30-05-2020

bearing ref. Lr. No.SE/EEDC/A/Cs. Br./DFC/AO/AAO/HT/AS/F.HT. 379(MTOA ch.-Transco)/R.NO.82/20 seeking to levy a sum of Rs.24,30,893/-for the entire month of April 2020 and Lr. bearing ref. No.SE/EEDC/A/Cs. Br./DFC/AO/AAO/HT/AS/F.HT. 379 (MTOA ch.-Transco)/R. No. 116/20 levying a sum of Rs.25,11,923/- respectively on the Petitioner for Open Access charges for the whole month of May 2020 in respect of the Petitioner's Medium Term Open Access Agreement (MTOA) dated 23-07-2019 for 26.3 MW to wheel the power.

7.21. The impugned demand notices as stated supra are illegal, unlawful and in violation to the terms and conditions of the EWA stated supra.

7.22. In addition to Regulation 46 of the Interstate Open Access Regulation 2014, the Clause 12 read with Clause 1 of the EWA also state that the Petitioner Company shall not be liable to any claim or any loss whatsoever arising out of failure to carry out with terms of the Agreement with regard to Force Majeure. Clause 12 of said agreement is extracted hereunder:

*"**Clause 12** – Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out with the terms of this agreement to the extent that such failure is due to Force Majeure. But, any party claiming the benefit of this clause shall satisfy the other party of such an event".*

7.23. The Janata Curfew / Lockdown announced by Hon'ble Prime Minister was:-

a) an unexpected intervening event,

b) was an event caused due to an act of God / Nature beyond the human control,

c) the Lockdown due to pandemic was beyond the control of parties to the agreement and

d) Most importantly (the unexpected event) made it "impossible to perform the terms of contract".

7.24. The Office Memorandum No.F.18/4/2020-PPD dated 19-02-2020 issued by Ministry of Finance, Govt. of India, which, interalia, states as under:

"....In this regard it is clarified that it should be considered as a case of natural calamity ad FMC may be invoked, wherever considered appropriate, following the due procedure as above".

7.25. On receipt of the impugned demand ignoring the said unexpected predicament rendering the performance of the contract impossible during the lockdown period, a representation vide letter dated 06-05-2020 and 27-05-2020 was sent to the office of 3rd Respondent to reverse the Open Access charges bill for the month of April 2020 as it is "Force Majeure" event.

7.26. Notwithstanding repeated explanations and representations, the Respondents have neither conceded to the fair and legitimate requests nor have they responded.

7.27. The lockdown due to Corona Virus was applicable to the entire nation and violators were punished severely by the executives. Had the Petitioner Company proceeded to function the plant, which alone would enable the payment of the open access charges, it would have attracted a closure due to contravention of law. Therefore, the Petitioner Company herein has established a prima facie case for grant of stay of impugned demand.

7.28. If the said impugned demand is not stayed, the Respondents may withdraw the open access facility granted to the Petitioner Company. This will lead to a closure of the plant owing to economic difficulties and would result in a 'irreparable damage' cause to the Petitioner. On the other hand, no loss would be caused to the Respondent and therefore, the balance of convenience is in the Petitioner's favour.

Per contra, Respondents have contended as follows:-

7.29. The charges payable are not in the nature of charges for actual usage but they are fixed charges payable for maintenance of the facilities irrespective of the usage.

7.30. The present situation namely the lockdown imposed by the respective governments cannot be called as a Force Majeure in order to bring it within the ambit of Clause 12 of the Medium Term Open Access Agreements.

7.31. We have heard the submissions of learned Counsel appearing for the Petitioner and the Respondents.

7.32. In this connection, Clause 12 of the Medium Term Open Access Agreements reads as follows:

"Both the parties shall ensure compliance of the terms and conditions of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure. But any party claiming benefit of this clause shall satisfy the other party of the existence of such an event(s);"

7.33. Further, in the Commission's Order dated 24-11-2020I.A. Nos. 1 to 4 of 2020inD.R.P. No.5of 2020andD.R.P. No.5 of 2020M/s. Solitaire BTN Solar Private Limited the issue of "Force Majeure" condition has been decided at page No.118 as under:

".....It is true that meaning of "Force Majeure" under the said clause includes epidemic as well. Even for moment considering the expression "epidemic" can be extended to pandemic such as Covid-19,.....".

7.34. Keeping in view the aforementioned facts, the Commission is of the view that the Lockdown due to pandemic was beyond the control of parties

to the agreement and making it "impossible to perform the terms of the contract" and deemed it as a Force Majeure condition. In the result, the prayer of the Petitioner is allowed and the Respondent is not justified in levying the Transmission, Wheeling & Scheduling & System Operating Charges (MTOA) during the pandemic period.

7.35. The Commission is of the opinion that Regulation 13 – Regulatory Asset in the TNERC (Terms and Conditions for determination of Tariff) Regulations, 2005, in respect of the reasons beyond the Transmission licensees control under natural calamities and force majeure conditions and the consequent revenue shortfall can be invoked to treat such revenue shortfall as Regulatory Asset.

7.36. For the above reason, the Commission is constrained to quash the Respondent's proceeding in demand letters dated 30-04-2020 and 30-05-2020 bearing ref. Lr. No.SE/EEDC/A/Cs. Br./DFC/AO/AAO/HT/AS/F.HT. 379(MTOA ch.-Transco)/R.NO.82/20 seeking to levy a sum of Rs.24,30,893/-for the entire month of April 2020 and Lr. bearing ref. No.SE/EEDC/A/Cs.Br./DFC/AO/AAO/HT/AS/F.HT.379(MTOAch.-

Transco)R.NO.116/20 levying a sum of Rs.25,11,923/- respectively on the Petitioner for Open Access charges for the whole month of May 2020 in respect of the Petitioner's Medium Term Open Access Agreement (MTOA) dated 23-07-2019 for 26.3 MW to wheel the power, as there was no generation or transmission of electricity in view of the nationwide lockdown

due to the corona virus pandemic as notified by the Central and State Governments as there was no use of the 1st, 4th and 5th Respondent's Transmission and Distribution and other infrastructure.

In the result, the petition is allowed. No costs.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission