

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the Day 30<sup>th</sup> of May 2024**

**PRESENT:**

Thiru M.Chandrasekar	....	Chairman
Thiru K.Venkatesan	....	Member
	and	
Thiru B.Mohan	....	Member (Legal)

**T.A.No.1 of 2024**

1. M/s.Kamachi Industries Ltd.  
formerly known as kamachi sponge &  
Power Corporation Ltd. (under Liquidation)  
Rep.by the Liquidator: Mr.Suresh Kumar,  
(Appointed by NCLT, Chennai)  
Inside Devi Theatre Complex,  
No.39, (Old No.50), Anna Salai,  
Chennai-600002.  

..... Petitioner  
(W.P. No. 8083 of 2020)  
Thiru M.A. Mudimannan  
Advocate for the Petitioner

**Vs.**

1. Tamil Nadu Generation and Distribution  
Corporation Ltd.  
144, AnnaSalai,  
Chennai-600002.
2. The Superintending Engineer,  
CEDC /North /TNEB /  
Chennai EDC North,  
Chennai- 600002.  

.... Respondents  
Thiru.N.Kumanan and  
Thiru.A.P.Venkatachalapathy,  
Standing Counsel for TANGEDCO

The present T.A arises out of the transfer made by the Hon'ble High Court of Madras in its Order dated 19.09.2023 in W.P.No.8083 of 2020 wherein the Hon'ble High Court referred the dispute between petitioner herein and the respondent to the Commission. Consequently, the Writ Petition transferred by the Hon'ble High Court of Madras was taken on file of the Commission as Transferred Application No.1 of 2021. It is seen from the Order of the Hon'ble High Court that the question which has been referred to the Commission is whether the petitioner herein is liable to pay Open Access charges during the lock down period under the Grid connectivity and Intra-state Open Access Regulations and the agreement entered into between the parties. The prayer of the petitioner in the said W.P.No.8083 of 2020, which is treated as the prayer in the present T.A, is to call for the records of the second respondent vide impugned invoice No. 193 dated 17-04-2020 for Transmission, Wheeling, Scheduling and System Operating Charges (MTOA), quash the same as illegal and arbitrary insofar as the period April 2020, direct the respondent to revise and reissue the invoice issued vide Letter No. SE/CEDC/N/DFC/AO/AAO/HT.F.Kamachi OA/D.1721/20, dated 05-05-2020 by deducting the proportionate portion of the charges in terms of the petitioner's letter dated 05-05-2020, consequently forbear the respondents from insisting payment pertaining to the lock down period until 05-05-2020.

This petition coming up for final hearing on 19-03-2024 in the presence of Thiru M.A. Mudimannan, Advocate for Petitioner and Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Respondents and on consideration of the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

## ORDER

### 1. Contentions of the Petitioner:-

1.1. The petitioner company entered into an “Energy wheeling Agreement” dated 11-11-2019 with the 2<sup>nd</sup> Respondent, on behalf of the 1<sup>st</sup> Respondent the Tamil Nadu Generation and Distribution Corporation Ltd,. (Hereinafter referred to as ‘1<sup>st</sup> Respondent’ or TANGEDCO’) which is the State Transmission Utility and distribution licensee.

1.2. By virtue of the said “ Energy Wheeling Agreement’ dated 11-11-2019, the Petitioner Company acting as CGT Holder has accepted at destination of its own use 36.568 MW for captive purposes through Licensee Transmission / Distribution Networks.

1.3. The Energy Wheeling Agreement’ dated 11-11-2019, *inter-alia deals with* terms and conditions, Clause 6 and 7 relates to ‘Charges’ and ‘Billing’. As agreed by the parties the 2<sup>nd</sup>respondent shall raise bills for the net energy consumed by captive user, (i.e) Petitioner Company after adjusting the wheeled energy at the rate as per the orders of Tamil Nadu Electricity Regulatory Commission and shall raise bills on the charges payable towards startup power and power drawn for other purposes, wheeling charges, excess demand and excess energy charges etc, as per Tamil Nadu Electricity Regulatory Commission and as per the regulations time being in force.

1.4. From the execution of the Energy wheeling Agreement dated 11.11.2019, the petitioner company has been very sincerely obliging to the terms and conditions stipulated under contract. The petitioner company has taken sincere efforts to settle all the bills raised by the 2<sup>nd</sup> Respondent.

1.5. In light of the deadly ongoing pandemic (COVID 19) (corona virus), the very functioning of the petitioner company came to a standstill, much like most other economic units. To combat the exponential spreading of the virus, the governments both at State and Centre had announced a complete lockdown which was subsequently relaxed subject to stringent and rigid conditions. In compliance to 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 24-03-2020. Closure of the plant was not due to lapse on the part of petitioner company or an deliberate act, but in compliance with the law which was unexpected and beyond the control of petitioner company.

1.6. Closure due to unforeseen, unexpected event has rendered the EWA an impossibility to perform. Hence, the petitioner company shall not be made liable to charges incurred during the said period by the application of “Doctrine of impossibility” and “Doctrine of Force Majeure”.

1.7. The present closure of the petitioner’s power plant comes under “Force Majeure” as described in Section 46 intra-state open access of the said Regulations, 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)."*

1.8. A bare perusal of the above said regulation 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.

1.9. While the matter stood so, as a matter of abundant caution, the petitioner company sent a representation vide e-mail dated 06.04.2020 elaborately explaining the details of the Janata Curfew and adumbrating the Force Majeure Clauses. Representation was made seeking the 2<sup>nd</sup> Respondent not to levy any charges in view of the Force Majeure Clause under the concerned Energy Wheeling Agreement as well as the Commission's Regulations.

1.10. Much to the dismay and consternation of the petitioner, the 2<sup>nd</sup> Respondent without considering the petitioner's representation sent vide e-mail dated 06.04.2020 and in scant regard to the Force Majeure Clause in the Energy Wheeling Agreement raised the impugned Invoice vide letter No. Lr.No.SE/CEDC/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20, dated 05.05.2020 for Transmission, wheeling & Scheduling & System Operating Charges (MTOA) amounting sum of Rs. 25,30,222/- (Rupees Twenty Five Lakhs Thirty Thousand Two Hundred and Twenty Only) toward open access Charges for the full

month of April 2020.

1.11. Impugned demand vide letter No.Lr.No.SE/CED/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20, dated 05.05.2020 is illegal, unlawful and is in violation of Regulation 46 of Interstate Open Access Regulation 2014, the Clause 12 r/w Clause 12 r/w Clause 1 of Energy Wheeling, Agreement 11-11-2019 as per which the petitioner company shall not be liable to bear any loss whatsoever arising out of failure to carry out with terms of the Agreement with regard to Force Majeure. For the sake of convenience Clause 12 of said agreement is extracted herein under.

*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.”*

1.12. The Jananta Curfew / Lock down 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 the contract”.

1.13. On receipt of the impugned demand ignoring the said unexpected predicament rendering the performance of the contract impossible during the lockdown period, another

representation vide e-mail dated 07.05.2020 was sent to the office of 2<sup>nd</sup> Respondent to revise the Open Access charges bills for the month of April 2020 in view of “Force Majeure” event.

1.14. Notwithstanding repeated explanations and representations, the Respondents have neither conceded to the fair and legitimate requests nor have they responded. Hence, the impugned invoice issued vide Letter No.SE/CEDC/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20, dated 05-05-2020 is challenged.

1.15. The impugned invoice Letter No. SE/CEDC/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20, dated 05-05-2020 levying Open Access charges for the period April, 2020 is harsh, illegal, unjust and in violation of the settled principles of Contract Law and hence has to be set aside in limine.

1.16. The impugned demand is unlawful and against the principles of contract law as the lockdown as a result of the (Covid 9 – Corona Virus) will be covered under the Doctrine of ‘Force Majeure’ and no claims during the period of lockdown can be entertained.

1.17. The impugned demand pertaining to the period from 25<sup>th</sup> March to 31<sup>st</sup> March 2020 ought to be set aside by the virtue of the legal principle ‘les non cogitadim possibilia“ which means that the law will not compel a man to do what he cannot possibly perform (Doctrine of impossibility of performance).

1.18. The 2<sup>nd</sup> Respondent has raised the impugned demand without giving due regard to Regulation 46 Intra-State Open Access Regulations, 2014 and Clause 12 r/w 1 of the Energy Wheeling Agreement.

1.19. The inability to pay the impugned demand raised by the 2<sup>nd</sup> Respondent is directly attributable to the lockdown due to pandemic. Had the Petitioner Company attempted to fulfill the terms and conditions of the contract by running the plant, it would have been a contravention of law.

1.20. The 2<sup>nd</sup> Respondent ought to have considered that the non-performance of the contract by way of payment of open access charges during the lockdown period from 25<sup>th</sup> March to 8<sup>th</sup> May 2020 was unexpected and beyond the control of the parties and impossible to perform.

1.21. The non-performance of contract by the petitioner company is not a 'mere impracticality' but that the changed circumstances i.e. lockdown due to corona virus has made the performance of the contract impossible.

1.22. The Apex Court in various judgments has categorically held that when it appears that the performance of the formalities prescribed by a contract has been rendered impossible by circumstances over which the persons interested has no control, like an act of God, the circumstances will be taken as a valid excuse.

1.23. The insistence of the impugned demand by foregoing the agreed terms of Force Majeure under the Contract is whimsical, unreasonable and arbitrary violating Article 14 of the Constitution of India.

1.24. In the event of the non-payment of this oppressive excessive demand, action will be taken to withdraw the open access facility granted to the petitioner company. Therefore, the impugned demand is in direct contravention of the petitioner's fundamental right under



Article 19(g) of the Constitution of India.

1.25. The invocation of 'Force Majeure Clause' by the petitioner vide email dated was disregarded. Therefore, the impugned demand not only contravenes the terms and conditions of the Energy Wheeling Agreement, the Regulation 46 Intra-State Open Access Regulations, 2014 and settled principles of Contract Act confirmed by the Apex Court but also has acted in violation to the inalienable principles of natural justice enshrined in the Constitution of India.

1.26. The Hon'ble Ministry of Finance vide Office Memorandum No.F/18/4/220 PPD dated 19.02.2020 has expressly clarified that Corona Virus will be covered under 'Force Majeure Clauses' as it would be considered as 'Natural Calamity'.

1.27. The lockdown due to Corona Virus was applicable to the entire nation and violators were punished severely by the executives. 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 face case for grant of stay of impugned demand. Furthermore, 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' to the petitioner. On- the other hand, no loss would be caused to the respondent and therefore, the balance of convenience is in favour of the petitioner.

2 In spite of several opportunities, the respondent did not file counter and hence the Commission proceeds to decide the issue on the basis of available records.

3. Arguments advanced by the petitioner counsel heard. Records perused. Legal precedents traversed.

#### 4. Findings of the Commission:-

4.1. The question which is posed before us in the instant petition is whether lock down due to pandemic can be said to be beyond the capacity of the parties so as to make it impossible to perform the terms of the contract and whether the same can be deemed to be a force majeure condition.

4.2. We have given anxious consideration to the submissions of the petitioner. The list lies in a narrow compass. The petitioner seeks to quash the impugned notice seeking open access charges in view of the fact that there was no generation or transmission of electricity due to pandemic which gripped the nation in the year 2020. The counsel for the petitioner relied upon Regulation 46 of the Intra-state open Access Regulation and clause 12 of the EPA entered into between the parties, and O.M. No. / 18.04.2020 PPO of Government of India Ministry of Power dated 19.02.2020. The said provisions are reproduced below:-

*“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.*

#### *Clause 12 of the MTOA*

*(12) 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)."*

4.3. Having considered the contentions of the petitioner at length, it is necessary to advert to the order passed by the Hon'ble High Court of Madras in its order dated 14.08.2020 in W.P.Nos. 7678 of 2020 and other connected petitions. The following portion of the order would be relevant.

42. *The HT consumers were actually caught between the devil and deep sea. On the one hand the government asked them to shut down their establishment and on the other hand TANGEDCO was levying the Maximum Demand from the consumers. If this is allowed to be continued, it will virtually lead to permanent shutting down of the industries. The financial crunch that is being faced by almost all industries due to the lockdown and the huge challenge they are going to face post the pandemic is now made worse by TANGEDCO by levying the Maximum Demand Charges. TANGEDCO must understand that its attitude will kill the industries and closing down of industries will ultimately have a financial implication on TANGEDCO also. And TANGEDCO was virtually killing the goose that was laying the golden eggs.*

4.4. It may be seen from the order of the Hon'ble High Court that the financial crunch faced by all the industries due to lock down was considered and relief granted in view of the same. More importantly, the Hon'ble High Court made a specific observation that on the one hand the Government asked the industries to shut down the establishment and on the other hand TANGEDCO was levying maximum demand from the consumers. Though the

subject matter of the levy in the said Writ Petition before the Hon'ble High Court and the petition before the Commission are different and cannot be called one and the same, we find that there is a striking similarity on the question of validity of levy of fixed charges during pandemic. We see no reason as to why the said decision cannot govern the present case especially when the causative factor for both levy, namely, the corona virus, is identical though the resultant levies are different.

4.5. Further, it is clear that the subject matter of this petition is squarely covered by the decision of the Hon'ble High Court in W.P.No. 7678 of 2020. We are also not oblivious to the fact that a decision dated 28-09-2021 has been rendered by the Commission in D.R.P. No. 5 of 2020 in which the prayer for consideration of Force Majeure was rejected. But it is to be observed that the D.R.P.No.5 of 2020 in the matter of M/s.Solitaire BTN Solar Pvt. Ltd will not come to the rescue of respondent as the said order was set aside by the Hon'ble APTEL in its judgment dated 05.07.2021 in Appeal No. 67 of 2021 and consequential orders were passed by the Commission on 28-09-2021 upon remand by APTEL. Now coming back to the decision of the Hon'ble High Court, the HT consumers were caught between devil and deep-sea and hence it would be too much to burden them with transmission, wheeling, and scheduling and system operation charges during the pandemic period when the entire nation was grappling with the deadliest corona virus. It is manifest that there was a supervening impossibility which rendered the enforcement of the contract between the petitioner and the respondent an impossibility. Gleaned from the any angle, this Commission decides that the impugned notice issued by the 2<sup>nd</sup> respondent is not sustainable both on facts and law.

In fine, following is ordered.

- 1) The demand notice of the 2<sup>nd</sup> respondent vide Letter No. No.SE/CEDC/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20 dated 05-05-2020, levying a sum of Rs.25,30,222/- being the Open Access Charges for the month of April 2020 is set aside.
- 2) Commission further directs that the 2<sup>nd</sup> respondent shall revise and reissue the invoice issued vide letter No.SE/CEDC/N/DFC/AO/AAO/HT/F.Kamachi OA/D.1721/20 dated 05-05-2020 by deducting the proportionate portion of the charges in terms of the petitioner's e-mail dated 07-05-2020

The petition is disposed of on the above terms. No order as to costs.

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

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

**Secretary**  
**Tamil Nadu Electricity**  
**Regulatory Commission**