

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

PRESENT:-

Thiru.S.Kabilan ... **Chairman**

Thiru.K.Venugopal **Member**
and

Thiru.S.Nagalsamy **Member**

D.R.P. No. 12 of 2011
and
I.A. No.1 of 2011 in D.R.P. No.12 of 2011

M/s. OPG Power Generation Pvt. Ltd
No.117, P.S. Sivasamy Salai
Mylapore
Chennai – 600 004.

.... **Petitioner**
(Thiru Rahul Balaji, Advocate for Petitioner)

Vs.

1. Tamil Nadu Electricity Board
Rep by its Chairman
800, Anna Salai
Chennai – 600 002.
2. TANTRANSCO
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.
3. Director (Operation)
Tamil Nadu Transmission Corporation Limited
NPKRR Maligai
144, Anna Salai
Chennai – 600 002.

4. The Chief Engineer / PPP
Tamil Nadu Electricity Board
144, Anna Salai
Chennai – 600 002.
5. Superintending Engineer (Operation)
Tamil Nadu Electricity Board
144, Anna Salai
Chennai – 600 002.
6. TANGEDCO
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.

..... Respondents
(Thiru.H.S.Mohammed Rafi, Advocate for Respondents)

Dates of hearing: 4-3-2011 & 26-4-2011

Date of Order : 7-10-2011

D.R.P.No.12 of 2011 came up for final hearing before the Commission on **26-4-2011**. The Commission upon perusing the above D.R.P.No.12 of 2011 along with I.A. No.1 of 2011 in the said D.R.P. and other connected records and after hearing both sides passes the following:-

ORDER

Prayer in D.R.P. No.12 of 2011 as amended through I.A. No.1 in the said

D.R.P.:-

1. To call for the records of the third respondent comprised in letter No. Dir/O/SE/LD&GO/EE/ABT/F OPG Powergen/D3033/10 dated 18-1-2011 and quash the same as being arbitrary and illegal and contrary to the earlier correspondence of the Respondent Board and consequently direct the Second

Respondent and sixth Respondent to jointly and severally make payment in respect of the 22,50,000 units of firm power from the Petitioner's 1 x 77 MW generating plant from the date of commercial operation i.e. 22-4-2010 till 28-4-2010 at the rate of Rs.4.50 per unit being the sum collected for this power from the Petitioner's consumers and direct payment of the said sum with interest at the rate of 18% p.a. from 1-5-2010 till the date such payment is made and pass such further or other orders as this Hon'ble Commission may deem fit and proper.

Facts of the case :-

2. The Petitioner set up a 77 MW generating plant at Gummidipoondi and approached the third Respondent for necessary inspection and for the grant of evacuation facility in respect of the power plant. The Petitioner obtained the necessary approval from the Chief Electrical Inspector to the Government. The Petitioner's power plant is conceived as a generating station on a merchant basis from the date of commissioning, till the Commercial Operation Date (COD). In his letter Lr. No. OPGPG.TNEB/2009 dated 11-1-2010, the Petitioner requested the Respondent Board to accept the infirm power generated from its generating plant till the Petitioner goes in for commercial operation of the plant. The Chief Engineer / PPP, Tamil Nadu Electricity Board accorded his acceptance for the same through Lr.No.CE/PPP/EE/AEE/PPP/F.OPG/D142/10, dated 25-03-2010 and further directed the Petitioner to approach the TNERC for fixation of the rate for the infirm power to be supplied to the Respondent Board and to execute

necessary agreement with the Respondent Board. As the rate for supply of infirm power has not been fixed, the parties had agreed that this Commission shall fix the said rate. This has been occasioned due to the fact that this Commission has fixed tariff and rates for purchase of infirm power only with respect to fossil fuel based Group Captive Generating plants and fossil fuel based cogeneration plants.

3. The parties entered into an Energy Purchase Agreement dated 13-4-2010 for the purchase of infirm power which specifically sets out the terms in respect thereof, including the delivery point, metering arrangement etc. After execution of the said agreement, the Petitioner took further steps and it has commissioned its plant after receiving the go-head from the Respondent and the Petitioner's plant has been pumping power to the Tamil Nadu Electricity Board grid from 14-4-2010 (23:23:27 hrs) onwards.

4. The Petitioner made a request for in-principle approval on third party sale of 50 MW vide letter dated 15-4-2010. The Respondent have agreed for this in principle approval from the date of declaration of commercial operation vide their letter dated 21-4-2010 and the Petitioner having declared COD on 22-4-2010, the same came to be approved by the Tamil Nadu Electricity Board on 24-4-2010.

5. The Superintending Engineer (Operation), TNEB has however, in letter Lr. No. SE/CEDC/N/AEE/Dev/AE/D2/F OPG Power 1 x 77 MW/D 119/10, dated 24-4-2010 accorded in principle approval to the Petitioner to sell the power generated by the Petitioner to third parties within Tamil Nadu through Intra State Short Term Open Access.

6. Though the Petitioner had already commenced pumping in of power into the grid, approval by the third Respondent for third party sale was given only from 28-4-2010 vide their letter dated 27-4-2010.

Contentions of the Petitioner:-

7. The Petitioner had sought for approval on 15-4-2010 for third party sale, which is essentially an application for Open Access and the same was belatedly granted and there was a time delay between COD and approval of third party sale and during the entire period, power generated by Petitioner's generating plant was pumped into the Respondent's grid which was fully within the knowledge of the Respondent and also the SLDC.

8. It cannot be stated that the Respondents were not aware of the pumping in of the power into their grid and no direction came from the Respondent to stop such pumping in of energy generated by the Petitioner's plant. When such being the case and the delay in granting approval for third party sale having been

caused only by the Respondents, the Petitioner ought to be compensated for the power pumped in to the grid.

9. The Petitioner issued a letter on 4-12-2010 seeking payment for the firm power injected into the grid. The Respondent, vide the impugned letter dated 18-1-2011 stated that the Petitioner had requested, vide their letter dated 26-4-2010 approval for the third party sale transaction to 25 members of HT suppliers totaling 9.785 MW for 24 hours from 28-4-2010 to 27-5-2010 and that approval was accorded by the third Respondent only on 28-4-2010.

10 The Respondents have in their letter dated 26-4-2010 conveniently failed to mention the letter dated 15-4-2010 which is contradictory to the Respondent's own letters which had granted third party sale from the date of COD.

11. The Respondent is making statements contrary to its earlier communications, wherein it has been specifically agreed that third party sale would become effective from the date of COD. Only on this basis, power had been pumped into the grid by the Petitioner. The adjustment of such power is not given to the benefit of Petitioner's consumers but had been utilized for the Board's benefit and having so utilized the power, the Respondents cannot take advantage of the same and state that no payment is due. There was no understanding between the parties that power would be supplied on gratuitous basis.

12. The Petitioner was denied of the payments from its consumers by third party sale. The rate at which the Petitioner had contracted to sell to its consumers is Rs.7/- (Rupees seven only) per unit and it is entitled to be compensated for the same by the Respondents who have utilized such power by not adjusting it in favour of the Petitioner's consumers.

13. The power was never intended to be gratuitously supplied and the Respondent had also never objected to the supply of the power and has admittedly utilized the same. The power generated by Petitioner's generating plant was being pumped into the Respondent's grid with the knowledge of the Respondent and also the SLDC. Therefore, it cannot be stated that the Respondents were not aware of the pumping in of the power into their grid and no direction came from the Respondent to stop such pumping in of energy generated by the Petitioner's plant.

14. The Petitioner has not received any payment for the firm power of 22,50,000 units already supplied during the period between 22-4-2010 and 28-4-2010. The Petitioner would have been entitled to collect Rs.7/- (Rupees Seven only) per unit from its consumers in terms of its contract and has suffered a loss on that count. The Respondent as a transmission / distribution licensee has benefited from said power as it has treated such power as power sold by it to the consumers and collected Rs.4.50 per unit and therefore the 2nd and 6th

Respondents have benefited out of such arbitrary action and have unjustly enriched themselves.

15. Since the consumers have already paid for such power to the 6th Respondent they cannot be directed by the Petitioner to pay for the same. The Petitioner is entitled to collect the difference of Rs.2.50 per unit from his consumers, while it would be entitled to recover Rs.4.50 which is the HT tariff for the 22,50,000 units of firm power. The Respondents cannot be permitted to unjustly enrich themselves by their arbitrary action.

Contentions of the Respondents in Counter Affidavits :-

16. Parallel operation approval was accorded to the Petitioner's 1 x 77 MW coal based power plant with Tamil Nadu Electricity Board's grid at 110 KV level for one year vide letter dated 22-12-2009 and the generator has executed an agreement on 29-12-2009. The new plant was synchronized on 14-4-2010 and the TNEB (now TANGEDCO) accepted to make payment for the infirm power injected from the date of synchronization to the date of declaring COD as per the rate fixed by TNERC.

17. The Member / Generation / TNEB (now Director / Generation / TANGEDCO) has informed the Petitioner that the Tamil Nadu Electricity Board is ready to accept the infirm power generated till declaration of commercial operation date and requested to execute agreement and also to approach the

Hon'ble TNERC to fix the rates for the infirm power to be supplied vide letter dated 25-3-2010.

18. As per clause 6 of Energy Purchase Agreement (EPA), for purchase of infirm power by Tamil Nadu Electricity Board, the agreement shall remain in force from the date of commencement of pumping of energy into TNEB's grid upto 12-10-2010 and thereafter the term may be extended for further period based on the mutual agreement between the parties. If the company declared the COD before the due date of 12-10-2010, then the said agreement shall automatically be terminated from the date of declaration of COD.

19. Based on the request of the Petitioner, the in-principle approval was given to the Petitioner to carry out third party sale of 50 MW to the HT consumers within Tamil Nadu through Intra State Short Term Open Access vide Lr. No. Dir/O/SE/LD&GO/EE/ABT/D 336/10, dated 21-4-2010.

20. The Petitioner declared the COD on 22-4-2010 vide Lr. No. OPGGEN/TNEB/2010/008 dated 22-4-2010 and the same was confirmed by SE/Dist/Chennai North vide Lr. No. SE/CEDC/N/AEE/Dev/AE/D2/F.OPG Power 1 x 77 MW/D 119/10, dated 24-4-2010.

21. The Petitioner submitted the application in letter dated 26-4-2010 for third party sale of firm power initially to only 25 number HT consumers totaling to only

9.785 MW for 24 hours from 28-4-2010 to 27-05-2010. The applications in the prescribed formats with necessary application fees were processed immediately and the necessary approval was given within the specified time period. The above transaction commenced on 28-4-2010 and ended on 27-5-2010 vide Respondent's letter No. Dir/O/SE/LD&GO/EE/ABT/F OPG PowerGen/D 370/10, dated 27-4-2010. The Superintending Engineer / Distribution circle concerned was duly informed that the energy meters at new H.T. consumers (if any) end as per the list enclosed shall be reset accordingly to carry out the above transaction from 28-4-2010 to 27-5-2010.

22. The Petitioner paid the necessary payment security, as specified in Clause 18 of Tamil Nadu Electricity Regulatory Commission's Intra State Open Access Regulations, 2005. The Superintending Engineer / Distribution Circle / Chennai North (Generator End) informed the respective Superintending Engineer / Distribution Circle (HT consumer end) to reset the energy meters to carry out the third party sale transactions vide Lr. No. SE/CEDC/N/AAO/HT/F. OPG Powergen/D/10, dated 28-4-2010.

23. As per Clause 24 of Parallel Operation and Open Access agreement executed by the Petitioner, they have specifically agreed that they will not inject any power or they will not claim for the energy injected to the grid till wheeling / sale is requested and approved by Tamil Nadu Electricity Board (now

TANGEDCO) and any excess energy injected into the grid will not be accounted for and paid by TANGEDCO under any circumstances.

24. TANGEDCO has not issued any direction or instruction to the Petitioner to inject the power into grid after declaration of COD. The Petitioner was well aware that the eligibility for payment will be only from the date of synchronization to the date of declaring commercial operation for the infirm power.

25. The contention of the Petitioner that the approval for third party sales requested on 15-4-2010 was unduly delayed and given only on 28-4-2010 is incorrect. The in-principle approval was given based on the Petitioner's letter dated 15-4-2010. The Petitioner has not declared COD at that time and the letter did not specify the details of HT industrial consumers, details of the quantum of power to be wheeled to the HT consumers, the day to day schedule of the individual third party transaction etc. which are necessary for approval of third party transaction.

26. As per SLDC approval, the Petitioner was permitted to carry out third party sale of firm and committed power from 28-4-2010 only. Therefore, the energy pumped by the Petitioner from 22-4-2010 to 27-4-2010 is liable to lapse vide Clause 6 of Energy Purchase Agreement and Clause 24 of Parallel Operation Agreement. TANGEDCO or TANTRANSCO and the Petitioner do not have any

agreement for accounting the power injected into grid for the disputed period is 22-4-2010 – 27-4-2010. In the absence of any specific approval, the Petitioner should not have pumped any energy into the grid violating the grid discipline.

27. Actual transaction of third party sale will commence only after identifying the HT consumers to whom the firm power has to be sold and obtaining necessary approval from the TANTRANSCO and then resetting of the meters at both generator and consumer end. The Petitioner submitted the list of third party consumers with quantum to be supplied in its letter, dated 26-4-2010 duly specifying the date from which the third party sale to the listed consumers have to be commenced (i.e. from 28-4-2010). The third Respondent, on the very next day 27-4-2010, accorded approval and intimated to all concerned and all further actions were done pursuant to the same and the third party sale effected by the Respondents as proposed by the Petitioner. Hence there is no delay in processing the application of the Petitioner for the third party sale transaction.

28. Having known that there can be no effective third party sale till 28-4-2010, the Petitioner should have sought for approval for sale to Board from the COD to actual effecting of third party sale or could have shut down their power plant instead of injecting power without the approval / agreement of the Board. Since the Petitioner has come before this Hon'ble Commission hiding facts, the petition is liable to be dismissed with costs.

Findings of the Commission:-

29. The petitioner set up a 77 MW generating plant at Gummidipoondi. The petitioner obtained the approval of TNEB for synchronizing of the unit with the TNEB grid on 14-4-2010. An energy purchase agreement was finalized by the parties on 13-04-2010 to sell infirm power to TNEB (now TANGEDCO) round the clock till the declaration of commercial operation date (COD) of the plant. The petitioner commissioned the plant on 22-4-2010. The sale rate of infirm power is the subject matter of another petition numbered as D.R.P. 15 of 2010. The petitioner has sought the approval of TNEB for third party sale to the tune of 50 MW vide their letter dated 15th April 2010. Sale to third party from the date of COD declared by M/s. OPG Power generation Pvt. Ltd., the petitioner, was permitted by TANGEDCO Ltd vide their letter dated 21-04-2010. This approval of TANGEDCO contained host of other conditions to be complied with. This implies that between 14th April 2010 and the COD of 22-04-2010, infirm power was pumped into the grid which has been accepted by the TNEB.

30. Understanding between the parties is that this station will be operating on a merchant basis after COD and will be supplying power to third parties. The petitioner sent a communication on 22-4-2010 or 24-4-2010 seeking approval of TANGEDCO for third party sale of power to the customers of the petitioner. The TNEB responded in their letter dated 24-04-2010 conveying its "in principle" approval to sale of surplus power of 50 MW for third party sales to HT consumers of the respondent within Tamil Nadu through intra state short term open access.

The letter dated 27-4-2010 of TANGEDCO indicates that third party sale was approved from 28-4-2010. This implies that there was no approval for sale to third party between 22-4-2010, the COD and 27-4-2010. Being a merchant plant, with no specific agreement with TNEB for supply of power and with indications of selling only to third parties, the treatment of power injected into the grid between the period 22-4-2010 and 27-4-2010 needs to be examined.

31. The petitioner has stated that the power was never intended to be gratuitously supplied and the respondent had also never objected to the supply of power and therefore the petitioner is liable to be compensated for the same. The Commission enquired from the petitioner as to whether any generator can inject power into the grid without any agreement or prior approval or scheduling and if large number of generators start injecting power into the grid without agreement or scheduling, what will happen to the grid?. Reference to chapter 8 of the Grid Code would clearly indicate that any generator who is interconnected to the Grid will have to schedule the dispatch of the power station. In this case, list of open access consumers was not made available in time for approval and scheduling of energy. The petitioner could not provide any satisfactory reply for the above questions at the time of hearing.

32. The parties have signed an energy purchase agreement for purchase of infirm power by TNEB on 13-04-2010. The agreement period for this infirm power purchase is 13-4-2010 to 12-10-2010, as per clause 6 of the agreement.

This clause further stipulates that if the company declare the COD before the due date of 12-10-2010, then this agreement shall be automatically terminated from the date of declaration of COD. According to this provision, the sale of infirm power has ceased w.e.f. 22-4-2010, which is the commercial operation date notified by the petitioner himself.

33. The parties have also entered into an agreement for parallel operation and open access for this power plant with TNEB grid at 110 KV level on 29th December 2009. Para 24 of the agreement is reproduced below:-

“The company shall furnish an undertaking that it will not inject any power or it will not claim for the energy injected to the grid till wheeling / sale is requested and approved by the Board. Any excess energy injected into the grid will not be accounted and paid for by the Board under any circumstances.”

This clause clearly brings out that injection of energy into the grid is prohibited till such time wheeling / sale is requested and approved by the Board and the petitioner is not entitled to be compensated for such energy injected into the grid.

34. It was pointed out by the Respondents during the arguments that the petitioner has not applied well in time in accordance with the TNERC's open access Regulations which provides a clear 15 days time for approval of short term open access. As stated by the Respondent during the hearing, the petitioner had approached the respondent vide their letter dated 22-4-2010 which was actually delivered on 24-4-2010, that too without the list containing the

beneficiaries of open access. The non availability of list with the letter dated 22-4-2010 or 24-4-2010 was not denied by the petitioner.

35. The processing of open access application is required to be done in accordance with the TNERC open access Regulations, 2005 which mandates filing of applications and the associated processing time for grant of approval and there after implementation of the open access. In the absence of open access, the action of the petitioner amounts to unauthorized injection of energy from his power station into the grid and therefore he could not now take the plea of his intention that the power was not intended to be gratuitous supply. Injection of power into the grid, in the absence of any contract or in the absence of open access, in violation of para 24 of the parallel operation and open access agreement, as discussed in para 33 above does not warrant compensation. In the light of the above discussions, the Commission is of the view that in accordance with the parallel operation and open access agreement, as discussed above, no payment is due for injection of energy between 22-4-2010 and 27-4-2010 into the grid.

36. While working on this order, the Commission had come across an order dated 16-5-2011 issued by Hon'ble Appellate Tribunal for Electricity in Appeal No. 123 of 2010 in the matter of M/s. Indo Rama Synthetics (I) Ltd., Nagpur Vs MERC and others. Para 13 of the order, which is relevant, is reproduced below:

“13. Thus, we do not find any substance in the claim of the Appellant for compensation for the power injected into the grid without any schedule and agreement.”

The order of APTEL as discussed above supports the findings of this Commission.

Order:

37. In view of the findings in paragraphs 29 – 36 above, the Commission directs that no compensation is payable to the petitioner for the energy injected into the grid in the absence of approval of open access. Further no compensation is payable to the petitioner for the energy injected into the grid in the absence of any agreement for sale of power and scheduling of energy for injection into the grid based on such agreement.

Appeal:-

38. An appeal under section 111 of the Electricity Act, 2003 against this order shall lie to the Appellate Tribunal for electricity within a period of 45 days.

D.R.P. No. 12 of 2011 is ordered accordingly. No order as to costs.

(Sd.....)
(S. Nagalsamy)
Member – II

(Sd.....)
(K. Venugopal)
Member – I

(Sd.....)
(S.Kaliban)
Chairman

/ True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**