

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

PRESENT:-

| | | |
|----------------------|------|----------|
| Thiru S.Akshayakumar | | Chairman |
| Thiru.G.Rajagopal | | Member |
| | and | |
| Dr.T.Prabhakara Rao | | Member |

I.A.No.1 of 2016
in
M.P.No.36 of 2015
and
M.P.No.36 of 2015

M/s. SEPC Power Private Limited
Represented by its Vice President
3B, Nawazish, No.30, Khader Nawaz Khan Road
Nungambakkam, Chennai – 600 006.

... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs.

Tamil Nadu Generation and Distribution Corporation Limited
Represented by its Chairman and Managing Director
144, Anna Salai, Chennai – 600 002.

... Respondent
(Thiru Yasod Vardhan
Senior Advocate for Thiru M.Gopinathan
Standing Counsel for the Respondent)

Dates of hearing: 28-10-2015, 30-12-2015, 28-01-2016
27-04-2016 and 29-08-2016

Date of Order: 13-06-2017

The M.P.No.36 of 2015 came up for final hearing on 29-08-2016. Both parties have filed their Written Submission as directed by the Commission. The Commission upon perusal of the Petition and all other connected records and after hearing the arguments of both parties hereby makes the following:

ORDER

1. Prayer of the Petitioner in M.P.No.36 of 2015:-

The prayer of the Petitioner in M.P.No.36 of 2015 is to direct that (a) Repairs and Maintenance Cost ; (b) Employee Cost and (c) Administration and General Expenses be directed to be paid to the Petitioner under the PPA at actuals.

2. Prayer of the Petitioner in I.A.No.1 of 2016 in M.P.No.36 of 2015:-

The prayer of the Petitioner in the I.A. is to reopen the case and to direct that:-

(a) Repairs and Maintenance Cost Plus Employee Cost Plus Administration and General Expenses be directed to be paid to the Petitioner under the PPA at actual; OR

(b) Bad & Doubtful debt of 0.25% Plus, Insurance Expenses of 0.5% Plus, Contingency of 0.5% as per deleted Regulations 29 to 31 which are in any case permissible going by Regulations 25 (g) & (10) be provided to the Petitioner ;

Alternatively

(c) Pass such orders and take such action in that regard, by if necessary, amending the TNERC Tariff Regulations 29 to 31 OR if necessary, align the TNERC Tariff Regulations, 25 with Regulation 29 of CERC (Terms and Conditions of Tariff) Regulations, 2014 in order to clarify the position

and pass such further or other orders as the Commission may deem fit in the facts and circumstances of the case and thus render justice.

3. Facts of the case:-

The Commission while issuing orders in P.P.A.P.No.5 of 2012, giving approval to the amended PPA to be executed by the Petitioner with TANGEDCO,

has fixed O&M expenses at 1% of the capital cost as per Regulation 25 of the Tamil Nadu Electricity Regulatory Commission Tariff Regulations. The contention of the Petitioner is that the O & M expenses was 2% at the time of amendment of the PPA, date of filing petition before this Commission and on the date of commencement of the hearing in this petition. The Petitioner therefore filed the present petition seeking a direction that repairs and maintenance cost plus employee cost plus administration and general expenses be paid to the Petitioner at actuals under the PPA or Bad and Doubtful debt of 0.25% plus insurance expenses of 0.5% plus contingency of 0.5% as per deleted regulations 29 to 31 which are in any case permissible going by regulation 25 (9) and (10) be provided to the Petitioner or to amend Tamil Nadu Electricity Regulatory Commission Tariff Regulation 29 to 31 or if necessary align the Tamil Nadu Electricity Regulatory Commission Tariff Regulation 25 with Regulation 29 of CERC (Terms and Conditions of Tariff) Regulations, 2014.

4. Contentions of the Petitioner in M.P.No.36 of 2015:-

4.1. The petition has been filed seeking for certain directions in view of the findings rendered by the Commission on the issue of O&M applicable to the Petitioner's project in P.P.A.P.No.5 of 2012. The Commission in Page 82 under para 1 (b) of the said order in P.P.A.P.No.5 of 2012 held as follows:-

.....
“(b) Commissions view: The O&M and Insurance Expenses in the original PPA prior to the ordering by the Commission is 2.5%. It is only at the insistence of this Commission that the O&M was identified. While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same. However, in view of the amendments dated 09-04-2014 to TNERC Tariff Regulations, the O&M and insurance expenses is to be kept at 1% of the capital cost as per the Regulation 25 including the subsequent adjustments provided in said Regulation 25.”

4.2. The O&M and Insurance expenses (which comprises of O&M Expenses of 1% as per Regulation 25, Insurance of 0.5% as per Regulation 30 and Contingency

of 0.5% as per Regulation 31) at the time of amending PPA was 2% as per Regulations and as clarified in that regard in the order in PPAP 1 of 2008. It continued to remain the same at 2% even at the time of filing of the Petition on 13.01.2012 and filing of additional affidavit on 26.02.2014. The TNERC Regulations relating to O&M and Insurance Expenses were kept to 1% (by deleting Insurance of 0.5% in Regulation 30 and deleting Contingency of 0.5% in Regulation 31) on 09.04.2014 during pendency of the Petition before this Commission.

4.3. In view of the fact that O&M and Insurance Expenses have been limited to 1% as stated above, certain additional items relating to costs and expenses become necessary to be included for recovery by the Petitioner to treat it on the same basis as the Respondent. The Respondent's generating plants recover the costs relating to O&M and Insurance Expenses over and above the O&M and Insurance Expenses in their annual ARR. This is evident from para 3.64 on page 132 of SMT-Order No. 9 of 2014 issued on 11.12.2014 wherein it has been stated:

"that provides information on the actual O&M Expenses (Including employee expenses, R&M Expenses and A&G Expenses) incurred by TANGEDCO"

4.4. Thus the Respondent is permitted to claim the following additional expenditure over and above 1% O&M provided for as per the Regulations, namely:-

- a. Repairs and Maintenance Cost;
- b. Employee Cost;
- c. Administration and General Expenses

4.5. Without conceding that the Regulations can be made applicable to a petition which has already been filed retrospectively, assuming that the Regulations are to be made applicable, the Petitioner ought to be treated in an identical manner for reasons of maintaining uniformity and also to ensure that the Petitioner is not unduly

penalized and prejudiced in its recovery. It is therefore just and equitable that the Petitioner should also be permitted to claim the above expenses which are allowed to the respondent. The directions in this regard would cause no prejudice to respondent as it only follows what the respondent itself is entitled to for its projects. Thus a reduction in the O&M and Insurance to 1% can be sustained only if the logical extension of such capping is extended by allowing certain specified expenditures as in the case of respondent. If this is not allowed, substantial mismatch would be caused.

5. Contentions of the Respondent:-

5.1. TNERC's Tariff Regulations, 2005 were notified on 03-08-2005. This Regulation is common to all the generators within the State of Tamil Nadu. For the purpose of awarding Operation and Maintenance expenses under clause 25 of the Regulation, generating stations established or to be established on the date of coming into force of the notification (i.e. on 03.08.2005) are categorised as follows:-

Category (a) - Power plants commissioned and completed five years of operation as on 03.08.2005.

Category (b) - Power plants commissioned and not completed five years of operation as on 03.08.2005.

Category (c) - Power plants achieved commercial operation on or after 03.08.2005.

5.2. The O&M expense applicable to the above mentioned category (c) power plants is as per clause 25 (5) of TNERC's Tariff Regulation which is as follows:-

"(5) In case of the thermal power generating stations declared under commercial operation on or after the notification of these Regulations, the base operation and maintenance expenses shall be fixed at 1.0% of the actual capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 4% per annum for the subsequent years."

5.3. The Petitioner comes squarely under category (c) and therefore Operation and Maintenance expenses as applicable to generating stations concerned under category (c) is only applicable to the Petitioner.

5.4. The Commission in its order dated 30-04-2015 in P.P.A.P.No.5 of 2012, has already awarded the Operation and Maintenance of the Petitioner's new generating plant in line with the provisions of TNERC's Tariff Regulations, 2005, as applicable to category (c) power plants.

5.5. The Commission in its SMT Order No.9 of 2014 issued on 11-12-2014, has awarded the Operation & Maintenance expenses of this Respondent's various power plants exactly in line with the provisions of clause 25 of TNERC's Tariff Regulations, 2005 as applicable to categories (a), (b) or (c) respectively.

5.6. The prayer of the Petitioner for Repairs & Maintenance cost, Employee cost and Administration and General Expenses at actual over and above 1% of the Capital cost for Operation and Maintenance Expenses is not consistent with the above Regulation and hence not maintainable.

6. Contentions of the Petitioner in the Affidavit dated 01-04-2016 filed in I.A.No.1 of 2016:-

6.1. The Commission in the hearing held on 28-01-2016 reserved the petition for ordering. However, in view of certain facts which require to be placed before the Commission for a holistic consideration, especially in view of the specific powers available under Regulations 89 and 90 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, the Petitioner is filing this additional

affidavit for consideration and a further hearing on these aspects. An alternative prayer for the exercise of powers available under Regulation 90 & 91 is also being sought for.

6.2. This application has been filed seeking directions in view of the findings rendered by the Commission on the issue of O & M and Insurance Expenses wherein it has been ordered that it shall be 1% instead of 2% in the PPA.

6.3. It is essential to remove the difficulty arising out of such application of orders of the Commission on O&M expenses which will by its operations result in a position which was not contemplated by any of the parties to the PPA and contrary to the objectives sought to be achieved by way of the amendments.

6.4. (a) The Petitioner brings to the notice of the Commission in the following dates:-

| | |
|---|------------|
| Date of amendment of PPA with O & M as 2% | 10-01-2012 |
| Date of submission to the Commission | 13-01-2012 |
| Date on which hearing commenced | 12-03-2013 |
| Amendment of TNERC Tariff Regulations | 09-04-2014 |

(b) During the hearing held on 12-03-2013, the Commission evidently accepted the O & M and Insurance Expenses to be 2% and therefore in the Daily Order dated 12-02-2013 in P.P.A.P.No.5 of 2012, the Commission had set out specific issues that numbered 4 which would be considered and O&M and Insurance Expenses was not an identified item for submissions and further consideration.

(c) It is further submitted to the notice of the Commission that while the regulations were amended on 09-04-2014, the petition on O & M as 2% as per

amended PPA was clarified and found acceptable on 12-02-2013 which is much before the amendment of TNERC Tariff Regulations.

(d) Therefore, any subsequent amendment to the TNERC Tariff Regulations ought not to be imposed on a concluded PPA unless accepted by the mutual agreement of the parties as per Regulation 28 (2) or 35 (2).

6.5. (a) The Commission issued the draft amendments proposing the changes to

Regulations 24A, 25, 29, 30 & 31 vide TNERC/TR/5/2/10 dated 08-11-2013;

(b) During the aforesaid notice of proposing for amendments to TNERC Tariff Regulations, the petition was being heard by the Commission;

(c) In view of the contents of the proposed amendments and the normal practice of giving prospective effect there was no necessity to submit objections with respect to the proposed amendments or challenge the same;

(d) There was thus no ground to assume that a decision on O&M would be taken on the basis of the subsequent amendments.

6.6. (a) The present petition is for removing certain inconsistencies;

(b) The Petitioner is not challenging the Regulation 25 in order to fix the O&M at 2%.

(c) The Petitioner nevertheless confirms the O&M of 1% as per PPA and Tariff Regulations;

(d) The petition arose because the balance 1% which was sum total of 0.5% towards Contingency and 0.5% towards Insurance both of which were dispensed with due to amendments on 09-04-2014.

(e) While Regulations 29-31 were deleted on 09-04-2014 which were respectively for Bad Debts. Contingency and Insurance, the provisions relating to this under Regulation 25 (9) & (10) were still retained as below:-

“(9) In case of considerable variation between the normative expenses and actual expenses, the Commission may allow the Generating Company or the Licensee to achieve the normative level over a period of time.”

and

(10) Increase in Operation and Maintenance expenses due to force majeure conditions like war, insurgency, change in law, may be considered by the Commission.”

(f) Therefore, even though, the Regulations 29-31 were deleted, going by the Regulation 25 (9) & (10), the Petitioner in effect is eligible for 1% which may be taken towards Regulation 25 (9) & (10) which were not yet deleted.

6.7. (a) The Commission in page 82 under para 1 (b) of the order in PPAP 5 of 2012 has held that:

"While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same. However, in view of the amendments dated 09-04-2014 to TNERC Tariff Regulations, the O&M and Insurance expenses is to be kept at 1%"

(b) It can be clearly seen from the above that the Commission itself comes to the conclusion that:

“While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same.”

(c) Therefore, the Commission itself has clarified that O&M and Insurance (which includes O&M of 1% as per Regulation 25 and Insurance and Other Expenses of 1% as per Regulations 29 to 31) shall be 2% in the PPA as has been clarified in the order as well as earlier order of the Commission.

6.8. (a) The present Petition is for removing the difficulties that have arisen out of inconsistencies resulting out of partial adoption of CERC regulations while amending the TNERC Tariff Regulations on 09.04.2014;

(b) The Petitioner submits that as ordered by the Commission in PPAP 1 of 2008, the O&M Expenses (Regulation 25), Bad & Doubtful Debt (Regulation 29), Insurance Expenses (Regulation 30) and Contingency (Regulation 31);

(c) The Petitioner further submits that in the draft amendments proposed vide TNERC/TR/5/2/10, dated 08-11-2013, the reasons stated for proposing for amendments to Bad & Doubtful debt (Regulation 29), Insurance Expenses (Regulation 30) and Contingency (Regulation 31) were to align these with CERC (Terms and Conditions of Tariff) Regulations 2014. However, the related Regulation 25 on O&M was not proposed to be aligned with CERC (Terms and Conditions of Tariff) Regulations 2014 (hereinafter referred to as CERC Tariff Regulations);

(d) Therefore, while amendments to Regulations 29-31 were aligned with CERC Tariff Regulations, the related Regulation 25 of TNERC Tariff Regulations were not aligned with CERC Tariff Regulations relating to O&M;

(e) Thus the Regulation 25 of TNERC Tariff Regulations ought to have been aligned with CERC Tariff Regulations while aligning Regulations 29 to 31.

6.9. (a) The present estimate of O&M and Insurance Expenses for a coal based thermal power plant of capacity 525 MW would be Employee Expenses of

1%, Insurance Expenses of 0.25%, Repairs and Maintenance of 1% and Administration, General and Overheads of 0.5% all totaling to 2.75% of Capital Cost.

(b) Therefore, the O&M and Insurance Expenses of 1 % of capital cost as per the amended TNERC Tariff Regulations is not sufficient to meet the estimated O&M and Insurance Expenses provided in sub-para (a) above.

(c) The O&M and Insurance Expenses as per Regulation 29 of CERC Tariff Regulations is Rs.17.01 lakhs / MW which translates to 2.55% of capital cost for a 525 MW assuming a present capital cost of Rs.6.69 Crs / MW.

(d) The O & M and Insurance Expenses of Rs.17.01 lakhs/ MW as per Regulation 29 of CERC Tariff Regulations which comes to around 2.55% of capital cost is adequate to meet the estimated O & M and Insurance Expenses.

6.10. (a) On the date of issuance of the Draft for amendments to the TNERC Tariff Regulations on 18.11.2013, there were only two major parties namely the Respondent and the Petitioner who were following the said TNERC Tariff Regulations and were affected by these amendments;

(b) The Respondent did not choose to contest against the draft amendments proposed mainly due to the reason that, they are claiming these expenses as below:

- A. O&M for existing stations are being claimed on the basis of average of these expense over last five years; and
- B. O&M for new stations are being claimed at 1% PLUS charges on actual basis comprising of "Employee expenses", "R&M Expenses" and

"A&G Expenses" all of these are claimed as part of historical basis and are allowed in the ARR;

(c) That is to say, in spite of amendments to the TNERC Tariff Regulations on 09.04.2014, the Respondent, in addition to O&M of 1 % for their new stations, are getting reimbursements on account of "Employee expenses", "R&M Expenses" and "A&G Expenses" on actual basis;

(d) Therefore, deletion of Regulation 29 to 31 were not of any significance to the Respondent as they were never covered under these Regulations due to the fact that actual of "Employee expenses", "R&M Expenses" and "A&G Expenses" were recovered in addition to 1% O&M for new plants also;

(e) On the contrary, the Petitioner, who is the only other affected party has to incur all these expenses only under the O&M and Insurance expenses stream which Comprise of:

O&M of 1% as per Regulation 25;

Bad & Doubtful Debt of 0.25% as per Regulation 29

Insurance Expenses of 0.5% as per Regulation 30; and

Contingency of 0.5% as per Regulation 31;

(f) Therefore, the Petitioner ought to be treated on par with the Respondent by TNERC Tariff Regulations as well as by the Commission;

(g) In any event, provision of Employee expenses, R & M Expenses and A&G Expenses

OR

Bad & Doubtful debt of 0.25% + Insurance Expenses of 0.5% + Contingency of 0.5% as per deleted Regulations 29 to 31, which are permissible going by Regulations 25 (9) & (10) needs to be provided to the Petitioner as being provided for the Respondent;

(h) Since the Respondent has already claimed these expenses in addition to 1% O&M for new stations, it ought to be extended to Petitioner also.

6.11. Without conceding that the Regulations can be made applicable to a petition which has already been filed retrospectively, assuming that the Regulations are to be made applicable, the Petitioner ought to be treated in an identical manner for reasons of maintaining uniformity and also to ensure that the Petitioner is not unduly penalized and prejudiced in its recovery.

7. Written Submission filed by the Petitioner dated 31-05-2016:-

7.1. The Petitioner in the I.A. filed on 31-03-2016 has interalia prayed that the Commission be pleased to reopen the case and further prayed for with reference to the clarification of the Commission as to why the I.A. be admitted, the Petitioner states as follows:-

(i) In page 91 under sub para (m) of the order in PPAP 5 of 2012, it has been ordered that the Parties should agree that:

"The parties hereby expressly agree that, notwithstanding anything contained in the Agreement, if any element of the tariff provided for in the Agreement shall be in deviation of, inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003 (as amended) and, in particular, TNERC Tariff Regulations, 2005, existing on the date of the agreement, such element shall be deemed to be amended to the extent required to bring it into compliance with the relevant provisions of the aforesaid Act /Regulations (the remaining portions shall be retained)" .

(ii) The terms of the agreement (the amended PPA in the instant case) shall be in line with the TNERC Tariff Regulations and Electricity Act, 2003 existing on the date of the agreement (the amended PPA in the instant case). Since the date of the agreement (the amended PPA in the instant case) is 10-01-2012, the TNERC Tariff Regulations on that date is applicable. Accordingly, O&M on 10-01-2012 was 2% and hence the same is applicable as per order of the Commission in P.P.A.P.No.5 of 2012 ordered on 30-04-2015.

8. Written Submission filed by the Petitioner on 07-09-2016:-

8.1. The Commission while taking up the amended PPA for approval considered various issues for approval and accordingly only four issues were determined to be taken up for considerations per the daily order on 12-02-2013.

8.2. During the pendency of the approval of the amended PPA in PPAP No.5 of 2012, the Commission amended the TNERC Regulations on 09-04-2014 for the new plants as below, evidently in order to align the TNERC Regulations in line with CERC Tariff Regulations:

O&M of 1% - As per Regulation 25;

Insurance Expenses of 0% - As per Regulation 30; and

Contingency of 0% - As per Regulation 31.

8.3. In view of the fact that O & M Expenses have been limited to 1% as stated above, certain additional items relating to costs and expenses become necessary to be included for recovery by the Petitioner to treat it on the same basis as the Respondent.

8.4. In view of the fact that O & M Expenses have been amended to 1% as stated in para (6) above, the Commission in its order on 30-04-2015 in P.P.A.P.No.5 of 2012 limited the O & M Expenses for the Petitioner also to 1%.

8.5. The Petitioner brings to the notice of the Commission, the following dates which are relevant:-

| | |
|--|------------|
| Date of amendment of PPA with O & M as 2%: | 10-01-2012 |
| Date of submission to the Commission: | 13-01-2012 |
| Date on which hearing commenced: | 12-03-2013 |
| Amendment of TNERC Tariff Regulations: | 09-04-2014 |

8.6. The amendments to the Regulations issued on 09-04-2014 was made applicable on retrospective basis to the Petitioner's amended PPA signed on 10-01-2012 whereas it should be made applicable only on a prospective basis, even in terms of the Regulations which have only prospective operation. The PPA submitted by the parties was a concluded PPA and required the approval of the TNERC only on certain specified issues.

8.7. At the hearing held on 12-03-2013, the Commission has found the 2% fixed for O & M Expenses to be in line with the Regulations and therefore in the Daily Order dated 12-02-2013 in P.P.A.P. No.5 of 2012, this Commission has set only the other 4 issues for final determination without including the O & M and Insurance Expenses issue.

8.8. While the Regulations were amended on 09-04-2014, the position on O & M as 2% as per amended PPA was clarified and taken on 12-02-2013 which is much before the amendment of TNERC Tariff Regulations.

8.9. Any subsequent amendment to the TNERC Tariff Regulations cannot be imposed unless accepted by the mutual agreement of the parties as per Regulation 28 (2) or 35 (2).

8.10. On the date of amendment of Regulations and thereafter, only the Petitioner's and Respondent's projects were to follow the TNERC Tariff Regulations. The Respondent presumably were not affected by the said amendments due to the fact that Respondent's generating plants recover the O & M and Insurance Expenses in their annual ARR based on the levels fixed by the Commission in SMT – Order No.9 of 2014 issued on 11-12-2014.

- a. Repairs and Maintenance Cost;
- b. Employee Cost;
- c. Administration and General Expenses.

8.11. The Respondent claims the above expenses which also included the expenses for the new plants over and above 1% O & M provided for as per the amended Regulations.

8.12. In spite of amendments to the TNERC Tariff Regulations on 09-04-2014, the Respondent, in addition to O & M of 1% for their new stations, are getting reimbursements on account of "Employee Expenses", "R&M Expenses" and "A & G Expenses" on actual basis.

8.13. The deletion of Regulation 29 to 31 were not of any significance to the Respondent as they were never covered under these Regulations due to the fact that actual of "Employee Expenses", "R&M Expenses" and "A & G Expenses" were recovered in addition to 1% O & M for new plants also.

8.14. The Petitioner has to incur all these expenses only under the O & M and Insurance Expenses stream which comprise of:-

O&M of 1% as per Regulation 25;

Bad & Doubtful Debt of 0.25% as per Regulation 29;

Insurance Expenses of 0.5% as per Regulation 30; and

Contingency of 0.5% as per Regulation 31.

8.15. In any event, provision of:

"Employee Expenses", R&M Expenses" and "A & G Expenses"

OR

Bad & Doubtful Debt of 0.25% + Insurance Expenses of 0.5% + Contingency of 0.5% as per deleted Regulations 29 to 31.

OR

Any of which are permissible going by Regulations 25 (9) & (10) needs to be provided to the Petitioner as being provided for the Respondent.

8.16. The Petitioner cannot be imposed a reduction under one head, if this Commission deems it appropriate to apply the Amended Regulations while at the same time denying other items. The application cannot be partial and in order to ensure appropriate and equitable application of the Amended Regulations.

8.17. The earlier claimed expenses are not applicable and in the future ARR, the Respondent cannot claim these expenses given in para (g) over and above 1% O & M for new stations. Such an interpretation would affect both the Petitioner

and the Respondent adversely, which, in the submission of the Petitioner could not have been the intention of the Commission.

8.18. In view of the contents of the proposed amendments and the normal practice of giving prospective effect there was no necessity to submit objections with respect to the proposed amendments or challenge the same. The Commission has the inherent power available to "Remove Difficulties" which ought to be exercised in such cases.

8.19. Should, the Commission determine that a retrospective application of the head of O & M Expenses was in order, the Petitioner can be directed to be granted O & M Expenses of 1% as per PPA and Tariff Regulations.

8.20. The petition arose because the balance 1% which was sum total of 0.5% towards Contingency and 0.5% towards Insurance both of which were dispensed with due to amendments on 09-04-2014.

8.21. While Regulations 29-31 were deleted on 09-04-2014 which were respectively for Bad Debts, Contingency and Insurance, the provisions relating to this under Regulation 25 (9) & (10) were still retained as below:-

"(9) In case of considerable variation between the normative expenses and actual expenses, the Commission may allow the Generating Company or the Licensee to achieve the normative level over a period of time."

And

"(10) Increase in Operation and Maintenance expenses due to force majeure conditions like war, insurgency, change in law, may be considered by the Commission."

8.22. The present petition is for removing the difficulties that have arisen out of inconsistencies resulting out of partial adoption of CERC Regulations while amending the TNERC Tariff Regulations on 09-04-2014.

8.23. The O & M and Insurance Expenses is the sum total of O & M Expenses (Regulation 25), Bad and Doubtful Debt (Regulation 29), Insurance Expenses (Regulation 30) and Contingency (Regulation 31).

8.24. In the draft amendments proposed vide TNERC/TR/5/2/10, dated 08-11-2013, the reasons stated for proposing for amendments to Bad & Doubtful Debt (Regulation 29), Insurance Expenses (Regulation 30) and Contingency (Regulation 31) were to align these with CERC (Terms and Conditions of Tariff) Regulations, 2014. However, the related Regulation 25 on O & M was not proposed to be aligned with CERC (Terms and Conditions of Tariff) Regulations, 2014.

8.25. While amendments to Regulations 29 – 31 were aligned with CERC Tariff Regulations, the related Regulation 25 of TNERC Tariff Regulations were not aligned with Regulation 19 of CERC Tariff Regulations relating to O & M.

8.26. The O & M Expenses as per Regulation 19 of CERC Tariff Regulations for the year 2014 is Rs.16.24 lakhs / MW which translates to 2.3% of Capital Cost whereas the equivalent O & M Expenses as per TNERC Regulations on 09-04-2014 and 1% (after amendment of TNERC Regulations on 09-04-2014).

8.27. The Commission in page 82 under para 1 (b) of the order in P.P.A.P.No.5 of 2012 has held that:

“While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in P.P.A.P.No.1 of 2008 in clarification of the same. However, in view of the amendments dated 09-04-2014 to TNERC Tariff Regulations, the O & M and Insurance Expenses is to be kept at 1%.”

8.28. The Commission itself comes to the conclusion that:

“.... While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same.....”.

8.29. The Commission itself has clarified that O & M and Insurance (which includes O&M of 1% as per Regulation 25 and Insurance and Other Expenses of 1% as per Regulations 29 to 31) shall be 2% in the PPA as has been clarified in the order as well as earlier order of the Commission.

8.30. The present estimate of O & M and Insurance Expenses for a coal based thermal power plant of capacity 525 MW would be Employee Expenses of 1%, Insurance Expenses of 0.25%, Repairs and Maintenance of 1% and Administration, General and Overheads of 0.5% of totaling to 2.75% of Capital Cost.

8.31. The O & M and Insurance Expenses of 1% of Capital Cost as per the amended TNERC Tariff Regulations is not sufficient to meet the estimated O & M and Insurance Expenses provided in sub-para (a) above.

8.32. The O & M and Insurance Expenses as per Regulation 29 of CERC Tariff Regulations is Rs.17.01 lakhs / MW which translates to 2.55% of Capital Cost for a 525 MW assuming a present Capital Cost of Rs.6.69 Crs / MW.

8.33. The O & M and Insurance Expenses of 17.01 lakhs / MW as per Regulation 29 of CERC Tariff Regulations which comes to around 2.55% of Capital Cost is adequate to meet the estimated O & M and Insurance Expenses.

8.34. On the date of issuance of the Draft for Amendment to the TNERC Tariff Regulations on 18-11-2013, there were only two affected parties namely the Respondent and the Petitioner who were following the said TNERC Tariff Regulations and were affected by these amendments.

8.35. The Respondent did not choose to contest against the draft amendments proposed mainly due to the reason that, they are claiming these expenses as below:-

- (a) O & M for existing stations are being claimed on the basis of average of these expense over last five years ; and
- (b) O & M for new stations are being claimed at 1% plus charges on actual basis comprising of "Employee Expenses", "R&M Expenses" and "A&G Expenses" all of these are claimed as part of historical basis and are allowed in the ARR.

8.36. In spite of amendments to the TNERC Tariff Regulations on 09.04.2014, the Respondent, in addition to O&M of 1% for their new stations, are getting reimbursements on account of "Employee expenses", "R&M Expenses" and "A&G Expenses" on actual basis.

8.37. The Petitioner has to incur all these expenses only under the O&M and Insurance expenses stream which comprise of:

O&M of 1 % as per regulation 25;

Bad & Doubtful debt of 0.25% as per Regulation 29;

Insurance Expenses of 0.5% as per Regulation 30; and
Contingency of 0.5% as per Regulation 31.

8.38. The Petitioner ought to be treated on par with the Respondent by TNERC Tariff Regulations as well as by the Commission.

8.39. In any event, provision of:

"Employee expenses", "R&M Expenses" and "A&G Expenses"

OR

"Bad & Doubtful debt of 0.25%" + "Insurance Expenses of 0.5%" +
"Contingency of 0.5%" as per deleted Regulations 29 to 31

Any of which are permissible going by Regulations 25 (9) & (10) needs to be provided to the Petitioner as being provided for the Respondent. ":

8.40. The Respondent has already claimed these expenses in addition to 1 % O&M for new stations, it ought to be extended to Petitioner also.

8.41. Assuming that the Regulations are to be made applicable, the Petitioner ought to be treated in an identical manner for reasons of maintaining uniformity and also to ensure that the Petitioner is not unduly penalized and prejudiced in its recovery. Thus a reduction in the O & M and Insurance to 1% can be sustained only if the logical extension of such capping is extended by allowing certain specified expenditures as in the case of Respondent. If this is not allowed, substantial mismatch would be caused.

9. Written Submission filed by the Respondent TANGEDCO dated 12-09-2016:-

9.1. The amendments to the TNERC Tariff Regulations came into force on 09.04.2014, the date of publication of the amendments in the Tamil Nadu Government Gazette. By virtue of these amendments, Regulations 29 to 31 were omitted. Thus in terms of the amended Regulations, the base O&M expenses of a new thermal power generating station would have to be fixed at 1% of the capital cost with an annual escalation of 5.72% per annum for subsequent years. As the plant of the petitioner has not achieved commercial operation, the amended Regulations would have to apply. Consequently, the O&M expenses in respect of the petitioner's plant would be governed by the amended Regulations.

9.2. The Commission is competent to frame the Tariff Regulations, the Tariff Regulations of CERC cannot have any application. The petitioner is bound by the amended Tariff Regulations and cannot collaterally challenge the amendments to the Regulations. The Regulations framed by the Commission alone would be applicable to the petitioner's project.

9.3. In terms of the order of the majority in SMT-Order No 9 of 2014 dated 11.12.2014 effective from 12.12.2014, the base O&M expenses for new thermal stations of the respondent have been determined as per the amended Regulations and capped at 1% of the capital cost (page 136 of the order, paras 3.78 to 3.80 and page 213-paras 4.51 to 4.53) and the benefit of repealed Regulations 29 to 31 have not been extended to such plants. The petitioner's thermal station is yet to come up and cannot be treated differently. The amended Regulations would be applicable to

the plant of the petitioner just as they have been applied to the new thermal stations of the respondent.

9.4. Viewed from any angle, the amended tariff regulations would apply to the project of the petitioner and accordingly, the base O&M expenses would have to be limited to 1% of the capital cost and the benefit of Regulations 29 to 31 would not be available as they have been omitted by the amendments to the Regulations.

10. Findings of the Commission:-

10.1. Against the fixation of O&M expenses at 1% of Capital Cost of the Petitioner's project by the Commission in PPAP 5 of 2012, the petitioner has filed M.P.No.36 of 2015 on 17.06.2015 with a prayer to direct that the O&M expenses are to be allowed to the petitioner under the PPA at actuals instead of 1% of capital cost as allowed to TANGEDCO. Subsequently he has filed an IA vide IA No. 1 of 2016 in the above MP on 01.04.2016 after the Commission reserved the above MP No. 36 of 2015 for orders on 28.01.2016 reiterating the same prayer as in the Main Petition with an alternate prayer to amend Regulation 25 of the Tariff Regulations of the Commission in line with Regulation 29 of the CERC Tariff Regulations and pass on the same to him.

10.2. Before dwelling further into this case, it would be appropriate to understand the brief history behind the case.

10.3. The petitioner has proposed to put up a Thermal Plant of 1 x 525 MW at Tuticorin under MOU route for supply of power to TNEB now TANGEDCO. The PPA was signed as early as 12.02.1998 based on the Financial and Operational norms as

per GOI circular dt.30.03.1992. But the project was not executed all these years due to various reasons. The petitioner filed a W.P. vide No.7241 of 2001 in the Hon'ble High Court of Madras citing delay in the provision of escrow by the Respondent TANGEDCO. In view of various developments that have taken place in the interim including coming into effect of Electricity Act 2003, the petitioner sent a letter on 03.08.2009 requesting the Respondent TANGEDCO to confirm the taking up of the project for implementation. The Respondent TANGEDCO in its letter dt.18.08.2009 confirmed that the PPA has been signed and ratified by GoTN and advised the petitioner to take up the matter with this Commission. Accordingly, the Petitioner filed M.P. No.18 of 2011 before this Commission with a prayer to direct the Respondent TANGEDCO to act in accordance with the terms of the above PPA dt.12.02.1998 for putting up the above project of 1x525 MW at Tuticorin.

10.4. Commission examined this case very carefully as it is relating to giving effect to a PPA which was pretty old based on the then existing conditions while the current conditions are very much different and therefore capital cost and other technical/financial terms and conditions are to be revisited to reflect current Conditions/Regulations/Norms. Accordingly a detailed analysis of these norms were carried out by the Commission and after ascertaining the willingness of the Respondent TANGEDCO for procuring the power from this petitioner's plant, Commission issued its orders on 09.05.2011 directing that the capital cost shall be got approved from the Commission once the EPC contractor is selected through ICB and the PPA shall be amended to correct the norms as per para 10.4.3 so as to fall in line with TNERC Tariff Regulations, 2005 and the amended PPA shall be submitted to the Commission in terms of section 86 of the Electricity Act 2003 for approval.

10.5. Accordingly the petitioner and the Respondent TANGEDCO discussed and agreed on the amendments to the PPA as ordered by the Commission and the amended PPA was filed for approval by the Commission. This was taken up by the Commission in PPAP 5 of 2012. Major amended items were Capital Cost, O&M Expense, Incentive payment, Depreciation, Other income, Late Payment Surcharge, loWC, Interest charges etc.

10.6. While disposing the above PPAP 5 of 2012, Commission in its order dated 30.4.2015 has given its approval for the above items of Capital Cost, O&M Expenses, Depreciation etc., and in doing so Commission has held that the O&M and Insurance expenses is to be kept at 1 % of the Capital Cost in view of the amendment dated 09.04.2014 to Regulation 25 of TNERC Tariff Regulations.

10.7. With this above background of this case, now let us go into the contention of the petitioner. The petitioner's contention is that he has filed the petition on 13.01.2012 i.e. prior to the amendment of the tariff regulation which was made on 09.04.2014 and therefore the original Tariff Regulation before the amendment of the Tariff Regulation shall be applicable to him. This contention is not at all tenable because even though the petition was filed prior to the amendment of the Tariff Regulation, the Order of the Commission was pronounced later i.e. on 04.05.2015 and therefore the Tariff Regulation as on the date of the Orders of the Commission will only apply and accordingly it was made applicable. This was explained in the Order itself which is extracted below:

..... *“(b) Commission view: The O&M and Insurance Expenses in the original PPA prior to the ordering by the Commission is 2.5%. It is only at the insistence of this Commission that the O&M was identified. While the*

Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same. However, in view of the amendments dated 09.04.2014 to TNERC Tariff Regulations, the O&M and insurance expenses is to be kept at 1% of the capital cost as per the Regulation 25 including the subsequent adjustments provided in said Regulation 25”.

10.8. TNERC’s Tariff Regulations, 2005 were notified on 03.08.2005. These Regulations will be equally applicable to all the generators whether private or Government within the State of Tamil Nadu. For the purpose of allowing Operation and Maintenance expenses under clause 25 of the Regulations, generating stations established or to be established on the date of coming into force of the notification (i.e. on 03.08.2005) are categorized as follows:-

Category (a) - Power plants commissioned and completed five years of operation as on 03.08.2005.

Category (b) - Power plants commissioned and not completed five years of operation as on 03.08.2005.

Category (c) - Power plants achieved commercial operation on or after 03.08.2005.

10.9 The O&M expense applicable to the above mentioned category (c) power plants is as per clause 25(5) of TNERC’S Tariff Regulations which is as follows:

“(5) In case of the thermal power generating stations declared under commercial operation on or after the notification of these Regulations, the base operation and maintenance expenses shall be fixed at 1.0% of the actual capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 4% per annum for the subsequent years.”

10.10. The petitioner comes under category (c) and therefore O&M expenses allowed at 1% of capital cost in the impugned order is as per the Commission’s Tariff Regulations.

10.11. The petitioner's PPA is an old one signed on 12.02.1998 but the project was not executed so far due to various reasons. At this juncture, as both the parties are willing to go ahead with the project, Commission has revised the Capital Cost to reflect current levels and therefore, other parameters like O&M expenses are also to be revised based on current levels in line with the Tariff Regulations of the Commission in force at the time of issue of orders by the Commission.

10.12. The petitioner further contended that assuming that the amended tariff regulation is applicable, the Commission has not followed it uniformly to all generators because it allowed 1% of capital cost towards O&M expenses to his plant while the actual O&M expenses was allowed in full to TANGEDCO which is more than 1% of Capital Cost. The petitioner has cited page 132 of the Commission's SMT Order dt. 11.12.2014 which is extracted below:

“..... that provides information on the actual O&M Expenses (Including employee expenses, R&M Expenses and A&G Expenses) incurred by TANGEDCO”.

10.13. Hence the petitioner has sought for allowing O&M expenses at actuals instead of 1% of Capital Cost to him also as allowed to TANGEDCO on the principles of equity otherwise substantial mismatch would be caused.

10.14. The petitioner has conveniently chosen to quote a part of a statement recorded by the Commission in page 132 of the above SMT Order dt. 11.12.2014 in para 3.64 forgetting the fact that it was not the approval of the Commission. If we go through the entire para 3.64 of the Commission's SMT Order dt. 11.12.2014 produced below, of which the petitioner has chosen to highlight only two sentences, more clarity would emerge.

“3.64 TANGEDCO has submitted its audited accounts for FY 2011-12, FY 2012-13, and annual statement of accounts for FY 2013-14 that provides information on the actual O&M expenses (including employee expenses, R&M expenses and A&G expenses) incurred by TANGEDCO”.

10.15. Further the petitioner has overlooked to see page 136 of the same SMT Order where the Commission has allowed only 1% of capital cost to TANGEDCO towards O&M expenses for its new plants for the year 2013-14 in para 3.78 to 3.80 which is extracted below:

“O&M expenses for new generating plants

3.78 The TNERC Tariff Regulations sets the following guidelines for determination of O&M expenses of the new generating stations:

“25. Operation and Maintenance Expenses:

In case of the thermal power generating stations declared under commercial operation on or after the notification of these Regulations, the base operation and maintenance expenses shall be fixed at 1.0% of the actual capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 4% per annum for the subsequent years.”

3.79 Commission for last tariff order had provisionally approved capital costs submitted by TANGEDCO of the new power plants. Based on the submissions made and the actual COD's of the new plants, Commission has computed the following O&M expenses for the new generating stations.

Table No.31 - O&M expenses for new thermal stations approved by the Commission (Rs. Cr)

| Name of the power plant | Capital cost as filed (including IDC)-Rs. Crore. | O&M expenses at 1% of capital cost-Rs. Crore | Date of commissioning | O&M expenses approved for the financial year of commissioning – Rs.crore |
|--------------------------|--|--|-----------------------|--|
| MTPS Stage – III | 3550 | 35.50 | October 2013 | 17.75 |
| NCTPS Stage II – Unit 1 | 5814 | 58.14 | March 2014 | 2.42 |
| NCTPS Stage III – Unit 2 | | | May 2014 | 26.65 |
| Ennore Expansion | 4012 | 40.12 | January 2016 | 10.03 |

3.80 Based on the actual COD of the new generating stations, O&M expenses approved for FY 2011-12, FY 2012-13 and FY 2013-14 are tabulated below:

Table No.32 - O&M expenses for new thermal stations approved by the Commission (Rs.Cr.)

| Name of the power plant | FY 2011-12 | FY 2012-13 | FY 2013-14 |
|--------------------------|------------|------------|------------|
| MTPS Stage – III | - | - | 17.75 |
| NCTPS Stage II – Unit 1 | - | - | 2.42 |
| NCTPS Stage III – Unit 2 | - | - | - |
| Ennore Expansion | - | - | - |

10.16. Again in page 213 to 215 of the same SMT Order, in para 4.51 to 4.53 the Commission has allowed only 1% the capital cost towards O&M expenses to TANGEDCO's new plants for the year 2014-15 which is also extracted below:

“Operation and Maintenance expenses for new generating stations:

4.51 The TNERC tariff regulations sets the following guidelines for determination of O&M expenses of the new generating stations:

“25. Operation and Maintenance Expenses:

In case of the thermal power generating stations declared under commercial operation on or after the notification of these Regulations, the base operation and maintenance expenses shall be fixed at 1.0% of the actual capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 5.72% per annum for the subsequent years.”

4.52 The Commission in last tariff order had provisionally approved capital costs submitted by TANGEDCO of the new power plants. Based on the submissions made and the revised actual CoD of the new plants, Commission has computed the following O&M expenses for the new generating stations.

Table No.139 - O&M expenses for new thermal approved by the Commission (Rs.Cr)

| Name of the power plant | Capital cost as filed in the Petition (including IDC)-Rs. Crore. | O&M expenses at 1% of capital cost-Rs. Crore | Date of commissioning | O&M expenses approved for the financial year of commissioning - Rs.crore |
|-------------------------|--|--|-----------------------|--|
| MTPS Stage – III | 3550 | 35.50 | October 2013 | 17.75 |
| NCTPS Stage II – Unit 1 | 5814 | 58.14 | March 2014 | 2.42 |

| | | | | |
|---------------------------------|-------------|--------------|---------------------|--------------|
| <i>NCTPS Stage III – Unit 2</i> | | | <i>May 2014</i> | <i>26.65</i> |
| <i>Ennore Expansion</i> | <i>4012</i> | <i>40.12</i> | <i>January 2016</i> | <i>10.03</i> |

4.53 Based on the actual CoD of the new generating stations, O&M expenses approved for FY 2014-15 are tabulated below:

“Table 140: O&M expenses for new thermal stations approved by the Commission for FY 2014-15 (Rs.Cr.)

| <i>Name of the power plant</i> | <i>Last TO</i> | <i>Commission</i> |
|---------------------------------|----------------|-------------------|
| <i>MTPS Stage – III</i> | <i>36.92</i> | <i>37.53</i> |
| <i>NCTPS Stage II – Unit 1</i> | <i>60.47</i> | <i>30.73</i> |
| <i>NCTPS Stage III – Unit 2</i> | | <i>26.65</i> |
| <i>Ennore Expansion</i> | <i>-</i> | <i>-</i> |

10.17. From the above, it is Cristal clear that the Commission has allowed only 1% of capital cost towards O&M expenses to the new plants of TANGEDCO. Hence the contention of the petitioner is devoid of any truth. Further it amounts to leveling allegations against the Commission itself as showing discrimination which is not true. The Petitioner if so aggrieved could approach the appropriate forum for necessary relief.

10.18. Hence this petitioner seeking to allow O&M expenses at actuals which is nothing but a Review Petition in disguise deserves to be dismissed and accordingly dismissed.

10.19. Coming to the IA, the prayer of the petitioner in the IA is to reopen the case and to direct the Respondent for payment of O&M expenses at actuals as is allowed to TANGEDCO, or in the alternative to amend Regulation 25 of TNERC Tariff Regulations in line with Regulation 29 of CERC Tariff Regulations 2014 and extend the same to the petitioner.

10.20. The first prayer in the IA i.e., payment of O&M expenses at actuals is dealt with in the main petition itself as stated supra.

10.21. The alternate prayer in the IA i.e. amending the TNERC Tariff Regulation 25 is beyond the scope of the petitioner's jurisdiction. Further, it was filed after the hearings were completed and orders were reserved in the said MP No. 36 of 2015.

10.22. In the light of the above reasons, the IA is not maintainable and therefore the Commission is not inclined to go into the further merits of the I.A. 1 of 2016 in M.P.No.36 of 2015.

With these findings both the above MP & IA are disposed of.

11. Appeal:-

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission