

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

PRESENT:

Thiru M.Chandrasekar Chairman
Dr.T.Prabhakara Rao Member
and
Thiru. K.Venkatasamy Member (Legal)

M.P. No.7 of 2016

M/s.Arkey Energy (Rameswaram) Limited
New No. 20/ Old No.129
Chamiers Road,
Nandanam,
Chennai 600 035.

... Petitioner
(Thiru F.B. Benjamin George
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002
2. The Government of Tamil Nadu
Represented by its Secretary
Energy Department
Fort St. George
Chennai – 600 009.

... Respondents

(Thiru M.Gopinathan, Standing Counsel for R1 and Thiru Abdul Saleem, Advocate for R2)

**Dates of hearing : 31-03-2016; 02-06-2016; 01-08-2016
27-09-2016; 26-10-2016; 09-12-2016;
24-02-2017; 28-04-2017; 19-09-2017
and 01-10-2019**

Date of Order : **29-10-2019**
ORDER

Brief Facts of the Case:-

1. The Petitioner in the above M.P.No.7 of 2016 has prayed for directing the he 1st Respondent to accept the proposal. The matter relates to supply power to the Respondent after May 2016 without any escalation on foreign exchange or cost of coal escalation at a fixed price of Rs.4.91 per kwh or alternatively to direct the 1stRespondent to pay any reasonable price for the above supply of power after May 2016.

2. In G.O. Ms. No. 77/Energy (A1) Dept., dated 10-10-2014, Government of Tamil Nadu has issued a notification under section 11 of the said Electricity Act, 2003 directing that all generating stations shall supply all exportable electricity generated to the State Grid for supply either to TANGEDCO or other Open Access consumers in the State of Tamil Nadu. The said G.O. has been challenged by Tamil Nadu Power Producers' Association and M/s. Ind Barath Thermal Power Limited by a separate Writ Petition in W.P. Nos. 27936 and 36877 of 2015 respectively. In the said Writ Petition, the Hon'ble High Court in its order dated 15-02-2016 inter alia held as follows:-

“Thus, the arrangement between the petitioners and TANGEDCO being purely contractual and both parties having accepted to the terms and conditions of the agreement and acted based on such terms and conditions, non-adherence to certain terms and conditions such as payment for the electricity supply cannot be a ground to nullify the impugned notification. In fact, sub-section (2) of section 11 provides for the appropriate Commission to offset

the adverse financial impact of the directions referred to in section 11 (1), on any generating company in such manner as it considers appropriate. Thus, the Appropriate Commission being the TNERC would have to adjudicate as to the nature of adverse financial impact of the impugned notification on the generating company for which purpose, the affected party should approach the Commission. In fact, the Karnataka High Court in the case of GMR Energy Ltd., (supra), has pointed out this aspect and held that the producer of electricity is also protected under law. However, on the grounds raised by the petitioner, the impugned notification cannot be set at naught.”

3. Based on the above orders of the Hon'ble High Court, the present Miscellaneous Petition came to be filed before this Commission. The petitioner has submitted that the petitioner is filing this petition under section 11 (2) of the said Act, 2003 to offset the adverse financial impact of the directions issued under the said section 11 (1) in such manner as this Commission consider appropriate. The Petitioner has contended that the Letter of Acceptance entered into the Respondent will come to an end in the month of May 2016 and after May 2016, the petitioner would not be able to supply power to others located outside the Sate even section 11 is revoked as all the tenders for the next year is already finalized if the TANGEDCO is not willing to lift the power generated by the petitioner, which ultimately causes irreparable financial loss and undue hardship.

4. The petitioner has further submitted that he will supply power to the Respondent after May 2016 without any escalation on foreign exchange or cost of

coal escalation at a fixed price of Rs.4.91 per kwh or alternatively this Commission may issue suitable direction to the Respondent to pay reasonable price as this Commission may deem fair and reasonable.

5. In the affidavit filed on 27-06-2016, the petitioner has filed an affidavit praying to implead the Government of Tamil Nadu as one of the Respondents.

6. In the common counter affidavit filed in M.P. No.4 of 2016 and 7 of 2016 on 06-05-2016, the Respondent TANGEDCO has stated as follows:-

(i) Section 11 (1) of the Electricity Act, 2003 empowers the appropriate Government to specify that a generating company shall, in extra ordinary circumstances operate and maintain any generating station in accordance with direction of that Government. Accordingly, in the present case, the aforesaid subject G.O. was issued by the State Government issuing the direction that the generating companies shall sell power within the State only.

(ii) The appropriate Commission can pass appropriate order to the appropriate Government and not to the Distribution Licensee / this respondent. The statutory provision does not mandate that the Distribution Licensee has to offset the adverse financial impact and in such circumstances the very claim of the petitioner is not maintainable as against this Respondent.

(iii) The above petition is not maintainable as against this Respondent which is only a Distribution Licensee.

(iv) There is no bar for the petitioner to sell power to any other consumer apart from the Distribution Licensee in the State of Tamil Nadu and the Government Order under section 11 of the Electricity Act, 2003 also does not prohibit the same. The aforesaid Government Order has been issued in public interest which is preponderant to the interest arising out of a contract.

(v) Letter of Acceptance (LOA) has been issued to the generators to supply power vide Tender No.06 of 2014 and the contract ended on 30-09-2015. Subsequently a Tender No.07 of 2015 was floated to procure 1200 MW Round the Clock (RTC) power from 01-10-2015 to 31-05-2016.

(vi) The Tender No.07 of 2015 could not be finalized before 01-10-2015 due to various reasons like litigations from the bidders, non-completion of the rate negotiations etc. Hence, the Tender No.06 of 2014 was extended for a period of 14 days from 01-10-2015 to 14-10-2015 to all contract holders of Tender No.06 of 2014. Even after the extended period, the tender could not be finalized in all respects and therefore another extension from 15-10-2015 to 28-10-2015 was given. Finally, the least rate among the Intra-State bidders was discovered as Rs.5.05/- per kwhr in the Tender No. 07 of 2015 and accordingly the Respondent is willing to enter into an agreement with all bidders, if the petitioner / others are willing and come forward on their own will.

(vii) The Hon'ble High Court of Madras by its order dated 15-02-2016 passed in W.P. No.27936 of 2015 & W.P. No.36877 of 2015 has taken into account a similar situation which prevailed earlier in the State of Karnataka and the decision of the

Karnataka High Court in upholding the powers of the State Government to bar selling of power outside the State. It is further submitted that Government Order under Section 11 of Electricity Act has acquired a statutory force and cannot be superseded by a contractual obligation of private nature as in any case a contract cannot override a statutory provision.

(viii) The back-down instructions issued by the State Load Despatch Centre (SLDC) to the generators is only based on the real time requirement of generated electricity to meet the State demand on real time without any load shedding. Also, it is the prime responsibility of the SLDC to ensure the Grid discipline as per IEGC norms and also ensure the safe and secured operation of the State Grid and in turn the All India Grid by optimum scheduling of power from various generating resources based on the Merit Order Dispatch. Accordingly, as per sections 32 & 33 of Electricity Act, 2003 and the prevailing Codes & Regulations issued by Central Electricity Regulatory Commission (CERC) & Tamil Nadu Electricity Regulatory Commission (TNERC), back down instructions are issued by SLDC only to ensure the Grid discipline and safety of the grid as and when the conditions vary according to the State Demand.

(ix) The following clause is stipulated in the agreement entered between the petitioner and the TANGEDCO is reproduced as follows:

"The company should abide by the provisions of Gnd connectivity and the Intrastate Open Access Regulations, 2014 with regard to charges and the other terms and conditions"

From the above, it is submitted that the SLDC has issued Short Term Open Access (STOA) approval along with the conditions to be abided by the petitioner to maintain grid security according to the Grid Code, CERC & TNERC Regulations and also as per time to time instructions of SRLDC.

(x) There is a compensation clause in the LOA of TANGEDCO which stipulates 20% of the contracted rate shall be payable by the purchaser (TANGEDCO) for deviation from procurer side is beyond the permissible limit of 15% of contracted quantum and hence the petitioner is being compensated with the rates. The Clause 26 (ii) of LOA of TANGEDCO is reproduced as follows:-

"In case deviation from procurer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, procurer shall pay compensation at 20% of tariff per kwhr for the quantum of shortfall in excess deviation of 15% while continuing to pay open access charges as per the contract."

(xi) If there is no generation on back-down instructions a compensation of 20% of the contracted rate per unit for the quantum of short fall in excess of deviation of 15% besides open access charges being paid by TANGEDCO without any generation of electricity from the petitioner's power plant according to the PPA that may be entered with TANGEDCO by the petitioners.

(xii) It was also permitted to supply power to consumers within the State (a few thousand HT consumers). The Intra-State private power producers including captive generators have been facilitated with Open Access for wheeling their

generated power even below 1 MW of any HT consumers within the State first of its kind in India mainly to protect the public interest of the State.

(xiii) The petitioner can maintain the above petition only if there is an absolute ban to sell power to anyone other than the Distribution Licensee and as such in the present circumstances when there is no such absolute ban and that the petitioner is at liberty to sell power to any other consumer within the State, the above application deserves to be dismissed.

7. Findings of the Commission:-

(i) We have perused the records and also heard the arguments of the learned Counsels appearing for both sides. The petitioner has prayed for issuing suitable directions to the 1st Respondent to accept the proposal of the petitioner to supply power to the Respondent after May 2016 without any escalation of foreign exchange or cost of coal escalation at a fixed price of Rs.4.91 per kWh or alternatively to direct the 1st Respondent to pay any reasonable price for the above supply of power after May 2016. However, it is seen that the petitioner has filed the present petition under section 11 (2) of the Act which empowers the Commission to offset the adverse financial impact on a generating company on account of the directions issued by the Government under section 11 (2) of the Act. Further, the Hon'ble High Court has also held that the Appropriate Commission being the TNERC would have to adjudicate as to the nature of the adverse financial impact of the impugned notification on the generating company for which the purpose the affected party should approach the Commission. The learned Counsel appearing for the Second Respondent, Government of Tamil Nadu also pointed out that as

per the orders of the Hon'ble High Court, the petitioner has to approach the Commission, only to demonstrate the adverse financial impact on it i.e. the loss sustained by the adverse finance on account of the notification issued by the Government under section 11. Therefore, essentially the petition has to be filed only for the purpose of claiming compensation for the loss sustained by the petitioner with proof of such loss. But the petitioner has not filed any document proof to demonstrate the actual financial loss suffered by the consequent on the issuance on the notification under section 11 by the Government. The petitioner has only submitted that he would not been able to supply power to others located outside the State even after the notification under section 11 is revoked as all the tenders for the next year is already finalized, as TANGEDCO is not willing to take power generated by the petitioner. The situation stated by the petitioner is only the market risk attached to the business of the electricity trading and it will not fall for consideration by this Commission while dealing a matter under section 11 (2) of the Act.

7.2 The learned Counsel Thiru Rahul Balaji appearing for the petitioner would submit that in the absence of specific provision categorising the claim petition made under section 11 (2) of the Act in the TNERC Fees and Fines Regulations, 2005, the petition has to be classified only as a M.P. He would further submit that the levy of 1% of the fee applicable to DRP cases would arise only in case of dispute between the Licensee and the generating company or Licensee *inter se*. But in this case, the compensation is claimed against the Government which is impleaded as a party in this case subsequently. Therefore, the adjudication of claim in this case would not be under section 86 (1) (f) of the Act and therefore it has to be treated

only M.P., even for the purpose of adjudicating the compensation claim originally made by the petitioner.

7.3 In this connection, it may be pointed out that sub-section (2) of the said section 11 provides that the appropriate Commission may offset the adverse financial impact of the directions issued under sub-section (1) of section 11 on any generating company, in such manner as it considers appropriate. Therefore, the Commission in order to offset the financial impact on a generator has to evolve the manner in which the prayer of the petitioner should be considered. Therefore, the Commission by exercising its regulatory power has to decide unilaterally in the first instance based on the records furnished by the petitioner regarding the financial loss suffered by the petitioner consequent on the direction issued by the Government under section 11. As such at this stage no adjudication of dispute between the licensee and the generating company arises and the Commission has to decide whether or not any financial loss is suffered by the generating company and decide the quantum of compensation, if any, to be paid by the appropriate Government to the generating company.

7.4 Further, it has also been pointed out by Thiru M.Gopinathan, the learned Standing Counsel for the TANGEDCO that the petitioner has made a submission before the NCLAT, New Delhi that he undertakes to withdraw all cases pending before all Forums in India subject to payment of 229 crores of rupees and that, based on that assurance TANGEDCO has also made certain payments to the petitioner but the petitioner has not come forward to withdraw this petition pending before this Commission.

7.5 In view of the above circumstances and the submissions of the parties, nothing survives on the petition has pointed out by the learned Counsel for the Government.

The petition is accordingly dismissed.

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

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission