

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

PRESENT:

ThiruM.Chandrasekar Chairman
Dr.T.PrabhakaraRao Member
and	
Thiru.K.Venkatasamy Member (Legal)

M.P. No.18 of 2016

Ind-Barath Thermal Power Limited
New No.20/Old No.129
Chamiers Road
Nandanam
Chennai – 600 035.

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

Vs.

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

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

3. Thiru C.Selvaraj
Plot No.162, Ranga Nagar 1st Street
Thiruneermalai Main Road
Chromepet
Chennai – 600 044.

.... Intervening Petitioner

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.18 of 2016 has prayed to fix an appropriate compensation under section 11 (2) of the Electricity Act, 2003 to be paid by the 2nd Respondent at whose instance and request the 1st Respondent had invoked section 11 (1) to restrain the generators from supplying power outside the State of Tamil Nadu, and consequential impact caused by the G.O. to the Petitioner in the month of June 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. IndBarath Thermal Power Limited by way of separate Writ Petitions 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 matter 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 to fix appropriate compensation under section 11 of the said Act.

4. The petitioner in his petition has contended as follows:-

- (i) Pursuant to the said G.O., the Peitioner was constrained to supply electricity to the TANGEDCO alone and was unable to export power to other needy States.

- (ii) The said G.O. issued under section 11 of the Electricity Act, 2003 had created irreparable loss and undue hardship to the petitioner and the petitioner along with the Tamil Nadu Power Producer's Association had challenged the G.O. Ms.No.77, Energy (A1) Department dated 10-10-2014 before the Hon'ble High Court, Madras in W.P. No. 27936 of 2015 and requested to quash the same. The Hon'ble Single Judge while dismissing the said Writ Petition has observed that "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 such purpose, the affected party shall approach the Commission".
- (ii) The 2nd Respondent has not come forward to draw the power generated by the Petitioner after 31.05.2016, due to the effect of the G. O. issued under Section 11 (1) by the 1st Respondent caused non-generation at power and even if the power is generated by the Petitioner it is unable to export power to any state due to efflux of time. The Petitioner is filing this petition under s11 (2) of the Act, 2003 before this Commission to offset the adverse financial impact of the direction issued by the 1st Respondent in sub section (1) of Section 11 of the Act, in "such manner as it considers, just and appropriate" .
- (iii) The Letter of Acceptance entered into with the Respondent came to an end in the Month of May 2016 and after May 2016, the Petitioner is

not able to supply power to others located outside the State even Section 11 is revoked as all the tenders for the next year is already finalized.

- (iv) It is submitted that due to Respondents, unjust attitude and actions had caused the petitioner heavy financial loss apart from facing various legal actions from the financiers and suppliers of fuel to the power plants.
- (v) Virtually the plant is kept idle without generation and supply of power, though the Respondent revoked the G.O. (Ms) No. 41, Energy (A1) Department, dated 31-05-2016, the Petitioner could not able to supply power to the needy licensees of other States, as the tenders floated by them had already been closed.

5. In the Common Counter filed in M.P. No.17 of 2016 and M.P. No.18 of 2016 on 09-12-2016, the Respondent, TANGEDCO has stated as follows:-

(i) The appropriate Commission can pass appropriate order to the appropriate Government and not to the Distribution Licensee, the Second 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 petitioners are not maintainable as against Second Respondent.

(ii) There is no bar for the petitioners to sell power to any other consumers apart from the Distribution Licensee in the State of Tamil Nadu and the Government Order under section 11 (1) 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.

(iii) Letter of Acceptance (LOA) has been issued to the generators to supply power in Tender No.07 of 2015 to procure 1200 MW Round the Clock (RTC) power. The petitioners in the above said Miscellaneous Petitions have accepted the terms unconditionally.

(iv) The petitioners in M.P. No.17 of 2016 and M.P. No.18 of 2016 have wilfully entered into an agreement with the TANGEDCO along with other bidders in Tender No.07 of 2015 for the period from 13-01-2016 to 31-05-2016 and come forward on their own will to supply power to TANGEDCO.

(v) The following clause is stipulated in the agreement entered between the petitioners and the TANGEDCO:-

"The company should abide by the provisions of Grid connectivity and the Intra-State 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 to the petitioners along with the conditions to be abided by the petitioners to maintain grid security according to the Grid Code, CERC & TNERC Regulations and instructions of SRLDC.

(vi) The averments made by the Petitioners are completely wrong and denied on the following grounds:-

- (a) The Petitioners have supplied power to TANGEDCO upto 31-05-2016 under bilateral agreement / contract at a particular rate and binding with the various conditions including both side compensation clause. The petitioners are very well known that the contracts are getting expired on 31-05-2016.
- (b) As submitted before the Hon'ble High Court of Madras during hearing in W.P. No. 36877 of 2015 filed by the petitioner in M.P. No.18 of 2016, the Government Order G.O. Ms. No.77, Energy (A1) Department dated 10.10.2014 was reviewed by the Government during May 2016 and the Government of Tamil Nadu have issued revocation of the directions issued under Section 11 (1) of the Electricity Act, 2003 vide G.O. (Ms.) No.41, Energy (Ai) Department, dated 31.05.2016 allowing the generators to sell the power outside Tamil Nadu.
- (c). As per the prevailing CERC/TNERC Open Access Regulations, since the Section 11. (1) was revoked, any generator including the petitioners can sell power through short term open access to any other States under bilateral contract or through traders according to Day Ahead Open Access and also sell power through Power Exchanges.
- (d) 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.
- (e) After the section 11 (1) of the Electricity Act, 2003 as revoked from

01-06-2016, the following generators in Tender No. 07/2015 who supplied power to TANGEDCO are selling power to other States and through Power Exchanges under Inter-State open access from June 2016 onwards:-

- i) M/s Sakthi Sugars Ltd., Sakthi Nagar,
- (ii) M/s.Sakthi Sugars Ltd., Sivaganga,
- (iii) M/s.Sakthi Sugars Ltd., Poonduarai,
- (iv) M/s. India Cements Ltd.
- (v) M/s.SKI Carbon Black India Ltd.
- (vi) M/s. MALCO Energy Ltd.
- (vii) M/s. Vedanta Ltd.

- (f) The section 11 (2) of the Electricity Act, 2003 is the provision to compensate the generators who are supplying power to other States under contractual basis and binding with compensation for the financial impact due to the imposing of direction issued under Section 11 (1) of Electricity Act, 2003.

(vii) The petitioners are in the business of supplying electricity knowingly and fully aware of the provisions of the law and all legal aspects on which they have to operate. The petitioners have participated in the tender process and as such estopped to claim anything beyond the contract terms. The petitioners have conveniently failed to project that they were also permitted to supply power to those willing consumers within the State. The available power generation is being utilised

within the State as the impugned G.O. has been passed in accordance with law and in terms of section 11 (1) of the Electricity Act, 2003.

(viii) In the light of the above, the prayer for compensation is not maintainable. The Petitioners can maintain the above Miscellaneous Petitions only if there is an absolute ban to sell power to anyone other than the distribution licensee or else if the petitioner companies have made an agreement on interstate sale of power while invoking of section 11 (1). As such in the present circumstances, when there is no such absolute ban and that the petitioners are at liberty to sell power to any other consumer within the State, the above petitions are liable for to be dismissed.

(ix) Even after revoking of section 11(1) of the Electricity Act, 2003 from 01.06.2016, the generators who supplied power to TANGEDCO in Tender No. 7 are selling power to other States and through Power Exchanges under Inter-State Open Access from June 2016 onwards. When other generators in Tender No.7 are selling power to other States from June 2016 onwards, the petitioners claim for appropriate relief for keeping the plant idle in the month of June 2016 and to offset the adverse financial impact as per section 11(2) of the Act are totally baseless and the petitions are deserved to be dismissed.

(x) With reference to various other averments in the respective petitions, they are made on presumptions and assumptions and prayer in these petitions are premature. Therefore, the petitions on hypothetical grounds and prayers are liable to be dismissed in limine.

6. An Intervening Petition dated 19-09 2017 was also filed by Thiru C.Selvaraj seeking to implead himself. In the counter affidavit filed on 10-10-2017, the petitioner has objected the Intervening Petition filed by Thiru C.Selvaraj and prayed to dismiss the Intervening Petition.

7. Findings of the Commission:-

7.1 We have perused the records and also heard the arguments of the learned Counsels appearing for both side. Further the learned Counsel appearing for the State of Tamil Nadu would submit that the provision of section 11 (2) is in-built and already available in the Act itself and that the Hon'ble High Court has also held that sub-section (2) of section 11 provides for the Appropriate Commission to offset the adverse financial impact of the directions referred to under section 11 (1) on any generating company in such a manner as it considers appropriate. The Hon'ble High Court has further 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.

7.2 The learned Counsel appearing for the 1st 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. However, it is seen from the

prayer of the petitioner that the petitioner has only prayed to fix appropriate compensation without indicating any quantum of loss suffered by him on account of the direction issued by the Government under section 11 of the Electricity Act, 2003.

7.3 The Intervening Petitioner Thiru.C.Selvaraj has submitted that even if the petition is dismissed, it would be appropriate to direct the petitioner to pay the court fee applicable to DRP on the claim originally made in the petition and the same should be recovered from the petitioner. He has also submitted that in the copy of the petition obtained by him from the Government such endorsement was not available and hence he has stated that the endorsement would have been a subsequent one and an afterthought. In this connection, the Commission has perused the other copies of the petitions maintained in the Commission and we find that when the petition is returned to the Advocate for rectifying any defects / for compliance, the usual procedure is to obtain its endorsement in the main copy (Chairman copy) only and that is why the endorsement was not available in the copy sent to the Government from whom the Intervening Petitioner obtained a copy under RTI Act.

7.4 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 falling under section 86 (1) (f) of the Act and therefore it has to be treated only as M.P., even for the purpose of adjudicating the compensation claim originally made by the petitioner.

7.5. We have carefully gone through the averments made by the petitioner in his petition and also the submissions of the parties. It is seen that the petitioner has approached this Commission for fixing appropriate compensation under section 11(2) of the Electricity Act, 2003 to be paid by the second respondent. 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 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. In the first instance, 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. The compensation claim must be direct consequence or the result of the directions issued by the Government under section 11 of the Act.

While so, we notice that in the subsequent affidavit filed before this Commission on 06-09-2017, the petitioner has elaborately claimed the compensation under various heads under section 11 (1) of the Act. This clearly indicates that the petitioner has not properly understood the provisions of the said section and there has been no clarity on the contents of the petition.

7.6. Further Second Respondent in its counter affidavit has pointed out that section 11 (2) of the Electricity Act, 2003 is the provision to compensate the generators who are supplying power to other States under contractual basis and binding with compensation for the financial impact due to the imposing of direction issued under Section 11 (1) of Electricity Act, 2003. In other words, if the petitioner had already entered into a contract for supply of power for any other States and by virtue of the issuances of the directions issued by the Government under section 11 if the petitioner discontinued the supply of power to such other States and consequent of such contractual violation if the petitioner paid any compensation then the said compensation amount incurred by the petitioner would have to be offset by this Commission under the said section 11. Further, the second Respondent has also pointed out that the petitioners are in the business of supplying electricity knowingly and fully aware of the provisions of the law and all legal aspects on which they have to operate. The petitioners have participated in the tender process and as such estopped to claim anything beyond the contract terms. The petitioners have conveniently failed to project that they were also permitted to supply power to those willing consumers within the State. The available power generation are being utilised within the State as the impugned G.O. has been passed in accordance with law and in terms of section 11 (1) of the

Electricity Act, 2003. The Petitioners can maintain the above Miscellaneous Petitions only if there is an absolute ban to sell power to anyone other than the distribution licensee or else if the petitioner companies have made an agreement on interstate sale of power while invoking of section 11 (1). As such in the present circumstances, when there is no such absolute ban and that the petitioners are at liberty to sell power to any other consumer within the State, the petitioner is not entitled to any compensation under section 11 (2). The above contentions have not been contraverted by the petitioner. It has also been pointed out by Thiru.M.Gopinathan, the learned Senior 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.

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

The petition is accordingly dismissed.

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

(Sd.....)
(Dr.T.PrabhakaraRao)
Member

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission

