

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

D.R.P. No. 11 of 2013

M/s. OPG Energy Pvt. Ltd.
No. 167, St. Marys Road
Alwarpet, Chennai.

..... Petitioner
(Thiru P. Vinod Kumar,
Advocate for the petitioner).

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited,
Rep. by its Managing Director,
NPKRR Maaligai,
144, Anna Salai, Chennai – 600 002.
2. PTC India Limited
2nd Floor, NBCC Tower
15, Bhikaji Cama Place,
New Delhi – 110 066.

..... Respondents
(Thiru M.Gopinathan,
Standing Counsel for R1 &
Thiru Ravi Kishore, Advocate,
M/s.RnR Associates for R2)

**Dates of hearing: 12-04-2013, 05-02-2014, 04-04-2014,
21-04-2014, 22-04-2014 and 29-11-2018**

Date of order: 04-01-2019

The above D.R.P.No.11 of 2013 was heard and reserved on 21-04-2014 by the earlier Commission consisting of two Members and as one of the Members demitted office before pronouncement of the order, the case was posted for further argument before this Commission and accordingly arguments of both the parties were heard elaborately on 29-11-2018. The Commission upon perusing the above petition, counter and other connected records and after hearing the arguments on both side passes the following order:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.11 of 2013:-

The Prayer of the petitioner is to -

- (a) direct the PTC to pay the petitioner the sum of Rs.15,71,328/- in terms of the petitioner's debit note dated 7.7.2011 towards compensation for failure to off take 80% of the contracted energy along with interest surcharge at 15% per annum;
- (b) direct the PTC to pay surcharge/interest of Rs.3,45,037/- calculated till the date of the petition at 15% per annum calculated on a day to day basis for each day of delay after the 30th day of receiving the petitioner's debit note dated 7.7.2011;
- (c) pass such other orders as deemed fit in the circumstances of the case;
- (d) direct the respondents to pay costs of the present proceedings to the petitioner.

2. Contentions of the petitioner:

2.1 The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 involved primarily in the business of setting up power plants

and generating electricity. The petitioner had set up a natural gas based captive power plant in Maruthur Village in Nagapattinam District with an installed capacity of 17.5 MW and the plant was commissioned during April 2004.

2.2 There has been severe shortage of power in the State and to meet the severe shortfall of power, to augment the power supply, the First Respondent TANGEDCO had in the year 2009, sought to purchase power from captive generators and other private generators through trading licensees recognized by the Central Electricity Regulatory Commission ("the CERC") and in this regard issued tenders. The Second Respondent PTC India Ltd. (PTC) which is a trading licensee was selected by the TANGEDCO, as the medium through which captive power plant / private generators were to sell power to the Board. Consequently the petitioner entered into an Agreement dated 1.6.2009 with the PTC wherein the petitioner had agreed to sell certain quantities of power every month for onward supply to the TANGEDCO till 31.5.2010. A Letter of Agreement (LoA) dated 04.07.2009 was issued by the PTC incorporating the terms and conditions of the supply. The term of the Agreement between the petitioner and the second respondent was extended till 31.5.2014 by Supplementary Agreement dated 27.10.2009.

2.3 Based on fresh tender issued by the TANGEDCO for procuring power from CERC approved trading licensee for the period from 1.6.2010 to 31.5.2011 the PTC came to be selected. The petitioner had offered to supply 7 MW of power to

TANGEDCO through the PTC. A new LoA, dated 23.8.2010 was issued by PTC to the Petitioner stipulating the terms and conditions under which power from the petitioner's captive power plant was to be scheduled to the TANGEDCO. The LoA formed integral part of the agreements between the petitioner and PTC under which power was to be supplied to TANGEDCO.

2.4 Another LoA was issued on 17.2.2011 by PTC in favour of the petitioner, whereby 9 MW of power was to be scheduled to TANGEDCO by the petitioner during May 2011 in addition to the quantity agreed under the LoA dated 23.8.2010. All other terms of the LoA dated 23.8.2010 were to apply to the off take of 9 MW under the LoA dated 17.2.2011.

2.5 The Power Purchase Agreement (PPA), dated 1.6.2009 was entered into by the petitioner with PTC for the same of power and the PTC had a back to back agreement with the TANGEDCO. The agreement between the Petitioner and PTC was entirely for the benefit of the TANGEDCO. Therefore, there is a clear nexus between the transaction under agreements entered into by the Petitioner with PTC and the transaction under agreement entered into by PTC with the TANGEDCO.

2.6 The LoA dated 23.8.2010 *inter alia* stipulated that the delivery point of the power to be scheduled to the TANGEDCO was to be the plant bus at the Petitioner's plant switchyard. The Petitioner was required to schedule and dispatch power in coordination with the SLDC. Further, except in case of transmission

constraints as certified by the SLDC, the petitioner was required to schedule the power in full. As per clause 9(a) of the LoA, it was obligatory for the petitioner to schedule 80% of the contracted energy in a month and it was obligatory for the PTC to off take the said 80% of contracted energy. Failure on either side to abide by the said obligation contemplated payment of compensation. For failure to off take 80% of the contracted energy, the liability of PTC was pre-determined at Rs.0.93/kWh for the quantum falling short of 80% of the contracted energy. The said pre-determined sum was payable as compensation to the petitioner, in the event of failure to off take 80% of the contracted energy.

2.7 The Petitioner supplied power in terms of the agreement/ LoAs. During May 2011 there was a failure to off take 80% of the contracted energy of 7 MW and 9 MW, respectively, in terms of LoA s dated 23.8.2010 and 17.2.2011. The shortfall in off take was 7,39,200 units in respect of the LoA dated 23.8.2010 and 9,50,400 units in respect of the LoA dated 17.2.2011. Such reduced off take has attracted clause 9(a) of the LoA, in terms of which the petitioner is entitled to compensation at Rs.0.93/kWh for the quantum falling short of 80% of the contracted energy.

2.8 In terms of the agreements/ LoAs the petitioner is entitled to be compensated for such shortfall. Accordingly the petitioner raised Debit Note No. OPGE/PTC/001 dated 07.07.2011 on PTC claiming the compensation at the prescribed rate of Rs.0.93 kWh in respect of the aforesaid 7,39,200 units and 9,50,400 units. The total amount of Rs.15,71,328/- claimed by the petitioner under

the said Debit note has remained unpaid till date despite repeated follow ups. The transaction under which the petitioner supplied power to the First respondent through PTC being under a back to back arrangement, the TANGEDCO is duty bound to ensure that the amounts due to the petitioner under the intra state transaction is paid.

2.9 In terms of clause 12 of the agreement dated 1.6.2009, the petitioner is entitled to a surcharge of 15% per annum calculated on a day to day basis for each day of delay, on all payments outstanding after the 30th day of receiving the relevant invoices. The surcharge at 15% on the delayed payment of the aforesaid sum of Rs.15,71,328/- claimed under the Debit note works out to Rs.3,45,037/- as of 23.01.2013. Hence as of the date of this petition PTC is liable to pay the petitioner an amount of Rs.19,16,365/-.

2.10 The petitioner had issued a notice dated 15.10.2012 to the Respondents calling upon PTC to make the payment of Rs. 15,71,328/- along with surcharge/interest towards belated payment of the Debit Note. Despite receipt of the said notice the respondents have not taken any action towards making the payment till date. The PTC's action of refusing to make payment of the amounts due to the petitioner is erroneous and contrary to the terms of the contract. The non-payment has caused financial loss to the petitioner and it has also been prejudicial to the petitioner's interest. The non-payment of the amount by the respondents is totally unjustified. Having agreed to make payment for failure to off

take 80% of the contracted energy, PTC have to honour the terms of the Contract. The TANGEDCO being the distribution licensee and for whose benefit the transaction between the petitioner and PTC came into existence is also duty bound to ensure compliance of obligation by the PTC.

2.11 PTC is a trading licensee, and the transaction out of which the present dispute has arisen relates to supply of power to TANGEDCO which is the generation and distribution licensee of the State of Tamil Nadu. Although PTC is an inter-state trading licensee, since the transaction between the petitioner and PTC has a clear nexus with TANGEDCO and PTC has only carried out a purely intra-state transaction within the State of Tamil Nadu, the Commission has jurisdiction to entertain the petition. The Agreement between the petitioner and PTC provides for dispute resolution through arbitration in terms of Arbitration and Conciliation Act, 1996. In view of section 86(1)(f) of the Electricity Act, 2003 and the decision of the Supreme Court in Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd. reported in 2008 (4) SCC 755, the Commission is entitled to adjudicate the present dispute.

3.0 Written Submissions of the petitioner on maintainability of the DRP before the Commission:

During the hearing held on 12-04-2013 the Commission observed that it would like to decide the jurisdiction issue in this petition. Accordingly the petitioner submitted the following as to maintainability of the petition before the Commission.

3.1 The Agreement between the petitioner and the second respondent was pursuant to the tender issued by the first respondent TANGEDCO to purchase power. The entire transaction (generation, purchase and supply) in respect of which the dispute relates has taken place within the State of Tamil Nadu of which the Commission is the Regulator.

3.2 Under section 86(1)(f) of the Electricity Act, 2003 the Commission has jurisdiction to adjudicate all disputes between a generating company and a licensee. The petitioner is a generating company with its plant in Tamil Nadu. The second respondent is a licensee as defined under the Act and has carried out a purely intra-state transaction by virtue of the license granted to it by the CERC. The present dispute being one between the petitioner (generating company) and licensee (second respondent), this Commission has jurisdiction in terms of section 86(1) (f) of the Act. Section 86(1)(f) of the Act is wide and encompasses all disputes. The provisions of the Act do not exclude dispute of any specific nature from the jurisdiction of this Commission. In the absence of any exclusion under the Act, all disputes arising between a generator and licensee can be adjudicated only by this Commission. The Agreement between the parties provides for Arbitration as the dispute resolution mechanism. The Supreme Court in *Gujarat Urja Nigam Ltd. vs. Essar Power Ltd.* 2008(4) SCC 755 has held that when arbitration is provided as the mechanism for dispute resolution, the Regulatory Commission can either adjudicate the dispute itself or refer the dispute to Arbitration.

3.3 The second respondent PTC herein had entered into a back to back agreement with the first respondent for supply of the power that was to be purchased from the petitioner. There is a clear nexus between the two agreements. The second respondent by purchasing power from the petitioner and reselling to the first respondent was carrying on activity permitted under Rule 9 of the Electricity Rules, 2005. The supply of power by the petitioner under the transaction was for the first respondent and the transaction was merely routed through the second respondent. The APTEL in Appeal No. 15 of 2011, (*Lanco Power Limited v. Haryana Electricity Regulatory Commission*), has held that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate State Commission has the power to determine the tariff. Similar view has been taken by the APTEL in Appeal No. 31 of 2012 (*PTC India Ltd. v. Gujarat Electricity Regulatory Commission and Anr.*) and in Appeal No. 200 of 2009 (*Pune Power Development v. Karnataka State Electricity Regulatory Commission*). In the instant case the entire transaction has occurred in the State of Tamil Nadu. As such it is submitted that this Commission has the jurisdiction to adjudicate this matter. The Commission in DRP No. 16 of 2011 in the case of *Shree Ambika Sugars Ltd. & Anr. v. the TNEB Ors.* considered the aforesaid orders of the Appellate Tribunal in holding that so long as the distribution licensee is procuring power, from any trader Inter-State or Intra-State, disputes relating to such matter shall be dealt with by the State Commission under section 86(1)(f). As such the position on the jurisdiction of the Commission in this

regard has been considered in length by the APTEL and the Commission with the finding that the Commission shall have jurisdiction in such matters.

3.4 In this instance the transaction has taken place between a generating company and a licensee within the jurisdiction of Commission. The Agreements being back to back Agreement with the Distribution licensee within the State the Commission has the jurisdiction taking into consideration the fact that there exists a clear nexus between the trading licensee and the State licensee.

4.0 Contentions of the first respondent, TANGEDCO in the counter affidavit dt. 27-03-2014:

4.1 TANGEDCO has been unnecessarily impleaded to the above proceedings as first respondent with an intention by the petitioner to harass and attain unlawful gains. The averments stated in the petition filed by the petitioner has no relevance to the first respondent and there is no privity of contract between the petitioner and the first respondent and hence the first respondent may be discharged from the above Dispute Resolution Petition. The correspondences relate to a dispute between the petitioner and the second respondent.

4.2 TANGEDCO had entered into a power supply agreement with M/s. PTC and M/s. PTC had entered into separate agreement with various generators with different set of terms and conditions. There is no back to back agreement with any generator. The petitioner is also one such generator entering into agreement with M/s. PTC, the second respondent herein. The above agreement is a bipartite

agreement and not a tripartite agreement. Since the petitioner's power plant is connected with TANGEDCO's grid, TANGEDCO's representative as a "Data Recorder" signs the joint meter reading for the sole purpose of energy accounting and no dispute can be attributed to the "Data Recorder".

4.3 If the above petition against this respondent is entertained, this first respondent would be put to severe unnecessary strain, hardship and consequential loss. The balance of convenience is in the favour of this respondent. It is reliably learnt that the second respondent PTC, has filed petition before the High Court of Madras in its original jurisdiction comprises the issues of this DRP 11 of 2013 also. In case, the Hon'ble High Court of Madras issues orders appointing sole arbitrator, then PTC and TANGEDCO alone will be parties before the arbitration tribunal and this petitioner will not be a party before the arbitration tribunal. It clearly demonstrates that this respondent has no obligation on the issues of this DRP No. 11 of 2013.

5.0 Contentions of Second respondent, PTC India Ltd. in their counter affidavit dated 19-04-2014:

5.1 There is no merit in the claims made by the petitioner as the petitioner has itself admitted that the subject contract was for the benefit of Respondent No. 1 and there is a clear nexus between the transaction between the petitioner and the PTC and on the other hand the transaction between the second respondent and TANGEDCO. Admittedly, the petitioner recognizes PTC as an intermediary and it can pay the amount only if TANGEDCO pays the same to PTC.

5.2 PTC denies any liability for payment of the subject amount in the absence of the same being received from the TANGEDCO. PTC has raised an invoice dated 10 June 2011 for an amount of Rs.5,48,16,000/- on the TANGEDCO which includes the amount claimed by the petitioner and is yet to be paid off.

5.3 The petitioner has itself admitted existence of nexus between two back-to-back contracts and cannot insist on payment without the answering respondent being paid by the TANGEDCO.

5.4 The judgment of the Hon'ble Supreme Court delivered in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. deals only with dispute between a Generating Company and a licensee.

6. Findings of the Commission:

6.1. The following three issues are to be addressed by the Commission:

- i) Jurisdiction
- ii) Liability of the Licensees in the present DRP
- iii) Liability of M/s.PTC India Limited

6.2. JURISDICTION

During the hearing held on 12-4-2013, the Commission observed that it would like to decide the jurisdiction issue in this petition and accordingly the petitioner filed written submission justifying the jurisdiction of the Commission duly quoting various orders of the Hon'ble APTEL, Hon'ble Supreme Court and the orders of the Commission in DRP No.16 of 2011.

Section 86 (1)(f) of the Electricity Act, 2003 empowers the Commission to adjudicate upon the disputes between the licensees, and Generating Companies

and to refer any dispute for arbitration. This issue was dealt with by the Supreme Court in the Gujarat Urja case wherein it has been held that the Appropriate Commission may either adjudicate upon the disputes between the licensees and generating companies or may refer any dispute for arbitration. A careful reading of the Gujarat Urja case leads to the conclusion that the Commission may either adjudicate upon the dispute or refer the matter for arbitration at its own discretion. Just because a provision exists in the contract for arbitration, the Commission is not bound by such a provision and therefore compelled to refer the matter for arbitration.

The Commission in its orders dated 30-11-2011 in DRP.No.16 of 2011 has gone through various issues raised by Hon'ble APTEL in its orders in Appeal No.200 of 2009 and Appeal No.15 of 2011 and has held that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86 (1)(f) to adjudicate upon the dispute. Further as long as the Distribution Licensee is procuring power, from any trader inter-state or intra-state, disputes relating to such matter shall be dealt with by the State Commission under Section 86 (1)(f) of the Act.

The Commission notes that M/s.PTC India Ltd., has performed purely an intra-state transaction in this particular case. Power was supplied by generators who are located within Tamil Nadu and the distribution licensee is also located in Tamil Nadu. As the parties to the dispute are located within Tamil Nadu, the Commission rules that TNERC has jurisdiction to adjudicate the dispute on this count as well.

6.3. Liability of the Licensee in the present Dispute Resolution Petition:

After carrying out due tendering process, TANGEDCO issued LOA to PTC dated 19-08-2010 for procurement of Power from the month of August 2010 to May 2011. Subsequently, it has executed an agreement for supply of Power for the above period.

PTC, the 2nd Respondent herein entered into separate agreements with various generators including the Petitioner with Terms and Conditions which were different from its agreement with TANGEDCO. The contention of the Petitioner is that the contract entered by them with the PTC is a back to back contract entered by PTC with TANGEDCO. M/s. PTC signed the agreement with the Petitioner, generator on 01-06-2009. A Supplementary Agreement was also entered with the above Petitioner on 27-10-2009 amending certain Clauses of the original agreement.

Now let us look into the provisions relating to payment, rebate, surcharge for late payment by TANGEDCO and compensation for default in supply / offtake in the contract between PTC and TANGEDCO.

“Billing Cycle:

The relevant monthly bill will be raised starting from first day of the month to the last day of the month based on Joint Meter Reading (JMR) signed by the representative of generators and concerned TANGEDCO official on the last day of the month and the energy accounting will be made based on the JMR only .

Payment:

TANGEDCO shall make the payment to PTC within Seven working days of TANGEDCO from the date of submission of the monthly bill by PTC to TANGEDCO by fax followed by post copy for confirmation. In case of timely payment by

TANGEDCO, admissible rebate as per clause 8 below would be allowed while making the payment against the monthly bill.

Rebate for Prompt Payment:

PTC would allow 2% rebate for the billed amount, if TANGEDCO deposits the full payment to PTC Bank account within 7 (Seven) working days of presentation of the bill through fax by PTC as per clause 7 above.

Surcharge for late Payment by TANGEDCO:

A surcharge of 15% (Fifteen Percent) per annum shall be applied on all payment outstanding after the 30th day following the date of receiving PTC's relevant Bill. This surcharge would be calculated on a day-to-day basis for each day of the delay after 30th day.

Compensation for Default in Supply/Offtake:

Without prejudice to the provisions of Force Majeure, PTC has to apply for open access for the quantum as per LOA and if PTC fails to schedule 80% of contracted energy in a month then PTC shall pay compensation to TANGEDCO at the rate of Rs.1.00/kWh to the extent of short fall of 80% of monthly contracted energy.”

Now let us look into the provisions relating to payment security mechanism, rebate for prompt payment by PTC, surcharge for late payment by PTC and compensation for default in supply / offtake, in the contract between PTC and the Petitioner are as follows:-

“Payment Security Mechanism:

PTC shall provide irrevocable Letter of Credit equivalent to 100 % of 45 days peak billing of contracted energy valid upto 15 days from the last date of dispatch. PTC will be making direct payment to OPGPGPL and letter of credit will only act as a payment security mechanism. All LC charges viz Opening, Operations/ Negotiations, recoument etc. shall be borne by PTC.

Rebate for Prompt Payment by PTC:

OPGPGPL would allow 2% rebate on the purchase price if PTC deposits the full payment in OPGPGPL Bank account within 10 (Ten) days of presentation of the bill through fax by OPGPGPL.

Surcharge for late Payment by PTC:

A Surcharge of 15% (Fifteen Percent) per annum shall be applied on all payments outstanding after the 30th day of receiving OPGPGPL's relevant bill. This surcharge would be calculated on a day-to-day basis for each day of the delay.
Compensation for Default in Supply/Offtake:

OPGPGPL will declare the daily availability in energy terms at delivery point for first four months.

It is obligatory for OPGPGPL to schedule 80% of the declared energy in a month subject to ii(a) as arrived by summing up the declared daily availability of the weeks falling in that particular month and it is obligatory for PTC to off take 80% of the declared energy in a month as arrived by summing up the declared daily availability of the daily falling in that particular month for first four months.

If OPGPGPL fails to schedule 80% of declared energy in a month then compensation shall be paid by OPGPGPL @ Rs.3.04/kWh for the shortfall which falls short of 80% of energy. Similarly if PTC fails to off take 80% of the declared energy in a month then compensation shall be paid by PTC @ Rs.2.46/kWh to OPGPGPL for the shortfall which falls short of 80% of energy.

Supply beyond contracted quantum

Any oversupply by OPGPGPL to the tune of upto 20% over and above the contracted quantum, as per clause No.ii(a), in energy terms is allowed in a month which shall be settled at the tariff rate as indicated at para clause No.5 above.”

It may be seen from the above, that the provisions of the contract between PTC and TANGEDCO and the provisions of the contract between PTC and the Petitioners contain different provisions. In order to term a contract as Back to Back contract, the provisions between the contracting parties should contain identical provisions. In view of the different provisions in the above two contract, it cannot be termed as Back to Back contract. As such the contract between PTC and TANGEDCO and PTC and the Petitioner are to be interpreted separately.

There is no privity of contract between the Petitioner and the first Respondent, TANGEDCO as the agreements entered into between TANGEDCO and PTC is a bi-partite agreement. Similarly, the 2nd Respondent PTC's agreement with the Petitioner, OPG Energy Pvt. Ltd. is also a bi-partite agreement. As the petitioner's power plant is connected with TANGEDCO's Grid, TANGEDCO's representative signs the Joint Meter Reading as Data Recorder for the sole purpose of energy accounting and no dispute can be attributed to the "Data Recorder".

Hence, in the given situation TANGEDCO cannot be a party to this present petition. PTC has made no claim on TANGEDCO based on the contract entered by it with TANGEDCO. In the present Petition TANGEDCO has no obligation to pay the Petitioner for the shortfall in offtake of Power by the PTC. TANGEDCO is therefore discharged from its liability in the present Petition as PTC alone has entered into contract with the OPG Energy Pvt. Ltd.(Petitioner herein)

6.4. Liability of M/s.PTC India Ltd.,

LOA dated 23-08-2010 and 17-2-2011 were issued by PTC to OPG Energy Pvt. Ltd. and as per Clause 9(a) of LOA dated 23-08-2010, compensation at Rs.1.07/kwh is payable for failure to Schedule 80% of Contracted Energy and Compensation at Rs.0.93/kwh is payable for failure to offtake 80% of Contracted Energy.

As the contract between PTC and the Petitioner, obviously there is failure to offtake the quantity of electricity on the part of the Respondent 2 as detailed below:-

Details	Quantity (in Units)	Amount (in Rs.)
Shortfall in offtake of 80% of the quantity contracted Compensation - (Rs.0.93/ per unit)		
1. Quantity as per LOA dated 23-08-2010.	7,39,200	6,87,456/-
2. Quantity as per LOA dated 17-02-2011	9,50,400	8,83,872/-
Total	16,89,600	15,71,328/-

As per the LOA dated 23-08-2010 and 17-02-2011 issued by PTC to the Petitioner, PTC has to pay the claim of Rs.15,71,328/- with interest as per Clause 12 of the Agreement dated 01-06-2009 between M/s.PTC and the Petitioner.

Ordered accordingly.

7. 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