

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.1 of 2013

M/s.OPG Power Generation Pvt Ltd.
No.6, Sardar Patel Road, Guindy
Chennai-600 032.

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

Vs.

1. PTC India Limited
2nd Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi – 110 066.

2. TANGEDCO
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.

3. TANTRANSKO
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.

... Respondents
(Thiru M.Gopinathan
Standing Counsel for R2 and R3
M/s.RNS Associates for R1)

**Dates of hearing: 07-02-2013, 19-03-2014, 04-04-2014
21-04-2014, 09-10-2018, 20-11-2018 and
29-11-2018**

Date of Order: 04-01-2019

The above D.R.P.No.1 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 sides passes the following order:-

ORDER

1. Prayer of the Petitioner:

The prayer of the Petitioner in D.R.P. No.1 of 2013 is to direct the Respondents to make payment of Rs.56,61,291.50 towards supply of 12,12,268 units against Debit Note dated 30-09-2010 raised by the Petitioner and pass such further or other orders as the Commission may deem fit and proper in the facts and circumstances of the case and thus render justice.

2. Facts of the Case:-

The TANGEDCO, the second Respondent herein invited tender from CERC approved power traders, for procurement of power of 600 MW RTC for June 2010 to May 2011. PTC the first Respondent herein was awarded the contract for supply of 469 MW in August 2010, September 2010, 561 MW in October 2010 to March 2011 and 571 MW in April 2011 and May 2011. PTC in turn entered into a PPA with the Petitioner for supply of certain quantity of power pursuant to the said contract with TANGEDCO. The present dispute has arisen in connection with the implementation of the contract between PTC and the Petitioner.

3. Contentions of the Petitioner:-

3.1. The Petitioner has a power generation plant with 77 MW capacity situated in Gummidpoondi. The plant is run using coal as a fuel. The Petitioner is supplying the power generated by it to the 2nd and 3rd Respondents through the 1st Respondent as per terms of the Power Purchase Agreement between the Petitioner and the 1st Respondent under the Intra State Open Access Regime. The Petitioner is also selling the excess power generated directly to the third party consumers.

3.2. The Petitioner had entered into a Power Purchase Agreement dated 01-06-2009 with the 1st Respondent. The agreement was to have a tenure of one year and was to be valid till 31-05-2010. The tariff for the supply of power was fixed at Rs.5.94 per kWh. The agreement further provided that the bills for supply of power would be raised on a monthly basis and shall be on the basis of the Joint Meter Reading of the Petitioner and the 2nd and 3rd Respondent. The power supplied under this agreement was consumed by the 2nd and 3rd Respondent and the 1st Respondent was merely acting as a trading intermediary.

3.3. The Petitioner had executed a supplementary agreement dated 27-10-2009 as per the terms of which the tenure of the original agreement was extended till 31-05-2011. Pursuant to this supplementary agreement, the 1st Respondent has issued a letter dated 23-08-2010 to the Petitioner calling upon it to supply power to TNEB through the 1st Respondent under Intra-State Open Access regime. The quantum of power to be supplied on a monthly basis, tariff for supply of power, and other terms and conditions of supply were provided in the said letter.

3.4. The Petitioner was required to raise the bill on a monthly basis pursuant to the Joint Meter Reading by the representative of the Petitioner and the 2nd and 3rd Respondent. The Petitioner raised a supplementary invoice dated 30-09-2010 for supply of 12,12,268 units of power supplied in the month of September 2010. As per the terms of the Supplementary Agreement dated 27-10-2009, more particularly as per clause No.14 as amended by Clause 4 of the Supplementary Agreement, the Petitioner is permitted to supply upto 10% over the contracted quantum during a given month and the same would be compensated in a manner similar to normal supply by the Respondent. The clause is extracted hereunder:-

Supply beyond contracted quantum

“Any over supply by OPGGPL to the tune of upto 10% over and above the contracted quantum, as per Clause No.1 (ii)(a), in energy terms is allowed in a month which shall be settled at the tariff rate as indicated at para clause 5 above provided necessary prior approval shall be obtained from PTC. If PTC is not in need of the energy supplied over and above declared 100% then PTC is not liable to pay for any over supplied by OPGGPL.”

3.5. The supply made during the month of September 2010 which is subject matter of the supplementary invoice constitutes 3.78% of the contracted quantum for the month of September 2010, and does not exceed the surplus permitted as per the above mentioned clause and the Respondents are liable to pay for the same.

3.6. The Petitioner issued a reminder to the 1st Respondent on 12-12-2011 calling upon to make payment against the supplementary invoice. There has been no positive response to this letter or payment against the supplementary invoice till date. The Petitioner sent another reminder dated 24-04-2012 to the 2nd Respondent calling upon to make payment for the power supplied.

3.7. The power supplied by the Petitioner during the month of September 2010 (against which the supplementary invoice has been raised) has been accepted by the Respondents without demur. Further, the invoice has been raised only pursuant to the Joint Meter Reading of the Petitioner and the Respondents and the Petitioner has not received any communication from any of the Respondents stating that the supply of power by the Petitioner during the above mentioned period was over and above the contracted quantum.

4. Contentions of the 2nd Respondent / TANGEDCO in Counter Affidavit dated 07-03-2013:-

4.1. The 2nd Respondent herein had invited tender from the Central Electricity Regulatory Commission (CERC) approved power traders for procurement of 600 MW of Round the Clock (RTC) POWER (00.00 hours to 24.00 hours) and 1000 MW of peak power (18.00 hours to 22.00 hours) for the months of June 2010 to May 2011 subject to various terms and conditions to meet out the Respondent's power demand.

4.2. On finalization of tender, the 2nd Respondent, TANGEDCO had issued Letter of Acceptance (LOA) to the successful bidders including the 1st Respondent, PTC herein for supply of power to the 2nd Respondent. As per the LOA issued by the 2nd Respondent to the 1st Respondent, PTC based on its concurrence has to supply 469 MW of power in the months of August 2010 and September 2010, 561 MW in the months from October 2010 to March 2011 and 571 MW of power in the months of April 2011 and May 2011.

4.3. An agreement has been executed on 25-01-2011 between the 2nd Respondent and the 1st Respondent in this regard. The above agreement contains a clause regarding modification of quantum to be supplied and payment thereof. The relevant clause reads as follows:-

*“11. Modification such as addition / deletion:
PTC will stick to the contracted quantum of power for scheduling. There is no liability for payment on TANGEDCO to pay for the excess energy supplied beyond the approved scheduled energy or the contracted energy by PTC on its own accord”.*

4.4. TANGEDCO has paid all dues as claimed by the 1st Respondent PTC by honouring the said agreement. The energy claimed by the 1st Respondent and admitted by the 2nd Respondent for the months of August 2010 and September 2010 is as under:-

Period: August 2010 and September 2010

(Figures in MU)				
Sl. No.	Claim	Energy claimed by PTC	Energy admitted by TANGEDCO	Balance to be admitted
1	Claim – I	56.366434	49.849877	4.516557
2	Claim – II	276.559966	276.559966	0.0000
Total		330.926400	326.409843	4.516557
Paid vide cheque : 805957 dated 04-11-2010			4.516557	
Total admission		330.926400	330.926400	Nil

The table above reveals that the 2nd Respondent has paid for all the energy as claimed at the rate of Rs.4.74 per kwh as per the agreement and there is no payment due pending to the 1st Respondent by the 2nd Respondent in this regard.

4.5. The contract period was only upto May 2011 in the tender floated by the 2nd Respondent. The agreement said to have been entered between the Petitioner and the 1st Respondent, PTC has been signed by the Petitioner alone, and PTC has not

signed the agreement per-se as a whole but signed only first two pages. Further the supplementary agreement said to have been entered between the Petitioner and PTC has been signed by the Petitioner alone and PTC has not signed at all. Therefore, it is needed to be decided whether there exists any agreement as referred by the Petitioner.

4.6. There is no privity of contract whatsoever between the Petitioner and the second Respondent relating to the claim raised in the above petition. The 2nd Respondent has been unnecessarily impleaded as a party in this petition with an intention to harass this Respondent and gain unlawful enrichment. The claim against the 2nd and 3rd Respondents is not tenable in and thereby the petition filed by the Petitioner against these Respondents are liable to be dismissed in limine.

4.7. The averment to the extent that the power is dispatched to the 2nd Respondent through the 1st Respondent in accordance with the contract executed between the 1st Respondent and 2nd Respondent is admitted.

4.8. The averment of the Petitioner is that the power supplied by the Petitioner under the agreement between the Petitioner and 1st Respondent has been consumed by the 2nd and 3rd Respondent is false and misleading. The fact is the power was supplied by the 1st Respondent, as provided in the Letter of Acceptance (LOA). Responsibility and accountability of 2nd Respondent end with that. The 2nd Respondent is not having any concern about the source of power, quantum of power taken by the 1st Respondent PTC from any source, and third party sale if any therein. Regarding excess power supplied, the position of law has been settled by APTEL in

its order dated 16-05-2011 A.No.123 of 2010 (M/s.Indo Rama Synthetics (I) Ltd., Vs.MERC and Others). The relevant para 8 of the said order is reproduced as under:-

“8. Unlike other goods electricity cannot be stored and has to be consumed instantaneously. The generating plants, interconnecting transmission lines and sub-stations form the grid. State grids are interconnected to form Regional Grids and interconnected regional grids form the National Grid. The SLDC prepares the generation schedule one day in advance for the intra-state generating station and drawal schedules for the distribution licensees based on the agreements between the distribution licensee and the generators / trading licensees, declared capacity by the generators and drawal schedule indicated by the distribution licensees. The generators and the licensees are expected to follow the schedule given by the SLDC in the interest of grid security and economic operation. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid. In the present case, the expensive power has injected by the Appellant without the knowledge or consent of the distribution licensee or agreement and without any schedule from SLDC. Admittedly, the Appellant’s power was high cost power for which none of the distribution licensees had any agreement with the Appellant. Therefore, there is no substance in the contention of the Appellant for compensation”.

4.9. The concept of Joint Meter Reading is for authentication of quantum of energy injected, out of which how much is to be accounted against the various categories of third party sale, captive consumer, sale under tender, sales under agreement etc. The Petitioner cannot attribute contractual obligation to the meter reading agency and cannot derive any comforts to other legal issues. Sending some reminder letter to the 2nd Respondent is highly objectionable and not acceptable under law as there is no direct contract between the Petitioner and the 2nd Respondent. At the most, the roll of Respondents 2 and 3 is to authenticate the readings actually taken, and inasmuch as they are available with the Petitioner as records Respondents 2 and 3 need not be necessary parties to this petition.

4.10. The 2nd and 3rd Respondents are not liable for making any payment to the Petitioner herein for any excess energy injected by the Petitioner as claimed by the Petitioner. Therefore, the 2nd and 3rd Respondent may be discharged in the petition.

5. Contentions of the First Respondent, PTC in their Counter Affidavit dated 17-04-2014:-

5.1. There is no merit in the claims made by the Petitioner as under the subject contract, there was no scope of over-supply of electricity and over-supply made had to be accepted and paid for by 2nd Respondent. The Petitioner is fully aware of the provisions of the contract and cannot feign ignorance to mulct this claim on the PTC. The Petitioner has attempted to foist a claim which is based on false and baseless facts with an intention to mislead the Commission. The claim of the Petitioner is liable to be dismissed on this ground alone.

5.2. In the sale of power through the PTC to 2nd Respondent, only the quantity of electricity given in para 1 of the PTC's Letter No. PTC/MTFG/OPGPGPL/6169, dated 23rd August 2010, was to be supplied. Any over-supply has been specifically prohibited as per para 13 of the said letter. Further as provided in the said para 13, any over-supply is permitted only as per para 9 (c) of the said letter with a rider that any claim would be entertained only after settlement of account with and acceptance by the 2nd Respondent.

5.3. It is denied that the supply of electricity in the month of September 2010 was made pursuant to this agreement alone. The agreement dated 1st June 2009 and as amended on 27th October 2009 was for sale of electricity to the 2nd Respondent

which the Petitioner admittedly was aware that the PTC acted only as an intermediary. Only after PTC was selected and awarded the LOI, PTC would issue instruction to the Petitioner to commence supply to the 2nd Respondent with directions which were consistent with the terms of the tender and the LOI. The letter dated 23rd August 2010 was issued pursuant to this arrangement and the Petitioner has misled the Commission by omitting to present the scheme truthfully.

5.4. It is categorically denied that the electricity was supplied to the 2nd Respondent under the provision of the agreement relied upon by the Petitioner and it is reiterated that the letter dated 23rd August 2010 formed the foundation for the supply in September 2010, which provided at para 13 as follows:-

“OPGPGPL has to stick on to the contracted quantum of power for scheduling as per Sr.No.1 above. Any revision in contracted quantum by OPGPGPL shall not be entertained under any circumstances. Any over / excess generation by OPGPGPL on account of reason as power Sr.No.9(c) above shall be entertained and paid, if any only after settlement and acceptance of account by PTC with TNEB for the concerned period”.

5.5. The PTC has not received any payment relating the impugned over-supply by the Petitioner from the 2nd Respondent and any liability to pay the alleged amount to the Petitioner is denied.

5.6. The PTC had no liability to make any payment as it was not under any obligation to accede to the illegal request of the Petitioner and has always informed the Petitioner that under the arrangement for supply, the PTC would make the payment only after the account is settled and accepted by the 2nd Respondent.

5.7. The PTC denies having accepted the oversupply as claimed by the Petitioner as it has never been involved in the Joint Meter Reading.

6. Findings of the Commission:-

6.1. TANGEDCO, the 2nd Respondent herein invited tender from the CERC approved power traders for procurement of 600 MW of Round the Clock (RTC) Power (00.00 Hrs to 24.00 Hrs) and 1000 MW of Peak Power (18.00 Hrs to 22.00 Hrs) for the months of June 2010 to May 2011 subject to various terms and conditions to meet out the power demand. The contract was awarded to PTC, the first Respondent and LOA, dated 19-08-2010 was issued for Purchase of Round the Clock Power for the period from August 2010 to May 2011 for supply of 469 MW in August 2010 and September 2010, 561 MW in October 2010 to March 2011 and 571 MW in April 2011 and May 2011.

6.2. The 1st Respondent, PTC has entered into Power Purchase Agreement with the Petitioner vide agreement dated 01-06-2009 for purchase of power from the Petitioner till 31-05-2010. As per Clause 1(a) of the agreement dated 01-06-2009, *“OPGPGPL is willing to sell and PTC is willing to buy the following power from OPGPGPL’s coal/gas based Project – Upto 60 MW power (00.00 hours to 24 Hours) for the period from September 2009 or COD whichever is later to 31st May 2010.”*

6.3. A Supplementary agreement dated 27-10-2009, has been entered into by the Petitioner and the 1st Respondent PTC, extending the validity of the agreement upto 31-05-2014 after amending various clauses of the Power Purchase Agreement.

Clause 14 of the original agreement amended by clause 4 of the Supplementary Agreement between M/s.PTC & M/s.OPGPGPL, on supply beyond contracted quantity is as under.

“Any oversupply by OPGPGPL to the tune of upto 10% over and above the contracted quantum, as per Clause No.1(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 provided necessary prior approval shall be obtained from PTC. If PTC is not in need of the energy supplied over and above declared 100% then PTC is not liable to pay for any over supplied by OPGPGPL.”

6.4. The petitioner, M/s.OPG Power Generation Pvt.Ltd., has not substantiated that they have obtained prior approval of PTC for supply of the excess energy of 1212268 units.

PTC has stated that it has already informed the Petitioner that only the quantity of electricity given in para 1 of the PTC's Letter No. PTC/MTFG/OPGPGPL/6169, dated 23-08-2010 was to be supplied. Any over supply has been specifically prohibited as per para 13 of the said letter which is as follows:

“OPGPGPL has to stick on to the contracted quantum of power for scheduling as per Sr.No.1 above. Any revision in contracted quantum by OPGPGPL shall not be entertained under any circumstances. Any over/excess generation by OPGPGPL on account of reason as per Sr.No.9 (c) above shall be entertained and paid, if any only after settlement and acceptance of account by PTC with TNEB for the concerned period”.

PTC has also stated that it has not received any payment from TANGEDCO for supply of the disputed quantum i.e. excess energy of 12,12,268 units supplied over the contract during the month of September 2010 and that it is not under any obligation to pay the amount for the above supply of energy amounting to Rs.56,61,291.50 claimed vide Debit Note dated 30-09-2010. It is admitted that the Government of Tamil Nadu has notified order vide G.O.Ms.No.10 Energy (C3) dated

27-02-2009 warranting the generators located in the State of Tamil Nadu to supply all exportable electricity generated to the State grid either to Tamil Nadu Electricity Board or to any other HT consumers within the State as per the Regulations notified in this regard by the Commission; but the injection of power shall be in accordance with the Commissions Regulations that is with proper scheduling therefor.

6.5. In the orders of Hon'ble APTEL dated 16-05-2011 in Appeal No.123 of 2010 M/s.Indo Rama Synthetics Vs. MERC, it was held that no compensation is payable for unscheduled injection of power into the grid.

Further the Commission in its orders in DRP.12 of 2011 and DRP 17 of 2011, clearly held that no tariff/ compensation is payable for unscheduled injection of power. Hence it is decided that M/s.PTC is not obliged to pay for the supply over contracted quantum of power i.e. Rs.56.61 lac in respect of 1212268 units.

It is stated by TANGEDCO that the 1st Respondent PTC has supplied power according to the LOA issued by TANGEDCO. Further, TANGEDCO has no obligation to pay directly to the Petitioner, as stated by the Petitioner, for the excess energy injected by the Petitioner as there is no contract between the Petitioner OPGPGPL and TANGEDCO.

6.6. In the present DRP, two contracts have been entered into and one contract between TANGEDCO and PTC dated 25-01-2011 for Purchase of RTC Power to the quantum for which the LOA have been issued and the second contract dated 01-06-2009 has been entered into between PTC and CPPs/Generators (generator wise).

TANGEDCO issued a LOA on 19-08-2010 vide Letter No. DIR/EE/AEE/PP/F. Purchase-Tender No.2/LOA No.06/2010 to PTC for procurement of power for the month from August 2010 to May 2011 with the approved quantum and rate per unit including a trader margin of 7 paise per unit.

6.7. There is no privity of contract between the Petitioner and the second Respondent relating to the claim raised in the above petition.

6.8. The concept of Joint Meter Reading is for authentication of quantum of energy injected, out of which how much is to be accounted against the various categories of third party sale, captive consumer, sale under tender, sales under agreement etc., The Petitioner cannot attribute contractual obligation to the meter reading agency and cannot derive any comforts to other legal issues. Role of Respondents 2 and 3 is to authenticate the readings actually taken, and inasmuch as they are available with the Petitioner as records Respondents 2 and 3 need not be necessary parties to this petition.

6.9. As per TANGEDCO's Counter, TANGEDCO has stated that based on the PTC's letter dated 28-10-2010, it has settled the balance quantum of 4.516557 MU at Rs.4.74 per unit for the period from 26th August to 30th September 2010 and in support of this it has submitted the document as to copy of the PTC's letter dated 28-10-2010, U.O. of the Director/Operation to Financial Controller/Cost for admission and payment of the above quantum of power and the payment details for making payment of the amount relating to the above quantum i.e. $4.516557 \text{ MU} * 4.74 \text{ per unit} = \text{Rs.}2,14,08,480/-$ and after 2% rebate, the Net amount paid by TANGEDCO

was Rs.2,09,80,310/- in respect of the above transaction and including other transaction, the total amount settled by TANGEDCO to PTC was Rs.2,23,63,401/- vide Cheque No. 805957, dated 04.11.2010.

In view of the above, it is understood that the TANGEDCO has settled the claim made by PTC, the 1st Respondent and there is no direct contract/agreement between the Petitioner and the TANGEDCO, in respect of the Purchase of Power through the above tender, the claim made against TANGEDCO is not tenable. The 2nd and 3rd Respondents are discharged from this Petition as there is no payment liability as on date as the transactions are covered under separate contracts / LOAs.

In view of the above, the Petition is dismissed.

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