

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.5 of 2011

Saheli Exports Pvt. Ltd.
New No.25, Old No.10
Sir Madhavan Nair Road
Mahalingapuram
Nungambakkam
Chennai – 600 034.

... Petitioner
(Thiru.P.Vinod Kumar
Counsel for the Petitioner)

Vs.

The Tamil Nadu Electricity Board
Represented by its Chairman
800, Anna Salai
Chennai – 600 002.

...Respondent
(Thiru.M.Gopinathan,
Standing Counsel for TANGEDCO)

Dates of hearing : 04-03-2011; 23-03-2011; 15-07-2011;
12-08-2011; 10-08-2012; 26-09-2012;
21-11-2012; 20-12-2012; 12-02-2013;
05-02-2014; 04-04-2014; 21-04-2014;
22-04-2014; 14-07-2014; 28-07-2014;
16-10-2018; 27-11-2018; and
29-11-2018.

Date of Order : 04-01-2019

The above D.R.P.No.5 of 2011 came up for final hearing 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.5 of 2011:-

The Prayer of the Petitioner in D.R.P.No.5 of 2011 is to

- a) direct the Respondent to pay the Petitioner an amount of Rs.1,91,58,166/- being the amount payable at the contractual rate for the 4,115,180 units supplied to the Respondent for which the Respondent is yet to make payment;
- b) direct the Respondent to pay interest at 18% on the amount of Rs.1,91,58,166/- from the date when the payments for the units supplied each month become due;
- 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. Facts of the Case:-

The Petitioner has filed the Dispute Resolution Petition for a direction to the Respondent to pay the Petitioner for the 4,115,180 units of power which was injected into the grid by the Petitioner's plant at various points in time.

3. Contentions of the Petitioner:-

3.1. 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 power plant

in Komal West Village, Mayiladuthurai Taluk with an installed capacity of 8.81 MW and the plant was commissioned on 14.04.2005.

3.2. Since June 2009, the Petitioner has been supplying power to the Respondent through Power Trading Corporation (PTC). The Petitioner had contracted to supply 4 MW power to the Respondent through PTC for the period from June 2009 to May 2010. The tariff payable to the Petitioner for such supply was fixed at Rs.5.782 per unit. During 14.07.2009 & 24.07.2009, Respondent informed that the offtake from the generators has been reduced to 80% of their respective contracted quantities. Since, the Petitioner had contracted to supply specific quantity of power to the Respondent through the term of the contract the Petitioner had not made any alternate arrangement for the contracted quantity. Therefore, the reduction in offtake resulted in the Petitioner injected additional units into the grid. For the units injected by the Petitioner, raised monthly invoices for the units supplied to the Respondent through PTC. For the units supplied during 22.07.2009 to 22.08.2009, the Respondent refused to consider making payment for 22,800 units. Similarly for the power supplied during the period from 22.01.2010 to 22.02.2010, the Respondent has not made payment for 53,093 units. In terms of the Contract, the Respondent is liable to pay at the rate of Rs.5.782 per unit for the power supplied by the Petitioner.

3.3. During May 2010, the Respondent Board invited offers from Power Traders approved by the Central Electricity Regulatory Commission (CERC) for supply of 600 MW of Round the Clock power for the period from June 2010 to May 2011. The Power Trading Corporation (PTC) was selected as the successful bidder by the Respondent Board. PTC procures from generators like the Petitioner to meet the

obligation of having to supply the contracted quantity of power to the Respondent Board. The supply is directly made by the generators to the Respondent's grid and it is treated as a sale to the Respondent Board through PTC.

3.4. The Petitioner offered to supply 5 MW power from its plant every month and also commenced supply with effect from 01.06.2010. Although as per the tender the power supply was to commence from 01.06.2010, the Respondent Board delayed the signing of the Power Purchase Agreement with PTC. Consequently, PTC did not make payments to the generators for the power supplied as it was not being paid by the Respondent Board.

3.5. While continuing to accept the power being supplied to it, the Respondent Board took a sudden decision to reduce the offtake from the generators to 60%. Consequently, the Petitioner's supply to the Respondent Board through PTC was restricted to 3 MW as against 5 MW which was offered initially. The Petitioner had a third party sale permission which was confined to 3.5 MW and therefore it was left with a difficult situation as the generation in excess of 6.5 MW could not be allotted to any consumer.

3.6. Since the Respondent Board was not willing to increase the third party sale permission given to the Petitioner, with no other option the Petitioner had to pump in the entire power generated by it into the Respondent's grid. The Petitioner has been requesting the Respondent Board to pay the Petitioner for the additional units pumped in by it at the same rate as per the tariff payable for the power purchased in terms of the tender.

3.7. During August 2010, the Respondent finalized the tariff and executed the Power Purchase Agreement with PTC. In terms of the finalized terms, TNEB has agreed to pay the following rates for the supply of contracted power:

Month	Amount
June/July/Aug/Sep 2010	4.74 per Kwhr
Oct/Nov/Dec 2010/Jan/ Feb. 2011	4.89 per Kwhr
March 2011	6.13 per Kwhr
April / May 2011	6.14 per Kwhr

The intimation received by the Petitioner regarding the tariff payable for the supply of power, also notified the quantum of power which the petitioner was required to supply from August 2010 to May 2011. The Petitioner was required to supply 3 MW to the Respondent Board through PTC during the months of August and September 2010 and 4 MW during the remaining months till May 2011.

3.8. On 27-08-2010, the Petitioner was asked to reduce its quantum of supply to 80% of 3 MW (2.4 MW) with effect from 29.08.2010. The reduction of offtake announced suddenly on 27-08-2010 meant that despite the Petitioner had no other choice but to inject its entire generation into the grid without being able to allot to anyone the units available in excess of the offtake by the TNEB and the supply to its third party consumers.

3.9. It is relevant to point out that in terms of G.O.Ms.10 dated 27.02.2009, sale of electricity outside the State of Tamil Nadu has been banned and all generators have been directed to optimize their generation and deliver into the grid the entire

generation irrespective of there being any arrangement with the Respondent or not. The Petitioner has continued to adhere to the said mandate of the State Government and has been delivering its entire generation into the grid. Further, in terms of the gas supply contract which the Petitioner has with GAIL India Limited, it is required to pay for the contracted quantity of gas irrespective of whether it is consumed or not and hence the Petitioner cannot reduce its generation by reducing its gas consumption as and when the Respondent Board reduces the off take. The Petitioner has had to pay to GAIL India Limited for the gas which it has drawn for generating the power, for which the Respondent has not made payments.

3.10. The below table gives the details of the total units injected into the grid by the Petitioner's plant, the units for which payment has been made, the units for which the Respondent has not made any payments and the total amount due to the Petitioner based on the prevailing contractual rate:-

Period	Details	Billed	Considered	Surplus/(Deficit)	Rate	Amount
		(A)	(B)	C= (A-B)		
22-07-2009 to 22-08-2009	22-07-2009 -10 hrs to 24 hrs.	44,800	36,400	8,400	5.782	48,569
22-07-2009 to 22-08-2009	23-07-2009 -0 hrs to 24 hrs.	76,800	62,400	14,400	5.782	83,261
22-01-2010 to 22-02-2010	22-01-2010 -10 hrs to 22-02-2010 10 hrs.	2,433,893	2,380,800	53,093	5.782	306,984
22-05-2010 to 31-05-2010	22-05-2010 -10 hrs to 31-05-2010 24 hrs.	929,423	736,000	193,423	5.782	1,118,372

1-3 rd 2010	June		297,481		297,481	4.5766	1,361,452
4-22 nd 2010	June	4 – 22 June 2010	1,778,891	1,768,000	10,891	4.5766	49,844
22 nd 2010 to July 2010	June	22 nd June 2010 to 26 June 2010					
		27 th June 2010 to 22 July 2010	3,491,219	3,080,000	411,219	4.5766	1,881,985
22 nd 2010 to 22 Aug. 2010	July	22 nd July 2010 to 22 Aug. 2010	4,091,289	2,232,000	1,859,289	4.5766	8,509,222
22 nd 2010 to 22 nd Sep. 2010	Aug	26 th Aug 2010 to 28 Aug 2010					
		29 th Aug 2010 to 22 nd Sep 2010	3,889,384	2,622,400	1,266,984	4.5766	5,798,479
Total			17,033,180	12,918,000	4,115,180		19,158,166

3.11. The Respondents' action of refusing to make payment for the units injected into the grid by the Petitioner which has been utilized by the Respondent Board, is erroneous, arbitrary and contrary to law. The Petitioner has been grossly prejudiced on account of the Respondent refusing to make payment for the units which it is otherwise entitled to be paid for. The non-payment for the said units has caused enormous financial hardship to the Petitioner which is operating a small power plant and is entirely dependent on the revenue generated by the sale of the power produced by the plant. The withholding of the amount by the Respondent being totally unjustified, the Respondent is liable to pay interest to the Petitioner for the delayed payments.

4. Affidavit filed by the Petitioner on 22-11-2011:-

4.1. The Petitioner had set up a natural gas based captive power plant and was supplying power generated at its plant to its captive consumers. During November-December 2008, the Petitioner requested the Board for grant of permission to sell power to third parties. Permission was granted to the Petitioner for sale of 3.5 MW power to third parties till 18-05-2009 vide the Boards letter dated 02.01.2009. The said permission has been periodically renewed by the Board based on the request made by the Petitioner. The Petitioner was also supplying 4 MW power to the Respondent Board through PTC from June 2009 to May 2010. The tariff payable was Rs.5.782 per unit.

4.2. The Claim of the Petitioner in the present proceedings relates to two periods i.e. June 2009 to May 2010 and June 2010 and September 2010. In respect of the first period from June 2009 to May 2010, the Petitioner had entered into an agreement dated 2nd June 2009 with PTC for supply of 4 MW power every month to be supplied to the Board.

4.3. During the period from 22.07.2009 to 22.08.2009, when the Board vide its letter dated 14.07.2008 communicated its decision to reduce the off take from the generators supplying power through the PTC to 65% and subsequently to 805 vide letter dated 23.07.2009, the Petitioner had an open access for sale to captive consumers and accordingly the power in excess of 4 MW which was committed to TNEB through PTC was being supplied to captive consumers. For the period from 22.01.2010 to 22.02.2010, the Petitioner's supply to its third party consumers was 2.40 MW. During 22.05.2010 to 31.05.2010, the third party permission was 3.5 MW and the also confirmed to such quantity.

4.4. In respect of the second period commencing from June 2010, the Petitioner had offered to supply 5 MW per month to the Board through PTC from 01.06.2010 to 31.05.2011. Although the supply was to commence from 01.06.2010, on 28.05.2010, the Petitioner was informed that since the tender has not been finalized the offtake would not commence not commence from 01.06.2010. The Petitioner had on 31.05.2010 addressed a letter to the Chairman, TNEB informing about the difficulty faced by the Petitioner by the decision to delay the offtake pursuant to Tender No.2 and had requested that since the Petitioner was unable to identify any third party consumers at such short notice, the quantity of power meant for to TNEB sale through PTC (5 MW) may be treated as direct sale to TNEB, till the finalization of the tender. This was followed up by letter dated 02.06.2010 of the Petitioner. It is relevant to point out that the Petitioner was supplying 4.00 MW to the TNEB through PTC till May 2010 and since the TNEB had called for fresh tender for the period from June 2010 to May 2011 for which the Petitioner had offered to supply 5.00 MW, the Petitioner had not sought an enhancement of its short term open access from 3.50 MW since it was under the belief that the supply to TNEB through PTC in terms of Tender No.2 issued by the TNEB. The Petitioner had between 01.06.2010 to 03.06.2010 supplied 2,97,481 units to the TNEB.

4.5. The Petitioner was informed by letter dated 03.06.2010 of PTC that the scheduling of the 5 MW power will commence from 04.06.2010 as an interim arrangement till the finalization of the Tender No. 2 and the Petitioner were asked to strictly adhere to the aforesaid quantity. On 26.06.2010, the Petitioner was informed that a decision had been taken to reduce the offtake by 60% with effect from

27.06.2010. The Petitioner had not sought enhancement of its open access for third party sale which was restricted to 3.50 MW since it had committed to supply 5 MW to TNEB through PTC.

4.6. The reduction in the offtake to 60% of 5 MW meant that the supply through PTC was only to be 3 MW. The Petitioner had therefore vide letter dated 29.06.2010 requested for enhancement of the open access granted to it for third party sale to 6.5 MW from 3.5 MW. Since no response was received to the said request, the Petitioner made enquiries with officials. The Petitioner was informed that the enhancement of open access for third party sale cannot be granted, since the Petitioner had committed to sell 5 MW to the Board through PTC and since the capacity of the plant was only 8.81 MW, the Petitioner's eligibility for third party sale is restricted to 3.81 MW. The Petitioner addressed letters dated 09.07.2010, 20.07.2010 and 06.08.2010, to the Respondent highlighting the hardship caused on account of the delay in issuance of enhancement to the open access for third party sale.

4.7. The Direction Operations, Tamil Nadu Transmission Corporation Limited by letter dated 18-08-2010, informed that the Petitioner is entitled to enhancement of only 1.41 MW after taking into account the commitment to existing third party consumers, PTC etc. and informed that till the sale to PTC is confined to 60% of the committed quantity, the third party sale quantum can be enhanced by 1.41 MW. The Petitioner vide its letter dated 23.08.2010, responded to the letter dated 18.08.2010 and requested that the third party sale approval be enhanced to 4.91 MW. In the meanwhile, the tender was filed by the Respondent and on 23.08.2010, PTC India

Limited forwarded the LoA to the Petitioner and informed that the scheduling of power to TNEB through PTC would commence from 24.08.2010 till 31.05.2011. In terms of the LoA, the Petitioner was required to supply 3 MW for the months of August and September 2010, for the remaining months except December 2010, the quantum of supply was to be 4 MW. For the month of December the quantum was fixed at 4.5 MW.

4.8. On 27.08.2009, the Petitioner was granted enhanced open access for third party sale for 4.91 MW. However, vide letter dated 27.08.2010 the Respondent Board informed PTC to restrict the quantum of supply to 80% of the contracted quantity with effect from 29.08.2010. This meant that the offtake from the Petitioner was reduced to 2.4 MW. Had the Petitioner been granted open access for sale to third parties for 6.5 MW as requested vide letter dated 29.06.2010, the reduced offtake would not have burdened the Petitioner.

4.9. Although the Petitioner's short term open access for third party sale was enhanced to 4.91 MW, by letter dated 27.08.2010, since, the off-take was reduced to 80% by the instructions dated 27.08.2010, the enhanced open access for third party sale granted on 27.08.2010 could not take care of the additional units available with the Petitioner pursuant to the reduction of off-take. This resulted in the excess units being pumped into the grid. The Petitioner vide its letter dated 01.09.2010 requested enhancement of the third party sale permission to 5.51 MW if not 6.50 MW. By letter dated 18.09.2010, the Petitioner was asked to furnish an undertaking that the increased third party quantum sought by the Petitioner would be diverted back to the TNEB through PTC as and when required. Since the Petitioner did not give such an

undertaking the third party approval granted to the Petitioner on 27-09-2010 for the month of October 2010, was confined to 3.91 MW despite the petitioner asking for renewal of the existing 4.91 MW approval. Presently, the Petitioner's open access approval for third party sale is restricted to 3.50 MW and the Petitioner has filed D.R.P. No. 6 of 2011 seeking a direction to the Respondent to grant short term open access to the Petitioner for its installed capacity of 8.81MW.

4.10. The Petition was granted open access on 28.03.2005 for their entire installed capacities of 8.81 MW for supply of its generation its captive consumers. In addition after captive power plants were permitted third party sale, the petitioner during November-December 2010 requested for grant of this party sale permission, which was granted on 02.01.2009, and has been periodically renewed. With effect from October 2009, the Petitioner relinquished the open access granted to it for sale to the captive consumers.

5. Counter Affidavit filed on behalf of the Respondent:-

5.1. The petitioner herein had filed D.R.P. No.5 of 2011 inter-alia praying for payment for 4,115,180 units which were allegedly injected into TANTRANSOCO grid without any prior approval or contract with the respondent, and therefore the petition itself is neither maintainable nor to be considered and devoid of all merits . The petition is not legally tenable.

5.2. The Petitioner was used (in contractual obligation) to wheel the power to its captive consumers based on respondent's wheeling approval granted on 28.03.05. However, the petitioner filed DRP 33 of 2009 before the Commission for direction to

cancel Long Term Open Access approval in order to reap maximum benefit out of least effort and the Commission passed an order dated 17.08.2010 for cancellation with retrospective effect from 01.10.2009 which was challenged by the respondent herein before Appellate Tribunal for Electricity (ATE) and is pending disposal. It is an admitted fact that the petitioner has been supplying power to respondent through traders and to a few third parties since middle of the year 2009. In fact the petitioner had rescinded the long term agreement made with the TANGEDCO for supply of Power in order to escape from the clutches of its contractual obligation and is now trying to make false claim, The respondent is not bound to comply without any valid contract.

5.3. The terms of the agreed contract is only between the respondent and Power Trading Corporation of India Ltd known as PTC India Ltd and not with the petitioner. Indeed the respondent has made payment for the said claim period to PTC in accordance with terms of contract and is not liable to pay the petitioner without any contractual obligation.

5.4. Even in 2010-2011 tender also the petitioner has neither participated in the tender nor contracted with the respondent directly for supply of power. It is submitted that unless the offer made directly is accepted by the offeree and in turn sends his acceptance to the offerer it will not become a binding contract. In this case the offer was made by PTC India Ltd only. There is no privity of contract.

5.5. The respondent submits that it has made all the payment to its vendor viz., M/s.PTC as per the contractual obligation and petitioner ought to have approached

only the PTC for necessary payment as per their terms of agreement with PTC and further the respondent cannot have any hold against the Petitioner directly or indirectly, for redressing a grievance which is totally outside scope of the contract.

5.6. That all the respondent's action was as per the legal provision available in the terms of agreement between him and PTC only and the petitioner is not a party directly involved (contracted) with the respondent. The fact behind petitioner's difficulty with PTC India limited in getting allotment for excess generation is best known to him as the respondent in no way directly bound with him. In fact, the petitioner ought to have approached the appropriate court for its specific performance against PTC India Ltd only under the terms of agreement between them rather than filing this mischievous petition against the respondent before this forum. The petitioner is liable to be dismissed.

5.7. As per the terms of contract for 2009-2010 with PTC, only upto 10% of excess quantum contracted shall be accepted and that too with the prior approval of the respondent. As for the year 2010-2011, PTC will stick to the contracted quantum of power for scheduling and there is no liability for payment on the respondent to pay for the excess energy supplied beyond the approved scheduled energy. The petitioner has *no locus standi* to approach the respondent for payment towards the additional units pumped in to the grid against a non-existing direct contract with the respondent.

5.8. It is to be submitted that no intimation was sent directly to the petitioner in enforcing the agreement and all communications in this regard were sent to PTC

only with whom the respondent has an agreement which will prove that the respondent has no contractual obligation with the petitioner.

5.9. When there is no specific contract with petitioner, it is not clear how can the petitioner can seek declaration seeking to declare the respondent be liable in law to compensate the petitioner. The petitioner's claim is a misconception of law. The petitioner ought to have approached PTC with whom it had contracted. The respondent is not liable for any of the acts done by the petitioner when there is no specific agreement or contract.

5.10. The G.O No.10/09 indicated in the petition was dated as 27.02.09 and if the contention of the petitioner that he was adhering to the mandate of Government of Tamil Nadu is true, then the petitioner should have approached the respondent as early as March'09 for selling the power and the respondent would have approached the commission for fixing the tariff for purchasing such surplus power. But the petitioner chose to sell the power to PTC for getting higher yield, which clearly reveals that the malafide intention of the petitioner to maximize his profit out of his greediness.

5.11. In fact the petitioner had rescinded the long term agreement made with the respondent for supply of Power in order to escaping from the clutches of its contractual obligation and is now trying to take advantage out of the Government Order . The respondent is no way bound to make any payment to the petitioner as there was no valid contract or its acceptance to avail surplus power available with it surplus.

5.12. If the petitioner's contention is true then he would have approached the respondent Board immediately upon the issuance of the Government Order for a specific contract or the petitioner shall have approached immediately to this Hon'ble commission as per the terms of Government Order.

5.13. It is to be mentioned that while the petitioner has rescinded the long term agreement stating its inability to perform its obligations to its captive users/third party buyers, whereas claiming compensation as if it has performed the obligation as per the Government Order which is totally absurd and misleading.

5.14. It is to be submitted that if the contention of the petitioner is true then it should have approached the Commission for fixing remedies or compensation as against PTC or third parties rather than filing this sort of petition, claiming payment from the respondent with whom there is no contractual obligations.

5.15. It is submitted that the respondent has not made any payment directly to the petitioner for the supplies made by him through PTC. The PTC may have paid for the energy supplied by the petitioner under any contractual obligation. The respondent has not received any complaints from its vendor PTC for any short payment against its claim which clearly shows that the respondent has fulfilled its contractual obligations without any default under the contract.

5.16. It is once again reiterated and submitted that Where there is no contract with the petitioner, there is no obligation for the respondent to reply for any claim

unnecessarily made by any person who is in no way connected legally with it in the specific contract.

5.17. It is submitted that the petitioner is greedy and is citing G.O No.10, only to protect themselves from its obligation. If the petitioner is really aggrieved in not getting the consent for third party sales by the respondent, the petitioner should have approached the Commission well in advance. The petitioner should have stopped injecting energy for want of the third party sale permission and the terms of G.O.10 cannot be construed as a blanket approval to pump any additional power available with the petitioner and linking with the payment. The petitioner has unauthorisedly injected power into grid there in causing threat to grid stability.

5.18. Further it is to be submitted that the said G.O does not prevent the petitioner from carrying out its obligations to the third parties / captive users if they are located within the state. The petitioner has no approval for selling power to any person outside the state of Tamil Nadu. As per G.O for any difficulties faced by the generators in this case the petitioner should have approached either the Government or the Commission as the last line of the G.O stipulates that within the state as per the regulations notified in this regard by TNERC the pumping of energy without getting approval of either the Government or the Commission or consent of the respondent is violation of law and requires to be penalized.

5.19. It is further prayed that there is no cause or merit arose out of this petition and hence it is liable for dismissal. The petition itself clearly shows the covetous nature

and fraudulent intention of the petitioner claiming consideration without any valid contract.

5.20. It is further submitted that approval was accorded to the petitioner for parallel operation of its power plant with TNEB grid subject among other things to compliance of the provisions of the Electricity Act, 2003, the rules, regulations made there under. It has been periodically applying and getting third party approval subject to permissible limits in law. Therefore the petitioner cannot be said to be a novice to generation business to believe that supply can be injected to the licensee's grid without a valid agreement. The same is evident from the letter of the petitioner, dated 20.05.2010 informing the PTC that the schedule offered for the period from 01.06.2010 to 31.05.2011 will be confirmed only after finalizing the commercial terms and conditions of procurement of power by PTC India Limited. While entering into any transactions with the said trader the petitioner was so cautious enough of the commercial terms and conditions of procurement but in the case of respondent it has taken an opposite stand of not even seeking the prior approval of the respondent before injecting the power and continuously injected power unauthorisedly and unlawfully.

5.21. It is further submitted that the directions to PTC to restrict the quantum of supply at various points of time during the period of contractual obligation was based on so many factors including the transmission constraints. In all such cases, the respondent has specifically informed the PTC to direct the generators to maintain the quantum without any excess over the quantum and further specifically stated that if any CPP scheduled more than such quantum the TNEB will not make any payment

for the excess quantum beyond such quantum. Having knowledge of everything, the petitioner has injected the power unlawfully and claiming payment. In fact, in one occasion, PTC in its letter, dated 28.05.2010 has specifically directed the petitioner not to schedule power beyond 31.05.2010 for the reasons stated therein.

5.22. It is further submitted that admittedly the Government of Tamil Nadu has issued directions in G.O.Ms. No.10, Energy (C3) dated 27.02.2009 to the generating stations to operate and maintain generating stations to maximum capacity and PLF. It is to be noted that the said direction is subject to compliance of transmission constraints, compliance of grid code, seeking approval/permission as per the provisions of Electricity Act, 2003, the regulations, rules, codes, etc. made there under. The said Government Order nowhere directed the generating stations to operate and maintain generating stations to maximum capacity and PLF in utter contravention of all laws, mandates, practices in force. Having committing an illegality in injecting power without the prior approval / permission as per requirements, the petitioner is estopped to claim for the illegal injection of power at the relevant periods.

5.23. It is further submitted that if the petitioner was expecting or experiencing any constrain due to gas supply agreement with GAIL India Limited, it has to sort it out on its own including by redirecting the gas to any needy areas as per the prevailing practice by many generators considering the shortage in supply of gas. Otherwise, it should have chosen to curb the generation of power even by shutting down their stations instead of doing acts in total contravention of all law and claiming amount at the later point for all such illegal acts.

5.24. It is further submitted that the respondents are also does not expect the petitioner to do any gracious act but it is bound duty of the petitioner to act in accordance with law and in the manner known to law. Having a committed in illegal act of injecting the power without prior approval / permission the petitioner cannot be said to have done an lawful act so as to plead that it has not done graciously. In fact, every act of the petitioner contrary to law should be deprecated and claims, if any pursuant to such illegal act should be dismissed with costs. In view of the illegal act of injecting power without the approval/ permission the grid system would have got damaged due to unscheduled illegal injection and the petitioner is bound to compensate such loss as and when a claim is made by the respondent after quantifying the loss.

5.25. It is further submitted that the petitioner had acted maliciously without having any agreement or approval/permission. It appears that the petitioner has done such a cowardly act with an intention to claim payment at a later date by one way or other by mis-representing the rules or mis-representing the facts / communications or on any other irrelevant grounds. Having often stated from time to time that they have no third party consumer to sale their power, the petitioner should have approached the respondent for sale to the TANGEDCO on such terms and conditions and the tariff as may be fixed by the Commission. Having failed to do so, perhaps with an oblique motive to seek claim at an higher rate citing one case or their selectively to suit its convenience to encash the illegal injection of power, the petitioner has come up with the above petition praying this Hon'ble Commission to hold that the respondent TANGEDCO is liable to pay for the energy illegally injected by the petitioner.

Without prejudice to above, the petitioners is put to strict proof of its injections as claimed in paragraph 11 of the petition.

5.26. It is further submitted that the petitioner has been projecting the case as if there has been contractual obligations between the petitioner and this respondent. It is not so. The same is evident from the Power Purchase Agreements entered into by the respondent with PTC and the separate Power Purchase Agreements emerged into by the Petitioner and PTC.

6. Reply to the Counter Affidavit:-

6.1. The claim of the Respondents in paragraphs 2 and 3 that the petition is not maintainable in law is denied as false and baseless. Further, the claim of the Respondent that the petition is liable to be dismissed for non-joinder of party is untenable. It is denied that the Petition is not legally tenable or that it is devoid of merits. The allegation of the Respondent that 4,115,180 units were injected without the permission of the Respondent is denied. The sale of the power by the Petitioner is to the Respondent and the same is only routed through the PTC. Had the Respondent not suddenly without any reason not reduced the off take of power on several occasions and had the request of the Petitioner for grant of open access for sale of power to third parties been considered, the Petitioner would not have been in the present situation. Therefore it is only on account of the reasons solely attributable to the Respondents that the Petitioner was not left with any option but to inject its generation into the grid.

6.2. It is relevant to point out that for the period from 1st June 2010 to 25th August

2010, the Respondent did not have any contract with the PTC to source power although instructions were being routed through PTC. Admittedly the term of the Respondent's contract with PTC was from 26th August 2010 to 31st May 2011. The Petitioner's contract with PTC was also for the corresponding period. Hence, without prejudice to the contentions of the Petitioner, the power supplied by the Petitioner from 1st June 2010 to 25th August 2010, was a direct supply to the Respondent without PTC being in any manner involved, except for routing instructions as an agent of TNEB.

6.3. It is relevant to point out that G.O.Ms.No 10 came to be passed in exercise of the powers under section 11 of the Electricity Act, 2003 on account of acute power shortage within the State and all generating companies were directed to operate and maintain their generating companies to operate and maintain their maximum capacity and had also further directed all generators to supply all the exportable electricity generated by them to the State Grid alone. The Government by issuing the said directive and imposing a duty on the Petitioner and other companies has also imposed upon the Respondent a duty to avail of the maximum electricity generated and supplied to it. It is an admitted position that there has been acute power shortage in the State for the last few years on account of which power cuts have been in vogue. In the aforesaid background, the Respondent is not justified in contending that the units were illegally injected into the grid.

6.4. The allegation in the Counter Affidavit that the Petitioner had rescinded its long term agreement with TANGEDCO to escape contractual obligations is denied as false and defamatory. The Petitioner had communicated the reasons for relinquishing its long term open access. The claim of the Petitioner in D.R.P.No.33 of

2009 has no bearing on the instant dispute. It is admitted by the Respondent too that the Petitioner was a captive power plant and was supplying power generated at its plant to its captive consumers. During both periods of dispute claimed in this Petition, the Petitioner Company was supplying power to the Respondent through PTC or to third parties only after having obtained necessary approval from the Respondent. Further, the invoices filed by the Respondent in its Typeset of papers filed along with the Counter Affidavit clearly establish that the Respondent have themselves admitted that the supply of power was by the Petitioner to the Respondent through PTC. Thus the claims of malafides attributed are completely fallacious and untrue. Despite repeated requests, the Petitioner Company was only granted third party sale permission of 3.5 MW and in light of the off-take of power being reduced time and again, the Petitioner was left with no alternate but to pump its entire generation into the grid. The Respondent has utilized the units for meeting its supply obligations and hence is duty bound in law to compensate the Petitioner for its non-gratuitous act of pumping electricity in the grid.

6.5. The allegation raised in the Counter Affidavit, that the terms of the agreed contract is only between PTC and the Petitioner and that therefore the Respondent is not liable to pay is denied. The units generated are supplied through PTC to the Respondent and the sale of power is actually a sale to the Respondent. The Respondent being a beneficiary under its contract with PTC at the instance of the Petitioner is not entitled to contend otherwise. The Respondent is liable to compensate for the excess units pumped into the grid which has also been in keeping with the mandate in G.O.Ms.No.10.

6.6. The allegation raised by the Respondent in paras 8&9 of the Counter Affidavit that it is not in any way liable for the non-allotment of excess electricity by PTC is prima facie false and baseless. It is the Respondent that had been periodically reducing the off-take without any reason by issuing overnight instructions. Further, it is on account of the callous attitude of the Respondent that the Petitioner was not granted open access for sale of the power to third parties. In such circumstances the allegations of the Respondent are entirely without any basis. The Respondent after having used the units supplied by the Petitioner cannot claim absence of contract to absolve itself of all liabilities.

6.7. The allegation in Paras 10, 11 &12 of the Counter Affidavit that the Petitioner has no locus *standi* to approach the respondent for payment is denied. The Respondent cannot claim lack of liability merely on the basis of lack of direct contract especially the Petitioner and all other generators in the State are entirely dependent on the Respondent for grant of open access for use of grid. Open access being a matter of right, the Respondent by denying it to the Petitioner and thereby compelling the Petitioner to pump its generation into the grid is not entitled to deny the Petitioner payment for the said units. The Respondent not only utilized the power units injected by the Petitioner but also shut down all other avenues of disposal available to the Petitioner thereby ensuring that all power generated by the Petitioner is supplied to the Respondent grid.

6.8. The allegations made in para 13 of the Counter Affidavit attributing malafides to the Petitioner are vehemently denied. The claim that the Petitioner has chosen to sell power to PTC for higher yield or out of its alleged greediness is absurd and untrue. As a generator the Petitioner is entitled to decide on its end user. The

Respondent by denying the said choice to the Petitioner has forced the Petitioner into the present situation. The GO issued by the Respondent was applicable to all generators including the Petitioner. The Petitioner once again denies the claim that long term agreement was rescinded to evade liability. It is submitted that the lack of contract will not absolve the Respondent in the facts and circumstances of the present case.

6.9. The averments in para 14 of the Counter Affidavit are denied and in any event those averments are not relevant to the issue in dispute in the present proceedings. The allegation in para 15 of the Counter Affidavit are repetitive and it is submitted that in the facts and circumstances of the present case, the Petitioner is entitled to be compensated for the units which it has supplied to the Respondent.

6.10. As regards the allegation in paragraph 20 of the Counter Affidavit, it is submitted that the Petitioner has at no point claimed that it is a novice to the generation business. The Petitioner did not inject power into the grid illegally. The Respondent by not enhancing the Petitioner's open access limit for third party sale despite repeated requests and also introducing overnight reductions in the off-take left the Petitioner with no choice but to supply the excess units to the Respondent grid. It is pertinent to note that the letter dated 20-05-2010 was only in relation to confirmation of quantum/schedule offered and is not indicative of any malafides as purported by the Respondent.

6.11. The allegation in para 21 of the Counter Affidavit that various factors including transmission constraints caused the reductions in off-take is denied. The

Respondent has failed to substantiate the same. The Respondent has deliberately not stated anything regarding the non-enhancement of the open access limit for supply to third parties despite repeated requests. As regards the allegations in para 22 of the Counter Affidavit, it is submitted that the Petitioner maintained its optimum generation and supply only in compliance with the G.O.Ms.No.10 dated 27.02.2009. The Respondent cannot allege that the supply made by the Petitioner is in contravention of the said G.O.

6.12. As regards the averments in paragraph 23 of the Counter Affidavit it is submitted that the Petitioner did not have the option of not generating electricity as it is bound to pay GAIL India Ltd for the contracted amount of gas, irrespective of generation. The allegations in paragraph 24 of the Counter Affidavit are denied. The Petitioner has not committed any illegality as alleged by the Respondent. It is denied that the grid system would have got damaged due to the injection done by the Petitioner. Such allegations are made without any basis, only suit the convenience of the Respondent. The fact remains that the Petitioner was a long term open access customer for whom capacity of 8.81 MW was reserved. It is not the case of the Respondent that the capacity reserved for the Petitioner was subsequently allotted to other generators and hence the injection of units would have adversely affected the grid.

6.13. The allegations in para 25 of the Counter Affidavit are denied in its entirety. Generation of electricity is continuous and the Petitioner was left with no option but to inject electricity into the grid of the Respondent in keeping with the GO and also as the Respondent Company had also blocked all other options available to the Petitioner. It is denied that the Petitioner is projecting as though there is a contract

between the Petitioner and Respondents. It is the case of the Petitioner that despite there being no direct contract between the Petitioner and the Respondent, in the facts and circumstances of the case, the Petitioner is entitled to maintain the claim against the Respondent.

6.14. The Petitioner once again reiterates its claim for compensation for supply of electricity of the units in the time period from June 2009 to May 2010 and June 2010 to September 2010. The excess units pumped into the grid were as a result of the reduction of off-takes issued by the Respondent and in keeping with the directives issued by the State Government. Further, by denying all permissions sought for enhancement of its open access limit, the Respondent left the Petitioner with no choice but to supply excess units into the grid. The Respondent cannot absolve itself of liability on the ground of lack of contractual obligation, as it has by accepting and using the units pumped into the grid. The Petitioner is a power generation company and is in a position to survive only if power generation is maintained. Further, Electrical energy generated cannot be stored and it is therefore the, duty of the Respondent to compensate for the energy pumped in.

6.15. The Petitioner places on record that all details of access, third party sale and supply of electricity has been placed on record before the Commission and all claims of malafides are therefore frivolous and completely baseless. Further, the details of the instructions issued by the Respondent in reduction in off-takes have also been placed on record to further substantiate the liability of the Respondent. The Respondent is liable to compensate the Petitioner for the excess units of electricity injected into the grid and all allegations to the contrary are false and baseless.

7. REJOINDER FILED BY THE RESPONDENT TO THE REPLY OF THE PETITIONER TO THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT

7.1. It is respectfully submitted that the Respondent has gone through the reply made by the petitioner to the counter affidavit filed by the respondent. It is submitted that the petitioner has neither furnished any new grounds nor given any additional evidences in support of their claim. At the outset, the respondent denies various averments raised in the reply filed by the petitioner to counter affidavit already filed on behalf of this respondent. The respondent respectively submits certain points with reference to various averments stated by the petitioner in the reply to the counter affidavit.

7.2. The petitioner has no comments as for as the averments contained in paragraph 1 and 2. It is submitted that the petitioner has approached this commission with malafide intention and without any clear legal grounds. This may be evident from the fact, that the petitioner has violated the provisions of Electricity Act 2003, the Tamil Nadu Electricity Grid Code notified by this Commission, the Contracts Act (When there is no contractual obligations between the petitioner and the respondent) etc. and seeking remedy and justification for its conduct of pumping un-requisitioned energy citing certain provisions of the G.O.No: 10 dated 27.02.2009 issued by the Government of Tamil Nadu invoking the provisions under the Section 11 of the Electricity Act 2003. It is submitted that the averments made by petitioner in para 3 that the sale of power is only routed through the PTC a licensee – trader is correct as the agreement is between the petitioner and PTC only. It has got nothing

to do with the agreement between the respondent and PTC. Further, the respondent for the safety and economical operation of the grid has to reschedule the power purchased through PTC in the real time operation. The respondent has not specifically, instructed the PTC to reduce the off take from the petitioners plant only. PTC instead of apportioning may have regrouped in such a way they maintain the required supplies quantum to the respondent in accordance with the agreement. For their grievance, the petitioner ought to have sought remedies from PTC or approached appropriate forum (Hon'ble CERC) for contending with PTC for varying the quantum.

7.3. The claim of the petitioner states only as account of reasons attributable to the respondent for not considering the request for grant of open access for sale of power to third parties. This stages a typical example of how the petitioner has sought for open access is furnished herein.

7.4. The attention of the Commission is drawn to the typed set submitted by the petitioner in page 41, wherein they have sought to enhance their third party sale to 6.5 MW from 3.5 MW. This letter was dated 29.06.2010 addressed to TANTRANSCO.

Total capacity of the plant	: 8.81 MW
Third Party Sale	: 3.5 MW
Contract with PTC	: 5.0 MW

7.5. The petitioner has stated that PTC informed them that it has to maintain supply only up to 60% of the contracted capacity and they understand that this may

again come down to 40% which will be 2 MW and there will be excess of 3 MW available for sale. Hence they sought permission to third party sale be enhanced from 3.5 MW to 6.5 MW.

7.6. In their reply TANTRANSCO in their letter dated 18.08.2010 that their request cannot be complied with, since the surplus quantum available for enhancement of third party sale after considering the availability, consumption, existing arrangements to Third party sales and to PTC, and higher injection towards transmission and distribution losses is only 1.41 MW. Hence M/s. Saheli exports pvt Ltd is informed that only 1.41 MW could be concluded for enhancing third party sale to PTC which is upto 60% of the communicated quantum. There was no response from the petitioner to TANTRANSCO for issuing any revised approval.

7.7. It is therefore, submitted that because of such illogical requests only their request for third party sales was denied / not approved to the level sought by the petitioner by TANTRANSCO. So their allegations that for the reasons of respondent only they were left with no other option but to inject its generation into the grid is totally is to be dismissed.

7.8. It is submitted that the petitioner has violated the provisions of the Electricity Act 2003 and the Tamil Nadu grid code etc. willfully and their action is liable to be penalized before the eye of law. The respondent therefore submits that the illegal act of having energy supplied by them cannot be regularized and tariff paid for the same.

7.9. Regarding the averments contained in para 4.0, it is respectfully submitted that the petitioner is accepting that his contract with PTC was only from 26th August 2010 and the petitioner pumping power direct into grid without executing agreement with PTC. The petitioner is justifying its action by stating from 1st June 2010 to 25th August 2010 was a direct supply of the respondents without PTC being any manner involved, except for routing instructions as an agent of TNEB.

7.10. It is submitted that the respondent strongly objects being termed it having employed PTC (a licensee-trader) as an agent to the respondent. It is evident that the petitioner has wilfully pumped the energy into the grid without being requisitioned and isolating the Electricity Act 2003, T.N.grid code etc. Hence this un-requisitioned energy is to be rejected and no payments need to be paid as per the latest orders of Hon'ble APTEL upholding the decision of Maharashtra Electricity Regulatory Commission.

7.11. The petitioner has stated because of the prevalent of GO MS 10 issued under section 11 of Electricity Act 2003, The respondent's contention that the units were illegally injected into the grid cannot be accepted.

7.12. In this connection , it is to be submitted, the said G.O is none of the places has stated that the other provisions of the ACT can be overlooked especially the powers directly vested with SLDC's, RLDC's and the Appropriate Commissions.

7.13. Further, it is submitted that the notification of the said G.O clearly states that the supply of all exportable electricity generated as per the regulations notified in this

regard by the Tamil Nadu Electricity Regulatory Commission. It is therefore evident that the G.O clearly mandates the generators to strictly adhere to all regulations notified by the Commission. This Act of the petitioner clearly establishes the violation of the TN Grid Code notified by the Commission.

7.14. It is further submitted that if the petitioner could not supply to grid for want of contractual obligations, then the petitioner shall have immediately approved the Commission for compensation which was not done. This clearly establishes the wilful in-subordination of the petitioner to the regulations of the Commission.

7.15. It is submitted the averments made by the petitioner in para 6 are incorrect. As explained in the previous para 5.2, of this petition, the TANTRANSCO has indeed sought confirmation of the petitioner for allowing 1.41 MW of additional open access for which the petitioner has not given his reply from which it is evident that the petitioner is making unnecessary allegations against the respondent and justifying its action by claiming that the petitioner has no alternate, except to pump the entire generation in to the grid.

7.16. The averment of the petitioner in para 7 is that the respondent has utilized the energy supplied for meeting its supply obligations and hence its duty bound in law compensate the petitioner for its non-gratuitous act of pumping electricity in to the grid. In this connection, it is submitted that in the pre paras it has been clearly established by this respondent that the pumping of energy was without any requisition and illegal and hence the respondent is not bound to make payments for the energy thrust upon it by the petitioner.

7.17. In para 8.0, the petitioner has stated that the respondent is liable to compensate for the excess units pumped into the grid which has also been keeping with the mandate in GO Ms 10. The respondent submits that it has made it clear that the excess energy pumped is illegal in para 7.0 to 9.0 above and therefore it is not liable to pay for the excess energy so pumped without proper scheduling by the petitioner.

7.18. It is humbly submitted that the averments contained in para 9 and 10 are first repetitive in entire of the previous paras relating to claim of payments by the petitioner and as already submitted, the respondent need not pay any amount for the illegal and un-requisitioned pumping by the petitioner.

7.19. The petitioner has claimed that as a generator it is entitled to decide in its end user and by denying the said choice the respondent has forced the petitioner into the present situation. It is humbly submitted that in the pre paras it was clearly established that the petitioner has wilfully in-subordinating the ACT, the TN Grid code and the energy pumped is also illegal. Therefore the claims of the respondent in paras 13 (a) to (d) cannot be denied as false.

7.20. In the said para 11, the G.O issued by the respondent was applicable to all generators and the lack of contract will not absolve the respondent in the facts and circumstances of the present case. In this connection it is respectfully to be pointed out that the said GO, was issued by the Govt. of the Tamil Nadu and not by the respondent. The respondent is also bound by the terms if the said GO. However, the

petitioner cannot take it for granted for pumping of energy into the grid without an agreement or contractual obligations. The petitioners claim is therefore to be discussed as devoid of merits.

7.21. It is submitted that the petitioner in paras 12 &13 has claimed that the petitioner is entitled to be compensated for the units to which it has supplied to the respondent and has denied the pumping of the units without prior approval is in violation of law.

7.22. In this connections, the respondent respectfully submits that it had already established that the pumping of energy into grid without prior approval is wilful in subordinations of the law and also the respondent is not liable to pay any compensation.

7.23. It is submitted that the petitioner in para 14 has stated that the respondent having utilized the units which the petitioner has pumped into the grid, cannot cite alleged financial position to delay the petitioner its dues". In this connection it is to be submitted that the petitioner has pumped the energy without prior approval and is illegal. They are not entitled for any payments for illegal pumping of energy. They cannot claim for payment that no instability has happened to the grid consequent upon pumping of energy violating the grid code. This attitude of the petitioner is punishable under the eye of the law. The respondent cannot be a party for the violations made by the petitioner.

7.24. The averments in this para 15 is repetitive in nature and the respondent has already submitted in the earlier paras of this petition.

7.25. As for as the averments in para 16 starting that the respondent has failed to establish the transmission constraints caused etc. In this connection, it is to be submitted, if all the generators starts behaving like the petitioner there will be no grid discipline and this attitude of the petitioner is liable to be punished by the SLDC and/or the appropriate Commission under the provisions of the Electricity Act 2003. The petitioner also claims that the respondent cannot allege that the supply made by the petitioner is in contravention of the said G.O. In this regard it is respectfully to be pointed out that the Commissions during various sittings has clarified that when there is mismatch between orders, rules, regulations, Act etc. The provisions are the Act will prevail upon. Therefore energy as in G.O in ordering to pump energy into grid, it has not bye-passed any of the provisions of the Act, particularly with the powers conferred to the Commission and SLDC. In fact the G.O directs the generations to adhere to the regulations notified by the Commission. So the petitioner has undoubtedly contravened with the provisions and the intention of the said G.O.

7.26. As far as the averments in para 17.0, it is submitted that the take or pay obligations of the petitioner with GAIL cannot be considered as a legal binding on the respondent. It is also submitted that the non-allotment of surrendered capacity would not have affected the grid by injection of illegal power as claimed by the petitioner, however this will only encourage other generations to violate the regulations, acts etc. and therefore the petitioner is to be treated of having committed an offence in the eye of law.

7.27. It is submitted that the petitioner in para 18 has stated that the generation of electricity is continuous process and hence was left into no option but to inject electricity as the Respondent has also blocked all other options available and the G.O. Despite of there being no direct contract between petitioner and Respondent, in the facts and circumstances of the case, the petitioner is entitled to maintain the claim against the Respondent. It is humbly submitted that the argument of the petitioner is violative of law, and the petitioner had an avenue before them (ie) they must have appeared before the Commission then itself praying for compensation in view of the G.O instead of pumping energy illegally.

7.28. In para 19 & 20, the petitioner has reiterated its stand. The petitioner has stated that it is in a position to survive only if power generation is maintained and since electrical energy generated cannot be stored, it is duty of the Respondent to compensate for energy pumped in. It is to be submitted that in the foregoing paras the respondent had clearly submitted that the petitioner has pumped electricity illegally, deliberately and without any contracted obligation violating grid discipline and law and now seeking compensation. The petitioner is therefore not eligible for any payments and their claims that respondent has to pay compensation are false and baseless.

8. Written Submissions filed on behalf of the Petitioner dated 26-08-2011:-

8.1. The Petitioner submits that the claim made by it is maintainable before the Commission and the Commission has the jurisdiction to decide on the claim made by the Petitioner. The Petitioner being a generator and the Respondent being a licensee, all disputes between the Petitioner and the Respondent is to be agitated

before the Commission in terms of section 86 (1) (f) of the Electricity Act, 2003. The provisions of the Electricity Act, 2003 does not exclude any dispute from the jurisdiction of the Commission. In the absence of any exclusion under the Act, all issues arising between a generator and licensee can be adjudicated only by the Commission.

8.2. It is an admitted fact that the Petitioner had contracted with PTC to supply power to the Respondent during the period when which the Petitioner supplied the excess units to the Respondent (except the period from 1st June 2010 to 25th August 2010). However, the contract of the Petitioner with PTC is only incidental. The basis of the claim made by the Petitioner is not the contract with the PTC, but it is the supply made by the Petitioner in accordance with G.O.Ms.No.10 and the failure of the Respondent to grant enhanced third party sale permission despite several requests made by the Petitioner. The Petitioner being a generator and the Respondent being a licensee, the claim for compensation as made by the Petitioner is maintainable only before the Commission under Section 86(1)(f) of the Electricity Act, 2003.

8.3. The Petitioner has in its Petition pleaded that the Respondent had failed to enhance the limit for third party sale permission granted to the Petitioner and it is on account of this that the Petitioner left with no other avenue of supplying the power generated by it, was constrained to feed the units into the grid. The Petitioner has sent periodic letters to the Respondent informing the Respondent the difficulty being faced by it on account of the reduction in the off-take of the quantity of power being scheduled through PTC and at the same time declining the enhance the limit for third

party sale. These letters have been filed by the Petitioner in the set of documents filed along with the Petition and the Additional set of documents filed subsequently. Had the Respondent granted the enhancement of third party limit as requested by the Petitioner, the Petitioner would have been able to allot the units to other third party consumers. The Respondent cannot be permitted to take advantage of its own wrong of not enhancing the third party sale limit of the Petitioner and plead that the Commission has no jurisdiction by citing the contract the Petitioner had with PTC. Since the Respondent did not chose to reply to any of the letters of the Petitioner, there arose a dispute between the parties. Since it is the inaction of the Respondent in not enhancing the Petitioner's third party sale limit that resulted in the Petitioner feeding its entire generation into the grid, the Petitioner had requested the Respondent vide its letter dated 13.12.2010 to make payments to the Petitioner. Since there was no response from the Respondent, the Petitioner is entitled to approach the Commission for the relief which it has sought.

8.4. The Petitioner has in its Petition pleaded that G.O.Ms. No. 10 dated 27.02.2009 mandates all the generators in the State to operate to maximum capacity and PLF and to supply all exportable electricity to the State Grid for supply to either the Respondent or to any other HT consumers within the State. In compliance with the aforesaid G.O., the petitioner operated at maximum capacity and supplied the electricity generated by it to the State Grid. Had the Petitioner's request for enhancement of its third party sale limit been accepted by the Respondent, the Petitioner would have identified the HT Consumers in the State to allot the units generated by it. The Petitioner having supplied the entire generation into the State grid at a time when admittedly there was severe power shortage in the State. Since

the Respondent failed to consider the request made by the Petitioner and thereby disabling the Petitioner from supplying to HT consumers in the State, the Respondent is bound to compensate the Petitioner for the units which it has supplied to the State without being able to allot it to HT consumers. The Petitioner has at paragraph 9 of its Petition pleaded that the Respondent is liable to compensate the Petitioner for the units at prevailing rate at which the Respondent was purchasing power. A claim of such a nature by the Petitioner against the Respondent can be maintained only before the Commission.

8.5. It is submitted that the Respondent has not denied the specific averment made by the Petitioner that the units for which claim has been made in the Petition, has been consumed by the Respondent. It is not the case of the Respondent that the Respondent has paid the PTC for the units In respect of which the Petitioner has made the claim. It is admitted position that irrespective of the contract with PTC, the distribution and allotment of power is possible only by use of the State Grid. The Respondent by not enhancing the third party sale limit of the Petitioner forced the Petitioner into a situation where it had to supply its entire generation into the grid. Hence, it is for the Respondent to make payment for the said units, the Respondent who was the ultimate beneficiary.

8.6. It is relevant to point out that the period from 1st June 2010 to 25th August 2010 was not covered by any contract with PTC. Similarly for the said period the Respondent also did not have any contract with PTC. This is evident from the contract between the Petitioner and PTC filed Additional set of documents filed by the Petitioner and the contract between TNEB and PTC, the documents filed by the

Respondent. The Petitioner has in its rejoinder at paragraph 4 made specific averment that since there was no contract involving during the period from 1st June 2010 to 25th August 2010, the power supplied during the said period is a direct supply to the Respondent Board. Hence, in any event the contention of the Respondent on maintainability and jurisdiction based on the contract with PTC does not hold good at least for the excess units supply during 1st June 2010 to 25th August 2010.

8.7. The supply of power during the aforesaid period from 1st June 2010 to 25th August 2010 when there was no contract with PTC, being an integral part of the cause of action for the Petitioner's claim, the contention of the Respondent regarding maintainability and jurisdiction on the ground that there was a contract between the Petitioner and the Respondent is without any basis.

9. Contentions of the Petitioner's Affidavit filed on 19-12-2012:-

9.1. The Commission heard the counsel for the parties, on the preliminary issue of jurisdiction. The Commission, after considering the submissions by way of its order dated 21-11-2012, held that it had the jurisdiction to entertain the petition. In the aforesaid order dated 21-11-2012, the Commission directed the Petitioner to implead the 2nd Respondent herein as a necessary Respondent and serve a copy of the petition on them.

9.2. In pursuance of the aforesaid order of the Commission, the Petitioner herein seeks to amend the petition filed in D.R.P.No.5 of 2011, before the Commission to include the Power Trading Corporation as a Party Respondent.

9.3. It is further prayed that the Commission may be pleased to permit the Petitioner to amend the petition filed before it to include the 2nd Respondent herein as a Party Respondent in terms of the order dated 21-11-2012.

10. Reply on behalf of the Respondent, M/s.PTC India Limited:-

10.1. The Respondent, M/s.PTC India Ltd. (hereinafter referred to as “PTC” for sake of brevity) has been impleaded as a party before the Commission vide its order dated 21-11-2012. It is submitted that the Respondent is not filing a parawise reply to the petition filed by the Petitioner and denies all allegations made specifically against the answering Respondent. It is further submitted that nothing stated herein shall be deemed to be an admission unless the same has been admitted specifically therein and all allegations may be treated as denied as if the same was denied in seriatim.

10.2. The Tamil Nadu Electricity Board (hereinafter referred to as “TNEB” or “the Board” for sake of brevity) has filed its reply to the present petition and has pleaded privity of contract amongst other things and has also submitted before the Commission that the matter is purely a contractual matter between PTC and the Petitioner, i.e. Saheli Exports Pvt Ltd., (hereinafter referred to as “Saheli” for sake of brevity. It is submitted that the Board in its reply has also questioned the jurisdiction of the Commission amongst other things. It is submitted that the Respondent denies all allegations and averments made by both TNEB and Saheli and is filing a consolidated reply to both the petition and the reply filed by TNEB. All contentions under this reply are taken without prejudice and in the alternative to each other.

10.3. The Board has averred that the present petition is not maintainable and that the claim filed by the Petitioner is purely a contractual matter between PTC and Saheli. It is submitted that the Board in its reply has completely overlooked the facts and circumstances in the present case and has completely ignored the law of the land with respect to all matters contained under the Electricity Act, 2003 (hereinafter referred to as "Electricity Act" or "the Act" or "2003 Act" for sake of brevity). The reply filed by the Board proceeds on an erroneous evaluation of the law enunciated under the Electricity Act. The Respondent herein would like to deal with all the issues raised under the present petition and the reply filed by TNEB under separate headings and would thereafter elaborate on the facts to assist the Commission in the adjudication of the present dispute.

10.4. It is submitted that the Respondent has no role to play in the present dispute as the same is a matter completely between TNEB and the Petitioner. At best the Respondent is merely a proper party. Without prejudice to the other contentions of the Respondent, the Respondent submits that the Commission has the necessary jurisdiction to adjudicate contractual disputes under the Electricity Act. The matter is no longer *res-integra* that the Commission has the jurisdiction to adjudicate contractual disputes involving a trader who has been granted a license by the Central Electricity Regulatory Commission.

10.5. It is submitted that in the present case, the present dispute is with respect to a contract where power was being supplied to TNEB. It is submitted that for the purposes of exercise of jurisdiction by the Commission, the privity of contract is not a pre-requisite. It is further submitted that TNEB has erroneously submitted that the

jurisdiction of the Commission is ousted due to the arbitration clauses which are present in the agreements executed between PTC and Saheli and PTC and TNEB. It is submitted that for the purposes of jurisdiction, the Commission has jurisdiction to adjudicate the present dispute.

10.6. It is submitted that in the Gujarat Urja Case in para 59 of the Hon'ble Supreme Court has held that all disputes between generating companies and licensees must go before the State and Central Commission or may be referred to arbitration by the Regulatory Commissions. The Hon'ble Supreme Court of India had held that the power of appointment of arbitrator and the power referring a matter for arbitration was only with Statutory Commissions and not the Courts under the Arbitration and Conciliation Act, 1996. Furthermore, the Hon'ble Appellate Tribunal in the In Pune Power Case in Para 22 held that the 2003 Act is an exhaustive code and all matters must go before Statutory or State Commissions. In Appeal No.15 and 52 of 2011 the Hon'ble Appellate Tribunal had held in para 61 that a transaction through a trader to a distribution licensee cannot be kept outside the purview of the 2003 Act and is to be treated as one transaction. In the Adani Review Case the Hon'ble Appellate Tribunal reiterated in para 18 that in light of the Gujarat Urja Case private arbitration was not permissible under the Electricity Act. The Hon'ble High Court of Delhi in OMP No. 677 of 2011, PTC India Ltd. v. Jaiprakash Power Ventures Ltd. in para 48, in light of the Booz Allen Case has held that private arbitration is not permissible under the Electricity Act. Therefore, the contention of the Board that the present matter is to be settled by way of private arbitration is completely incorrect.

10.7. It is submitted that a trader is merely as intermediary. In the present case, the trader was acting as a conduit for sale between the various CPPs and TNEB. It is submitted that in the present transaction, the CPPs were all aware that the power was to be consumed by TNEB and TNEB was also aware of all the sources from where the power was being sourced by PTC.

10.8. Before proceeding with a substantive reply to the petition filed by the Petitioner, the Respondent would like to submit that the Board has not denied the authenticity of any of the documents filed by the Petitioner and has neither given a substantive reply thereto. It is submitted that the Respondent had entered into Power Purchase Agreement (hereinafter referred to as "PPA" for sake of brevity) dated 21-10-2009 with TNEB for sale of 325-433 MW from various CPPs in Tamil Nadu and Andhra Pradesh.

10.9. It is submitted that the following points raised by the Petitioner are pertinent for the purposes of the present reply:-

- (a) Since June 2009, the Petitioner has supplied power to TNEB through PTC.
- (b) Petitioner contracted to supply 4 MW from June 2009 to May 2010.
- (c) 14.07.2009 & 24.07.2009 TNEB informed that the off-take from generators has been reduced to 80% of their respective contracted quantities.
- (d) TNEB has not paid the Petitioner for 22,800 units supplied during 22.07.2009 to 22.08.2009.
- (e) For the power supplied between 22.01.2010 and 22.02.2010, TNEB has not paid for 53,093 units.

- (f) On 26.06.2010, TNEB reduced the off-take from the generators by 60%. Consequently Petitioner's supply was reduced from 5 MW to 3 MW.
- (g) Till the date of filing of the Petition, the Petitioner has supplied 17,033,180 units of electricity to TNEB through PTC and TNEB has not paid for 4,115,180 units of electricity.
- (h) For the period of June 1, 2010 to 25th August, 2010 there was no agreement between PTC and TNEB and the power was supplied directly by the Petitioner to TNEB (Only instructions were routed through PTC)
- (i) Permission to supply to third parties by Petitioner has been sought regularly and the said permission has been regularly renewed by TNEB. [However under the Act there is no requirement for seeking of permission from TNEB.]

10.10. It is submitted that it is the Petitioner case that relief is maintainable only against TNEB, therefore, no relief can be granted against the Respondent on the basis of the pleadings in the present Petition. Further, the Board has not disputed the documents annexed by the Petitioner and therefore, the same are deemed to be admitted under law. Further, from June 1, 2010 to 25th August, 2010 there was no existing contract between PTC, Saheli and TNEB, therefore, any supply between TNEB and Saheli is a matter which is to be adjudicated purely amongst them.

10.11. It is submitted that the supply of power by Saheli to TNEB through PTC was completely on a back to back basis. The billing clauses in both the PPAs with Saheli and TNEB provided that payment shall only be made once the JMR was signed jointly by officials of TNEB and Saheli. Under the contractual documents, supply beyond the contracted quantum was only permissible till 10 % above the contracted

quantum. It is submitted that the present case raises some interesting issues. It is submitted that for the period of 1st June, 2010 to 25th August, 2010 there was no agreement between PTC, Saheli and TNEB, therefore, any supply between Saheli and TNEB is to be directly settled between TNEB and Saheli and PTC has no role to play in the same. Further, with respect to the bills where TNEB has accepted their liability in the JMR, the same should be payable by TNEB. However, different aspects pertaining to grid-security and grid stability are to be considered by the Commission. Therefore, the excess supply by the Petitioner, when there was a deficit scenario and the UI rates were not zero the same electricity should be paid for by TNEB as the same has been consumed by the consumers of TNEB and TNEB has billed for the same. However, the power which was supplied in a surplus scenario cannot be paid for by TNEB as the same would have gone waste. However, the same aspect is to be considered by the Commission and the Respondent has no role to play in the same.

10.12. It is submitted that TNEB during the duration of the contract had reduced the quantum of the contracted capacity arbitrarily. As such, such a reduction was not permissible under the PPAs executed with PTC. Further, TNEB and its subsidiaries have been guilty of restraining the Petitioner from selling the surplus power to third parties, and to such an extent the Board is liable to compensate the Petitioner for the excess power consumed. It is submitted that once the Board has acted in a particular manner, it cannot be allowed to rescind its conduct. It is submitted that the Board being a state within the meaning of Article 12 of the Constitution of India, it is duty bound to act in fairness and non-arbitrarily. It is submitted that the conduct of the Board in the present case has been arbitrary. It is submitted that the Respondent

merely being a trader cannot be held accountable for the acts of the Board or any of its subsidiaries.

10.13. It is submitted that TNEB has enjoyed the power sold by the Petitioner. The conduct of TNEB is important as TNEB has acted in manner contrary to the contractual arrangements by giving divergent instructions and has also enjoyed power supplied by the Petitioner while restricting its ability to sell the surplus power in open market when no such restrictions exists under the Electricity Act.

10.14. It is submitted that the Respondent has no role to play in the present dispute as the same is an issue to be adjudicated between TNEB and the Petitioner. It is submitted that the Respondent cannot be made liable for the acts of the Board as the Respondent being a trader is merely a conduit. Thus, the present dispute may be adjudicated by the Commission as a dispute between TNEB and the Petitioner.

11. Written Submissions filed on behalf of the Petitioner:-

11.1. The petition has been filed claiming a sum of Rs.1,91,58,166/- with 18%. The amount is claimed for the 4115180 units supplied by the Petitioner during various time periods from 22.07.2009 to 22.09.2010. The Petitioner has at para 11 of the Petitioner set out the periods when the units were supplied. At the .relevant point of time, G.O.Ms. 10 dated 27.2.2009 was in force and all power generating units in the State were directed to operate and maintain the generating stations at maximum capacity and plant load factor. Further, the said G.O. also required that all generating stations shall supply all exportable electricity generated by them to the State Grid for supply to the TNEB or to any other HT consumers within the State.

11.2. The Petitioner has a natural gas-based power plant. The Petitioner had entered into a PPA with PTC on 02.06.2009 for supplying 4 MW to the TNEB. At the time of entering into the said PPA, the Petitioner had a third-party sale permission for 3.5 MW. Despite the directions contained in G.O.Ms.10, TNEB issued periodic instructions in the last minute reducing the offtake in respect of the power being supplied to it through PTC, by generators like the Petitioner. On 14.07.2009, the offtake was reduced to 65% of the scheduled quantum from 16.07.2009. Although after few days, 100% offtake started, again on 23.07.2009, it was once again reduced to 80% of the scheduled quantum.

11.3. During the period from 22.07.2009 to 22.08.2009, from the units supplied by the Petitioner, 22,800 units were not taken into consideration for making payment. These units were supplied in terms of G.O.Ms.10. Had the offtake not been unilaterally reduced by TNEB, these units would have been within the 4 MW scheduled to be supplied to TNEB through PTC.

11.4. On 11.12.2009, generators supplying through PTC were once again asked to reduce the offtake to 80% from 13.12.2009. This continued till March 2010. On 09.03.2010, the TNEB instructed that from 13.03.2010, the generators will have to supply 100% through PTC.

11.5. During the period from 22.1.2009 to 22.2.2010, from the units supplied by the Petitioner, 53,093 units were not taken into consideration for making payment. These units were supplied in terms of G.O.Ms.10. Had the offtake not been unilaterally

reduced by TNEB, these units would have been within the 4 MW scheduled to be supplied to TNEB through PTC.

11.6. For the 22,800 units supplied from 22.07.2009 to 22.08.2009 and the 53,093 units supplied from 22.01.2009 to 22.02.2010, the petitioner has claimed at Rs.5.782 per unit, which was the rate agreed under the PPA with PTC. The amount has been claimed from Respondent No.1 since the supply although through PTC was for the benefit of the first respondent. Further, in view of G.O.Ms. 10 passed by the State Government, the first respondent could not have refused to make payment for these units.

11.7. On 08.05.2010, Tender No.02 was issued by the TNEB for purchase of 600 MW RTC power and 1000 MW peak hour power from June 2010 to May 2011, from CERC approved traders PTC was selected to supply under Tender No.02 and the Petitioner had offered to supply 5 MW. The supply was to commence from 01.06.2010. However, on 28.5.2010, PTC informed the Petitioner that there is no communication from TNEB regarding the PPA and that no power be supplied. This came as a surprise as the entire state was reeling under severe power shortage and G.O.Ms.10 was also in force which directed all exportable electricity generated to be supplied to the State Grid for supply to the TNEB or to any other HT consumers.

11.8. The Petitioner issued a letter on 31.05.2010 to the Chairman TNEB, explaining the circumstances under which it will have no choice but to supply the power from 01.06.2010 to TNEB at a tariff to be fixed by the Commission. In such circumstances the Petitioner supplied units from 01.06.2010. Petitioner once again

wrote to the Chairman, TNEB informing that the Petitioner is supplying the units from 01.06.2010 and requested that the Petitioner be paid the same rates as are finalised in the Tender. On 3.6.2010, PTC informed the Petitioner that the Petitioner can commence supply of 4 MW from 04.06.2010.

11.9. During the period from 01.06.2010 to 03.06.2010, the Petitioner supplied 2,97,481 units. For these units, no amounts have been paid to the Petitioner.

11.10. On 26.06.2010 all generators were once again asked to reduce the offtake to 60% from 27.6.2010. Immediately on being informed of this, the Petitioner on 29.06.2010 requested TANTRANSCO that its third party sale limit be increased from the existing 3.5 MW to 6.5 MW, in view of the reduction in offtake to 60%. The TANTRANSCO informed the Petitioner that only 1.41 MW will be considered for enhancement, because of the commitment to supply to TNEB through PTC.

11.11. In the meanwhile, the PPA between TNEB and PTC was finalised and the term of the PPA was from 26.08.2010 to 31.05.2010. Under the revised terms, the Petitioner was to supply 3 MW in August and September 2010 and 4 MW from October 2010 to May 2010.

11.12. Of the power supplied by the Petitioner from 01.06.2010 to 25.06.2010, 25,78,880 units were not taken into consideration for making payment. These 25,78,880 units were supplied in terms of G.O.Ms.10. Had the offtake not been unilaterally reduced by TNEB, these units would have been within the quantum scheduled to be supplied to TNEB. Further, had the TANTRANSCO not delayed the

issuance of third party sale limit, the Petitioner would have had the opportunity to sell power to third party consumers as and when the TNEB reduced the offtake. With the G.O.Ms.10 being in force and the request for enhancement of third party limit having been only partially granted that too belatedly, the Petitioner was not left with any choice but to supply the units to the grid. It is pertinent to point out that during this period there was no contract between PTC and TNEB.

11.13. While on 27.8.2010, the Petitioner's third-party limit was enhanced to 4.91 MW, on the same day, the TNEB reduced the offtake to 80%. Immediately following this on 01.09.2010, the Petitioner requested that the third party limit be enhanced to 5.51 MW. In response to this on 18-09-2010, the TANTRANSCO asked the Petitioner to give an undertaking that the power will be diverted to TNEB through PTC as and when required.

11.14. The Petitioner has acted in the most prudent manner by requesting for enhancement of third-party limit. In fact, by not acceding to the Petitioner's request in a timely manner, the TANTRANSCO has disabled the Petitioner from supplying to HT consumers in the State in accordance with G.O.Ms. 10 and the only option available to the Petitioner was to supply to the First Respondent.

11.15. Under such circumstances, the First Respondent cannot take advantage of the situation by reducing the offtake and also refusing to enhance the quantum for third party supply.

11.16. The supply by the petitioner is a non-gratuitous act and in terms of section 70 of the Contract Act, 1872, the Petitioner is entitled to be compensated for such act, especially since the First Respondent has enjoyed the benefits of such act. It is relevant to point out that the huge shortage at that point of time is a well-known fact and hence, the First Respondent has rightly not denied that it has utilised the power supplied by the Petitioner. Further, based on the acute shortage of power in the State it can also not be the case of the First Respondent that it did not have requirement for power.

12. Written Submissions filed on behalf of the TANGEDCO:-

12.1. TANGEDCO submitted that the above Application is liable to be dismissed on the following grounds:-

- i. No privity of contract.
- ii. No Back to Back Contract.
- iii. No merits on both the factual and legal aspects.

12.2. Now dealing with the aforesaid grounds:

- i. No privity of contract:

12.3. It is submitted that the petitioner has been supplying power to TANGEDCO through traders and to a few third parties since middle of the year 2009. In fact the Petitioner had rescinded the long term agreement made with the TANGEDCO for supply of power in order to escape from the clutches of its contractual obligation and is now trying to make false claim, hence the 1st Respondent is not duty bound to comply without any valid contract.

12.4. It is submitted that the terms of the agreed contract is only between the TANGEDCO and the Power Trading Corporation of India Ltd (PTC India Ltd) and not with the Petitioner. The payments for the alleged claim period were made to PTC in accordance with terms of contract by TANGEDCO and hence there is no liability on the part of the TANGEDCO to pay to the petitioner without any contractual obligation.

12.5. It is submitted that even in 2010-2011 Tender, the Petitioner has neither participated nor contracted with the 1st Respondent directly for supply of power.

12.6. It is submitted that unless the offer made directly is accepted by the offeree and in turn send his acceptance to the offerer it will not become a binding contract. In the present case, the offer was made by PTC India to TANGEDCO, hence no privity of contract between the Petitioner and TANGEDCO.

12.7. It is submitted that the TANGEDCO is not liable for any of the voluntary or suo Motto acts done by the petitioner when there is no specific agreement or contract between the petitioner and TANGEDCO.

12.8. It is well settled by a catena of decisions that no claim can be made against a stranger to the contract. In support of the above, the Hon'ble Supreme Court in its Judgment reported in AIR 1970 Supreme Court 504 at Paragraph 9 as follows:-

“.....It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In (1) I.L.R. 55 Med. 436.

Krishna Lal Sadhu v. Primila Bala Dasi(1) Rankin, C.J observed:

"Clause (d) of section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in india in certain cases in which the English Law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in s. 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of 'promisor' and 'promisee'."

Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: Dunlop Pneumatic Tyre Co. v. Selfridge & Co. (2)".

ii. No Back to Back Contract:

12.9. It is submitted that the Power Purchase Agreement (PPA) dated 02.06.2009 was entered into between PTC and the Petitioner, in which clause 13 read as follows:-

"13. Compensation for default in Supply/Offtake:

SEPL will declare the weekly availability in energy terms at delivery point.

It is obligatory for SEPL to schedule 80% of the declared energy in a month as arrived by summing up the declared weekly 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 summon up the declared weekly availability of the weeks falling in that particular month.

If SEPL fails to schedule 80% of declared energy in a month then compensation shall be paid by SEPL @ Rs.3.04/kWh for the shortfall which falls short of 80% of energy 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 SEPL for the shortfall which falls short o 80% of energy.

14. Supply beyond contracted quantum

Any over supply by SEPL to the tune of up to 20% 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".

12.10. It is submitted that an agreement dated 21.10.2009 was entered into between PTC India Limited and TNEB for supply of power from 19.06.2009 to 31.05.2010, in which Clause No. 11 reads as follows:

“11. Compensation for default in Supply/Offtake:

PTC will declare the monthly availability in energy terms at delivery point for TNEB's purpose only. It is obligatory for PTC to declare 80% of the contracted energy in a month and it is obligatory for TNEB to offtake 80% of the contracted energy in a month.

If PTC fails to schedule 80% of contracted energy in a month then PTC shall pay the compensation to TNEB at the rate of s.1.75/kWh to the extent of short fall of 80% of monthly contracted energy. Similarly, if TNEB fails to offtake 80% of the contracted energy in a month then compensation shall be paid by TNEB @ Re.1.00/kWh to PTC for the shortfall which falls short of 80% of contracted energy.

Compensation clause shall be applicable on individual plant basis i.e., 80% of contracted energy from a single source.

Compensation bills shall be raised by the claimant party separately within 5 days and the same shall be settled within 7 days.

12. Supply beyond contracted quantum

i) Any supply by PTC up to 10% over and above the contracted quantum from the individual plan (s) in energy term is allowed in a month which shall be settled at the tariff rate as mentioned at clause (2) above provided necessary prior approval shall be obtained from TNEB.

ii) If TNEB is not in need of energy supply over and above contracted 80% then TNEB is not liable to pay for any oversupply by PTC. However 03 days advance intimation shall be given by TNEB”.

12.11. Clause 12(ii) of the agreement between TNEB and PTC is not found in the agreement between the petitioner and PTC. To be termed back to back agreements, the two agreements should have identical clauses and obligations. It will thus be seen that the agreements cannot be termed back to back agreements as they have clauses that are different. It is apparent from the

above clauses of two different agreements i.e., the agreement between the Petitioner and PTC and between the TANGEDCO and PTC are two different agreements. No similar terms in these two agreements, hence the same are not back to back agreements.

12.12. It is pertinent to note that the agreement between the petitioner and PTC does not contain any clause similar to clause 12(ii). The liability if any for payment for such oversupply despite advance intimation of TNEB not to do so will be that of the 1st Respondent. The 1st Respondent is not liable for any such payment to the petitioner.

iii. No merits on both the factual and legal aspects:

12.13. It is submitted that TNEB/TANGEDCO floats tender for procurement of power under short term for specific period with specific terms and conditions. The short term tenders are not fuel specific. Any generator using any fuel can participate and successful bidder can supply at discovered tariff.

12.14. It is submitted that the petitioner himself has admitted that it was selling power to third party consumers from January 2009. Prior to issue of the said GO in February 2009, the petitioner had started their merchant activity. Subsequently, they entered into agreement with M/s PTC and supplied to TNEB/TANGEDCO through M/s PTC from June 2009.

12.15. It is submitted that when similar gas based plant was supplying power under long term PPA at a tariff of less than Rs.2.50 per unit, the petitioner preferred to

enter into agreement with PTC, because the tariff discovered under bidding route was more remunerative. It was business risk taken by the petitioner to enter into agreement with M/s PTC that includes the risk of take or pay obligation with gas supplier.

12.16. The 1st Respondent submits that it has made all the payment to its vendor viz., M/s.PTC as per the contractual obligation and petitioner ought to have approached only the PTC for necessary payment as per their terms of agreement with PTC and further the 1st Respondent cannot have any hold against the Petitioner directly or indirectly, for redressing a grievance which is totally outside scope of the contract.

12.17. It is respectfully submitted that all actions of the 1st Respondent were as per the legal provision available in the terms of agreement between it and PTC only and the petitioner is not a party directly involved (contracted) with the 1st Respondent. The fact behind petitioner's difficulty with PTC India limited in getting allotment for excess generation is best known to him as the 1st Respondent in no way directly bound with it. In fact, the petitioner ought to have approached the appropriate court for its specific performance against PTC India Ltd only under the terms of agreement between them rather than filing this mischievous petition against the 1st Respondent before this forum.

12.18. It is submitted that as per the terms of contract for 2009-2010 with PTC, only upto 10% of excess quantum contracted shall be accepted and that too with the prior approval of the 1st Respondent. As for the year 2010-2011, PTC will stick to the

contracted quantum of power for scheduling and there is no liability for payment on the 1st Respondent to pay for the excess energy supplied beyond the approved scheduled energy. The petitioner has no locus standi to approach the 1st Respondent for payment towards the additional units pumped in to the grid against a non-existing direct contract with the 1st Respondent.

12.19. It is to be submitted that no intimation was sent directly to the petitioner in enforcing the agreement and all communications in this regard were sent to PTC only with whom the 1st Respondent has an agreement which will prove that the 1st Respondent has no contractual obligation with the petitioner. When there is no specific contract between the petitioner and TANGEDCO, the said claim is a misconception of law.

12.20. It is submitted that the G.O No.10/09 indicated in the petition was dated as 27.02.09 and if the contention of the petitioner that he was adhering to the mandate of Government of Tamil Nadu is true, then the petitioner should have approached the 1st Respondent as early as March'09 for selling the power and the 1st Respondent would have approached the Commission for fixing the tariff for purchasing such surplus power. But the petitioner chose to sell the power to PTC for getting higher yield, which clearly reveals that the malafide intention of the petitioner to maximize his profit out of his greediness.

12.21. It is submitted that, in fact the petitioner had rescinded the long term agreement made with the 1st Respondent for supply of Power in order to escaping from the clutches of its contractual obligation and is now trying to take advantage out

of the Government Order. The 1st Respondent is no way bound to make any payment to the petitioner as there was no valid contract or its acceptance to avail surplus power available with it surplus.

12.22. It is submitted that TANGEDCO has not made any payment directly to the petitioner for the supplies made by him through PTC. The PTC may have paid for the energy supplied by the petitioner under any contractual obligation. The 1st Respondent has not received any complaints from its vendor PTC for any short payment against its claim which clearly shows that the 1st Respondent has fulfilled its contractual obligations without any default under the contract.

12.23. It is once again reiterated and submitted that where there is no contract with the petitioner, there is no obligation for the 1st Respondent to reply for any claim unnecessarily made by any person who is in no way connected legally with it in the specific contract.

12.24. It is submitted that the petitioner is greedy and is citing G.O No.10, only to protect themselves from its obligation. If the petitioner is really aggrieved in not getting the consent for third party sales by the 1st Respondent, the petitioner should have approached the Commission well in advance. The petitioner should have stopped injecting energy for want of the third party sale permission and the terms of G.O.10 cannot be construed as a blanket approval to pump any additional power available with the petitioner and linking with the payment. The petitioner has unauthorisedly injected power into grid there in causing threat to grid stability. Further it is to be submitted that the said G.O does not prevent the petitioner from

carrying out its obligations to the third parties / captive users if they are located within the state. The petitioner has no approval for selling power to any person outside the state of Tamil Nadu. As per G.O for any difficulties faced by the generators in this case the petitioner should have approached either the Government or the Commission as the last line of the G.O stipulates that within the state as per the regulations notified in this regard by TNERC the pumping of energy without getting approval of either the Govt. or the Commission or consent of the 1st Respondent is violation of law and requires to be penalized.

12.25. It is to be submitted that in as much as there is no valid legal contract with the petitioner; the 1st Respondent has no obligation in law for making any reply to the petitioner and the petitioner has no *locus-standi* to make a claim. The petitioner has not come out with any regulatory provision enacted for this purpose in his petition to substantiate his claim which itself shall serve as a reason to dismiss this petition.

12.26. It is submitted that the following are the consideration of the Commission:

- i. The application is totally in violation of all the provisions of the Indian contract Act enacted for the purpose. The petition itself is Void *abinitio* suffers from latches and to be dismissed in *limine*.
- ii. It is further prayed that the Commission may be pleased to dismiss the petition which will harm the financial position of the 1st Respondent which is already facing severe financial crunch.
- iii. The 1st Respondent has been unnecessarily dragged in this petition with a malafide intention to defraud the 1st Respondent board for getting a blanket order without any valid contract and when there is no dispute as the obligation for the Commission to entertain these sort of petitions.

iv. The petitioner has wantonly excluded PTC as 1st Respondent to whom they have made a contract which clearly shows their intention to deceive not only the 1st Respondent board but also this Hon'ble forum. Only by the Commission, PTC was impleaded as a party.

v. As per the terms of agreement made by the petitioner with the PTC, any disputes shall only be referred to settlement under Indian Arbitration and conciliation Act and this Commission has no jurisdiction to entertain this petition.

vi. As the agreement is made by the 1st Respondent board with the PTC only any dispute shall be claimed by PTC and not by the petitioner who is not having any contract with the 1st Respondent and has filed this case without any jurisdiction.

vii. The claim made by the petitioner by the way of filing this petition is without jurisdiction and is made with frustration out of misconception and for unjust enrichment.

viii. The claim made by the petitioner is totally erroneous, arbitrary and contrary to the provisions of Law especially the Indian Contract Act.

ix. No cause of action arose out of this petition made without jurisdiction and the petition is liable for dismissal for non-inclusion of appropriate parties to this proceeding.

x. If the petition as prayed for is allowed then the 1st Respondent Board will be put to irreparable loss and other generators will start injecting their Generation into the grid without proper approval and claim for similar relief. This may lead to taking all the regulatory codes enacted for this purpose into task and make absurd.

12.27. It is further submitted that approval was accorded to the petitioner for parallel operation of its power plant with TNEB grid subject among other things to compliance of the provisions of the Electricity Act, 2003, the rules, regulations made

there under. It has been periodically applying and getting third party approval subject to permissible limits in law. Therefore the petitioner cannot be said to be a novice to generation business to believe that supply can be injected to the licensee's grid without a valid agreement. The same is evident from the letter of the petitioner, dated 20.05.2010 informing the PTC that the schedule offered for the period from 01.06.2010 to 31.05.2011 will be confirmed only after finalizing the commercial terms and conditions of procurement of power by PTC India Limited. While entering into any transactions with the said trader the petitioner was so cautious enough of the commercial terms and conditions of procurement but in the case of 1st Respondent it has taken an opposite stand of not even seeking the prior approval of the 1st Respondent before injecting the power and continuously injected power unauthorisedly and unlawfully.

12.28. It is further submitted that the directions to PTC to restrict the quantum of supply at various points of time during the period of contractual obligation was based on so many factors including the transmission constraints. In all such cases, the 1st Respondent has specifically informed the PTC to direct the generators to maintain the quantum without any excess over the quantum and further specifically stated that if any CPP scheduled more than such quantum the TNEB will not make any payment for the excess quantum beyond such quantum. Having knowledge of everything, the petitioner has injected the power unlawfully and claiming payment. In fact, in one occasion, PTC in its letter, dated 28.05.2010 has specifically directed the petitioner not to schedule power beyond 31.05.2010 for the reasons stated therein.

12.29. It is further submitted that admittedly the Government of Tamil Nadu has issued directions in G.O.Ms. No.10, Energy (C3) dated 27.02.2009 to the generating stations to operate and maintain generating stations to maximum capacity and PLF. It is to be noted that the said direction is subject to compliance of transmission constraints, compliance of grid code, seeking approval/permission as per the provisions of Electricity Act, 2003, the regulations, rules, codes, etc. made there under. The said Government Order nowhere directed the generating stations to operate and maintain generating stations to maximum capacity and PLF in utter contravention of all laws, mandates, practices in force. Having committing an illegality in injecting power without the prior approval / permission as per requirements, the petitioner is estopped to claim for the illegal injection of power at the relevant periods.

12.30. It is further submitted that if the petitioner was expecting or experiencing any constrain due to gas supply agreement with GAIL India Limited, it has to sort it out on its own including by redirecting the gas to any needy areas as per the prevailing practice by many generators considering the shortage in supply of gas. Otherwise, it should have chosen to curb the generation of power even by shutting down their stations instead of doing acts in total contravention of all law and claiming amount at the later point for all such illegal acts.

12.31. It is further submitted that the 1st Respondent are also does not expect the petitioner to do any gracious act but it is bound duty of the petitioner to act in accordance with law and in the manner known to law. Having a committed in illegal act of injecting the power without prior approval / permission the petitioner cannot be

said to have done an lawful act so as to plead that it has not done graciously. In fact, every act of the petitioner contrary to law should be deprecated and claims, if any pursuant to such illegal act should be dismissed with costs. In view of the illegal act of injecting power without the approval/ permission the grid system would have got damaged due to unscheduled illegal injection and the petitioner is bound to compensate such loss as and when a claim is made by the 1st Respondent after quantifying the loss.

12.32. It is further submitted that the petitioner had acted maliciously without having any agreement or approval/permission. It appears that the petitioner has done such a cowardly act with an intention to claim payment at a later date by one way or other by mis-representing the rules or the facts / communications or on any other irrelevant grounds. Having often stated from time to time that they have no third party consumer to sale their power, the petitioner should have approached the 1st Respondent for sale to the TANGEDCO on such terms and conditions and the tariff as may be fixed by the Commission. Having failed to do so, perhaps with an oblique motive to seek claim at an higher rate citing one case or their selectively to suit its convenience to encash the illegal injection of power, the petitioner has come up with the above petition praying the Commission to hold that the 1st Respondent TANGEDCO is liable to pay for the energy illegally injected by the petitioner. Without prejudice to above, the petitioners is put to strict proof of its injections as claimed in paragraph 11 of the petition.

12.33. It is further submitted that the petitioner has been projecting the case as if there has been contractual obligations between the petitioner and this 1st

Respondent. It is not so. The same is evident from the Power Purchase Agreements entered into by the 1st Respondent with PTC and the separate Power Purchase Agreements entered into by the petitioner and PTC.

12.34. It is submitted that Section 32 of The Electricity Act, 2003 has defined the role of State Load Dispatch Centre (SLDC) and section 33 of Electricity Act, 2003 has given powers to SLDC to exercise powers to give directions to generating companies for ensuring integrated grid operations to achieve maximum economy and efficiency in operation of power system in that state and initiate penal action for non-compliance. The TN Electricity Grid Code framed, which is consistent with Act, also emphasize that non-compliance is punishable. Grid Code – Chapter 10 – Non Compliance is extracted below.

As stipulated under Section 33 (2), (4) and (5) of the Act, every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by SLDC. If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State Grid or in relation to any direction given by SLDC, it shall be referred to the Commission for decision. Pending decision of the Commission the licensee or the generating company shall comply with the directions of the SLDC. TNERC, in turn, after due process, may order the defaulting entity for compliance, failing which it may take penal action and other regulatory measures, which includes termination of connectivity agreement/ de-linking from the Grid etc., through STU/SLDC.

Hence the petitioner cannot claim for unauthorized injection under the guise of Government Order issued under Section 11 of the Act. SLDC gives back down instructions to all generators supplying power to TANGEDCO under contract for

economic operation of grid without any discrimination and all generators have to oblige. If the generators do not comply the directions of SLDC during those hours, it will defeat the purpose of economic operations as mandated in Electricity Act. Even though this action of unauthorised injection/ over injection/ unwarranted injection ought to have been penalised, TNEB did not initiate any action for penalizing the petitioner, taking a lenient view and not out of any flaw or weakness.

12.35. It is submitted that the Petitioner herein has no regard to all the above regulations and had violated the regulatory instructions issued from time to time in respect of injection of power into the grid.

12.36. It is submitted that the Petitioner had injected more power than what has been sought to be injected in the grid thereby causing instability to the entire grid. Time and again the Hon'ble APTEL and the Commission have issued various orders highlighting the need to maintain grid stability and the impact of over injection. The following are the extracts of some of the orders and judgments of the Hon'ble APTEL and the Commission:-

a. Order in Appeal No.123 of 2010 in the matter of Indo Rama Synthetics (I) Ltd. Vs Maharashtra Electricity Regulatory Commission:

"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”.

“9. In our opinion, the appellant itself has to be vigilant and non-interference by SLDC in real time during the relevant period cannot be construed to be the confirmation of requirement of power of the appellant by the distribution licensees and authority to inject power into the grid”.

“11. The present case is governed by the Electricity Act, 2003 which is a complete code in itself. In the electricity grid, the SLDC, in accordance with Section 32 of the Act is responsible for scheduling and dispatch of electricity within the state, to monitor the grid operations, to exercise supervision and control over the intra-state transmission system and to carry out grid control and dispatch of electricity through secure and economic operation of the State Grid. All the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid. Moreover, in this case the injection of electricity was without the consent or knowledge of the distribution licensees”.

13. Thus, we do not find any substance in the claim of the appellant for compensation for the power injected into the grid without any schedule and agreement.

b. Order in Appeal No 120 of 2016 in the matter of Kamachi Sponge & Power Corporation Ltd. Vs Tamil Nadu Generation and Distribution Corporation Ltd:

- The energy pumped into the grid during the period under dispute by the Appellant is unauthorised and does not call for any payment by the 1st Respondent No.1.*
- Here we would like to mention that each entity created under the Electricity Act, 2003 has a clear defined role. In Appeal No. 120 of 2016 & IA No. 272 of 2016 this case the responsibility of regulation of power inflow into the grid from all suppliers lies with SLDC in accordance with Section 32 of the Electricity Act, 2003, based on the contractual agreements entered by the distribution licensee with power generators/suppliers through a well established system of scheduling. It is the duty of everyone connected with the operation of the power system to comply with the directions of the SLDC in its control area. In the instant case, the Appellant has not sought any approval/ schedule from SLDC before synchronisation for pumping any power into the grid. Even the SLDC was not aware of the power pumped during this period by the Appellant into the grid. Hence, the onus of the wrong doing by the Appellant cannot be shifted to the 1st Respondent No. 1.*

- *In view of our discussions and decision at para 10 b. above that the 1st Respondent No. 1 is not liable to make any payment for unauthorised injection of power into the grid by the Appellant.*
- *The safe and economic operation of the grid is of utmost importance. In this regard, many regulations, rules and procedures have been made by the Central/State Regulator(s). Maintenance of the grid discipline is the responsibility of all the stakeholders. The Appellant has pumped power into the grid without knowledge/ obtaining prior approval of the SLDC and without any valid agreement/ contract with the 1st Respondent No.1. If every generator starts injecting power into the grid without prior approval of the grid operators/ LDCs and without valid contractual agreements this may jeopardise secure grid operations and may lead to catastrophe. The action of the Appellant is not justified and moreover pleading that there was no such impact in the instant case is misplaced.*
- *Based on the facts and circumstances of the case as discussed in the preceding paragraphs, the Appellant is not entitled to any payments of its unauthorised action of pumping of electricity to the grid during the period under dispute and hence this issue is also decided against the Appellant.*
- *The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.*

c. Observation of TNERC in PPAP No.5 of 2011 in the matter of TANGEDCO Vs Ind Barath Power Gencom Ltd:-

“Unauthorized injection of power into the grid is dangerous to the grid operation”.

d. Observation of TNERC in DRP No.12 of 2011.

“31. The Commission enquired from the petitioner as to whether any generator can inject power into the grid without any agreement or prior approval or scheduling and if large number of generators start injecting power into the grid without agreement or scheduling, what will happen to the grid?. Reference to chapter 8 of the Grid Code would clearly indicate that any generator who is interconnected to the Grid will have to schedule the dispatch of the power station. In this case, list of open access consumers was not made available in time for approval and scheduling of energy. The petitioner could not provide any satisfactory reply for the above questions at the time of hearing”.

“35. Injection of power into the grid, in the absence of any contract or in the absence of open access, in violation of para 24 of the parallel operation and open access agreement, as discussed in para 33 above does not warrant compensation”.

e. Order of TNERC in DRP 17 of 2011 dated 01.07.2015 in the matter of Kaveri Gas Power Ltd., Vs TANGEDCO:-

8.8. But our concern in this case is not about the mere violations of the petitioner in injecting power into the grid. We are consternated by the impact of such violations by the generators in the state. The 1st Respondents have reported in their submissions that the generators in question i.e. 2X1.1 MW machines were connected to the grid on 22-12-2010 itself illegally and injected power without the approval of the TANTRANSCO. They substantiated their claim by furnishing the maximum demand readings recorded by the main ABT meter. The critical question is what will happen to the grid if every generator started injecting into the grid to their convenience, violating the daily schedule issued by the SLDC? It may not merely affect the UI charges to be paid by this state or penalty imposed on the SLDC but may affect the very stability of the grid, especially if the generators capacities are more. Since this act of the petitioner may affect the very stability of the grid, such indiscipline has to be dealt with severely.

f. Order of TNERC in DRP 24 of 2012 dated 01.07.2015 in the matter of OPG Energy Pvt. Ltd. Vs TANGEDCO:-

6.10. Taking into account all the above rules, regulations and the terms of separate contract /agreement entered into between the Petitioners and the 1st Respondent TANGEDCO (respective Superintending Engineer /EDC/xxxxxx) if the approval for compensation for injection of an additional power in to the grid by the 1st Petitioner is allowed then it would set as a bad precedent and there won't be any grid discipline and approval for STOA might not be sought from the SLDC by the generators whenever an additional generation is available with them and when they do not find any purchaser for their generated energy, they may inject power in the Grid and seek compensation from TANGEDCO stating that they have injected the power only in the State Grid and TANGEDCO should pay as it might have utilized the injected energy to meet its consumers demand, which might seriously affect the Southern Grid in which the State of Tamil Nadu is situated.

In view of the above, D.R.P. is dismissed”.

12.37. In view of the orders and reasons enumerated above, the claim of the Petitioner against TANGEDCO is not maintainable and hence the application has to be dismissed in the interest of justice.

13. Written submission on behalf of the Second Respondent, PTC India Ltd.:-

In the Written Submission filed by the Second Respondent on 19-12-2018, it has been stated as follows:-

All the submissions and relief was only against Respondent No.1 i.e. TANGEDCO and no relief was sought against PTC India Ltd.

Accordingly, PTC India Ltd. is not filing any Written Submission in this regard.

14. Findings of the Commission:-

14.1. Issues before the Commission

1. Whether there is privity contract between the petitioner and the respondent and , if not, , whether the claim made by the petitioner is valid in the absence of privity of contract?
2. Whether the contention of the petitioner that it was compelled to inject power into grid in view of the restriction imposed by GO. Ms. No. 10 is sustainable?
3. Whether there was refusal for grant open access to the extent sought for by the petitioner herein and whether the same could be a ground to legitimize the unauthorised injection of the energy made by the petitioner into the grid of the respondent?
4. Whether a contention of the petitioner that it was only due to the off-take instructions given by the respondent Board that it was left with a difficult situation of not being in a position to allot generation in excess of 6.5 MW is justified?
5. Whether the petitioner is entitled to any relief, if so, to what extent?

14.2. FINDINGS OF THE COMMISSION ON THE FIRST ISSUE

In order to answer the first issue, it is necessary to understand what is meant by Privity of Contract. The principle underlying the term 'Privity of Contract' is that only the parties to a contract or agreement can bring up a suit against the other party for damages or seek enforcement of contract/agreement and a stranger to a contract cannot sue or seek to enforce a contract. In order to establish that there is a contractual relationship, there must be offer and acceptance. These essential requirements of a contract have to be present in a contract as rightly contended by TANGEDCO. There is no element of offer and acceptance in the present case.. In view of the same, we are of the considered view that there is no privity of contract between the petitioner and the respondent and the essential elements of a valid contract such as offer and acceptance which are sine qua non for bringing about a petition before the Commission are not present. The legal position in this regard has been well settled and a stranger to a contract cannot bring up a suit for enforcement of contract.. However, for the better appreciation of the issue on hand, it is necessary to see whether there exists any privity of contract between the petitioner and TANGEDCO. On perusal of the documentary evidences produced before the Commission, the petitioner has entered into a contract only with the Power Trading Corporation of India and there is no contractual relationship between TNEB and the petitioner herein. It is the contention of the petitioner that though there is no contractual relationship between it and the TNEB, TNEB was issuing directions to reduce the off take of power on several occasions and also denied open access and TNEB had control over the contract and exercised the same to the detriment of the petitioner. In our view, this does not seem to be a sound argument for the reason that these factors are hardly sufficient to prove the existence of a contractual

relationship between TANGEDCO and the petitioner herein. Further, in order to bring up a dispute resolution before the Commission, there must be a dispute arising out of the agreement between the parties. A dispute with a third party or stranger to the agreement between a generator and a licensee cannot be the subject matter of dispute resolution whatever may be the effect of the actions of such party on the affairs of the parties to a case. In the result the issue is answered in favour of the respondent. However, we are bound to consider the other issues raised by the petitioner apart from the privity of contract such as the direction of the Government of TN to all the generating stations to export all the exportable energy to the State Grid during R & C Measures and accordingly, we proceed to discuss those issues as well.

14.3. FINDINGS OF THE COMMISSION ON THE SECOND ISSUE

As regards the second issue, it is the contention of the petitioner that the GO Ms No. 10 which was issued under section 11 of Electricity Act, 2003 imposed restrictions on supply of power outside the State of Tamil Nadu and hence it was left with no alternative but to pump the energy into the grid of the respondent. On the other hand, it is the contention of the respondent that though the said GO prohibits the sale of energy outside the State of Tamil Nadu in view of the acute power shortage, it cannot be construed as a blanket approval to pump additional power unauthorized into the grid. It is further the contention of the respondent that the GO Ms No. 10 does not prevent the petitioner from carrying out its obligations to the third parties/captive users if they are located within the state and that as per the said G.O. in regard to any difficulty faced by the generators, the petitioner could have approached the Government or the Commission. Considering the contentions

of the petitioner and the respondents in this regard we are of the considered view that the GO Ms No. 10 issued under section 11 of Electricity Act, 2003 cannot be interpreted by the petitioner in such a way that injection of power into the grid can take place without the consent of the respondent or the approval of the Commission or any other appropriate authority. As rightly contended by the respondent, the said G.O. does not give blanket approval for injecting the power into the Grid. In this connection, it must be noted that the Grid Code issued by this Commission requires scheduling on the part of the generators before injecting the power into the Grid. In its judgment in Appeal No. 123 of 2010 in M/s Indo Rama Synthetics Vs MERC before APTEL, the question of safety of the grid was discussed and it was made clear that no compensation need to be paid in cases where the safety of the grid would be put to jeopardy. We would have straightaway rejected the claim for injection of energy without prior approval but for the additional grounds. However, the present case is different from one relating to Indo-Rama Synthetics in that the petitioner has sought to rely on the conditions imposed in G.O. Ms. No.10 dated 27.2.2009 for justifying the injection of energy without proper authorization or agreement.

14.3.1. For this purpose, the relevant portions of the said G.O. requires to be seen. The following portions of the said G.O. is re-produced for easy reference.

In exercise of the powers conferred by sub-section (1) of Section 11 of the Electricity Act, 2003 (Central Act 36 of 2003), the Governor of Tamil Nadu hereby issues the following directions in the circumstances arising in the public interest namely;

- (i) All power generation units operating Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load Factor (PLF); and**
- (ii) All generating stations shall supply all exportable electricity generated to the State Grid for supply to either Tamil Nadu Electricity Board, or to any other HT consumers within the State as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission.**

14.3.2. It may be seen from the above that there are two directions by the Government of Tamil Nadu to all generating stations in the State of Tamil Nadu, namely,

- i) To operate and maintain the generating stations to maximum capacity and plant load factor.
- ii) To supply all exportable electricity generated to the State Grid or to any other HT consumer within the State of Tamil Nadu as per the Regulations notified by the TNERC.

14.3.3. It is clear from the above that the intention of the G.O. is to make use of the energy generated within the State of Tamil Nadu to the maximum extent for the requirement of the State and only for such purpose the above directions have been given. We are not in complete agreement with the contention of the petitioner that the petitioner was left with no option but to inject the energy into the grid of the respondent in view of the said G.O. for the reason that the said G.O. prohibited only the export of energy outside the State of Tamil Nadu and there was no prohibition with regard to Intra-State Open Access which the petitioner could have very well attempted before injecting the energy into the grid of the respondent. Here again, it is to be noted that the said G.O., even while directing that all the exportable energy generated within the State shall be supplied to the State Grid or to any other HT

consumers, at the same time, made it obligatory to comply with the regulations notified by TNERC. Thus, it was not a free-for all situation wherein anybody can inject energy at will. The intention on insistence of agreement was in the interest of securing the safety of the Grid. Therefore, in the absence of any agreement for the injected energy generated during the period in question, the petitioner could not have injected the energy on its own unmindful of the extent regulation meant for security of the Grid. The Regulation 8 of the Tamil Nadu Electricity Grid Code which deals with Scheduling and Despatch of Energy prescribes the procedures to be followed in injection of energy into the grid. The section 32 of the Electricity Act, 2003 which sets out the functions of State Load Despatch Centre also requires the scheduling and dispatch of electricity within the State in accordance with contracts entered into between generating companies and licensees which means that there shall be no injection of energy without the prior approval of the SLDC. On further reading of the said section, it is clear that the SLDC is responsible for carrying out the real time operation of the grid through secure and economical manner and for exercising supervision and control over the energy transmitted through the system. It is essential that an approved schedule by the SLDC is obtained for any injecting of energy into the State Grid. Therefore, the present claim in regard to supply of energy without a formal contract or agreement between the distribution licensee and the petitioner or atleast a prior approval is not sustainable.

14.3.4. As stated supra, there is no order in the G.O. under reference to the effect that a prior agreement with a licensee is not necessary for injection of exportable energy into the grid of the respondent. That even in the face of extreme power shortage prevailing at that point of time, the Government was cautious enough to

insist on compliance of rules and regulations cannot be lost sight of. All that was sought to be emphasized in the said G.O. was that the energy generated in the State of Tamil Nadu should be utilized within the State and there was no indication of whatsoever nature to form a conclusion that the G.O. directed the generators to supply the energy only to the grid of the respondent Corporation. There was an option also to sell power to any other HT consumer within the State of Tamil Nadu. The petitioner herein has failed to provide any document to the effect that all his effort to sell the excess power to the consumers other than the licensee within the State through Intra-State Open Access failed and that it was forced to inject the energy into the grid of the respondent Corporation. Even in such a case when the Petitioner finds it impossible to sell his energy to anyone, it should have approached the Commission or any other appropriate authority for permission to export power into the State Grid and for fixing of such cost of power in view of the G.O. cited. In the absence of a proper agreement which is required as per the extent regulation to inject energy into the grid of the respondent, the petitioner's unilateral decision to inject energy into the grid is tainted with illegality. Further, in the absence of any material on record to the effect that the attempts to export power on Intra-State Open Access to the consumers within the State of Tamil Nadu failed, the prayer of the petitioner for settlement of claim for the energy injected into the grid during the period in question is unsustainable.

14.3.5. This Commission cannot be oblivious or turn a blind eye to the continuing cases of unauthorized use of energy. It bears no repetition to say that safety of the Grid is of paramount importance and any act which has the effect of putting the Grid to peril cannot be countenanced. The lack of grid discipline brings about the

collapse of the whole power system and Commission cannot take a lenient view of unauthorized injection of power into the Grid. Thus, the act of the petitioner in injecting the energy into the grid of the respondent cannot be said to be justifiable under any circumstances. In the result, the contention of the petitioner that it was forced to inject energy into the grid in view of the G.O. is not sustainable.

14.4. FINDINGS OF THE COMMISSION ON THE THIRD ISSUE

The counsel for the petitioner strenuously contended that the respondent denied the open access to the petitioner herein over and above 3.5.MW and hence the petitioner was left with no alternative but to inject energy into the grid of the respondent. The argument of the petitioner in this regard is fallacious for the reason that the denial of open access and the injection of the energy into the grid are two different issues which cannot be interlinked. It is seen that the real object for which the present petition has been filed is to obtain payment/compensation for the energy injected into grid and only towards this end, the contention has been made by the effect that only on denial of open access on the part of the respondent the petitioner was forced to inject power into the grid. In fact, the G.O. under reference was passed to ensure that all the exportable energy was utilized within the State to meet the needs of the State and by no stretch of imagination, can it be concluded that there was denial of open access on that score. Here again, it may be noted that there was no bar on intra-state export of power to anyone within the State and the petitioner could have very well attempted such Intra-State sale before unilaterally deciding on injection of energy without proper authorization. Having failed to do, the justification adduced by the petitioner i.e, denial of open access for injecting energy into the grid in an unauthorized manner which has the effect of putting the entire power system in

peril is an after-thought and not sustainable. Therefore the contentions in this regard are rejected outright.

14.5. FINDINGS OF THE COMMISSION ON THE FOURTH ISSUE

In order to settle the above issue, it is necessary to first examine the powers of the respondent Board to issue off -take instructions. The powers of the SLDC and RLDC have been well defined under the Electricity Act, 2003. The powers of the SLDC in so far as the State of Tamil Nadu concerned in the matter of issue of directions for the safety of the grid cannot be called in question. It is the SLDC which is responsible for safety of the grid and it is the apex body to ensure integrated operation in the power system in a State. It has also been mandated under section 32 of the Electricity Act, 2003 to monitor the operations. Section 33 of the Electricity Act, 2003 , the State Load Despatch Centre in the state may give such directions and exercise such supervision and control that may be required for the integrated grid operations and for achieving the maximum economy and efficient in the operation of power system in that State. Every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the direction issued by the State Load Despatch Centre. Such being the case, the contention of petitioner questioning the validity of the off-take instructions cannot be accepted. Any loss or compensation arising therefrom cannot be entertained in the absence of challenge to the said provisions which empower the SLDC to issue such instruction. We, as a creature of Electricity Act, 2003 have no powers to go into the validity of section 32 or 33 and can limit our jurisdiction only to see whether such instructions are in line with the provisions of the Act. If at all, the petitioner suffers from the issuance of such instructions, the remedy lies in very

challenge to such provisions and not the consequential loss arising therefrom. In the result, the issue is answered in favour of the respondent.

14.6. FINDINGS OF THE COMMISSION ON THE FIFTH ISSUE

15.6.1. On the question of granting relief to the petitioner, it is to be seen whether the principle in regard to quasi-contract can be invoked. In this connection, we are to observe that the Hon'ble Appellate Tribunal refused to invoke section 70 of the Contract which deals with the quasi-contract and held that the energy injected illegally need not be paid for in Indo Rama Synthetic's case. In the present case the petitioner should not have acted in an illegal manner by violating the provisions of the Electricity Act, 2003 and the regulations made thereunder. It has been clearly specified in the Grid Code that scheduling is mandatory before injection of energy into the grid of the respondent. When that is so, it is not correct on the part of the petitioner to contend that it was constrained to export electricity into the grid of the respondent Board. Such acts cannot be countenanced bearing in mind the safety of the Grid. No act which is not in line with the provision of Electricity Act, 2003 and the regulations made thereunder can be justified on the grounds of protection of commercial interests of the petitioner or on the principle of quasi-contract.

14.6.2. The reasons advanced by the petitioner for injecting energy into the Grid of the respondent Corporation as far from satisfactory. The denial of open access or the issue of off take instructions cannot certainly be grounds for the petitioner to do illegal acts of injection of energy into the grid without proper scheduling arrangements. When there are adequate remedies in the Electricity Act, 2003 file complaints regarding violations of Electricity Act or the regulations made thereunder

before the Commission, we see no reason as to why the said provision were not invoked by the petitioner who for reasons best known to it chose to adopt a method which is at variance with the established canons of law. The injection of energy into the grid without schedule arrangements and without the consent of the respondent herein or the approval of the Commission goes against the provisions of Electricity Act, 2003 and the regulations made thereunder.

14.6.3. What happened to the NEW grid to serve as an eye-opener for all the power managers. The complete blackout made things worse to the people. Needless to say that Grid discipline is indispensable for the stability of the Grid and if the same is thrown to winds and indisciplined acts are allowed to continue, it could cause irreparable damage to the grid of the respondent on whom the responsibility of the safety of the grid rests. As stated above, the Commission cannot be oblivious or a salient spectator to the continuous acts of indiscipline and allow the same to perpetuate. Further, it is to be noted that a claim to be enforceable in court of law, must be legal. An illegal claim cannot be enforced. The violations committed by the petitioner in injecting energy into the Grid cannot be cured by the mere fact that the energy injected was accepted by the respondent. All the same, it must be noted that the respondent had no other go but to accept the energy and could not have prevented the petitioner from injecting energy into the grid in an unauthorized manner.

14.6.4. Though the petitioner stands to lose money in the present case, we cannot come to its rescue. The petitioner has to necessarily pay for his indiscreet act of

injecting energy unauthorisedly into the Grid of the respondent. In the result, the petition is dismissed. There will be no order as to cost.

15. 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