

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

**PRESENT:**

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

**M.P.No.9 of 2016**

M/s.IndBarathPowergencom Limited  
New No.20, Old No.129  
Chamiers Road, Nandanam  
Chennai – 600 035.  
... Petitioner

(Thiru Rahul Balaji  
Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)  
Rep. by its Chairman Cum Managing Director  
No.144, Anna Salai  
Chennai – 600 002.
2. The Government of Tamil Nadu  
Rep. by its Secretary, Energy Department  
Fort St. George  
Chennai – 600 009.

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

3. ThiruC.Selvaraj  
Plot No.162, Ranga Nagar 1<sup>st</sup> Street  
Thiruneermalai Main Road  
Chromepet  
Chennai – 600 044.

..

Intervening Petitioner  
(Party-in-Person)

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

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

**Brief Facts of the Case:-**

1. The Petitioner in the above M.P.No.9 of 2016 has prayed for issuing appropriate directions for the payment of compensation under section 11 (2) of the Electricity Act, 2003 (C.A. 36 of 2003 as per Annexure-I annexed with the petition. In the Annexure-I, the petitioner has claimed a compensation of Rs.96,77,71,162/- (Rupees Ninety Six Crores Seventy Seven Lakhs Seventy one Thousand One Hundred and Sixty Two only).

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

*“Thus, the arrangement between the petitioners and TANGEDCO being purely contractual and both parties having accepted to the terms and conditions of the agreement and acted based on such terms and conditions, non-adherence to certain terms and*

*conditions such as payment for the electricity supply cannot be a ground to nullify the impugned notification. In fact, sub-section (2) of section 11 provides for the appropriate Commission to offset the adverse financial impact of the directions referred to in section 11 (1), on any generating company in such matter as it considers appropriate. Thus, the Appropriate Commission being the TNERC would have to adjudicate as to the nature of adverse financial impact of the impugned notification on the generating company for which purpose, the affected party should approach the Commission. In fact, the Karnataka High Court in the case of GMR Energy Ltd., (supra), has pointed out this aspect and held that the producer of electricity is also protected under law. However, on the grounds raised by the petitioner, the impugned notification cannot be set at naught.”*

3. Based on the above orders of the Hon'ble High Court, this present Miscellaneous Petition cannot be filed before this Commission. An intervening petition dated 19-09-2017 has also been filed by Thiru C. Sevlaraj to implead himself in the present proceeding.

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

4.1. It is submitted that at the instance of Respondent the Government of Tamil Nadu have issued a G.O. Ms. No.77 (A1) Department dated 10-10-2014 exercising power under section 11 of the Electricity Act, 2003, stating that all generating stations shall supply all exportable electricity generated to the State Grid for supply either to

the Tamil Nadu Generation and Distribution Corporation Limited or to any other open access consumers within the State of Tamil Nadu.

4.2. It is submitted that pursuant to the said G.O., the petitioner was constrained to supply to the TANGEDCO alone and was unable to export power to other needy States.

4.3. It is submitted that as the said G.O. issued under section 11 of the Electricity Act, 2003 was creating irreparable loss and undue hardship to the petitioner. When things stood thus, the petitioner has been supplying power under various tenders at the rates fixed by the Respondent.

4.4. It is submitted that though we are permitted to supply 85% of the agreed quantum under the said LOAs, the Respondent was not taking the power to the agreed quantum of 85%. We have enclosed as Annexure I the working sheet for the lesser quantum when compared to the quantum of 85% for the various months along with corresponding loss incurred by the petitioner.

4.5. It is submitted that as stated above, the petitioner is restrained from exporting power to the neighbouring states under GO referred to above. This restriction has caused irreparable financial loss and undue hardship to the Petitioner. In order to recoup the financial loss, the Petitioner has approached the Hon'ble High Court challenging the GO under which the petitioner is restrained from taking power to neighbouring States except to supply to the State Grid to TANGEDCO or to any other Open Access Consumer within the State of Tamil Nadu.

4.6. It is submitted that the Hon'ble High Court, Madras after hearing the arguments of the petitioner as well as the Respondent came to the conclusion that the issues involved are purely contractual in nature, therefore, it is for the petitioner to invoke section 11(2) of the Electricity Act, 2003 for claiming compensation caused due to the application of section 11 (1) under which the petitioner is compelled to generate and supply power to the grid of the TANGEDCO or to the Open Access consumers within the State of Tamil Nadu.

5. In the reply filed by the first respondent, TANGEDCO on 06-05-2016, the following are submitted:-

(i) The provision contained in sub-sections (1) & (2) of section 11 of the Electricity Act, 2003 is clear that the Appropriate Commission can pass appropriate order to Appropriate Government and not to the Distribution Licensee / this Respondent. The statutory provision does not mandate that the Distribution Licensee has to offset the adverse financial impact and in such circumstances the very claim of the petitioner is not maintainable as against this Respondent.

(ii) The above petition is not maintainable as against this Respondent which is only a Distribution Licensee. The above petition is also liable to be dismissed for non-joinder of party as the Appropriate Government has not been made as a party and hence the above petition is not maintainable.

(iii) Without prejudice to the above contention, it is submitted that there is no bar for the Petitioner to sell power to any other consumer apart from the Distribution Licensee in the State of Tamil Nadu and the Government Order under section 11 of

the Electricity Act also does not prohibit the same. The aforesaid Government Order has been issued in public interest which is preponderant to the interest arising out of a contract.

(iv) The Letter of Acceptance (LDA) has been issued to the generators to supply power vide Tender NO.06 of 2014 and the contract ended on 30.09.2015. Subsequently a Tender NO.07 of 2015 was floated to procure 1200 MW Round the Clock (RTC) power from 01.10.2015 to 31.05.2016.

(v) It is submitted that the Tender No. 07 of 2015 could not be finalized before 01.10.2015 due to various reasons like litigations from the bidders, non-completion of the rate negotiations etc. Hence the Tender No.06 of 2014 was extended for a period of 14 days from 01.10.2015 to 14.10.2015 to all contract holders of Tender No.06 of 2014. Even after the extended period, the tender could not be finalized in all aspects and therefore another extension from 15.10.2015 to 28.10.2015 was given. Finally, the least rate among the intra state bidders was discovered as Rs.5.05/- per kwhr in the Tender No.7 of 2015 and accordingly the Respondent is willing to enter into an agreement with all bidders, if the petitioner/others are willing and come forward on their own will.

(vi) The back-down instructions issued by the State Load Despatch Centre (SLDC) to the generators is only based on the real time requirement of generated electricity to meet the State demand on real time without any load shedding. Also, it is the prime responsibility of the SLDC to ensure the Grid discipline as per IEGC norms and also ensure the safe and secured operation of the State Grid and in turn

the All India Grid by optimum scheduling of power from various generating resources based on the Merit Order Dispatch. Accordingly, as per section 32 & 33 of Electricity Act, 2003 and the prevailing Codes & Regulations issued by Central Electricity Regulatory Commission (CERC) & Tamil Nadu Electricity Regulatory Commission (TNERC), back down instructions are issued by SLDC only to ensure the Grid discipline and safety of the grid as and when the conditions vary according to the State Demand.

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

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

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

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

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

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

(x) The identical averments made by the petitioners in their respective affidavits that "the petitioner was constrained to supply to the TANGEDCO alone is not true. The petitioner has conveniently failed to project that it was also permitted to supply power to consumers within the State (a few thousand HT consumers). The Intra-State Private Power Producers including captive generators have been facilitated with open access for wheeling their generated power even below 1 MW of any HT consumers within the State first of its kind in India mainly to protect the public interest of the State. In so far as the averments in para 6 of the respective affidavits are concerned, Section 11 of the Electricity Act, 2003 is holding the field. The Hon'ble High Court of Madras has upheld the G.O.77, dt.10.10.2014. The petitioners have participated in the tender process and as such estopped to claim anything beyond the contract terms. Moreover the available power generation are being utilised within the State.

(xi) It is respectfully submitted that the identical averments made by the petitioners in para (7) of their respective affidavit that "though we are permitted to supply 85% of the agreed quantum under the said LOAs" is misinterpretation by the petitioners. The clause towards deviation of 15% is a compensation class only which is being abided both the petitioners and TANGEDCO. Accordingly, if there is no generation on back-down instructions a compensation of 20% of the contracted rate per unit being for the quantum of shortfall in excess of deviation of 15% besides open access charges paid by TANGEDCO without any generation of electricity from the petitioner's power plant according to the Power Purchase Agreement (PPA) entered by the petitioner with TANGEDCO. Hence the working sheet annexed by the petitioner calculating the loss by mollifying the 100% contracted rate is completely denied and false. It is strange to note that not even LOA is filed by the petitioners in support of their petitions .. Further, the petitioners have filed the petitions based on simple arithmetics without any supporting documents acceptable in law.

(xii) No private entity has a legal right to make unjust profit or remain insulated from financial losses including arising out of agreed contract conditions. Public interest is always paramount. The larger public interest of ensuring power supply to the common man in the State cannot give way for the unjust financial interests of a few entities. There is absolutely no public interest in the stand taken by the petitioner. In any event, such unsubstantiated statements are denied as vague and baseless. The interests of the common man in the State of Tamil Nadu are paramount and all other commercial interests will have to yield to the same. In any case, as stated already, the petitioners who have received the LOAs have no right to seek any compensation beyond the terms and conditions governing the LOAs.

(xiii) It is respectfully submitted with respect to para (9) of the respective affidavits that the transaction being contractual one and the petitioners have entered into the agreements/contracts with TANGEDCO agreeing to supply power at a particular rate and binding themselves to various Hence, the claim of compensation by the petitioner for the entire contracted rate is misleading this Commission. In fact, the petitioners, who have received LOAs, are stopped to seek any relief under section 11 (2) of the Electricity Act, 2003.

(xiv) The Hon'ble High Court of Madras also observed in this regard and the same is reproduced as below:

"However the transaction being contractual shall be governed by the terms and conditions of the contract between the parties. The petitioners are all generating companies and they have consciously entered into the agreements / contracts with TANGEDCO agreeing to supply power at a particular rate and binding themselves to various conditions."

(xv) Having elected the tender route and received LOAs, the petitioners have no manner of right much less any legal right to seek compensation under section 11 (2) of the Act.

(xvi) In the light of the above, the prayer for compensation is not maintainable. The Petitioners can maintain the above Miscellaneous Petitions only if there is an absolute ban to sell power to anyone other than the distribution licensee or else if the petitioner companies have made an agreement on interstate sale of power while invoking of section 11 (1). As such in the present circumstances, when there is no

such absolute ban and that the petitioners are at liberty to sell power to any other consumer within the State, the above petitions are liable for to be dismissed

**6. Affidavit filed by the Petitioner on 06-09-2017:-**

In the affidavit filed by the petitioner on 06-09-2017, he has submitted that he is entitled to loss at the fixed charges per unit by multiplying the number of shortfall units to the extent of reaching 80% of Plant Load Factor which is the PLF to be achieved for reaching the annual fixed cost. The petitioner has further stated the following:-

6.1 The normative value is arrived at Rs.0.92 per unit and the compensation payable on account of fixed charges for the period from October 2014 to November 2015 is Rs.49,48,24,337/- for shortfall units to the extent of reaching 80% PLF which is the PLF to be achieved for reaching the annual fixed cost.

6.2 The petitioner is entitled to start up and stop charges calculated at the rate of 90,000/- per start up. During the relevant period there was 109 trippings and the charges on account of start-up and stop is Rs.98,10,000/-.

6.3 The Petitioner is entitled to double the normal depreciation due to excessive wear and tear caused and it is calculated at 7.2% (3.6 x 2). The total cost of the project is Rs.699.30 crores. The wear and tear charges for the 14 months period is 8.4% of the project cost on pro-rata basis and the claim on account of wear and tear charges is Rs.58.74 crores.

6.4 The petitioner quantifies the compensation on account of loss of reputation at Rs.100 crores.

6.5 The petitioner suffered a total loss of Rs.209.20 crores on account of the backing down instructions given by TANGEDCO and the Government Orders passed under section 11 of the Electricity Act, 2003.

7. In his Rejoinder dated 30-05-2016, the petitioner has submitted as follows:-

7.1. The stand taken by the Respondent herein that the Government of Tamil Nadu is a necessary party to the proceeding is misconceived and untenable.

7.2 The contention by the Respondent as though the contractual obligations will bind the parties and hence, the action of the Respondent in giving back down instruction is sustainable and petitioner is not entitled to claim compensation, is misconceived.

7.3 A reading of the entire judgment of the Hon'ble High Court would show that the Hon'ble High Court was pleased to follow the judgment of the Division Bench of the Karnataka High Court. The Karnataka High Court had observed in clear and categorical terms that the Respondent is liable to offset the financial loss that would be sustained by the Government on account of the restraint against export of power outside the State.

7.4 If grid capacity is not available within the State, the Respondent ought not have requested the Government to issue an order under section 11 of the Electricity Act, 2003 to restrain the generators within the State from exporting power outside the State. Only if the Respondent Licencee was prepared and ready to receive the entire supply from the generators and there was shortfall of power within the State and there was a necessity for the Respondent to consume the energy generated by the generators, it could have made request to the Government to issue the Government Order.

7.5 Either it should be free to the petitioner to generate and sell to anyone within the State or export the power outside the State or in the event of a restraint at the instance of the Respondent, the Respondent should consume the entire energy that is generated by the petitioner.

7.6 The Respondent cannot have a complete restraint on the petitioner in exporting the power outside the State and on the other hand, cannot arm twist the petitioner and compel the petitioner to sell at a reduced price and that too, at reduced quantum at the whims and fancies of the Respondent.

7.7 The generation capacity of the petitioner has been taken as the basis and the quantum which was generated by the petitioner on the instructions of the Respondent has been given credit and the balance which was not generated on account of back down instructions of the Respondent herein, has been made the basis for the calculation of the compensation. The petitioner is entitled for such compensation under the scheme of the Electricity Act, 2003.

## **8. Findings of the Commission:-**

8.1. We have perused the records and also heard the arguments of the learned Counsels appearing for both side. The learned Counsel appearing for the State of Tamil Nadu has heavily relied on the endorsement made in the petition by the Counsel for the Petitioner. He would submit that since the petitioner has not pressed his claim for compensation nothing survives to be adjudicated by this Commission on the prayer made by the petitioner. Further he would submit that the question of deciding the applicability of the provision of section 11 (2) of the Electricity Act, 2003 as claimed by the Counsel for the petitioner would not arise since the provision of section 11 (2) is in-built and already available in the Act itself and that the Hon'ble High Court has also held that sub-section (2) of section 11 provides for the Appropriate Commission to offset the adverse financial impact of the directions referred to under section 11 (1) on any generating company in such a manner as it considers appropriate. The Hon'ble High Court has further held that the Appropriate Commission being the TNERC would have to adjudicate as to the nature of the adverse financial impact of the impugned notification on the generating company for which the purpose the affected party should approach the Commission.

8.2. The learned Counsel appearing for the Second Respondent, Government of Tamil Nadu also pointed out that as per the orders of the Hon'ble High Court, the petitioner has to approach the Commission, only to demonstrate the adverse financial impact on it i.e. the loss sustained by the adverse finance on account of the notification issued by the Government under section 11. Therefore, essentially the petition has to be filed only for the purpose of claiming compensation for the loss sustained by the petitioner with proof of such loss. When the petitioner has

withdrawn his claim for compensation, the petition itself would become infructuous and nothing survives and therefore the same may be dismissed. We see some force in the arguments of the learned Counsel for the Second Respondent.

8.3. The said endorsement made by the Counsel for the Petitioner reads as follows:-

*“I restrict my prayer only with regard to applicability of the provisions under section 11 (2) of the Electricity Act, 2003 under section 11 (2) of the Electricity Act, 2003 as directed by the Hon’ble High Court of Madras. Thereafter I will file my claim petition before this Hon’ble Commission in future”*

The said endorsement was made by the Counsel on the date of filing of the petition itself (i.e. on 10-03-2016) apparently when the Registry has sought to pay 1% of the claim made in Annexure I to the said petition and in order to get the petition numbered as a Miscellaneous Petition.

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

compliance, the usual procedure is to obtain its endorsement in the main copy (Chairman copy) only and that is why the endorsement was not available in the copy sent to the Government from whom the Intervening Petitioner obtained a copy under RTI Act.

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

8.6. We have carefully gone through the averments made by the petitioner in his petition and also the endorsement made by the Counsel for the petitioner dated 10-03-2016. It is seen that the petitioner has approached this Commission for issuing appropriate directions for the payment of compensation as per Annexure-I annexed with the petition under section 11(2) of the Electricity Act, 2003. In this connection, it may be pointed out that sub-section (2) of the said section 11 provides that the appropriate Commission may offset the adverse financial impact of the directions issued under sub-section (1) of section 11 on any generating company, in such

manner as it considers appropriate. Therefore, the Commission in order to offset the financial impact on a generator has to evolve the manner in which the prayer of the petitioner should be considered. Therefore, the Commission by exercising its regulatory power has to decide unilaterally in the first instance based on the records furnished by the petitioner regarding the financial loss suffered by the petitioner consequent on the direction issued by the Government under section 11. As such at this stage no adjudication of dispute between the licensee and the generating company arises. In the first instance, the Commission has to decide whether or not any financial loss is suffered by the generating company and decide the quantum of compensation, if any, to be paid by the appropriate Government to the generating company. When such is the scheme, we notice that the said prayer is mainly initiated to claim compensation and does not speak anything about the decision taken by this Commission as to the applicability of the section 11(2) in this case as mentioned by the Counsel for the petitioner in his endorsement mentioned above. Further we notice that his subsequent affidavit filed before this Commission on 06-09-2017, the petitioner has elaborately claimed the compensation under various heads. If the endorsement made by the counsel that he is restricting his prayer with regard to the applicability of section 11(2) of the Electricity Act, is true and bonafide he should have amended the prayer suitably to that effect and without doing the same pursuing the case further and filing a compensation claim subsequently clearly indicate that the petitioner has not properly understood the provisions of the said section and there has been no clarity on the contents of the petition. It has also been pointed out by Thiru.M.Gopinathan, the learned Senior Counsel for the TANGEDCO that the petitioner has made a submission before the NCLAT, New Delhi that he undertakes to withdraw all cases pending before all Forums in India subject to payment of 229

crores of rupees and that, based on that assurance TANGEDCO has also made certain payments to the petitioner but the petitioner has not come forward to withdraw this petition pending before this Commission. In view of the above submissions and going by the endorsement made by the Counsel on the petition on 10-03-2016 nothing survives on the petition, as rightly pointed out by the learned counsel for the Government.

The petition is accordingly dismissed.

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

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

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

/True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission