

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)

I.A. No.1 of 2020
in
D.R.P. No.11 of 2020
and
D.R.P. No.11 of 2020

OPG Renewable Energy Pvt. Ltd.
Represented by its Mr.SudhirSinghi,
No.8, Komal Road,
Maruthur Village Terizhandur Post,
MayiladuthuraiNagapattinam – 609 808.

... Petitioner
(ThiruVinod Kumar
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Transmission Corporation Ltd.
(TANTRANSCO)
Represented by its Chairman,
NPKRR Maaligai, 144, Anna Salai,
Chennai –600 002
2. The Superintending Engineer,
Chennai Electricity Distribution Circle/North
144, Anna Salai,
Chennai – 600 002.
3. Tamil Nadu Generation and Distribution
Corporation
Represented by its Chairman
NPKRR Maligai
144, Anna Salai, Chennai – 2.

..... Respondents
(ThiruM.Gopinathan,
StandingCounsel for Respondents)

Dates of hearing : 28-07-2020; 08-09-2020; 29-09-2020;
20-10-2020; 10-11-2020; and 19-11-2020

Date of Order : 15-12-2020

The I.A. No. 1 of 2020 and in DRP No. 11 of 2020 came up for final hearing on 19-11-2020. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent, written submission filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in DRP No.11 of 2020:-

The prayer of the petitioner in D.R.P. No. 11 of 2020 is to declare that the Respondents are not entitled to collect annual operation and maintenance charges from the Petitioner with respect to its fossil fuel-based generators for the maintenance of the bay and associated equipment at the 110 KV Gummidipoondi sub-station and to direct the Respondents to pay the costs of the present proceedings to the Petitioner.

2. Facts of the case :-

The present petition is being filed for a declaration that the Respondents are not entitled to collect annual operation and maintenance charges with respect to the Petitioner's fossil fuel based generators from them for the maintenance of the Respondents' bay and its associated equipment the same being the assets of the Respondents.

3. Contentions of the Petitioner:-

3.1. The Petitioner has set up its 10 MW fossil fuel based power plant at Gummidipoondi. Petitioner's plant was commissioned on 23.09.2008 and is connected to the Respondents' 110 KV sub-station at Gummidipoondi. The Petitioner's plant was set up as a captive power plant. However, since October 2015, the plant has not been generating any power. The petitioner had obtained open access from the Respondent for the supply of energy from its plant to its captive consumers. The Petitioner has duly complied with all payment requirements owed to the Respondents under the applicable regulations of the Commission and in consonance with the Electricity Act, 2003 read with the Electricity Rules, 2005.

3.2. The Petitioner at the time of grant of connectivity had paid an amount of Rs.68,89,300/- in compliance with its obligations as a generator as per the applicable regulations. The Petitioner herein has paid the Respondents the cost of the transmission infrastructure, including the dedicated transmission lines from the Petitioner's plant to the 110 KV sub-station at Gummidipoondi by remitting a sum of Rs.68,89,300/- and have also been paying transmission charges regularly to the Respondents.

3.3. The Petitioner has entered into an Energy Wheeling Agreement ("EWA") dated 31.12.2013 with the Respondents for utilizing the transmission system of the Respondents in order to transmit electricity to the Petitioner's destination of use. When the plant was operational, the Petitioner, by interfacing its plant with the Respondent's transmission/ distribution network was evacuating the

electricity generated (through the transmission lines owned by the Respondents) to the 110 KV sub-station at Gummidipoondi, so as to enable captive use by its captive consumer, Kanishk Steel Industries Ltd. The Petitioner in this instance has been paying the full transmission and distribution charges and losses for the utilization of the transmission systems of the Respondents, as determined by the Commission in its tariff orders from time to time.

3.4. The EWA sets out the obligations of the Petitioner and Respondents with respect to operation and maintenance. In terms of the aforesaid EWA, the Petitioner is obligated to maintain only the Generator and equipment including the transformer, switchgear protection equipment and other allied equipment at the Petitioner's bus bar (on the Petitioner's premises) at the Petitioner's cost. In consonance with the aforesaid requirement, the Petitioner has been duly bearing the cost for such maintenance of the aforesaid equipment at its premises as specified in the EWA.

3.5. The Petitioner has been remitting all payments as due to the Respondents, including full transmission and distribution charges and losses. In such circumstances, on 5.6.2019, the Petitioner was shocked to receive the 2nd Respondent's letter dated 27.5.2019 whereby a demand was made for payment of alleged operation and maintenance charges of the bay maintained and owned by the Respondent at the Gummidipoondi 110 KV sub-station for the years 2008-2009 to 2018-2019. As per the terms of the demand notice, the Petitioner is liable to pay Rs. 9,12,116/- for SIPCOT SS1 period bay at Gummidipoondi with respect

to the operation and maintenance charges for a period of 10 years from 2008-09 onwards. The 2nd Respondent further pointed that the obligation to pay the operation and maintenance charges was clarified by the Commission vide DRP No. 2 of 2014 and it is based on the said judgment that they have issued this notice of demand.

3.6. The Petitioner by its letter dated 28.6.2019, brought to the attention of the 2nd Respondent the fact that bay at the Gummidipoondi SS is in fact owned completely by the 1st Respondent as its very own assets and it is in fact their responsibility to maintain the same.

3.7. The Petitioner has further informed the 2nd Respondent that there is noregulation which allows the Respondents to collect operation and maintenance charges from a private generator such as the Petitioner and anycharges, required to be paid as per the Act and Regulations have already been paid by them. The Petitioner further stated that private generators are not required to pay operation and maintenance charges, especially in a case such as this with no dedicated line and for which no tariff is determined. The Petitioner had further asserted that the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 under Regulation 25 (8) would apply in this case, where it has been clearly set out that operation and maintenance charges will be collected with respect to transmission systems under "COMMERCIAL"operation and nowhere does it directly or indirectly include private generators within its ambit.

3.8. Since the operation and maintenance charges approved by the Commission have been paid dutifully and in full by the Petitioner, the Petitioner further points out that the levy of additional charges, as sought by the Respondents towards operation and maintenance of the bays, would amount to a double levy of charges on the Petitioner.

3.9. The said demand of the 2nd Respondent is based on a purported misinterpretation of the order dated 04.01.2019 of the Commission in DRP No. 2 of 2014. The Respondents have deliberately sought to misinterpret the order of the Commission to unjustly levy additional charges on the Petitioner in contravention of the Electricity Act, 2003 and the rules and regulations thereunder.

3.10. The factual considerations placed before the Commission in the aforesaid petition was entirely different from the instant dispute. It is relevant to state that in the said DRP No. 2 of 2014 filed by another Generator, the charges sought to be levied arose with respect to the payment of charges for the staff of the Respondent for operation and maintenance of the sub-station until permanent connectivity was granted. Further, the charges sought to be levied were agreed to be borne by the generator at the time of grant of temporary connectivity. In any event, the Petitioner herein is operating and maintaining the switchyard which is within its premises and is bearing the costs towards the same.

3.11. The Commission, in the aforesaid petition, has held that once permanent connectivity is obtained, to the sub-station established by the

Petitioner therein, it would become the duty of the Petitioner therein to operate and maintain the same in accordance with the provisions of the Electricity Act, 2003, or the rules or regulations thereunder. In this instance, such a requirement does not arise as the Commission while fixing the transmission tariff has also taken into consideration the operation and maintenance costs.

3.12. The Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 ("Tariff Regulations"), as amended from time to time, stipulates the manner in which the transmission tariff is to be determined in its Tariff Orders. Regulation 59 of the Tariff Regulation stipulates that the tariff for transmission of electricity by a transmission system shall comprise of recovery of annual transmission charges consisting of (i) interest on loan capital, (ii) depreciation, (iii) operation and maintenance expenses, (iv) interest on working capital at normative availability and (v) return on equity.

3.13. The Commission, has in its Tariff Regulations, specifically provided for inclusion of operation and maintenance expenses when calculating the transmission tariff payable by consumers utilizing the transmission systems of the Respondent. As such, the purported expenses incurred by the Respondents towards the operation and maintenance of the bay which are part of the transmission systems, is to be borne out of the transmission tariff paid by those utilizing the transmission system of the Respondents. The claims for the period from 2009 to 2017 are barred by limitation meaning that the demand notice will fail for this reason alone.

3.14. The Petitioner requested the 2nd Respondent to withdraw their demand notice letter dated 27.05.2019 since the Petitioner is not liable to pay the O&M charges due to the aforementioned reasons. The 2nd Respondent, without considering the response of the Petitioner, sent another notice of demand dated 21.3.2020 wherein the 2nd Respondent demanded a sum of Rs.10,25,210/- towards operation and maintenance charges for the period between 26.8.2008 till 31.3.2020. The said letter was received on 21.05.2020 and could not be responded to in view of the lockdown imposed by the Government due to the pandemic. Merely two months later, the Respondent sent a further demand notice to the tune of Rs.11,44,773/- vide letter dated 19.5.2020, which was received on 21.05.2020 for operation and maintenance charges for the period between 26.8.2008 till 31.3.2021. The subsequent letters were also based on a deliberated and purported misinterpretation of the judgment of the Commission and in complete reliance of the same. It is also relevant to note that there are no reasons given in any of the notices on how the judgment is applicable to the factual circumstances of the case at hand, especially in light of the permanent connectivity granted to the Petitioner. It is also relevant to note that the notice dated 19.5.2020 takes into account future charges for operation and maintenance since it accounts for the current financial year, one in which three months are left.

3.15. On 5.6.2020, the Petitioner received the HT bill in respect of the service connection maintained at its premises for drawing start up power for its power plant. In the said bill, the 3rd Respondent had included the disputed sum of Rs. 11,44,773/-. The said amount has been described in the HT

bill as operation and maintenance charges from wind energy generators. The Respondents cannot add the disputed amount which is purportedly towards operation and maintenance charges in the HT bills, which can only contain energy and demand charges applicable to energy consumed. Such inclusion of purported operation and maintenance charges in the HT bill is illegal and liable to be set aside

3.16. The levy and demand of operation and maintenance charges is clearly contrary to law and opposed to the Regulations and Tariff Orders of the Commission. The Respondent cannot separately collect operation and maintenance charges in respect of the bay, when the transmission charges determined by the Commission includes the operation and maintenance charges. The Respondents have sought to usurp the power of the Commission by demanding payment of operation and maintenance charges, which is, in reality a dual charge, without the permission of the Commission.

3.17. The petitioner will suffer irreparable hardship if the Commission does not declare that operation and maintenance charges cannot be levied by the Respondents on the Petitioner for the maintenance of the Respondents' bay and its associated equipment. The Petitioner's tariff for supply of electricity to its consumers is computed based on varied factors including all the charges payable by the petitioner to the Respondents for utilization of its transmission and distribution system. The Petitioner having acted upon the charges as payable to the Respondent during the relevant period

cannot now be subjected to an additional charge as this would gravely prejudice the Petitioner. It is just and necessary that the Commission declare that the Respondents are not entitled to collect annual operation and maintenance charges from the Petitioner for the maintenance of the Respondents bay and its associated equipment, the same being the assets of the Respondents.

4. I.A. filed on behalf of the Petitioner on 14-07-2020:-

4.1. The petitioner reiterated almost all the contention raised in the DRP in the I.A. also. In addition to the same, the following relief has been sought in the I.A.

The actions of the Respondents are clearly contrary to law. The Respondents are not entitled to collect the O & M charges. The Petitioner has a good case on merits. The Petitioner apprehends that the Respondents will take coercive actions to recover the amounts demanded from the Petitioner. The balance of convenience is in favour of the Petitioner. Grave prejudice and irreparable injury will be caused to the Petitioner, if pending, the D.R.P., the Respondents take any coercive action against the Petitioner.

4.2. In such circumstances it is just and necessary that pending adjudication of the dispute raised in the present Petition, the Respondents are restrained from taking any coercive action against the Petitioner. Commission may be pleased to grant an order of interim injunction restraining the Respondents from taking any coercive action against the Petitioner towards purported recovery of O & M charges, pending disposal of the dispute resolution petition.

5. Counter affidavit filed on behalf of the 1st Respondent on 07-09-2020:-

5.1. The 10MW unit of M/s OPG Renewable Energy Pvt. Ltd, is connected to 33 KV bay provided at Gummidipoondi 110 KV Substation and the plant was commissioned on 23.09.2008.

5.2. The generator is having grid connectivity with the intrastate distribution system, PPP wing of TANGEDCO, being the Nodal agency is dealing with all relevant matters (Grid connectivity, Energy Wheeling Agreements [EWA], etc.) of the above generator as per Grid connectivity and Intrastate Open Access Regulations, 2014.

5.3. The generator has entered into an Energy Wheeling Agreement [EWA] dated 31.12.2013. The generator was requested to make payment of Operation & Maintenance (O & M) charges towards maintenance of 1 No.33 KV bay provided at Gummidipoondi 110 KV Substation based on the TANTRANSCO Proceedings No.305, dt.23.12.2017.

5.4. As per above TANTRANSCO Proceedings the annual operation and maintenance charges from the private generators towards maintenance of bay and its associate equipments provided for connecting their generating units with TANTRANSCO grid may be collected at the rate of 1% of the capital cost of the bay in the year of commissioning with an escalation of

4% per annum in the subsequent years up to 08.04.2014 and with an annual escalation of 5.72% per annum from 09.04.2014.

5.5. TANTRANSCO is paying annual O&M charges @ 1.5% of the capital cost as mutually agreed for the bays provided and maintained by Power Grid Corporation of India Ltd. (PGCIL), the CTU for interfacing 230 KV/ 400 KV/ 765 KV substations of TANTRANSCO at PGCIL substations. PGCIL in vice versa is also paying annual O&M charges for the bays provided and maintained by TANTRANSCO.

5.6. In line with the above, TANTRANSCO is collecting annual O&M charges @ 1% of the capital cost as per TNERC's Tariff Regulations 2005 for the bays provided to the Intrastate private generators for interfacing their generating units with TANTRANSCO grid.

5.7. Clause 25.8 of the TNERC Tariff Regulations, 2005 reads as follows.

"In respect of the transmission system declared under commercial operation on or after notification of these regulations the base operation and maintenance expenses shall be fixed at 1 % of the capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 4% per annum for the subsequent years."

5.8. The annual escalation of 4% per annum has been amended to 5.72% vide the Commission's notification No. TNERC/TR/5/2-11 dated 13-03-2014 which has come into force from the date of publication in the Tamil Nadu Government Gazette i.e. from 9th April-2014.

5.9. Based on the above TANTRANSCO proceedings, M/s OPG Renewable Energy Pvt. Ltd was requested to pay an amount of Rs.9,12,116/- vide demand raised by TANGEDCO dated 27.05.2019 towards annual O&M charges for the maintenance of 1 No. 33 KV bay provided at Gummidipoondi 110KV substation for the period from 2008-09 to 2018-19.

5.10. Subsequently TANGEDCO had raised demands for the payment of annual O&M charges for Rs.10,25,210/- for the period from 26.08.2008 till 31.03.2020 vide letter dated 21.03.2020 and Rs.11,44,773/- for the period from 26.08.2008 till 31.03.2021 vide letter dated 19.05.2020 towards maintenance of 1 No. 33 KV bay provided at Gummidipoondi 110KV substation.

5.11. The charges collected towards annual Operation and Maintenance of bays provided to the private generators were deducted under the heads of "Other Income" while calculating the net ARR in the tariff petition filed by TANTRANSCO as per clause 59 (a) of TNERC's Tariff Regulations 2005. Hence, the O&M charges collected from the generators cannot be considered as double recovery as stated by the petitioner.

5.12. The charges collected towards annual Operation and Maintenance of bays provided to the private generators is as per clause 25.8 of TNERC's Tariff Regulations 2005 "which have been under commercial operation on or after the notification of these Regulations". Accordingly, annual O&Mcharges being collected towards the maintenance of bays provided to the private generators

with effect from declaration of COD.

5.13. The O&M charges are being collected for maintenance of bays provided to a generator for connectivity to the transmission / distribution system whereas transmission charges are being collected while availing open access for usage of transmission / distribution system. Hence, levy of O&M charges for the bay maintenance will not be a double levy of charges on the petitioner.

5.14. The Hon'ble CERC has passed an order dt.27.6.2007 in Petition No.146/2006 that those who are seeking connectivity to transmission system/ distribution system must agree to pay O&M expenses for maintenance of bays.

5.15. Though the bays provided to a generator for connectivity to the transmission / distribution system are the sole (very own) assets of TANTRANSCO/ TANGEDCO and having its obligation to maintain the same, the main purpose of erecting such bays is for interfacing that particular private generator with the transmission / distribution system and hence private generators who are seeking connectivity shall have to bear the O&M expenses towards the maintenance of bays erected exclusively for interfacing their generators with the transmission / distribution system.

5.16. The annual O&M charges for the bays provided to be private generators being collected from the date of commissioning respective

generating units and as the O&M expense is of recurring the same is collected till the generating units are connected with the grid. The limitation criteria as stated by the petitioner cannot be considered as the same is applicable to the consumers alone as per Electricity Act, 2003.

6. Counter Affidavit filed on behalf of the 2nd and 3rd Respondent on 07-09-2020:-

6.1. The Petitioner is having fuel based power plant with installed capacity of 10 MW at PeriyaObulapuramVillage, Gummudipoondi, Thiruvallur District. The petitioner with capacity of 10 MW is connected with Gummudipoondi SIPCOT Substation-II through 33 KV SC line. The Generating plant with 10 MW was initially owned by M/S Kanishk Steel Industries Ltd., and the Grid Connectivity Energy Wheeling Agreement was executed with above said Generator on 24.09.2008 as Co-Generator after the payment of Bay Capital Cost of Rs.68,99,300/- (Grid Connection Effective date was 26.08.2008).

6.2. Thereafter, based on the request of M/s. Kanishk Steel Industries Ltd., and also consequent to the formation of Special Purpose Vehicle (SPV), another Energy Wheeling Agreement was executed in the name of M/s OPG Renewable Energy Pvt. Ltd., on 07.02.2009 as Captive Generating plant.

6.3. The new Generator of M/s OPG Renewable Energy Pvt. Ltd., thereafter entered into Energy Wheeling Agreement 31.12.2013 for the Parallel Operation of the CGP holder's Captive Generating Plant and Wheeling of Energy (Power) from such Captive Generating Plant to the destination of

its own use and also for Wheeling of 1 MW power to his Captive user (M/S Kanishk Steel Industries Limited) through STU/Distribution licensee's Transmission/Distribution network.

6.4. The generator has Executed an Addendum No.1 on 14.11.2014 for cancelling the Wheeling of 1 MW power to the Captive user and to permit to have Grid connectivity of 10 MW Generator alone upto the period of 31.03.2015.

6.5. Based on the Generator's request, an Addendum No.2 has been executed on 18.03.2015 for Grid Connectivity of 10 MW Generator of M/S OPG Renewable Energy Pvt. Ltd., on permanent basis.

6.6. The generator was requested to make payment of Operation & Maintenance (O&M) charges towards maintenance of 1 No. 33 KV Bay provided at Gummidipoondi SIPCOT Substation-II based on the B.P. (Per) CHTRANSCO Proceedings No.305, dt.23.12.2017. As per above CHTRANSCO Proceedings, the annual operation and maintenance charges from the private generators towards maintenance of bay and its associated equipments provided for connecting their generating units with CHTRANSCO grid may be collected at the rate of 1% of the capital cost of the bay in the year of commissioning with an escalation of 4% per annum in the subsequent years up to 08.04.2014 and with an annual escalation of 5.72% per annum from 09.04.2014.

6.7. TANTRANSCO is paying annual O&M charges @ 1.5% of the capital cost as mutually agreed for the bays provided and maintained by Power Grid Corporation of India Ltd. (PGCIL), the CTU for interfacing 230 KV/ 400 KV/ 765 KV substations of TANTRANSCO at PGCIL substations. PGCIL in vice versa is also paying annual O&M charges for the bays provided and maintained by TANTRANSCO in the substations of TANTRANSCO.

6.8. In line with the above, TANTRANSCO is collecting annual O&M charges @ 1% of the capital cost as admitted by the Commission in TNERC Tariff Regulations 2005 for the bays provided to the Intrastate private generators for interfacing their generating units with TANTRANSCO grid.

6.9. Clause 25.8 of the TNERC Tariff Regulations-2005 reads as follows.

"In respect of the transmission system declared under commercial operation on or after notification of these regulations the base operation and maintenance expenses shall be fixed at 1 % of the capital cost (as admitted by the Commission), in the year of commissioning and shall be subject to an annual escalation of 4% per annum for *the subsequent years.*"

6.10. The annual escalation of 4% per annum has been amended to 5.72% vide the Commission's Notification No.TNERC/TR/5/2-11 dated 13-03-2014 which has come into force from the date of publication in the Tamil Nadu Government Gazette i.e. from April 9, 2014.

6.11. Based on the above TANTRANSCO proceedings M/s OPG Renewable Energy Pvt. Ltd. was initially requested on 27.05.2019 to pay an amount of Rs.9,12,116/- towards annual O&M charges for the maintenance of 110 KV bay

provided at Gummidipoondi SS for the period from 2008-2009 to 2018-19 and on 21.03.2020 demanded further claim for an escalation amount of Rs.1,13,094/- for the period from 01.04.2019 to 31.03.2020 and also on 19.05.2020 and demanded further claim for an escalation amount of Rs.1,19,563/- for the period from 01.04.2020 to 31.03.2021. towards annual O&M charges for the maintenance of 1 No. 110 KV bay provided at Gummidipoondi SIPCOT Substation-II.

6.12. AsTANTARNSCO has not become full-fledged entity till such time TANGEDCO was raising the demand for the payment of O&M charges, collecting and transferring the same to TANTRANSCO account. The O&M charges for maintenance of bays provided to some of the private generates are being paid by the respective generators.TANTRANSCO officials have carried out the O&M activities as detailed in the annexure of the typed set.

6.13. The charges collected towards annual Operation and Maintenance of bays provided to the private generators were deducted under the heads of Other Income while calculating the net ARR in the tariff petition filed by TANTRANSCO. The O&M charges collected from the generators cannot be considered as double recovery as stated by the petitioner.

6.14. The O&M charges being collected for maintenance of bays provided to a generator for connectivity to the transmission system whereas transmission charges are collected while availing open access for usage of transmission system. Hence levy of O&M charges for the bay maintenance will not be a double levy of charges on the petitioner.

6.15. The Hon'ble CERC has passed an order dt.27.6.2007 in petition No.146/2006 that those who are seeking connectivity to transmission system must agree to pay O&M expenses for maintenance of bays.

6.16. The 1st Respondent has approved Grid Connectivity of their generating units of the petitioner and petitioner executed the Agreement on 31.12.2013 for Grid Connectivity wherein the relevant Clause reads as follows:-

"Maintenance Charges if any for the lines/equipments maintained by TANTRANSCO or any other charges if approved by TNERC has to be paid by the company"

6.17. From the above, it is clear that the petitioner has to pay O&M charges as approved by the Commission from time to time. Therefore, the contention of the petitioner that in terms of EWA, the petitioner is obligated to maintain the Generator and equipment including transformers, switch gear protection equipment and other allied equipment at petitioner's bus bar at the petitioner's cost is not acceptable one.

6.18. D.R.P.NO.2 of 2014 is applicable to the extent payment has to be made for O&M charges alone by the petitioner. Therefore the contention of the petitioner is not acceptable one.

6.19. The Annual O&M charges for the bays provided to the private generators being collected from the date of commissioning of the respective generating units and as the O&M expense is of recurring nature, the same is collected till the

generating units are connected with the grid. It is now a settled position of law that the Limitation Act does not apply to the proceedings before the State Commission under the Electricity Act, 2003 as held in the *Tamil Nadu Generation & Distribution Corpn. Ltd. v PPN Power Generation Co. Ltd.* (2014) 11 SCC 53 and *Lafarge India Pvt, Ltd. V Chhattisgarh State Electricity Regulatory Commission* in Appeal No. 127 of 2013 dated 13.03.2015 (Full Bench). That by a judgment, the Hon'ble Appellate Tribunal in the case of *M/s. Aditya Industries v. Himachal Pradesh Electricity Regulatory Commission*, in Appeal No. 73 of 2014 dated 09.09.2015, allowed the claim of a consumer in regard to line losses for the period from 2005 when the petition was filed only in 2012. Therefore, the demand raised is not barred by limitation.

6.20. In view of the facts and circumstances of the case on hand and position of law as stated, the petitioner has no prima facie case to further pursue the above Petition. Therefore, the petitioner is not entitled to any relief as prayed for in the above petition. The balance of convenience is clearly in favour of the respondents herein. Hence, the above petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as O&M charges are levied in accordance with law and in the manner known to law.

7. Rejoinder filed by the Petitioner on 23-09-2020:-

7.1. As regards paragraph 8 of the 1st Respondent's Counter Affidavit, the *inter se* agreement between PGCIL and TANTRANSO is a matter between them and it cannot be the basis for levying and collecting O & M charges from the Petitioner. The respective bays are owned and maintained by PGCIL and TANTRANSO. Hence,

they may have mutually agreed to payment of O & M Charges. That, however, cannot entitle TANTRANSCO to collect O & M charges from the Petitioner.

7.2. As regards paragraph 9 of the 1st Respondent's Counter Affidavit, it is denied that the levy and collection of annual O & M charges at 1% of capital cost, for the bays provided to interstate private generators, is as per the TNERC's Tariff Regulations, 2005. The reliance placed on Regulation 25.8 of the TNERC Tariff Regulations, 2005 and the notification of the Commission increasing the annual escalation from 4% to 5.72%, in paragraphs 10 and 11 of the 1st Respondent's Counter Affidavit, are completely misplaced. The TANTRANSCO is not entitled to collect O&M charges for the bays based on the said regulations and/or the notification issued by this Commission. No amounts were levied and collected towards O&M charges for the bays prior to the impugned demand, as the Respondents are well aware that they are not entitled to collect such charges. In any event, TANTRANSCO cannot collect such charges from 2010 onwards.

7.3. As regards paragraph 12 and 13 of the 1st Respondent's Counter Affidavit, the proceedings of TANTRANSCO and the TANGEDCO are not valid is contrary to the applicable regulations and Tariff Order passed by this Commission. Hence, the demand made vide letters dated 27.5.2019, 21.3.2020 and 19.5.2020 are untenable. In any event, and without prejudice, the demands are barred by limitation.

7.4. As regards paragraphs 14 and 16 of the 1st Respondent's Counter

Affidavit, the collection of O&M charges from the generators amounts to double recovery. O&M charges collected from generators cannot be considered as "other income" for the purpose of net ARR. TANTRANSCO being the transmission licensee is duty bound to maintain and operate the transmission system. The bay and associated equipment are part of the transmission system and it is the main business of TANTRANSCO to build, operate and maintain the transmission system. Operation and maintenance of the transmission system being the main function of the transmission licensee, the costs towards it is one of the main components in tariff calculations. Therefore, any amounts collected towards O & M charges cannot be shown under the head of "other income". The Respondents cannot justify its action based on such wrong accounting. The amounts collected from the generators towards transmission charges as approved by the Commission includes O & M charges and hence, it cannot be once again collected under the guise of it being towards the maintenance of the bays provided for connectivity to the transmission system. The Respondents' contention to the contrary are denied.

7.5. As regards paragraph 15 of the 1st Respondent's Counter Affidavit, the TANTRANSCO is not entitled to collect O & M charges for the bays based on the said regulations and/or the notification issued by this Commission and that such collection is invalid and illegal. Therefore, the reliance on clause 25.8 of the TNERC Tariff Regulations, 2005 is completely misplaced and without any legal basis. Without prejudice to the same, the plant has stopped functioning from October 2015 and the O&M charges if, any, cannot be levied for the period between

October 2015 and 2020.

7.6. As regards paragraph 17 of the 1st Respondent's Counter Affidavit, the order dated 27.6.2007 of the CERC in Petition No.146 of 2006 does not justify the levy of O & M charges for the bays by TANTRANSCO. In the said order, the CERC has differentiated between providing connectivity to transmission system and allowing usage of system through open access and O & M charges for inter-connection bay is required to be paid only in cases where connectivity to transmission system is sought obtaining open access interconnection. Hence, the said order of the CERC supports the Petitioner's stand that since it has been granted open access and it pays all necessary open access charges, the Respondents cannot collect O &M charges towards the bays.

7.7. The averments made in paragraph 18 of the 1st Respondents Counter Affidavit are denied. The Petitioner, a private generator is not required to pay operation and maintenance charges both based on law as per the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 as per Regulation 25(8) and with respect to the case at hand, in light of the fact that there is no dedicated line and since no tariff is determined.

7.8. The averments in paragraph 19 of the 1st Respondent's Counter Affidavit are denied. The Respondents are not entitled to collect O & M Charges for the reason stated in the Petition and in this Rejoinder. In any event, the demand made

by the Respondents is barred by limitation and the stand of the 1st Respondent that limitation is applicable only in the case of consumers is untenable.

7.9. As regards paragraph 13 of the 2nd and 3rd Respondent's Counter Affidavit the basis of levy and collection of O & M charges being invalid, demand made by TANGEDCO purportedly for and on behalf of TANTRANSCO cannot be justified. The Petitioner was never informed that TANGEDCO is making the demand on behalf of TANTRANSCO. Legally, TANGEDCO cannot make such demand for and on behalf of TANTRANSCO.

7.10. As regards paragraph 16 of the 2nd and 3rd Respondent's Counter Affidavit, any payment made by generators will not justify the wrong levy and collection of the O & M charges. The Respondents not being entitled to collect such charges, cannot validate its actions based on payments made by generators.

7.11. As regards paragraph 18 of the 2nd and 3rd Respondent's Counter Affidavit, it is denied that TANTRANSCO officials have carried out O&M activities. In any event, any activity carried out towards maintenance of bays owned by TANTRANSCO is part and parcel of owning the bays and hence no amounts can be collected from the Petitioner towards O & M charges.

7.12. As regards paragraph 22 of the 2nd and 3rd Respondent's Counter Affidavit, the clause in the Agreement for parallel operations and open access does not entitle the Respondents to levy and collect O&M charges towards the bays The tariff

orders of the Commission supersede the contractual clauses in an agreement.

7.13. As regards paragraph 23 of the 2nd and 3rd Respondent's Counter Affidavit, the order in D.R.P. 2 of 2014 is applicable to the instant case. In this regard, the averments in paragraph 12 and 13 of the main Petition are reiterated.

7.14. As regards paragraph 24 of the 2nd and 3rd Respondents Counter Affidavit, it is denied that Limitation Act, 1963 does not apply to proceedings before the State Commissions. The orders which have been cited by the 2nd and 3rd Respondent are contrary to the judgment of the Hon'ble Supreme Court, which has categorically held that Limitation Act, 1963 is applicable to proceedings before the State Commission.

7.15. The Petitioner has a good case on merits and the demand of O & M charges for the bays is contrary to the regulations and the Petition deserves to be allowed.

8. Written Submissions of the Petitioner filed on 06-11-2020:-

8.1. The Petitioner operates a coal based captive power plant, which was commissioned on 23.9.2008 and is connected to the Gummidipoondi substation. The bay in respect of which the impugned demand has been made by the Respondents is located within the aforementioned substation. The Petitioner has borne the cost of the transmission infrastructure in respect of the aforesaid connectivity to the substation. The Petitioner has been availing open access for transmitting the power from its plant to the end consumers. For all this

necessary charges including the transmission charges as determined by this Commission in its various tariff orders are being promptly paid by the Petitioner. In terms of the Energy Wheeling Agreement, executed between the Petitioner and the Respondents, the Petitioner is required to maintain only the generator, the transformer, switch gear protection equipment and other allied equipment.

8.2. On 5.6.2019, the 2nd Respondent made a demand for Rs. 9,12,116/- purportedly towards operation and maintenance charges in respect of the bay owned by the Respondents located within the Gummidipoondi substation. The said demand was for the period since 2008. In the subsequent and latest demand dated 21.5.2020, the demand made on the Petitioner has gone upto Rs 11,44,773/- with regard to outstanding Operation and Maintenance charges.

8.3. The Petitioner objected to the demand and has not made any payments in that regard. However, the Respondents have demanded operation and maintenance charges, for a period starting from 2008 onwards.

8.4. Under the scheme of the Act, the Respondents cannot collect any charges from the power plants, in connection with use of the transmission system, unless the same is sanctioned or determined by the Commission. The Respondents by unilaterally levying operation and maintenance charges for the bay, has clearly tried to usurp the jurisdiction and powers of the Commission.

8.5. TNERC (Terms and Conditions for Determination of Tariff) Regulations,

2005 have been framed for the purpose of determining tariff by the Commission. Regulation 1 (5) of the said regulations makes it clear that the said regulations are applicable for determination of tariff by the Commission in accordance with section 62. It is an admitted position that the Commission has not determined any charge towards operation and maintenance of the bay within the substation. Hence, in the absence of any such charges, the Respondents cannot collect these charges from the Petitioner

8.6. The transmission charges fixed by the Commission include operation and maintenance charges. This is evident from Regulation 59(iii) of TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, which makes it clear that transmission charges include operation and maintenance charges. It cannot be disputed that the bays are part of the transmission system. Regulation 62 of the aforesaid Regulations requires the transmission licensee to maintain separate function wise accounts for the transmission system and furnish the revenue requirement line wise and bay wise. This being the case, the Respondents are already collecting operation and maintenance charges for the bay from the Petitioner, as part of the transmission charges. The demand made by the Respondents amounts to double levy of operation and maintenance charges. This is not sanctioned by the Act or any of the orders passed by the Commission and hence cannot be allowed.

8.7. Chapter III of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, comprising of Regulations 18 to 34, deals with general principles of computing cost and return, and are to guide the Commission.

Regulation 25 (8) provides that in respect of transmission system declared under commercial operation, the base operation and maintenance expenses shall be fixed at 1% of the capital cost subject to annual escalation of 5.72%.The Respondents have relied on the said regulation to justify the levy of operation and maintenance charges. Hence, the Respondents have admitted that bays are part of the transmission system. However, the Respondents have also taken a contradictory stand that operation and maintenance charges for the bays is different from transmission charges collected for use of the transmission system. It is an admitted position that the Respondents are collecting transmission charges from the Petitioner.

8.8. The base operation and maintenance expenses at 1% of the capital cost subject to annual escalation of 5.72%, has already been factored by the Commission while fixing the transmission charges. Hence, the Respondents cannot separately charge operation and maintenance charge for the bay.

8.9. The stand taken by the Respondents that charges for operation and maintenance of bays provided to private generators were deducted under the head other income while calculating ARR is contrary to Regulation 62 of TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, which requires revenue requirement to be furnished bay wise. The Respondents cannot, therefore, contend that these were deducted from other income while calculating ARR. Further, the Respondent's stand that the levy of these charges is based on the TANTRANSCO's board proceedings dated 23.12.2017, belies the stand now taken by the Respondents in these proceedings. If the amounts now

levied as operation and maintenance charges for the bays is sanctioned by the Commission as contended by the Respondents, there would have been no need for a board proceeding.

8.10. D.R.P. 2 of 2014 decided by the Commission is not in any manner applicable to the present case. D.R.P. 2 of 2014 did not deal with levy of operation and maintenance charges for bays within the substation. The Respondent's entitlement to levy of operation and maintenance charges based on TANTRANSCO Board proceedings dated 23.12.2017, was not the issue involved in that case. That was a case where the generator had agreed to pay charges to TANGEDCO for maintaining the switching station within its own plant premises, till the time, the generator availed temporary connection. Taking note of the facts and circumstances of that case, the Commission concluded that the generator was liable to make the payment. The conclusion of the Commission in that case was based on the fact that the temporary connectivity was established based on the request of the generator and the generator had agreed to bear the expenses of the maintenance staff. There are no such circumstances in the present case. Hence, the stand of the Respondents that based on the order dated 4.1.2019, passed in D.R.P. 2 of 2014 it is entitled to levy and collect operation and maintenance charges for the bays is completely baseless.

8.11. The initial demand made on 5.6.2019, for Rs.9,12,116 in respect of the bay within the Gummidipoondi substation, is for the period since 26.8.2008. The demand has been made belatedly and a significant part of the demand is barred by limitation.

8.12. The Petitioner had by its letter dated 28.6.2019 denied its liability and disputed the amounts claimed by the Respondents. Had the Respondents approached the Commission to recover the amounts, the claims relating to the period prior to three years from the filing of any such petition would have been clearly barred by limitation. It has been held by the Hon'ble Supreme Court in Andhra Pradesh Power Coordination Committee v. LancoKondapalli Power Ltd., reported in (2016) 3 SCC 468, that the Limitation Act, is applicable to proceedings before the state commissions. For this reason, also the demand made by the Respondents is liable to be set aside.

8.13. The Respondents are not entitled to levy and collect operation and maintenance charges for the bay owned by the Respondents which is located within the substation to which the Petitioner's power plant is connected

9. Findings of the Commission:-

9.1. We have heard the submissions of learned Counsel appearing for the Petitioner and the Respondents. The Petitioner has filed this petition in D.R.P.No.11 of 2020 to declare that the Respondents are not entitled to collect annual operation and maintenance charges from the Petitioner with respect to its fossil fuel based generators for the maintenance of the bay and associated equipment, the same being the assets of the Respondents, at the 110 KV Gummidipoondi Sub-station.

The Petitioner has also filed an Interim Application in I.A. No.1 of 2020 in the said D.R.P.No.11 of 2020 to grant an Order of interim

injunction restraining the respondent from taking any coercive action against the Petitioner towards purported recovery of O&M charges, pending disposal of this DRP.

9.2. The petitioner has entered into an Energy Wheeling Agreement ("EWA") dated 31-12-2013 with the Respondents for utilizing the transmission system of the Respondents in order to transmit electricity to the Petitioner's destination of use. When the plant was operational, the Petitioner, by interfacing its plant with the Respondents transmission / distribution network, was evacuating the electricity generated (through the transmission lines owned by the Respondents) to the 110 KV sub-station at Gummidipoondi, so as to enable captive use by its captive consumer, M/s Kanishk Steel Industries Ltd. The Petitioner in this instance has been paying the full transmission and distribution and charges and losses for the utilization of the transmission systems of the Respondents, as determined by the Commission in its Tariff Orders from time to time.

9.3. The EWA sets out the obligations of the Petitioner and Respondents with respect to operation and maintenance. In terms of the aforesaid EWA, the Petitioner is obligated to maintain only the Generator and equipment including the transformer, switchgear protection equipment and other allied equipment at the Petitioner's bus bar (on the Petitioner's premises) at the Petitioner's cost. In consonance with the aforesaid

requirement, the Petitioner has been duly bearing the cost for such maintenance of the aforesaid equipment at its premises as specified in the EWA.

9.4. When the plant was operational, it has been paying the full transmission and distribution charges and losses for the utilization of the transmission and distribution systems of the Respondents as per TNERC Tariff Orders on the same.

9.5. It is seen that the demand notice in this case has been issued on 27-05-2019 for a sum of Rs.9,12,116/- towards O&M charges payable by the petitioner for the bay maintained and owned by the Respondent at the Gummidipoondi 110 KV Sub-station for ten years from 2008-09 to 2018-19. Again, another notice dated 21-03-2020 for a sum of Rs.10,25,210/-towards O&M charges payable by the petitioner for the period from 26-08-2008 till 31-03-2020 has been raised. Further,another notice dated 19-05-2020 for a sum of Rs.11,44,773/- towards O&M charges payable by the petitioner for the period from 26-08-2008 till 31-03-2021 has been raised.

9.6. While raising the said demand notices, it is mentioned that the Commission in D.R.P. No.2 of 2014 dated 04-01-2019 has clarified the collection of O&M charges and therefore the above said sums are payable by the petitioner in this year. It may be pointed out that the

said orders of this Commission cited by the respondent relates to another generator namely M/s. Suryadev Alloys Pvt. Ltd. and the said decision has only clarified the provisions of the relevant regulations and the cause of action for levy of O&M charges arose from the date of issue of the regulations of the Commission and not from the date of Order of the Commission in the said D.R.P. No.2 of 2014.

9.7. The Respondents have submitted that the Operation and Maintenance Charges are levied and collected based on TANTRANSCO's Board Proceedings dated 23-12-2017.

9.8. In this connection, it is pertinent to mention that any monetary claim should be made within a period of three years from the date on which cause of action arose. In view of the above position, the claims for O&M charges for the period of three years prior to the date of issue of such notices of demand mentioned above (i.e. 27-05-2019 and 21-03-2020) clearly barred by limitation.

9.9. The Respondents have submitted that the levy of Operation and Maintenance Charges at 1% of capital cost with an annual escalation of 5.72% is in line with Sub-Regulation (8) of Regulation 25 of TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005.

9.10. The Respondents have submitted that in the tariff petition filed before the Commission, charges towards operation and maintenance of

bays provided to private generators were deducted under the head other income while calculating the Annual Revenue Requirement.

9.11. The Respondents have further submitted that the Commission in its Order in D.R.P. No.2 of 2014 dated 04-01-2019 has stated that the Respondents are entitled to levy and collect operation and maintenance charges for the bays.

9.12. Also, the Respondents have submitted that the Operation and Maintenance charges for the bays is different from transmission charges collected for use of the transmission system.

9.13. It is the contention of the Petitioner that O&M Charges for the maintenance of transmission lines by TANTRANSCO is factored (included) in the Transmission Charges and as such collection of O&M Charges separately from the generators like the Petitioner would not arise.

9.14. In this connection, the Commission would like to refer sub-regulation (8) of regulation 25 of TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, which provides as follows:

"8) In respect of the transmission system declared under commercial operation on or after notification of these regulations the base operation and maintenance expenses shall be fixed at 1% of the capital cost (as admitted by the

Commission), in the year of commissioning and shall be subject to an annual escalation of 5.72% per annum for the subsequent years”.

9.15. As regards the contention of the Petitioner that when O&M expenses are factored while computing the Transmission Charges payable by the generators using Transmission lines, collection of O&M Charges separately does not arise, it is clarified that the O&M Charges collected from the generator as per the said regulation 25(8) is deducted from the Annual Revenue Requirement (ARR) of the Transmission Licensee under the head “Less: OTHER INCOME” as shown in the Table in para 9.15 below, so that the Transmission Charges get reduced uniformly to all generators. In other words, the Transmission Charges payable by each generator is calculated by dividing the Annual Revenue Requirement by the Transmission Capacity available. The O&M Charges collected from the individual generators using transmission lines is subtracted from the ARR and Transmission Charges so arrived. Therefore, the Petitioner cannot contend that O&M Charges are levied twice.

9.16. The format prescribed in Tariff Order in T.P. No.2 of 2017 dated 11-08-2017, for the calculation of ARR is provided as below:-

"Table 4.14-1 Approved ARR for FY 2016-17 to FY 2018-19 (Rs. Crore)

Sr. No.	Particulars	Petition			Approved by the Commission		
		FY 2016-17	FY 2017-18	FY 2018-19	FY 2016-17	FY 2017-18	FY 2018-19

1.	O&M Expenses						
1.1	Employee Expenses						
1.2	R&M Expenses						
1.3	A&G Expenses						
1.4	Less: O&M Expenses capitalised	-	-	-	-	-	-
2.	Depreciation						
3.	Interest & Finance Charges						
4.	Interest Expenses capitalised	-	-	-	-	-	-
5.	Interest on Working Capital						
6.	Return on Equity						
7.	Less : Other Income						
8.	Aggregate Revenue Requirement						

9.17. It may be stated that the collection of O&M Expenses for bay maintenance is a revenue (miscellaneous income) received by the TANTRANSCO and deducted from its Annual Revenue Requirement in Sl.No.7 in the above Table, whereas the O&M Expenses claimed by TANTRANSCO and approved by the Commission in the Tariff Order is a component of Fixed Charges and it is related to the Employee Cost, Administration and General Expenses and Repairs and Maintenance Expenses.

9.18. Further, the Commission would also like to refer to regulation 59 of TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, which provides as follows:

"59. Transmission Tariff Charges

The tariff for transmission of electricity by a transmission system shall comprise recovery of annual transmission charges consisting of the following computed as per the principles outlined in Chapter III of these Regulations.

- (i) *Interest on Loan Capital;*
- (ii) *Depreciation*
- (iii) *Operation and Maintenance Expenses;*
- (iv) *Interest on Working Capital at normative availability; and:*
- (v) *Return on equity:*

The annual transmission charges computed as per this regulation shall be total aggregate revenue requirement of the STU / Transmission licensee. The following shall be deducted from the total revenue requirement.

Transmission charges collected from the short term intra state open access consumers, captive power plant and generating stations using Non Conventional Energy Sources.

Income from other business to the extent of portion to be passed on to the beneficiaries.

Reactive Energy Charges and Transmission charges received from CTU for use of facilities of the licensee / STU.

Till such time a common transmission tariff is evolved to maintain consistency in transmission pricing framework in inter state and in the state transmission system the monthly transmission charges payable by the Distribution licensees and other long term intra state open access consumers shall be based on the capacity allocated to each beneficiaries as detailed below:

$$\left\{ \frac{TC}{12} - \frac{(a + b + c) \times CL}{SCL} \right\}$$

Where TC = Annual Transmission Charges

A = Total transmission charges by the short term open access consumers

b= Income from other business to the extent of portion to be passed on to the beneficiaries.

c= Reactive Energy Charges and Transmission charges received from CTU for use of facilities of the licensee / STU

CL= Allotted capacity to the long term transmission customers

SCL= Sum of allotted Transmission capacity to all the long term open access customers of the intra-state transmission system.

The transmission charges shall be determined after following the procedure outlined in chapter II.

9.19. Had there been no O&M Expenses collected from the bay users for bay maintenance, then the ARR for TANTRANSCO will be more and the Open Access Charges will be more. The non-bay users like the Open Access consumers have to pay more.

9.20. In view of the above findings, the collection of O&M Expenses @ 1% for the bay maintenance is as per the Regulation of the Commission.

TANTRANSCO is directed to file necessary petition separately for clarification of the Commission regarding the levy of O&M charges for Bay maintenance and supervision charges etc. in order to avoid any ambiguity in future.

9.21. However, we notice that the second respondent issued a notice of demand for Rs.9,12,116/- on 27-05-2019 covering various periods and as the limitation period for money claim is three years from the date on which cause of action arose, the demand for the period prior to 27-05-

2016 is time barred and cannot be recovered. Similarly, in the second notice dated 21-03-2020, the demand for the period prior to 21-03-2017 is time barred and cannot be recovered. The remaining amounts due, which are within limitation period, can be recovered from the Petitioner by following due process.

With the result, the petition is partly allowed and the connected I.A. is closed. There will be no Order as to costs.

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

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission