

**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**

**and**

**Thiru.K.Venkatasamy**

**.... Member (Legal)**

**D.R.P. No.8 of 2016**

M/s. MALCO Energy Limited  
Post Box No.4  
Mettur R.S.  
Mettur Dam – 639 402.

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

Vs.

1. Tamil Nadu Generation and Distribution Corporation Ltd.  
(Formerly TNEB)  
Rep. by its Chairman and Managing Director  
144, Anna Salai  
Chennai – 600 002.
2. PTC India Limited  
2<sup>nd</sup> Floor  
NBCC Tower  
15, Bhikaji Cama Place  
New Delhi – 110 066.

... Respondents  
(Thiru.M.Gopinathan,  
Standing Counsel for TANGEDCO and  
Thiru.Ravi Kishore for M/s.PTC India  
Limited)

**Dates of hearing : 13-08-2019; 24-09-2019; 22-10-2019;  
26-11-2019; 11-02-2020; 22-09-2020;  
24-11-2020 and 01-12-2020**

**Date of Order : 02-03-2021**

The DRP No. 8 of 2016 came up for final hearing on 01-12-2020. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit 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 D.R.P.No.8 of 2016:-**

The prayer of the petitioner in D.R.P. No. 8 of 2016 is to direct the Respondents to jointly and severally pay the petitioner at the rate of Rs.4.67 per unit, amounting to Rs.2,54,28,398/- for the power supplied by the petitioner to the respondent Board between 01-06-2010 and 03-06-2010 along with interest at the rate of 15%, totaling an amounting to Rs.4,69,03,603/- and further interest at 15% until date of payment.

#### **2. Facts of the Case:**

This petition has been filed to direct the respondents jointly and severally to pay the petitioner at the rate of Rs.4.67 per unit, amounting to Rs.2,54,28,398/- for the power supplied by the petitioner to the respondent Board between 01-06-2010 and 03-06-2010 along with interest at the rate of 15%, totaling an amount of Rs.4,69,03,603/- and further interest at 15% until date of payment.

#### **3. Contentions of the Petitioner:**

3.1. The present petition is being filed before the Commission seeking to direct the first respondent to forthwith and in a time bound manner, to release the dues amounting to Rs.4,72,16,703/- towards power supplied through the second

respondent for the period between 1.6.2010 and 3.6.2010.

3.2. In so far as the State of Tamil Nadu is concerned, due to the tremendous growth in power intensive industrial activities and development in all branches of industries, there had been substantial increase in requirement of power within the State. While so, there had not been a commensurate increase in generation capacity of power resulting in wide gap between requirement and supply of power in the State of Tamil Nadu. For the year 2008-2009 the gap was 1232 MW and there were severe power shortage during the year 2008-2009 and 2009-2010.

3.3. The petitioner company owns and operates captive power plant located at Mettur Dam, Salem District with installed capacity of 100 MW. During the relevant period, the petitioner's plant has been generating 120 MW of power with PLF of 120% and after meeting its internal requirement of 12MW, the petitioner has been supplying 108MW power to TNEB and third party industrial consumers from November, 2008.

3.4. The Government of Tamil Nadu, on 27.2.2009 had issued a Government Order in G.O. Ms. No.10, citing a power shortage within the State and therefore directing all generating companies to operate and maintain their generating stations at their maximum capacity and Plant Load Factor (PLF) and had further directed all generators to supply all the exportable electricity generated by them to the State Grid alone. It would further be relevant to state that the TNEB (now TANGEDCO) had refused to grant interstate open access and the Tamil Nadu Government had passed an order purportedly under section 11 of the Electricity

Act, 2003 which had effectively prevented sale of power outside the State of Tamil Nadu.

3.5. Therefore, all of the surplus power has to necessarily be sold to the Tamil Nadu Electricity Board. The order under Section 11 of the Electricity Act, 2003 mentioned above by the Government of Tamil Nadu preventing the sale of power outside the State of Tamil Nadu impliedly directs to sell the entire surplus power after supplying to the HT consumers, to the TNEB.

3.6. Whiles, the TNEB (now TANGEDCO) was issuing tenders for purchase of power from time to time and PTC Ltd. an electricity trader and the 2nd Respondent herein had been the successful bidder in respect of such tenders. The 2<sup>nd</sup> respondent PTC being a trader had commenced negotiations with various generators having spare capacity within the State of Tamil Nadu in order to procure power and supply the same to TNEB. PTC Ltd. had a back to back arrangement with various generators including the petitioner herein. Accordingly, the Petitioner was supplying power to TNEB grid through the trader PTC Ltd. The Petitioner states that the PTC Ltd., was in the practice of issuing Letters of Intent for supply of power from time to time fixing the rates at which such supply would be compensated and such supply would be in terms of the main contract between the generators and PTC Ltd.

3.7. The Petitioner had entered into a Power Purchase Agreement on 24.04.2009 for the supply of power to PTC on a short term basis until 31.03.2010. The said PPA was subsequently amended by the parties thereto and the period of

supply was changed to the period between 01-07-2009 to 31-05-2010. As per the provisions of the said Agreement, the tariff was agreed to at the rate of Rs.5.90/kWh for the period until 31.05.2010.

3.8. Immediately prior to the expiry of the Supplemental Agreement, the 2nd respondent (PTC) herein wrote a letter to the CPP Incharge on 14.5.2010 requesting all captive power plants to take a Joint Meter Reading (JMR) on 31.5.2010 at 24.00 Hours for the final calculation of energy in the light of the expiration of the contract. Towards the power supplied by the petitioner company from July 2009 to May 2010, payments had been finalized by the TNEB and the same has been paid.

3.9. On 27<sup>th</sup> May, 2010, the Petitioner made a representation to various authorities, including to the 1st respondent TNEB intimating that if there was going to be any delay in awarding the contract to the 2nd respondent PTC for the subsequent period starting from 1.6.2010, it would be faced with a grave situation where it would have to shut down its plant itself as there were no alternate routes available for evacuation of the excess power. In view of the above, the petitioner requested the 1st respondent TNEB to provide Inter State Open Access approval to the petitioner, whereby the power generated by the petitioner can be sold to required customers outside the State, from 1.6.2010. But the TNEB had indicated that the generators within the State could continue to supply power and the same would be compensated on the basis of the rates that would be fixed in the proposed tender. The petitioner issued a letter dated 01.06.2010 to TNEB agreeing to supply 80 MW power round the clock from 1<sup>st</sup> June till the date of

finalization of the TNEB tender. Thereafter, the 2<sup>nd</sup> respondent PTC issued letter dated 03.6.2010, requesting the petitioner to start scheduling 80 MW of power from 00.00 Hours of 4<sup>th</sup> June 2010. The 2<sup>nd</sup> respondent PTC also mentioned in the said letter dated 03-06-2010 that the payment towards the energy supplied towards the above mentioned interim period will be released only after the receipt of the same from the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent shall not entertain any excess injection in the interim period and that no payment would be made against the same.

3.10. Pursuant to the above letter, the petitioner sent letter dated 16.6.2010, to the 1<sup>st</sup> respondent TNEB requesting them to treat the energy supplied from 1.6.2010 to 3.6.2010 as sale through the second respondent, at the rate that is to be finalized in the new tender. The petitioner received a letter from CE/PPP of TNEB bearing reference No.Lr.No.DIR/PP/EE/PP/FM/S MALCO/D/116/2010, dated 06.07.2010, intimating that further action on the supply of power to TNEB for the interim period 1.6.2010 to 03.06.2010 shall be taken up after the recommendation of the 2<sup>nd</sup> respondent. But no payment has been made by either parties.

3.11. Pursuant to the above communication from the first respondent, the petitioner raised an invoice dated 15.09.2010 for Rs.2,50,52,873/- towards the sale of HT power from 31<sup>st</sup> May 23.43 hrs to 3<sup>rd</sup> June 23.40 hrs. on the second respondent. In the said invoice, the Petitioner has calculated payment to be made at the rate of Rs.4.67/- per unit, being the rate at which payments had been made to other similarly situate generators, in all totaling to Rs.4,72,16,703/- for the total

of 5364641 units supplied during the period 31.05.2010 23:43 Hrs to 03.06.2010 23 :40 Hrs.

3.12. As there was no payments forthcoming towards the above invoice, on 12-11-2010, the petitioner sent a representation to the CE/PPP of TNEB intimating that the 2<sup>nd</sup> respondent has sent its confirmation on the supply of power made from 01-06-2010 to 03-06-2010 and thus, requesting to make payments towards energy supplied from 01-06-2010 to 03-06-2010 at the rate of Rs.4.67 per unit amounting to a total of Rs.4,72,16,703/-.

3.13. In addition to restricting interstate open access, the TNEB also imposed restriction and control measures within the State of Tamil Nadu imposing very stringent power cuts to alleviate the widely prevalent situation of power shortage. Owing to the restriction and control measures adopted by the respondent board, the petitioner being a generating company was in any event compelled to export this excess energy to the respondent Board in compliance with the directions contained in the GO issued under seal.

3.14. The petitioner has to be compensated for supply of power effected by it during the period from 01.06.2010 to 03.06.2010.

3.15. In the light of the recent arbitration proceedings, the 1<sup>st</sup> respondent has been directed to pay a balance final settlement amount of Rs.220 crores to the 2<sup>nd</sup> respondent. In view of the above arbitral award, the petitioner once again wrote a reminder letter on 27-02-2015 to the Director (Finance) of TANGEDCO for the

release of payment due to them before releasing payment to the 2<sup>nd</sup> respondent.

3.16. The refusal of payment by both the respondents have left the petitioner denied of its right to recover the amount, despite the fact that even by its letter dated 02-03-2011, the 2<sup>nd</sup> respondent has confirmed to TANGEDCO to release payments to the petitioner and the units injected by the petitioner for the disputed period have been utilized by the respondent TANGEDCO as evidenced by the statement of the concerned Superintending Engineer. The petitioner states that it is entitled to payment for the units supplied by its, along with interest from the due date of payment, irrespective of whether PTC Limited is entitled to the amount or not from the 1<sup>st</sup> Respondent, since the power supplied by it through PTC has been utilized by TANGEDCO and payment has been stalled it in the light of the internal disputes between the two Respondents.

3.17 The petitioner is entitled to the sums claimed and therefore in law and in equity the Respondents are jointly and severally liable to make payment in that regard. This Commission may therefore fix the liability and direct payment by the respondent.

3.18 The petitioner is paying a court fee of Rs.4,72,168/- being 1% of the claim amount in the petition. The petitioner submits that it has been constrained to approach the Commission only because of the omissions and commissions of the Respondents and prays that the court fee paid may be paid as costs in the event of the petitioner succeeding in the petition.



#### **4. Counter Affidavit filed on behalf of the Respondents:-**

4.1. TANGEDCO (formerly known as TNEB), the 1<sup>st</sup> Respondent had entered into agreement with the Respondent No.2 (M/s.PTC India Ltd (PTC) for procurement of Round the Clock (RTC) power in the range of 325 MW to 433 MW for the period from 19.06.2009 to 31.05.2010.

4.2. Prior to expiry of contract, 1<sup>st</sup> Respondent, had invited tender on 08.05.2010 from the Central Electricity Regulatory Commission (CERC) approved power traders for procurement of 600 MW of Round The Clock (RTC) power (00.00 Hrs to 24.00 Hrs) and 1000 MW of Peak Power (18.00 Hrs to 22.00 Hrs) for the months of June 2010 to May 2011 to meet the respondent's power demand.

4.3. Tender No.2 was opened on 24.05.2010 and there was response from six bidders. The 2nd Respondent, PTC was one among them. The answering Respondent initiated price negotiation with the bidders. As the Tender could not be finalised, the Respondent No. 2 instructed all the generators to stop injection of power on the expiry of previous contract which was to expire on 24:00 hrs on 31.05.2010 and the Petitioner MALCO Energy Ltd (MALCO) was one among them.

4.4. TANGEDCO had also instructed the SE/EDCs to take the final readings of the CPP's in Tamil Nadu on 31.05.2010 at 24:00 hrs for billing purposes as the contract was expiring on 31.05.2010. Further, the 2nd Respondent PTC had also requested all CPPs through e-mail dated 31.05.2010 including MALCO, not to inject power through PTC to TANGEDCO grid after 31.05.2010 24.00 hours.

4.5. In the meantime, the 2<sup>nd</sup> Respondent PTC in letter dated 03.06.2010 expressed their willingness to start scheduling of power from the generators with effect from 00.00 hours of 04.06.2010 to TNEB till finalization of tender at a mutually agreed tariff and requested TNEB to confirm immediately to enable them to inform their generators accordingly. The answering Respondent, by its letter dated 03.06.2010 requested PTC to commence scheduling of RTC power as per tendered quantum of 600 MW to TNEB with effect from 00.00 hrs. on 04-06-2010 subject to approval of negotiated rate by the Board of TNEB.

4.6. The petitioner having injected power into the grid of the answering respondent without any schedule or agreement to sell power with the answering respondent is now seeking payment for the units so injected unilaterally from 01-06-2010 to 03.06.2010. There was neither a contractual agreement between TANGEOCO and MALCO nor a concurrence accorded by TANGEOCO.

4.7. The petitioner has alleged that the entire dispute arose out of Government of Tamil Nadu action at the insistence of answering Respondent. The Government Order issued under Section 11 of Electricity Act, 2003 prevented the sale of power outside Tamil Nadu impliedly directs to sell the entire surplus to TNEB after supplying to the HT consumers. The answering Respondent denies the averment.

4.8 The Notification issued by Govt. of Tamil Nadu through G.O.Ms 10 dated 27.02.2009 is extracted below.

- “(i) All power generation units operating in Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load

Factor (PLF):-

- (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 or to any other HT consumers within the State as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission."

4.9. 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 said government order nowhere directed the generating stations to operate and maintain generating station to the maximum capacity and PLF in utter contravention of all laws, mandates, practices in force.

4.10. Any injection of power without contract / scheduling or knowledge of SLDC would not be in principle in the interest of disciplined operations of the grid which is of vital concern from the view of reliable and safe operations of the grid. Accordingly, section 32 (2) of the Electricity Act, 2003 mandates the SLDC to be responsible for optimum scheduling and dispatch of electricity within the State in accordance with the contracts entered into with the licensees or the generating companies operating in the State. In view of grid security and economic operation such injection of power without scheduling should not be encouraged as it will create a bad precedent and lead to indiscipline.

4.11. A generator has to pump energy based on contract. Though instruction had been issued to stop injection of power, the petitioner had injected the power after expiry of previous tender and hence TANGEDCO is not liable for the energy pumped into the grid for the period from 01-06-2010 to 03-06-2010 without any contracts.

4.12. The 1<sup>st</sup> respondent TANGEDCO addressed 2<sup>nd</sup> respondent PTC to start scheduling RTC power as per tendered quantum of 600 MW RTC under Tender No.02 (2010-11) with effect from 00.00 Hrs. on 04-06-2010 subject to approval of mutually accepted tariff by the Board of TNEB. Payments obligations for the supplies made under the above tender have been completed.

4.13. The 2<sup>nd</sup> respondent PTC had entered into separate agreement with various generators with different set of terms and conditions. The petitioner is also one such generator entering into agreement with M/s. PTC, the 2<sup>nd</sup> respondent herein. The above agreement is a bipartite agreement executed between the petitioner and 2<sup>nd</sup> respondent and not a tripartite agreement. There is no privity of contract between answering respondent and the petitioner during the disputed period.

4.14. The Hon'ble APTEL and the Commission have issued various orders highlighting the need to maintain grid stability and impact of unauthorized injection of power.

## **5. Contentions of the Second Respondent:-**

5.1. The relief sought by the petitioner against the answering respondent is not maintainable on account of the fact that the supply of power, for which payment is sought by the petitioner from the respondents jointly, was supplied during a period (01-06-2010 to 03-06-2010) when there was no Power Purchase Agreement between the petitioner and the answering respondent. Accordingly, the answering respondent does not have any contractual and / or legal liability in this regard.

5.2. The answering respondent had entered into a Power Purchase Agreement with the petitioner on 24.04.2009 for supply of power to TANGEDCO through PTC until 31.03.2010. That subsequently the said PPA was amended and the period of supply was changed to 01.07.2009 to 31.05.2010.

5.3. Before expiry of the PPA, the Answering Respondent vide letter dated 14.05.2010, had informed all CPP that contract is coming to end on 31.05.2010 at 24.00 hours and accordingly all CPPs were requested to take Joint Meter Reading (JMR), at 24:00 hours on 31.05.2010. Thus, all the CPPs were adequately informed that the PPA was coming to an end on 31.05.2010. Though, TANGEDCO had floated fresh tender but same was not finalized yet.

5.4. After expiry of the PPA on 31.05.2010 there was no fresh PPA signed between the Petitioner and the Answering Respondent-PTC. This fact is also evident from the letter dated 01.06.2010 of the Petitioner to Respondent No.1 wherein, the Petitioner had offered to supply power to TANGEDCO directly in the absence of any contract.

5.5. Subsequently the Answering Respondent vide letter dated 03-06-2010 requested the Petitioner to start scheduling power from 00.00 hours of 04-06-2010 PTC also clearly informed the petitioner that

*“It may please be noted that PTC will release the payment of the energy bill for the above interim period only after receipt of the same from TNEB to PTC. There will not be any compensation clause applicable for the sale of above power. It is advised to adhere strictly to the above mentioned quantum only and PTC shall not entertain any excess injection in the interim period & no payment against the same shall be paid by PTC.”*

From the above, it is evident that PTC had made its stand clear to the Petitioner that any payment during the interim period shall be made by PTC only on receipt of same from TANGEDCO.

5.6. The petitioner vide its letter dated 16.06.2010 had written directly to TANGEDCO for release of payment in respect of power supply from 01.06.2010 to 03.06.2010.

5.7. PTC vide letter dated 03.06.2010 had clearly informed the Petitioner that *"..... PTC will release the payment of the energy bill for the above interim period only after receipt of the same from TNEB to PTC. .... "*. Thus it is clear that PTC had no liability towards payment for the energy supplied during the interim period i.e. 01.06.2010 to 03.06.2010.

5.8. As regards the Arbitration proceedings between Respondent No.1 and Respondent No.2, this is to confirm that the arbitral proceedings was initiated in respect of supplies which were made by various generators to TANGEDCO through PTC strictly under NITs / LOIs and agreements, and the present supply was not covered under the said arbitral proceedings.

5.9. This respondent is not liable for any payment in respect of supplies made by the petitioner to respondent No.1 which were outside the PPA. This fact was known to the petitioner as the petitioner had taken up the matter directly with the respondent No.2.

## **6. Findings of Commission:-**

6.1. The prayer of the petitioner in D.R.P. No. 8 of 2016 is to direct the Respondents to jointly and severally pay the petitioner at the rate of Rs.4.67 per unit, amounting to Rs.2,54,28,398/- for the power supplied by the petitioner to the respondent Board between 01-06-2010 to 03-06-2010 along with interest at the rate of 15%, totaling an amounting to Rs.4,69,03,603/- and further interest at 15% until date of payment. The facts of the case lie in the narrow compass, which is as follows:-

- (i) The TNEB (now TANGEDCO) had refused to grant interstate open access and the Tamil Nadu Government had passed an order purportedly under section 11 of the Electricity Act, 2003 which had effectively prevented sale of power outside the State of Tamil Nadu. Therefore, all of the surplus power has to necessarily be sold to the Tamil Nadu Electricity Board. The order under Section 11 of the Electricity Act, 2003 mentioned above issued by the Government of Tamil Nadu prevented the sale of power outside the State of Tamil Nadu and impliedly directed to sell the entire surplus power after supplying to the HT consumers in Tamil Nadu, to the TNEB.
- (ii) Whiles, the TNEB (now TANGEDCO) was issuing tenders for purchase of power from time to time and PTC Ltd. an electricity trader and the 2nd Respondent herein had been the successful bidder in respect of such tenders and it procured power from various generators and supplied the same to TNEB. PTC Ltd. had a back to back arrangement with various generators including the petitioner herein. Accordingly, the Petitioner was supplying power to TNEB grid through the trader PTC Ltd.
- (iii) The Petitioner had entered into a Power Purchase Agreement on 24.04.2009 for the supply of power to PTC on a short term basis until 31.03.2010, which was subsequently amended by the parties upto 01.07.2009 to 31.05.2010. As per the provisions of the said

Agreement, the tariff was agreed to at the rate of Rs.5.90/kWh for the period until 31.05.2010.

- (iv) Prior to the expiry of the Agreement, the 2nd respondent (PTC) herein wrote a letter on 14.5.2010 requesting all captive power plants to take a Joint Meter Reading (JMR) on 31.5.10 at 24.00 Hours for the final calculation of energy in light of the expiration of the contract.
- (v) On 27<sup>th</sup> May, 2010, the Petitioner made a representation to various authorities, including to the 1st respondent TNEB intimating that if there was going to be any delay in awarding the contract to the 2nd respondent PTC for the subsequent period starting from 1.6.2010, it would be faced with a grave situation where it would have to shut down its plant itself as there were no alternate routes available for evacuation of the excess power. In view of the above, the petitioner requested the 1st respondent TNEB to provide Inter State Open Access approval to the petitioner, whereby the power generated by the petitioner can be sold to required customers outside the state, from 1.6.2010. But the TNEB had indicated that the generators within the State could continue to supply power and the same would be compensated on the basis of the rates that would be fixed in the proposed tender. The petitioner issued a letter dated 01.06.2010 to TNEB agreeing to supply 80 MW power round the clock from 1<sup>st</sup> June till the date of finalization of the TNEB tender. Thereafter, the 2<sup>nd</sup> respondent PTC issued letter dated 03.6.2010, requesting the petitioner to start scheduling 80 MW of power from 00.00 Hours of 4<sup>th</sup> June 2010. The 2<sup>nd</sup> respondent PTC also mentioned in the said letter dated 03-06-2010 that the payment towards the energy supplied towards the above mentioned interim period will be released only after the receipt of the same from the 1<sup>st</sup> respondent and the 2nd respondent shall not entertain any excess injection in the interim period and that no payment would be made against the same.
- (vi) Pursuant to the above letter, the petitioner sent letter dated 16.6.2010, to the 1<sup>st</sup> respondent TNEB requesting them to treat the energy supplied from 1.6.2010 to 3.6.2010 as sale through the second respondent, at the rate that is to be finalized in the new tender. The petitioner received a letter from CE/PPP of TNEB bearing reference No.Lr.No.DIR/PP/EE/PP/FM/S



MALCO/D/116/2010, dated 06.07.2010, intimating that further action on the supply of power to TNEB for the interim period 1.6.2010 to 03.06.2010 shall be taken up after the recommendation of the 2<sup>nd</sup> respondent. But no payment has been made by either parties.

6.2. The short question which arises for consideration is whether the injection of power by the petitioner from 01-06-2010 to 03-06-2010 had the approval of the first respondent (TANGEDCO) and if so whether the petitioner is entitled to be paid for the same. Though the issue is simple, we are constrained to say that much desired to be said on the need to adhere to the commercial values which are found wanting in the second respondent (PTC) which we will be discussing in the coming paragraphs. Let us first discuss the issue on the validity of injection of power from 01-06-2010 to 03-06-2010 by the petitioner into the grid of the first respondent after the expiry of the period of the agreement between the petitioner and the PTC India Limited on 31-05-2010.

6.3. We have minutely examined the material records adduced as evidences and heard the parties at length. It is not in dispute that there is an agreement between the petitioner and the second respondent on the one hand and the agreement between the first respondent and the second respondent on the other hand and they are independent agreements for procurement of power. The agreement between the petitioner and the PTC (the aggregator) expired on 31-05-2010. It is also not in dispute that there was an explicit direction from the second respondent to the petitioner herein and the other generators clearly indicating that the power supply agreement was due to expire on 31-05-2010 and the final meter reading should be taken from 31-05-2010 signalling the end of the agreement period and

thus the extension of further agreement between the petitioner and the second respondent was very much dependent on the finalization of the tender by the first respondent which is the procurer.

6.4. It is seen from the letter dated 01-06-2010 of the petitioner to the first respondent TNEB that it had agreed to supply 80 MW Round the clock power from the 1<sup>st</sup> June 2010 till the date of finalization of TNEB tender in the month of June to TNEB at the tender rates to be finalized for the month of June 2010. The request dated 01-06-2010 of the petitioner for scheduling power from 01-06-2010, as we see from records, was not responded to directly by the first respondent and it remained undisposed till the end. But things turned out differently with the second respondent PTC considering the request of the petitioner in its letter dated 03-06-2010 requesting the petitioner to start scheduling the 80 MW of power from 00.00 hrs. of 4<sup>th</sup> June 2010 and to ensure to get the initial meter reading prior to commencement of transaction certified by the respective office / circle of TNEB, in the absence of which, claim for payment will not be entertained by PTC under any circumstances.

6.5. The said letter dated 03-06-2010 of the second respondent PTC emanated with reference to the letter of the petitioner dated 01-06-2010. The contents of the said letter dated 01-06-2010 of the petitioner had been misconceived by the PTC as if the petitioner had been seeking payment for its sale of power to TNEB from 04-06-2010 till the finalisation of TNEB Tender No.02/TNEB/2010-11, dated 08-05-2010. But in fact the petitioner in its letter dated 01-06-2010 has requested the

TNEB for approval of rate for the power supplied from 01-06-2010 till finalization of TNEB Tender.

6.6. Further, it is seen from letter of the second respondent PTC India Limited bearing the even date of 03-06-2010 to the first respondent TANGEDCO, placing on record the discussions held between the PTC and Chairman, TNEB, that it was agreed till such time Letter of Intent is issued by TANGEDCO consequent to the finalization of the tender, PTC would direct its generators to schedule power to TANGEDCO in the interim period to which tariff was agreed to be paid by TNEB. It may be noted that, all through this time, the first and second respondents were well aware that the tenders would be finalized only by 10-06-2010. But, the second respondent took a different line and neither chose 01-06-2010 nor 10-06-2010 for scheduling of power till the finalization of the tender called for by the first respondent mentioned above but had chosen 04-06-2010 for scheduling power in the TNEB grid. Perhaps, since the said letter was dated 03-06-2010, scheduling of power was permitted from 04-06-2010 and excepting the above, there is no rhyme or reason to fix the said date of 04-06-2010 for scheduling of power.

6.7. In the said letter dated 03-06-2010, the PTC India Limited, the second respondent sought confirmation for such scheduling of power during the interim period from the 00.00 hours of 04-06-2010 from the end of the generators instead of 01-06-2010 or 10-06-2010 when either of these two could have been only the natural choices. In response to the same, on the same day itself the Member (Distribution) of the first respondent TNEB agreed to the proposal of the second respondent PTC to permit scheduling of RTC power from the 00.00 hours of 04-06-

2010. It is here the question of the fate of the power injected from 00.00 hours of 01-06-2010 to 04-06-2010 arises for consideration.

6.8. We have on an earlier occasion, held categorically that the parties are bound by the PPA and the Commission cannot travel beyond the PPA and settle the disputes. However, exigency or peculiarity of a given case always demands an exception and in few such cases if there is an agreement between the parties either expressly or orally, the power can be scheduled beyond the date of agreement without written agreement. In an earlier occasion in the order dated 09-02-2021 delivered in R.A. No.3 of 2020, based on the filing of PPAP by TANGEDCO for seeking the regularisation of power injected into the grid by a generator without an agreement, the Commission ratified the injection of power and approved the *rates* for the power so injected.

6.9. It has been the consistent stand of the Commission that the power injected unauthorisedly need not be paid for. The Hon'ble Appellate Tribunal has also observed the same categorically in Indo Rama Synthetics (I) Ltd. case (Appeal No. 123 of 2010 dated 16-05-2011). In the present proceedings, the first respondent has sought to deny payment to the petitioner for the power injected during the interim period on the ground that the said power was illegally injected and hence need not be paid for in view of the ratio held in Indo-Rama case. We are unable to agree fully on this score. We find that the said case is applicable only when the stand of the parties are consistent throughout to the effect that formal agreement is necessary for injection of power and only when there is no inequity arising out of such stand taken by one party to the case. We cannot import the said ratio mechanically without having regard to the conduct of the other side. We find that

the injection of power during the period from 01-06-2010 to 03-06-2010 cannot be termed as unauthorised injection in a strict sense. We also find that prior approval was sought by the petitioner before injecting the power into the grid during the interim period and the petitioner approached the first respondent for permission on 01-06-2010 to inject the power to be generated in the interim period. However, for reasons best known to it, the second respondent in its letter dated 03-06-2010 sought the consent of the first respondent for injection of power only for the period starting from 04-06-2010 leaving out the first three days and the first respondent immediately agreed to schedule the power with effect from the early hours of 04-06-2010 vide letter of even dated.

6.10. It is therefore evident that because of the failure on the part of the second respondent PTC to recommend or issue proposal to TNEB to regularise the injection of power from 01-06-2010 to 03-06-2010, the petitioner was not paid for the energy supplied during the said period. It is seen that the approval for scheduling of power for the period 01-06-2010 to 04-06-2010 by the first respondent TANGEDCO depended very much on the recommendation of the second respondent PTC. This is evidenced from the fact that TANGEDCO in its letter dated 23-02-2010 addressed MALCO had informed as follows:-

*“In response to M/s. MALCO’s letter cited 1, it was informed in reference 2 cited vide this office letter dated 06-07-2010 that the subject matter will be taken up when it is recommended by M/s. PTC India Ltd. No representation has been received from M/s. PTC India Ltd. so far in respect of M/s. MALCO.*

*TANGEDCO had not given any instruction to M/s. MALCO to supply the power from 00.00 hrs. of 01-06-2010 to 00.00 hrs. of 04-06-2010. M/s. MALCO had supplied the power without the concurrence of TANGEDCO.”*

6.11. It is inexplicable and incomprehensible as to why the second respondent chose 04-06-2010 as the effective date of scheduling for the interim period leaving out three solid days from 01-06-2010 to 03-06-2010. The first respondent in our view, cannot be faulted for the blunder as it acted only upon the recommendation of the second respondent with which it has Power Supply Agreement as there is no privity of contract between the petitioner and the first respondent. We find from the material records that it has been the consistent request of the petitioner to accord approval for injection of power beyond the period of the PPA from 1<sup>st</sup> June 2010 until the date of finalization of the tender and the petitioner has not sought the effective date as 04-06-2010 anywhere in its averments. But strangely, the second respondent on its own, decided the effective date as 04-06-2010 without assigning any reasons for leaving out the first 3 days in the month of June. What is more is that, the second respondent even at the time of writing to the first respondent for regularization of the power injected during the interim period, did not mince any word on the injection of power from 01-06-2010 to 03-06-2010.

6.12. It is further seen that the petitioner company wrote to the first respondent on 16-06-2010 stating that it was supplying power from 01-06-2010 but was permitted by the PTC only to supply from 04-06-2010 and therefore sought regularisation of the supply of power from the 00.00 hours of 1<sup>st</sup> June to 4<sup>th</sup> June 2010. However, the first respondent TNEB, in its letter dated 23-02-2011, placing on reliance on the representation from PTC, the second respondent, expressed its inability to consider the request for treating injection of power from 01-06-2010 to 04-06-2010 as sale of power to TANGEDCO. In this connection, it is to be necessarily held that the decision of the second respondent PTC India Limited, to the extent of not considering the request of the petitioner for treating the power supply from 01-06-

2010 until the date of finalization of the tender as sale to TANGEDCO but considering it only from 04-06-2010, is without reasoning and arbitrary. If it was the case of the second respondent that there was no power purchase agreement subsisting during the interim period from 01-6-2010 to 03-06-2010 and hence there was no contractual obligation on the part of the second respondent to the petitioner herein, the appropriate course of action in such circumstances would be to remain steadfast until the date of finalization of tender and execute the fresh agreement from the said date. It is pertinent to note that even on 04-06-2010 there was no contract between the petitioner and the second respondent PTC for supply of power. But when the supply of power from 04-06-2010 is sought to be regularized by PTC we see no reason to deny the same from 01-06-2010 particularly when the petitioner is following up the matter diligently and constantly right from the beginning. Moreso, it was a period when section 10 notification issued by the State Government was in force whereby the generator was prevented from selling its power outside the State.

6.13. We see no reason as to why 04-06-2010 was considered as effective date. We are also of the considered view that the process of tender and signing the fresh agreements ought to have been taken much in advance. It is not a case of unauthorized injection as stated in the counter of the first respondent. No doubt, there was no agreement subsisting on the days of injection. But, the first respondent had the option to reject the power which was not done. But on the other hand, the power was accepted with effective from 04-06-2010 with conditions attached by the second respondent.

6.14. It is seen that the action of the second respondent, in our view is the starting point of the issue on hand and hence it is but fair that the second respondent is made liable to compensate the petitioner. As regards the plea of the petitioner for recovery of the dues from the arbitral proceedings between the respondent 1 and 2, we cannot agree to the same as there is no connection between the said proceedings and the present one. However, we have no second opinion on the point that the petitioner need to be compensated for the injection of power made during the period from 01-06-2010 to 03-06-2010 and it is the second respondent which is to bear the liability as it failed to forward proposal to the first respondent in the correct manner and right perspective.

6.15. We have arrived at the conclusion purely based on the conduct of the parties. The second respondent being an intermediary as contended by it ought to have forwarded the request of the petitioner to the first respondent with either 1<sup>st</sup> June 2010 as the effective date or 10<sup>th</sup> June as the effective or even could have left the decision to the first respondent instead of deciding on its own resulting devolving of liability on it. We do not agree in principle with the contention that the second respondent is a mere intermediary. The second respondent being a trader, having back to back contracts and deriving trade margin cannot contend that no liability can be fastened on it and would only enjoy the benefits. In any case, even assuming that the second respondent is a mere conduit or intermediary, still the unilateral fixing of 04-06-2010 as the effective date has no rationale and in fact it has indicated that the second respondent had abdicated the role of intermediary and assumed a more active role. Hence, the inherent risks associated with playing an active role will have to be necessarily borne by the second respondent.



However, the power injected into the grid had been utilized by the first respondent. Therefore, both the first respondent and the second respondent are jointly and severally liable to pay the cost of the power injected by the petitioner during the period in question.

6.16. In the result, the petition is allowed with regard to the cost of the power injected and we hold that the first and second respondent are jointly and severally liable to pay for the power injected by the petitioner into the grid of the second respondent for the period from 01-06-2010 to 03-06-2010. The first and second respondents are directed to calculate the units injected into the second respondent's grid by the petitioner from 01-06-2010 to 03-06-2010 and pay the applicable tariff to the petitioner within 30 days from the date of this order. There will be no order as to the costs.

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

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

/True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission