

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.142 OF 2014
AND
APPEAL No.145 OF 2014

Dated:29th Nov, 2014

Present:

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

APPEAL No.142 OF 2014

In the Matter of:

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

..... Appellant

Versus

- 1. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maaligai,
144, Anna Salai,
Chennai-600 002**
- 2. The Chief Engineer/PPP
Tamil Nadu Electricity Board
6th Floor, Eastern Wing
144, Anna Salai
Chennai-600 002**

- 3. Tamil Nadu Electricity Regulatory Commission
No.19 A Rukmini Lakshmipathy Salai
Egmore, Chennai-600 008**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Gaurav Dudeja
Mr. Vinod Kumar

Counsel for the Respondent(s): Mr. S Vallinayagam for R-1 & 2

APPEAL No.145 OF 2014

In the Matter of:

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

..... Appellant

Versus

- 1. Tamil Nadu Electricity Regulatory Commission
No.19 A Rukmini Lakshmipathy Salai
Egmore, Chennai-600 008**
- 2. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maaligai,
144, Anna Salai,
Chennai-600 002**
- 3. The Chief Engineer/PPP
Tamil Nadu Electricity Board
6th Floor, Eastern Wing
144, Anna Salai**

Chennai-600 002

- 4. Director/Operation,
TANTRANSCO
144, Anna Salai,
Chennai-600 002**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Vinod Kumar

Counsel for the Respondent(s):Mr. S Vallinayagam for R-1 & 2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. M/s. OPG Power Generation Pvt Limited is the Appellant herein.
2. Challenging the order dated 19.3.2014 passed by the Tamil Nadu State Commisison directing the Appellant to pay to the TANGEDCO for purported service provided to the Appellant by offering the Grid for conducting tests and trial runs and introduced a factor namely "Grid Facilitation Factor", to purportedly compensate the TANGEDCO, the Appellant has filed Appeal No.142 of 2014.

3. Similarly, in respect of other units, the Impugned Order was passed on 7.4.2014 by the Tamil Nadu State Commission directing the Appellant to pay the charges towards the Grid Facilitation Factor to purportedly compensate the TANGEDCO, the Appellant has filed Appeal No.145 of 2014.
4. The Appellant has set up a coal based power plant at Gummidipoondi, Tamil Nadu. The said plant has three units namely two 1x77 MW units and one 1x80 MW unit. All these three units use imported coal as fuel. The issue that arises in the Appeals relates to the tariff payable to the Appellant for the infirm power injected into the Grid during the testing and commissioning phase prior to commercial operation date. Appeal No.142 of 2014 relates to 1x77 MW unit II of the plant and Appeal No.145 of 2014 relates to 1x80 MW unit III of the Plant.
5. Since the issues in both these Appeals are the same, we incline to render this common judgment.
6. The short facts relating to filing of the Appeal No.142 of 2014 are as follows:

(i) The unit II 1x77 of the Appellant's plant was ready for commissioning during May, 2012. The Appellant requested the TANGEDCO, the first Respondent through the letter dated 17.5.2012 to accept the infirm power to be injected into the Grid till CoD.

(ii) The Second Respondent through the letters though agreed to accept the supply of infirm power, instructed the Appellant to not inject any power into the Grid till the tariff is fixed by the State Commisison.

(iii) Under those circumstances, the Appellant filed PPAP 6 of 2012 before the State Commission for fixing the tariff for infirm power supplied by the Appellant's 1x77 MW Unit II.

(iv) In this Petition, the Second Respondent namely TANGEDCO filed its counter contending that the interconnection with the Grid for the purpose of testing is a service rendered by the Respondent and therefore, the Appellant was entitled to only a token sum of Rs.1.07 per kWhr for the infirm power injected prior to CoD.

(v) The State Commission by an interim order directed the parties to fix the date for trial run of the 1x77 second unit within one month. Accordingly, the Appellant carried out the trial runs and other commissioning activities from 5.9.2012 to 10.10.2012 during which time the plant injected 1,09,63,682 kWhr of infirm power into the Grid.

(vi) The matter was taken up for final disposal.

(vii) After hearing the parties, the State Commission passed the Impugned Order dated 19.3.2014 holding that the Appellant is liable to pay the TANGEDCO, the first Respondent for purported service provided to the Appellant by offering the Grid for conducting tests and trial runs and introduced a factor namely "Grid Facilitation Factor" to compensate the first Respondent. By the Impugned Order, the State Commission arrived at a generalized formula to be adopted for arriving at the tariff of infirm power irrespective of the generation capacity or fuel.

(viii) The formula introduced by the State Commission through the Impugned Order has

resulted in a tariff of Rs.1.34/-per kWhr which is lesser than the tariff (Rs.1.75/- per kWhr) fixed by the State Commission in respect of the first unit of the Appellant's plant.

(ix) Challenging the said order dated 19.3.2014, the Appellant has filed this Appeal.

7. Let us see the facts relating to filing of the Appeal No.145 of 2014:

(a) This Appeal would relate to the Appellant's plant 1x80 MW, Unit-III, the said unit was ready for commissioning during May, 2013 to accept the infirm power to be injected into the Grid till CoD. The Respondent through the letter dated 21.5.2013 though agreed to accept the supply of infirm power, instructed the Appellant to not inject any power into the Grid till the tariff is fixed by the State Commission.

(b) Under those circumstances, the Appellant filed Petition in PPAP 7 of 2013 before the State Commission for fixing the tariff for the infirm power supplied by the Appellant's 1x80 MW unit III, during the testing and trial run of the plant till the date of CoD.

(c) In this case, the Appellant carried out the trial run of the plant till the date of CoD during which time the plant injected 16,00,545 kWhr of infirm power into the Grid.

(d) After hearing the parties, the State Commission passed the Impugned Order dated 7.4.2014 following the earlier order dated 19.3.2014.

8. Thus, both these orders dated 19.3.2014 and 7.4.2014 have been challenged by the Appellant in these Appeals.

9. The submissions of the Appellants in both the Appeals are as follows:

(a) The invocation of Regulation 89 relating to removal of difficulty by the State Commission is without basis and contrary to law.

(b) The Commission while invoking Regulation 89 failed to give opportunity to the Appellant and other Generators. Regulation 89 has an inbuilt mechanism of fair play and reasonableness and requires parties to be put on notice as regards its invocation. In the instant case, the Commission did not give any notice to

the Appellant with regard to its intention to invoke Regulation 89.

(c) Regulation 89 clearly provides that any provision made by invoking it needs to be consistent with the Regulations. Introduction of Grid Facilitation Factor in the guise of removing difficulty is inconsistent with what is provided under Regulation 20(3).

(d) The Commission had on the earlier occasion while passing an order on Appellant's similar Petition relating to its unit-I through the order dated 7.10.2011 applied Regulation 20(3). In the present case also, the Commission ought to have applied Regulation 20(3) and determined the tariff only in accordance with the said Regulations.

(e) The TANGEDCO has benefited by the injection of infirm power by the Appellants Unit II and Unit III. The State Commission was facing severe power shortage at the relevant time. In such a situation any power, though unscheduled, could have only helped the TANGEDCO and there would have been correspondingly lesser overdrawal from National Grid.

(f) The State Commission in the Impugned order has indirectly made applicable the amendments to Regulation 20(3) which were notified on 9.4.2014 to the Appellant's units which had achieved CoD in the years 2012 and 2013 respectively. The amendment to Regulation 20(3), introduced on 9.4.2011 which has only prospective effect.

10. On these grounds, the Impugned Orders which are sought to be set aside by the Appellant in both the Appeals.
11. The learned Counsel for the State Commission as well as the contesting Respondent TANGEDCO in justification of the Impugned Order has elaborately argued and pointed out the various reasonings given in the Impugned Order deciding the issues.
12. In the light of the rival contentions two main issues would arise in the present Appeals:
 - (a) Introduction of Grid Facilitation Factor;
 - (b) Adoption of cost of Indian Coal for the purpose of fixation of price for infirm power.

13. Let us refer to the portion of the Impugned Order passed by the State Commission given in the findings:

“5.2. The relevant provision for determination of the cost for infirm power is traceable to regulation 20 of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for the determination of Tariff) Regulation, 2005. The said regulation reads as follows:-

“20. Revenue / charges during trial stage (prior to COD)

(1) The cost incurred during trial up to COD shall be treated as capital cost.

(2) The revenue earned from sale of power (infirm power) shall be treated as reduction in capital cost.

(3) Cost of infirm power shall be the lowest fuel cost applicable to the existing similar type of station”.

5.3. Sub-Regulation 20(3) provides criteria to determine the cost of infirm power. In the absence of specific Regulation to determine the cost of infirm power to the CGPs, Merchant Generators etc., the Commission has decided to adopt sub-regulation 20(3) to all the generators. The Commission adopted the regulation to determine the cost of infirm power in its earlier similar cases and orders. As per sub-regulation 20 (3), the lowest fuel cost of the existing “similar type of station” should be reckoned as the cost of infirm power. There is a difficulty in applying the above said regulation in toto due to non-availability of “similar type

of station” in the State. Each generating station varies in terms of its capacity. The generators may use different fuels such as Indian coal, Imported coal, gas, liquid fuel etc.

5.4. The respondent contended that the licensees are offering their grid for testing the generating plants as a service to the generators. Further the injection of such infirm power imposes certain difficulties to the licenses to schedule and dispatch. The respondent therefore contends that the generating companies cannot be permitted to claim reimbursement of actual cost incurred by them for generation during trial run period. There is a valid point in the contention of the respondents. The generators may use different fuels including the costly fuels such as liquid fuel, naphtha etc. to their convenience. The licensees are providing a service to the generators by extending their network / grid facilities for conducting the test / trial run. Just because, the generators use costly fuel, it is not justifiable to charge the licensee the high variable cost of the costly fuel. Therefore, a viable solution has to be arrived at, in order to arrive at the cost of infirm power as provided in regulation 20(3) referred to above. Regarding the fuel, though the cost of gas is considered to be the cheapest, since most of the upcoming generators are coal based, coal has been considered as the fuel for the purpose of determining the tariff for infirm power. Even among the coal, imported coal cannot be considered in view of high cost involved, since the regulation 20(3) insists on the lowest fuel cost. As such we consider that the cost of the Indian coal may be considered for this purpose. In order to protect the interest of both the generators and

the licensee / consumers, we have considered the cost of Indian coal for arriving at the tariff for infirm power.

5.5. Further there are many new generators with different capacities are coming up in the State. It is difficult to determine infirm power tariff by the Commission for each and every new generators. As already discussed, in view of the non-availability of “similar type of station” and the lowest fuel cost we have decided to consider the following generalized parameters to determine the reasonable cost of infirm power for all categories of generators.

- (i) Average specific coal consumption;*
- (ii) Average auxiliary consumption; and*
- (iii) Lowest landed cost of coal in Tamil Nadu.*

The first two parameters can be obtained from the Central Electricity Authority’s annual report on “Performance Review of Thermal Power Stations”. We have chosen to adopt the Central Electricity Authority’s report obviously for the reason that the annual report of Central Electricity Authority covers more than 400 thermal units in the country to a total installed capacity of around 1,00,000 MW in the range of 25 MW and above and most of the petitions pending with the Commission for determination of cost of infirm power is in respect of less than 200 MW coal fired thermal units. Further Central Electricity Authority report considers the higher size units also. The heat rate and the variable cost are generally high for small capacity generators. Captive / merchant generators are generally choosing small capacities for their convenience. On the other hand, the general

trend among the Government owned generators and IPPs is opting for higher capacity units in the range of 500–800 MW so as to increase the efficiency. Therefore, it is considered injustice to make the licensee to bear the high variable cost of such small generators of the captive / merchant generators. In the future higher capacity units also may be commissioned by the captive / merchant generators. Hence, it is prudent to consider the higher capacity units also to arrive at the common parameters to arrive at a generalized tariff.

5.6. The fuel cost varies depending upon the source of fuel and the destination of its use. The Commission has approved yearwise average landed coal cost for the state owned thermal stations in Tamil Nadu which are available in the Commission's tariff order. The lowest landed coal cost for the year in question shall be obtained from the Commission's tariff order which is in force for the particular period.

5.7. The respondent has argued that taking into account the service provided by the licensee, only a token rate may be fixed as tariff to the infirm power injected by the generators. It is a fact that the respondent is providing a service by offering his grid to the petitioner without which the generator cannot conduct the test / trial run. We cannot conclude that the service of the licensee is a gratuitous one. Since the respondent has made large investment to create the network / grid, a charge has to be paid for using the grid. At the same time, the Commission has to facilitate the generators in the State to utilize the grid for testing and commissioning their generators. Therefore, we

have no hesitation to introduce a factor, namely Grid Facilitation Factor (Gf) to give reasonable charges to the service provided by the licensee. While facilitating the generators to test their generators, the Commission shall take into account the interest of the consumers also. As the electricity consumers are ultimately paying the network cost through tariff, the benefit arising out of introduction of grid facilitation factor should go to the consumers. Taking into account all the factors, we consider that it is reasonable to apply a Gf of 0.60 (sixty percent) on the formula to arrive at the generalized tariff for infirm power.

14. Now let us discuss the issues.
15. With reference to the Grid Facilitation Factor introduced by the State Commission, the Commission in the Impugned Order has set out the reasons for introduction of the same which is as follows:

“5.7. The respondent has argued that taking into account the service provided by the licensee, only a token rate may be fixed as tariff to the infirm power injected by the generators. It is a fact that the respondent is providing a service by offering his grid to the petitioner without which the generator cannot conduct the test / trial run. We cannot conclude that the service of the licensee is a gratuitous one. Since the respondent has made large investment to create the network / grid, a charge has to be paid for using the grid. At the same time, the Commission has to facilitate the generators in the State to utilize the grid for testing and commissioning their generators. Therefore, we

have no hesitation to introduce a factor, namely Grid Facilitation Factor (Gf) to give reasonable charges to the service provided by the licensee. While facilitating the generators to test their generators, the Commission shall take into account the interest of the consumers also. As the electricity consumers are ultimately paying the network cost through tariff, the benefit arising out of introduction of grid facilitation factor should go to the consumers. Taking into account all the factors, we consider that it is reasonable to apply a Gf of 0.60 (sixty percent) on the formula to arrive at the generalized tariff for infirm power”.

16. Let us consider the issues raised by the Appellant.
17. The first issue is regarding Introduction of **Grid Facilitation Factor**.
18. In the impugned order, the State Commission has stated that Regulation 20(3) provides criteria to determine the cost of infirm power and in the absence of specific Regulation to determine the cost of infirm power to CGPs, merchant generators etc., the Commission has decided to adopt Regulation 20(3) to all the generators. The State Commission has decided to calculate the infirm power based on average specific coal consumption, average auxiliary consumption and the lowest landed cost of coal in Tamil Nadu for calculating variable tariff of the infirm power.

19. We do not find any fault in the State Commission determining the variable charges taking into account its Regulation 20(3). However, we feel that the State commission has erred in introducing Grid Facilitation Factor for the services provided by the Licensees in allowing injection of the infirm power by the Appellant for the following reasons:

i) The introduction of Grid Facilitation Factor is not in consonance with the Regulations. The Regulations only provide for infirm power to be calculated at the lowest fuel cost.

(ii) The electricity injected by the Appellant which is available at the variable charge at the lowest fuel cost of the operating power plant of Tamil Nadu has been utilized by the Respondent No.2 for supplying to its consumers for which the Electricity Board has recovered revenue at the Retail Supply Tariff determined by the State Commission which includes all the expenses of the Respondent No.2 including the network cost.

(iii) Tamil Nadu is normally deficit in power. It is not the case of Respondents that they had to suffer financially by absorbing infirm power and no documents were submitted by them in this regard.

(iv) It is not the case of Respondent No.2 that they had to back down generation at their power plant where the variable charge was lower than the infirm energy rate, causing a financial injury to them. Even otherwise the infirm energy rate of the Appellant is calculated at the lowest fuel price of Tamil Nadu.

(v) The base rate for unscheduled Interchange (UI) at 50 HZ was 193.5 Paise/kWh and at 49.9 HZ 336 P/kWh.

20. On the **second issue** regarding **Fuel Cost for Imported Coal**, we agree with the State Commission that if the Respondent No.2 has allowed the Appellant to carryout trial run and inject infirm energy from their units and in the process they cannot be made to pay for the high fuel cost utilized by the Appellant. If an IPP is using liquid fuel, LNG or expensive imported coal, the Respondent No.2 cannot be made to pay for its actual variable cost during the trial run of the power plant of the IPP.

21. Hence, the **Second issue** is decided against the Appellant.

22. Summary of Our Findings

(a) The introduction of **Grid Facilitation Factor** for calculation of tariff for infirm power is not in consonance with the Regulations and is set-aside.

(b) We do not find any infirmity in the **State Commission order allowing tariff for infirm power based on lowest cost of coal in Tamil Nadu.**

23. In view of the above, the Appeal is allowed in part as indicated above. No order as to costs.

24. Pronounced in the Open Court on this 29th Day of November, 2014

(Rakesh Nath)
Technical Member
Dated:29th Nov, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√REPORTABLE/~~NON-REPORTABLE~~