

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.Nos.7737, 7738, 7739, 8415, 8429, 8484,& 9321 of 2020  
and  
WMP.Nos.9387, 9541, 10235 to 10237, 11385, 10427, 10420, 10132 &  
10133, 9105, 9388 & 9532 of 2020

OPG Power Generation Private Ltd.,  
OPG Nagar, Periyaobalapuram Village,  
Nagarajakandigai, Madharapakkam Road,  
Gummidipoondy, Thiruvallur,  
Tamil Nadu,  
Pin 601 201.

... Petitioner

W.P.Nos.7737 & 7738 of 2020

OPG Energy Private Ltd.,  
rep. by Authorized Signatory,  
Registered Office at Maruthur Village,  
Kuttalam Taluk,  
Nagapattinam District 601 201.

.... Petitioner

W.P.No.7739 of 2020

Suryadev Alloys and Power Pvt. Ltd.,  
rep. by its Vice President,  
No.497 & 498, ISANA Building,  
8<sup>th</sup> Floor, Poonamallee High Road,  
Arumbakkam,  
Chennai 600 106

... Petitioner

W.P.No.8415 of 2020

Sree Rengaraj Ispat Industries Ltd.,  
SIPCOT Industrial Growth Centre,  
Perundurai 638 052  
repd. By its Director S.Shyam Sundar.

... Petitioner

W.P.No.8429 of 2020

ARS Energy Private Limited,  
Rep. by its Deputy Director - Finance,  
D-109, 4<sup>th</sup> Floor, LBR Complex,  
Anna Nagar East,  
Chennai 102.

... Petitioner

W.P.No.8484 of 2020

TCP Limited,  
represented by its Executive Director,  
No.4, Karpagambal Nagar,  
Mylapore,  
Chennai-600 004.

... Petitioner  
W.P.No.9321 of 2020

Vs.

1. Tamil Nadu Generation and Distribution Corporation Ltd.,  
Rep. by its Chairman, NPKRR Maaligai,  
144, Anna Salai,  
Chennai 600 002.

..Ist respondent  
WP.7739/2020

2. The Chief Finance Controller/Revenue,  
TANGEDCO (Accounts Branch),  
144, Anna Salai,  
Chennai 600 002.

2. The Superintending Engineer,  
NEDC/Nagapattinam,  
No.25, East Sattaiyapparkila street,  
Nagapattinam,  
Pin 611 001

..2<sup>nd</sup> respondent in  
W.P.No.7739 of 2020

3. The Superintending Engineer,  
CEDC/North,  
Chennai 600 002.

3. The Superintending Engineer,  
Erode Electricity Distribution Circle,  
TANGEDCO, Erode-638 009.

..3<sup>rd</sup> Respondents in  
W.P.No.8429/2020

4. Tamil Nadu Transmission Company,  
(TANTRANSCO)  
144, Anna Salai,  
Chennai 600 002.

5. State Load Dispatch Centre,  
C/o.TANTRANSCO  
144, Anna Salai,  
Chennai 600 002.

...Respondents  
in all the

W.Ps.7737,7738,8415,8429,8484,9321/2020

W.P.No.7737 of 2020: Writ Petition filed under Article 226 of  
Constitution of India, seeking Writ of Certiorarified Mandamus,  
calling for the records of the 4<sup>th</sup> respondent in the impugned

demand letters bearing Lr.No.SE/CEDC/N/AAO/HT/F OPG unit 1/F.CPP/1683/20 levying a sum of Rs.98,47,160/- (Rupees Ninety eight lakhs forty seven thousand one hundred and sixty only) as the dues payable for Open Access charges for the month of March 2020, to be modified and the 4<sup>th</sup> respondent to revise and refund the proportionate portion of the charges in terms of the petitioner's letter dated 09.05.2020 and the impugned demand letter dated 07.05.2020, bearing reference Lr.No.SE/CEDC/N/AAO/HT./F.OPG unit 1/F.CPP.D.1725/20, for a sum of Rs.54,09,067/- (Rupees fifty four lakhs nine thousand and sixty seven only) levied for the month of April 2020, and to set aside the demands to the extend of the period of lock down as notified by the Central and State Government for the period when there was no utilization of the Transmission and Distribution Infrastructure of the respondents for the medium term open access due to force majeure conditions and quash the same and to consequently direct the respondents to refund the excess sums collected as requested by the petitioner vide letter dated 09.05.2020 for such period towards Open Access charges.

W.P.No.7738 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 4<sup>th</sup> respondent in the impugned demand letters bearing Lr.No.SE/CEDC/N/DFC/AO/AAO/HT./F.OPG 230KV/D 1685/20 levying a sum of Rs.3,77,03,231/- (Rupees Three crores seventy seven lakhs three thousand two hundred and thirty one only) as the dues payable for Open Access charges for the month of March 2020, to be modified and the 4<sup>th</sup> respondent to revise and refund the proportionate portion of the charges in terms of the petitioner's letter dated 09.05.2020 and the impugned demand letter dated 06.05.2020, bearing reference Lr.No.SE/CEDC/N/DFC/AO/AAO/HT./F.OPG/230KV/D.1722/20, for a sum of Rs.2,19,77,568/- (Rupees Two crores nineteen lakhs seventy seven thousand five hundred and sixty eight only) levied for the month of 1<sup>st</sup> April, and to set aside the demands to the extend of the period of lock down as notified by the Central and State Government for the period when there was no utilization of the Transmission and Distribution Infrastructure of the respondents for the medium term open access due to force majeure conditions and quash the same and to consequently direct the respondents to refund the excess sums collected vide the Demand Letters dated 08.04.2020, as requested by the petitioner vide letter dated 09.05.2020, for such period towards Open Access charges.

W.P.No.7739 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 2<sup>nd</sup> respondent vide Impugned Invoice No.193 dated 17.04.2020 for Transmission, Wheeling & Scheduling & System Operating Charges (MTOA), quash the same as illegal and arbitrary insofar as the period from 25<sup>th</sup> March 2020

to 31<sup>st</sup> March 2020, direct the respondents herein to revise and reissue the Invoice by deducting the proportionate portion of the charges in terms of the petitioner's letter dated 18.04.2020, consequentially forbear the respondents from insisting payment pertaining to the lock down period until 08.05.2020, and pass orders.

W.P.No.8415 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 3<sup>rd</sup> respondent in the impugned demand letter dated 07.05.2020 bearing Lr.No.SE/CEDC/NAAO/HT/F.Suryadev CPP/D 1724/20 levying a sum of Rs.1,19,94,190/- (Rupees one crore nineteen lakhs ninety four thousand one hundred and ninety only) on the petitioner company as the alleged dues payable for Open Access charges for the month of April, 2020 when in fact there was no generation or transmission of electricity in view of the nation wide lockdown due to the corona virus pandemic as notified by the Central and State Governments and consequently there was no use of the 1<sup>st</sup> and 4<sup>th</sup> respondent's Transmission and Distribution infrastructure and refund the above mentioned charges paid by the petitioner under protest on 09.06.2020 due to threat of disconnection of open access and quash the same as being arbitrary and illegal and pass orders.

W.P.No.8429 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 3<sup>rd</sup> respondent's impugned demands dated 30.04.2020 bearing Lr.No.SE/EEDC/A/Cs.Br/DFC/AO/AAO/HS/AS./F HT 379 (MTOA Transco)/ R.No.82/20 and dated 30.05.2020 bearing Lr.No.SE/EEDC/A/Cs.Br/DFC/AO/AAO/HT/AS/F.HT.379(MTOA Transco) / R.No.116/20 seeking to levy Open Access Charges for the period April 2020 and May 2020 and to quash the same to the extend of the period of lockdown as notified by the Central and State Governments for the period when there was no utilization of the Transmission and Distribution infrastructure of the respondents for the Medium Term Open Access due to force majeure conditions and pass orders.

W.P.No.8484 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 3<sup>rd</sup> respondent in the impugned demand notice bearing Lr.No.SE/CEDC/N/AO/Rev/AAO/HT/ CPP/Allot/D.1678/2020 dated 4.4.2020 and the demand notice dated 07.05.2020 bearing reference number Lr.No.SE/CEDC/N/DFC/AAO/HT/AS.4/F.CPP Allot/D1727/20 levying a sum of Rs.77,68,827/- (Rupees Seventy seven lakhs sixty eight thousand eight hundred and twenty seven only ) and Rs.44,84,914/- (Rupees forty four lakhs eight four

thousand nine hundred and fourteen only) on the petitioner company as the alleged dues payable for Open Access charges for the period March 24<sup>th</sup> to March 31<sup>st</sup>, 2020 and April 2020 (01.04.2020 to 30.04.2020) respectively during which time, in fact there was no generation of electricity by the Petitioner due to nationwide lockdown in view of the Corona virus pandemic and to direct the respondent TANGEDCO to recalculate and refund the excess open access charges paid by the Petitioner Company on 22.04.2020 and 09.06.2020 respectively under protest due to threat of disconnection of open access facility by the 3<sup>rd</sup> respondent and quash the same as being arbitrary and illegal since there was no electricity generated, transmitted and wheeled by the petitioner company.

W.P.No.9321 of 2020: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified Mandamus, calling for the records of the 3<sup>rd</sup> respondent seeking to levy Open Access Charges during lockdown, including through the demand during the period of lockdown as demanded in their impugned demand letter Lr.No.SE/CEDC/N/DFC/AO/Rev/HT/AS/4/F/TCP CPP/D 1677/2020 dated 03.04.2020; Lr.N.SE/CEDC/N/AO/Rev/AAo/HT/AS.4/F.CPP Allot/D.1713/2020/ dated 04.05.2020; Lr.N.SE/CEDC/N/AO/Rev/AAo/HT/AS.4/F.CPP Allot/D.1778/2020 dated 06.06.2020 by and set aside the same for the period when the lockdown was in effect during the above period and there was no use of the Respondent's Transmission and Distribution infrastructure during the period 24.03.2020 - 31.03.2020; 01.04.2020- 30.04.2020 and 01.05.2020 - 13.05.2020 and quash the same as being arbitrary and illegal and direct the 3<sup>rd</sup> respondent to recalculate and refund the excess sums paid by the Petitioner company as open access charges for the period March 2020, April 2020 and May 2020 and pass orders.

For Petitioner in : Mr.Rahul Balaji  
W.P.Nos.7737, 7738,  
8415, 9321 & 8484 of 2020

For Petitioner in : Mr.Kumarpal R Chopra  
W.P.No.7739 of 2020

For Petitioner in : Mr.R.S.Pandiyaraj  
W.P.No.8429 of 2020

For Respondents in Mr.P.H.Aravind Pandiyan  
AAG, asst. by  
W.P.Nos.7737 & 7738 of 2020: Mr.N.Damodharan,  
for RR1 to 3  
Standing Counsel.  
Mr.Anil Kumar, for RR4 & 5

W.P.Nos.7739,8484

& 9321 of 2020 : Mr.N.Damodharan,  
for RR1 & 2.  
Standing Counsel.  
Mr.Anil Kumar 3 to 5

W.P.Nos.8415 & 8429 of 2020: Mr.N.Damodharan,  
for RR1 and 2

Standing Counsel.  
Mr.Anil Kumar, for RR3 to 5

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#### COMMON ORDER

The issue involved in all the writ petitions are common and hence all the writ petitions are taken up together for disposal.

2.The petitioners are engaged in the generation of electricity and they have set up captive power plants. The petitioners have entered into agreements with TANGEDCO / TANTRANSCO for supply of power to various captive consumers. These agreements are called Energy Wheeling Agreement and Medium Termed Open Access Agreement. The former deals with supply of power by the petitioners to the captive consumers and the later deals with the usage of the power transmission lines belonging to the TANGEDCO, for the purposes of transmission of the power generated by the petitioners. As per the agreement, the petitioners are liable to pay various charges such as transmission and wheeling charges, scheduling and system operation charges, grid support charges, transmission loss etc.

3.The petitioners have approached this Court on the ground that after the lock-down was announced on 23.03.2020, they were not able to run the operation till May 2020. The charges are fixed and it is levied only when there is utilization of the transmission and distribution infrastructure as per the Agreement and as per the relevant Act and Regulations. The Agreement itself provides for a Force Majeure Clause, which states that no party shall be liable for any claim for any loss or damage, whatsoever arising out of failure to carry out the terms of the agreement, when such failure is due to force majeure. In spite of the same, TANTRANSCO issued demand letters to the petitioners levying open access charges for the entire lock-down period. Aggrieved by the same, the present writ petitions have been filed before this Court challenging the charges levied against the petitioners.

4.The petitioners had sought for interim orders in all the writ petitions restraining the respondents from demanding and collecting the charges based on the bills raised on the petitioners. This Court on considering the submissions made on either side, passed an order of interim injunction pending disposal of the writ petitions and also stayed the demand notices, by an order dated 12.06.2020.

5.The above order became a subject matter of appeal before the Hon'ble First Bench in W.A.No.597 of 2020 and the matter was remanded back to this Court by an order dated 04.08.2020. The relevant portions of the order is extracted hereunder:

"Learned counsel for the appellants has raised several grounds questioning the correctness or otherwise of the impugned order dated 12.06.2020, but the main ground raised is that the learned Single Judge ought not to have entertained the Writ Petition in view of Clause 12 of the agreement, which is extracted here in under.

"12: Settlement of Disputes : If any dispute or difference on account of difference of any kind whatsoever arises between the parties to this agreement, it shall at the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for the adjudication of such disputes under Section 86(1) (f) of the Electricity Act, 2003."

2. Learned counsel for the respondents submits that the learned Single Judge, after the arguments were heard, proceeded keeping in view of the controversy involved on merits and therefore the writ petition was rightly entertained by the learned Single Judge, as interference was called for on the issues raised in the writ petition.

3. Having heard learned counsel for the parties, since this appeal is only against an interim order passed during the pendency of the writ petition, we find it appropriate that the learned Single Judge may also address himself to the issue relating to the remedy available under Clause 12 of the agreement read with any law applicable in relation thereto, which the learned counsel for the parties will be at liberty to point out, including judgments on issue. The learned Single Judge may accordingly proceed to hear the

matter and counsel for the parties agree to appear before the learned Single Judge on 13.08.2020."

6.The learned counsel appearing on behalf of the petitioners specifically brought to the notice of this Court the various Clauses under Grid Connectivity and Intra-State Open Access Regulations, 2014 and also the relatable provisions under the Electricity Act, 2003 and more particularly Section 32, 42 and 62(1) of the Act. The main focus of the arguments was on the expression "Usage". According to the petitioners, Usage is the main criteria for levy of charges and if the same has not been done admittedly during the lock-down period, the respondents cannot levy any charges under the agreement.

7.Mr.Aravind Pandian, learned Additional Advocate General, appearing on behalf of the respondents submitted that this Court need not go into the various contentions raised by the petitioners since the writ petition itself is not maintainable in view of the specific clause in the agreement, which provides for settlement of dispute between parties. When such an alternative remedy is available for the petitioners, the petitioners ought to have availed of that remedy and should not have approached this Court by filing the above writ petitions. The learned Additional Advocate General also further submitted that the Hon'ble First Bench had remitted the matter back to this Court to also consider the issue relating to the alternative remedy, apart from the other issues raised by the petitioners.

8.The agreement that has been entered into between the parties specifically provides for the mode of settlement of disputes. According to the petitioners, there is no dispute in this case and what they are claiming is only for the enforcement of the Regulations governing the parties and while enforcing such statutory regulations, the agreement cannot be put against the petitioners.

9.The petitioners on the one hand are contending that the charges are meant for the usage of facilities/infrastructure provided by the respondents and the respondents on the other hand are contending that these are fixed charges payable for the maintenance of the facilities irrespective of the usage. The various technical details that have been raised on either side with regard to the usage or otherwise of the facilities/infrastructure, can be properly appreciated by TNERC, which is an expert body constituted under the Act. Even the agreement between the parties provides that the parties can approach the Regulatory Commission, in case of any disputes. This Court does not want to go into the issue raised by the petitioners to the effect that there is no dispute in this case. Even if the case involves only interpretation of the regulations

and enforcement of the same, it can be safely left to the decision of the Regulatory Commission. Therefore, this Court deems it fit to place these issues before the TNERC and give a direction to decide the issues after hearing both the parties within the time frame fixed by this Court. This exercise clearly falls within the adjudicatory function of the State Commission.

10. It is informed that some of the petitioners have paid the charges levied by the respondents without prejudice to their rights and the other petitioners have the protection of the interim orders passed by this Court on 12.06.2020. The same status quo can continue till the TNERC passes final orders.

11. In the result, all these writ petitions are disposed of with the following directions:

(a) The issues involved in these writ petitions viz., whether the petitioners are liable to pay the open access charges during the lock-down period under the Grid Connectivity and Intra-State Open Access Regulations, 2014 and under the Agreements entered into between the parties, are referred to the TNERC and the TNERC is directed to adjudicate upon hearing the parties and pass final orders.

(b) the TNERC shall issue notice to both the petitioners as well as to the respondents herein and fix a date and direct them to submit their written submissions and also hear the counsel appearing on either side, if they insist for oral arguments also.

© the TNERC shall pass final orders within a period of four weeks from the date of commencement of the proceedings and

(d) the protection given by this Court while passing interim orders on 12.06.2020 shall continue until final orders are passed by TNERC. Thereafter, the orders passed by TNERC shall determine the liability of the petitioners.

No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. 1.Tamil Nadu Generation and Distribution Corporation Ltd.,  
Rep. by its Chairman, NPKRR Maaligai,  
144, Anna Salai,  
Chennai 600 002.
2. The Chief Finance Controller/Revenue,  
TANGEDCO (Accounts Branch),  
144, Anna Salai,  
Chennai 600 002.
2. The Superintending Engineer,  
NEDC/Nagapattinam,  
No.25, East Sattaiyapparkila street,  
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3. The Superintending Engineer,  
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4. Tamil Nadu Transmission Company,  
(TANTRANSCO)  
144, Anna Salai,  
Chennai 600 002.
5. State Load Dispatch Centre,  
C/o.TANTRANSCO  
144, Anna Salai,  
Chennai 600 002.
6. The Superintending Engineer,  
Erode Electricity Distribution Circle,  
TANGEDCO, Erode-638 009.
7. The Chairman,  
TNERC.
8. The Public Prosecutor,  
High Court, Madras.

W.P.Nos.7737, 7738, 7739, 8415, 8429,  
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and  
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10427, 10420, 10132 & 10133, 9105, 9388 & 9532 of 2020

RLD(CO)  
RV(07/12/2020)