

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 13th Day of February 2025

PRESENT:

Thiru. R.Manivannan Chairman
Thiru K.Venkatesan Member
and
Thiru B.Mohan Member (Legal)

I.A.No.1 of 2024
in
M.P. No. 6 of 2023

M/s.SEPC Power Private Limited
Represented by its Vice President
MEIL House, First Floor
395, Anna Salai, Teynampet,
Chennai – 600 018.

..... Petitioner
(Ms. Gayatri Aryan & Mr. Rajesh Jha, Advocates,
M/s. J. Sagar Associates)

Vs.

Tamil Nadu Generation and Distribution Corporation Ltd.
Rep. by its Chairman Cum Managing Director,
N.P.K.R.R Maaligai,
No.144, Anna Salai,
Chennai – 600 002.

... Respondent
(Thiru.Richardson Wilson
Advocate for the Petitioner)

This interlocutory application having come up for final hearing in the presence of Ms. Gayatri Aryan & Mr. Rajesh Jha, Advocates for the petitioner and Thiru.Richardson Wilson, Advocate for the respondent and upon hearing the arguments advanced on either side and on perusal of material records and the matter having stood over for consideration of this Commission till date the Commission pass the following.

ORDER

1. The prayer sought for in the present interlocutory application which stand preferred by M/s.SEPC Power Private Limited, the petitioner in the main petition, are as hereunder :-

i) Declare that TNPDCCL does not have power under the PPA to carry out deductions towards FCC components of Provisional Capital Cost.

ii) Direct TNPDCCL to immediately desist from making deductions from SEPC's invoices for FCC and to not make any such deductions during the pendency of the present petition.

iii) Direct TNPDCCL to immediately reimburse the amounts deducted / adjusted from SEPC's FCC invoices including invoices for May 2024 / June 2024 / July 2024.

2. The very maintainability of the petition is sought to be challenged by the respondent on the premise that the declaratory relief sought for by the petitioner require adjudication by the Commission and as such can be raised and decided only by preferring a Dispute Resolution Petition on payment of the requisite fee prescribed in the Tamil Nadu Electricity Regulatory Commission's Fee and Fines Regulation 2022 and not through an interlocutory application such as the one preferred by the petitioner. Even though the above contention raised by the respondent appear superficially glamorous, the same is not a solid one requiring serious consideration for the following reasons.

3. Interlocutory applications are meant to address issues arising during the course of a proceeding and courts usually try to ensure that they are dealt with efficiently without getting bogged down by technicalities. Generally, an interlocutory application that is otherwise procedurally sound, should not be dismissed on technical grounds as the courts tend to focus on the substance of the application rather than minor technicalities, especially when the application is not causing significant prejudice to the opposite party. However in certain situations where the technical defect is substantial and affects the court's ability to properly adjudicate the matter, dismissal of the application on technical grounds might be considered by the court.

4. The above referred principle of law which hold the field for several decades indicate that substance of the application and not the form of the application that is material in the course of deciding the maintainability of the application. Bearing in mind the above settled law let us evaluate the sustainability of the technical plea projected by the respondent.

5. The main petition M.P.No.6 of 2023 pertain to True-up of the capital cost determined and approved by the Commission at Rs.3514 crores in P.P.A.No.5 of 2012 to the extent of Rs.5118.34 crores and the same is pending enquiry. The genesis of the present application, as per averments set out in the affidavit filed in support of the application, is the conduct of the respondent unilaterally deducting a sum of Rs.104.94 crores in regard to various fixed cost charges components during the pendency of the

main petition towards the alleged excess payment made for the period April 2022 to April 2024.

6. The bone of contention of the petitioner is that the deductions made by the respondent on its volition unilaterally is in flagrant violation of the terms mutually agreed by the petitioner and the respondent which stand incorporated in the Power Purchase Agreement entered into between the parties and as such perse arbitrary and illegal. Contending so the petitioner has sought for the reliefs set out in the petition which include the declaratory relief. As rightly contended by the counsel for the respondent, the declaratory relief prayed for in the interlocutory application cannot be enquired and granted in an interlocutory application, more so when such a relief has not been claimed in the main petition. However the main object of the petitioner in preferring the instant interlocutory application, as discerned from the averments made in the petition, is to restrain the respondent from making deductions in respect of the invoices raised by it with the respondent in tune with the terms of PPA entered into between the parties till the main petition is disposed of on merit. Such a prohibitory order is being sought for on the edifice of the specific case that the deductions made by the respondent is not only an arbitrary one but also an illegal one.

7. From the above discussion it is pellucid that the reliefs claimed in the interlocutory application are not properly framed / worded. When the relief sought for in a legal case is not properly framed, the court has got power to mould the relief meaning it can adjust the relief granted to ensure that substantial justice is done based on the facts of the case.

The primary goal for exercising such discretionary power is to achieve a fair outcome by adopting the relief to fit in the actual situation, even if the initial request was not perfectly worded or presented.

8. In the case on hand, the petitioner has prima facie made out a case to consider the prayer for passing a prohibitory order restraining the respondent from in any way making deductions contrary to the terms of PPA till the disposal of the main petition M.P.No.6 of 2023. Since such a relief is sought for based on subsequent events that took place after the filing of the main petition absence of such prayer in the main petition would not disable the petitioner claiming the prohibitory order by filing separate interlocutory application. Ultimately, on account of the above elaborate discussion this Commission decides that the technical plea raised by the respondent cannot be countenanced as the Commission is obliged to decide the petition on merits to ensure advancement of justice.

9. The learned counsel for the petitioner argued with vigour that the respondent is not entitled to recalculate the fixed capital cost components before ever the actual capital cost of the project is determined by the Commission after detailed enquiry in the main petition. The learned counsel assiduously argued that the entire deduction made by the respondent is in effect redetermination of tariff by retrospectively revisiting the FCC without approval of the Commission. The learned counsel further contended that as per the terms and conditions incorporated in the PPA an invoice raised by the petitioner can be disputed having recourse only to the procedure contemplated in Article 9.2(d) by

notifying the petitioner and by making payments in regard to the undisputed portion of the amount and seek redressal in respect of the disputed portion by resorting to Dispute Resolution set out in Article 15. The petitioner contend that such a recourse was not adopted by the respondent rendering the unilateral deduction made by the respondent an illegal one.

10. The argument so industriously advanced by the petitioner's counsel is sought to be jettisoned by the counsel for the respondent by stating that having come to knowledge that the equity infused by the petitioner is less than 30% set out in the PPA, a request was made by the respondent to the petitioner to revise the estimated FCC for the year 2021-2022; 2022-2023; 2023-2024 and 2024-2025 and the impugned deduction was made consequent to Audit objection raised which also directed recovery of excess payment of FCC made with reference to actual equity. The learned counsel would further state that in this regard Dispute notice as contemplated under Article 9.2(d) of the PPA was issued to the petitioner towards recovery of the excess payment made towards fixed charge components (viz) (i) Return on equity (ii) interest on loan and (iii) interest on working capital aggregating a sum of Rs.104,94,91,860/- for the period April 2022 to April 2024.

11. The respondent's counsel argued with aplomb that since the impugned deductions were made by the respondent adhering strictly to the Regulations formulated by the Commission and as per the terms of the PPA, it does not lie in the mouth of the

petitioner to contend that the deductions made by the respondent is arbitrary and illegal more so when clause 9.2(d) of the PPA provide for retrospective recovery.

12. In para 11 of the counter affidavit a specific stand has been taken by the respondent that the respondent had issued dispute notices to the petitioner as envisaged under clause 9.2(d) of the PPA / Addendum 3 towards excess payment made for the period April 2022 to April 2024 in regard to various Fixed Charges Components aggregating a sum of Rs.104, 94,91,860/-. This fact has not been disputed by the petitioner either by way of Rejoinder or during the course of advancing arguments in the present petition. Hence it is apparent that the contention of the petitioner that deductions were made by the respondent without notice to the petitioner is wholly untenable.

13. The moot point is whether issuance of Dispute notice by the respondent in regard to the alleged excess payment of FCC to the petitioner would render the unilateral deduction made by the respondent legal.

14. As already pointed out, when dispute arises between the petitioner and the respondent in regard to payment for the invoices raised by the petitioner, the same, as per Article 15 of the PPA, has to be resolved by raising a Dispute Resolution before the Commission by invoking the provisions of Section 86(1)(f) of the Electricity Act 2003. The authority competent to decide the dispute so raised is the State Commission and no one else. Situated thus it is apparent that before ever the dispute with regard to liability to pay the amount covered under the disputed invoice or portion of the amount covered under the invoice is resolved by the Commission upon a Dispute Resolution Petition

being preferred, the respondent, the erstwhile TANGEDCO, now TNPDCCL, has no legal authority to deduct the disputed amount unilaterally.

15. The Dispute Resolution mechanism prescribed in the PPA cannot be discarded or substituted or supplanted by neither the petitioner nor the respondent as the same would tantamount to tweaking the contours of the PPA and permitting the parties to transgress the boundaries of the scheme of the PPA which the parties are legitimately expected to scrupulously adhere to. The respondent may have a fair case in regard to recovery of the so called excess payment of FCC made to the petitioner through the earlier invoices but the same do not cloth the respondent the right to make unilateral deduction in utter disregard to the Dispute Resolution Scheme advocated in the PPA entered into between the parties.

16. The axiomatic principle of law is that when a statute prescribes something to be done in a particular manner it has to be necessarily done in that manner alone and not otherwise. Viewed in that context, when the PPA entered into between the petitioner and the respondent, which has all the attributes of a statutory contract, stipulate that when there is disagreement between the parties in regard to the extent of their liability to pay, the same has to be resolved only by approaching the Commission raising a Dispute Resolution and no other alternative mode can be adopted by the parties to the PPA for recovery of the disputed amount.

17. In the light of the above discussed factual and legal aspects involved in the case, this Commission decides that there is substance in the contention raised by the

petitioner that the respondent has no legal authority to make the unilateral deductions challenged in the petition during the pendency of main petition M.P.No.6 of 2023. The argument advanced by the counsel for the respondent in regard to alleged delay on the part of the petitioner to infuse capital cost; treating the premium on share as component of capital cost; moratorium etc., to justify the unilateral deductions made by the respondent being contentious issues which can be decided only on clinical examination of evidence adduced by both parties in this regard during enquiry in the main petition, those aspects are not considered and discussed at length in this order as such an exercise cannot be done by the Commission in an enquiry on an interlocutory application.

18. It is made clear that this Commission in this interlocutory application is not rendering any finding as to the merit of the contention raised by the respondent that excess payments have been made to the petitioner and the right of the respondent to recover the same. Even though the objections raised by the Audit parties might have prompted the respondent to initiate recovery proceedings in regard to the invoices submitted by the petitioner including the invoices for May, June and July 2024, unilateral deductions made by the respondent without a formal adjudication by the Commission in regard to the disputed amount is exfacie wrong.

19. The learned counsel for the petitioner placing reliance on the ratio laid down by our Hon'ble Supreme Court in the case of Bloomberg Television production Service India Private Limited and others Vs Zee Entertainment Enterprises Limited (2024) SCC online

SC 426 fervently argued that the petitioner is entitled to a prohibitory order restraining the respondent from in anyway making unilateral deductions contrary to the scheme. prescribed under the PPA till the disposal of the main petition M.P.No.6 of 2023.

20. The learned counsel for the petitioner submitted that as a consequence of the arbitrary and illegal unilateral deduction of Rs.104 Crores made by the respondent, besides the difficulty faced by the petitioner in maintaining the required Coal Stock for the smooth, uninterrupted and continuous operation of its plant, the petitioner is not able to honour its financial commitments towards its bankers who had sent huge money on interest and there is every likelihood of the petitioner's account being declared as "Non performing Assets". The Counsel further submitted that if the respondent continued to make deductions in the invoices submitted by the petitioner arbitrarily in defiance to the terms and scheme incorporated in the PPA, there is imminent danger of the Petitioner's business being brought to a grinding halt and there is every possibility of the petitioner losing its goodwill thus far earned by the petitioner through its impeccable business activities.

21. In the teeth of the above arguments, the learned counsel for the petitioner prayed for passing a prohibitory order as claimed in the petition as the petitioner has established prima facie case, balance of convenience and irreparable loss or injury that might be caused if the order is declined, the essentials for sustaining a prohibitory order such as temporary injunction.

22. Per Contra, the learned counsel for the respondent vehemently argued that since the dispute is monetary in nature, the question of the petitioner suffering irreparable loss or injury in case of refusal to pass any prohibitory order in favour of the petitioner does not arise at all and as such the petitioner is not entitled to any of the reliefs claimed in the petition much less a prohibitory or stay order in regard to the deductions already made and the impending deductions by the respondent. The learned counsel further argued that if any prohibitory order is passed against the respondent, the same will have severe ramnification in the financial viability of the respondent which is already not in a good shape and as such the balance of convenience exists only in favour of the respondent and not upon the petitioner.

23. Material records disclose that the petitioner had invested several crores in the project and in all probability would have financial commitment with its bankers. If the respondent continue to make arbitrary deductions in flagrant violation of the terms and conditions incorporated in the PPA, apart from facing difficulty to meet out its financial commitments there is every likelihood of the petitioner losing its name and reputation thus far earned in the business community and financial institutions. Hence, the contention of the respondent that the petitioner will not suffer any irreparable loss or injury if the prohibitory order sought for is withheld cannot be legally countenanced.

24. One of the prayer sought for in the petition is for a declaration that the deduction made by the respondent is arbitrary and illegal. A declaratory relief claimed through an interlocutory application cannot be entertained by any judicial forum. Hence, this

Commission decides that the petitioner is not entitled to the declaratory relief claimed in the petition more so when such a prayer is conspicuously absent in the main petition.

25. Yet another relief sought for by the petitioner in the petition is for reimbursement of the amount of Rs.104 crores arbitrarily deducted by the respondent to the petitioner forthwith. During enquiry of the present petition it transpired that the petitioner had already uploaded the debit invoices pertaining to the deducted amount in the PRAPTHI portal for recovering the said amount. Since the petitioner had already initiated legal action for the recovery of the deducted amount, the petitioner under law is not entitled to initiate any proceedings in any forum including this Commission, seeking the very same relief. But for the stay order passed by this Commission in the memo filed by the respondent, by this time the petitioner would have realized the amount covered under the debit invoice uploaded in the PRAPTHI Portal. Since the petitioner had not abandoned the action initiated by it in the PRAPTHI Portal for the recovery of the deducted amount, in the considered view of this Commission, the petitioner is not entitled to the relief of reimbursement prayed for in the petition.

26. Ultimately this Commission decides that the petitioner is entitled only to a prohibitory order in a qualified manner as the petitioner has established the essentials for securing such an order.

27. In the result this petition is partly allowed. An interim order is passed in favour of the petitioner prohibiting the respondent TANGEDCO / TNPDCCL from in anyway effecting deductions in regard to the invoices already presented and also invoices to be

presented by the petitioner SEPC claiming FCC in disregard to the terms and scheme incorporated in the relevant Power Purchase Agreement entered into between both the parties till the final disposal of the main petition M.P.No.6 of 2023 on merit.

The prayer of the petitioner for declaration and also direction to the respondent to reimburse the amount of Rs.104,94,91,860/- (One Hundred and Four Crores Ninety Four Lakhs Ninety One Thousand Eight Hundred and Sixty Only) already deducted / adjusted from the petitioner's invoices including the invoices for May 2024, June 2024 and July 2024 is dismissed.

However it is made clear that this order will not in any way stall the proceedings already initiated by the petitioner in the Prapthi Portal for recovery of the deducted amount.

Both parties shall bear their respective costs.

Consequent to the passing of this order, the earlier order of stay passed by this Commission in favour of the respondent TANGEDCO / TNPDCCL on the Memo dated 07.01.2025 filed by the respondent shall stand vacated automatically forthwith.

(Sd....)
Member (Legal)

(Sd....)
Member

(Sd....)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission