

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)

M.P. 42 of 2021

M/s. OPG Energy Pvt. Ltd.
Maruthur Village,
Kuttalam Taluk,
Nagapattinam District.
Represented by its Authorised Signatory

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

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
10thFloor, 144, Anna Salai,
Chennai 600 002.
Represented by its Chairman & Managing Director
2. M/s.AAA Plus Energy Pvt. Ltd.
No.19/16, Door No.1, Ground Floor,
Shyam Court Apartments,
Judge Jambulingam Street,
Mylapore,
Chennai – 600004.

... Respondents
(Thiru. M. Gopinathan,
Standing Counsel for TANGEDCO)

**Dates of hearing :26-10-2021; 23-11-2021; 21-12-2021;
11-01-2022; 25-01-2022; 08-02-2022;
22-02-2022; 15-03-2022; and 05-04-2022**

Date of order : 05-05-2022

The M.P. No. 42 of 2021 came up for final hearing on 05.04.2022. The Commission upon perusing the affidavit filed by the petitioner and all other connected records and after hearing passes the following:-

ORDER

1. Prayer of the Petitioner in M.P. No. 42 of 2021:-

The prayer of the Petitioner in this petition is to hold and clarify that no wheeling charges are payable to the Respondent, in case the Petitioner sources captive power to the Respondent No.2 through its 11 KV dedicated transmission line as mentioned in the present petition;

2. Facts of the case:-

The Petitioner M/s.OPG Energy Private Limited is having Captive Generating Plant at Nagapattinam District. The Energy Wheeling Agreement executed by the petitioner for wheeling of electricity from its CGP to various captive users along with one captive user M/s.AAA Plus Trading Pvt Ltd., located within the plant premises of the petitioner. The petition executed the EWA for wheeling to 13 numbers Captive users from 1.4.2021 to 31.3.2024. In this petition, the petitioner has sought clarification on applicability of wheeling charges for sourcing captive power from its CGP to Captive user i.e., M/s.AAA Plus Trading Pvt Ltd.

3. Contentions of the Petitioner:-

3.1. The present petition is being filed by the Petitioner thereby imploring the Commission to exercise its Regulatory Powers in order to provide the clarification and directive, that in case a Captive Generating Plant ("CGP") sources the power generated from its Captive Power Plant to its captive users located within the plant

premise of the said CGP through a 11 kV dedicated transmission line, the liability for payment of wheeling charges is not applicable in terms of the Electricity Act, 2003 readwith the Electricity Rules, 2005.

3.2. The entire issue involved in the present Petition is in relation to applicability of the wheeling charges upon the captive user of a particular CGP which is being sourced power by the said CGP through its dedicated transmission line. It is also relevant to highlight that the issue pertaining to applicability of wheeling charges upon the captive users being sourced power through dedicated transmission line from the CGP has already been dealt in length by the Hon'ble APTEL and the law in relation to the said subject matter has been laid down in various judgments.

3.3 However, since in the meeting convened between the Petitioner and the Respondent dated 12.03.2021, it was agreed and concluded that till the time the Commission provides the clarification in relation to applicability of wheeling charges upon the captive user being sourced power through dedicated transmission line, the Petitioner will bear the wheeling charges under protest prospectively. Accordingly, the Petitioner is filing the present Petition seeking a specific clarification in relation to applicability of wheeling charges upon the Respondent No.2.

3.4. The Petitioner Company is engaged in the business of generation of electricity. The Petitioner has established a 17.5 MW gas-based captive generating plant at Maruthur Village, Kuttalam Taluk, Nagapattinam District. The said generating plant achieved commissioning in the year 2003.

3.5. The Respondent No.1 is Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), an electrical power generation and distribution public sector undertaking that is owned by the Government of Tamil Nadu. It was formed under Section 131 of the Electricity Act of 2003, and is the successor to the erstwhile Tamil Nadu Electricity Board.

3.6. It is necessary to highlight that the Respondent No.2, AAA Plus Trading Pvt. Ltd. is the captive consumer owning 26% shares of the Petitioner Company and as such, AAA plus Trading Pvt. Ltd. is availing power directly via an 11KV dedicated transmission line from its CGP, i.e. Petitioner.

3.7. A wheeling approval was granted to the Petitioner, by the Respondent (then TNEB) on 18.09.2003. The said wheeling approval was granted to the Petitioner in order to enable the same to source 17.5 MW quantum of power under captive arrangement to its 18 number of captive users. For the said purpose, the Energy Wheeling Agreement (hereinafter "EWA") was executed between the Petitioner and the captive user(s).

3.8. That in accordance with the terms of the EWA, one of the captive users, viz. SaiKripaVyapar Ltd. (Presently known as "Avanti Metals Pvt. Ltd.") was categorically indicated as located within the Petitioner's plant premises. Accordingly, SaiKripaVyapar Ltd. was drawing power directly from the CGP of the Petitioner from 26.01.2005 through a 11 kV Dedicated Transmission Line.

In this regard, the Petitioner obtained the necessary permission from TNEB on 27.03.2004 in order to effectuate the above sourcing of captive power. The Petitioner also duly intimated TANGEDCO vide its letter dated 22.02.2005 for the commencement of power sourcing from the CGP of the Petitioner to SaiKripaVyapar Ltd.

3.9. Subsequently, the name of the one of the captive users viz. SaiKripaVyapar Ltd. was changed to OPG Metals Pvt. Ltd. in the year 2008. That after name change of SaiKripaVyapar Ltd., the Petitioner executed another EWA dated 15.11.2008 with TNEB to wheel 10 MW of power generated from the CGP of the Petitioner to the OPG Metals Pvt. Ltd. for its captive use. It is also significant to note that during the execution of the EWA, the Respondent was categorically and specifically informed that the captive user viz. OPG Metals Pvt. Ltd. is located within the plant premises of the Petitioner, as is evident from the Annexure to the EWA dated 15.11.2008.

3.10. Thereafter, once again, the name of SaiKripaVyapar Ltd. was changed from OPG Metals Pvt. Ltd. to Avanti Metals Pvt. Ltd. (hereinafter referred to as "AMPL"), with effect from 17.04.2018. It is relevant to note that AMPL is engaged in the business of Billet manufacturing and for the said purpose it has established a manufacturing plant at Maruthur village, Kuttalam Taluk, Nagapattinam District. Further, AMPL also executed a License Agreement dated 01.11.2019 with AAA Plus Trading Pvt. Ltd., agreeing to provide a license to operate its Billet manufacturing plant for a period of 5 years.

3.11. It is necessary to highlight that AAA Plus Trading Pvt. Ltd. is the captive user owning 26% shares of the Petitioner Company and as such, AAA plus Trading Pvt. Ltd. is availing power directly via an 11 KV dedicated transmission line from the CGP of the Petitioner.

3.12. That the Petitioner vide its letter dated 05.02.2021 informed the State Load Despatch Centre ("SLDC") of the fact that the said Petitioner is engaged in the business of generation of power from its Gas based Unit having a capacity of 17.5 MW, which is the captive generating plant, and a Solar Plant having 5 MW capacity. The Petitioner further apprised the Respondent of the fact that the energy generated from the Gas based generating station is wheeled to various captive user(s) of the Petitioner, and that the energy generated from the Solar Power Plant is being sold to NVVN under a Long-term PPA. Therefore, in order to wheel energy from the Gas based captive generating station to the captive user(s), necessary wheeling approval was required to be obtained from the SLDC.

Accordingly, vide the said letter the Petitioner made necessary applications for approval of wheeling of energy from the Gas based CGP. In this regard, the Petitioner furnished all the necessary details for the consideration of SLDC.

In addition to the above, the Petitioner also categorically and specifically informed the Respondent of the fact that out of total 14 number of captive users, one of the captive users viz. Respondent No.2, AAA Plus Trading Pvt. Ltd., is located within the plant premises of the Petitioner. Further, the said Petitioner requested SLDC to accord its approval for wheeling of 6.669 MW, quantum of power, to 13 numbers of captive users for the period from 01.04.2021 to 31.03.2024. The letter dated

05.02.2021, submitted by the Petitioner for grant of wheeling approval, was forwarded by SLDC to the Respondent vide its letter dated 08.02.2021.

3.13. Thereafter, SLDC vide its letter dated 26.02.2021, intimated the Petitioner that it has sought confirmation of the Respondent as to whether the Petitioner satisfies the ownership criteria in terms of Rule 3 of the Electricity Rules, 2005. The response with regard to the query in relation to ownership raised by SLDC was answered by the accounts department of the Respondent vide their letter dated 24.02.2021. As per the said letter of the Respondent, SLDC decided to not grant the wheeling approval to the Petitioner. In this regard, SLDC intimated the Petitioner that as per the Electricity Rules, 2005 the captive users of a CGP are required to possess 26% of the equity share capital with voting rights and the term ownership is with reference to the total paid-up equity share capital with voting rights. However, the captive users of the Petitioner are holding only 1.74% of the total paid-up equity share capital of the CGP. Therefore, it was intimated that the application of the Petitioner for wheeling approval cannot be processed.

3.14. That the Petitioner in response to the aforesaid letter of the Respondent, sent another letter dated 02.03.2021, intimating and categorically informing the said Respondent of the fact that the term ownership as provided under the Electricity Rules, 2005 means, with respect to a generating station or power plant setup by a Company, or any other body Corporate, equity share capital with voting rights. It was further pointed out by the Petitioner that from a plain reading of Rule 3(1)(a) along with definition of ownership, it is clear that there is no prohibition upon a Company from issuing shares without voting rights. The only requirement is that, while calculating the

ownership criteria of a CGP is that the equity shares without voting rights are not be taken into consideration, meaning thereby that equity shareholding is to be seen only qua equity shares having voting rights.

Further, it was also intimated that the CGP is entitled to issue equity shares with voting as well as non-voting rights and the nature of the said equity shares and the extent of the voting rights has to be seen in context of the Companies Act, 2013 and also the Articles of Association of the Company authorising the issue of equity shares with or without voting rights. In addition to this, the Petitioner vide the aforesaid letter furnished the complete details in relation to the ownership of the Petitioner Company. Accordingly, the Petitioner once again requested SLDC to grant energy wheeling approval for a quantum of 5.35 MW power to be sourced to its captive users through open access, including the captive user/ Respondent No.2 located within the plant premises, from the period starting from 01.04.2021 to 31.03.2024.

3.15. The Petitioner vide its letter dated 15.03.2021 intimated the TANTRASCO of the fact that the said Petitioner has already submitted the application for wheeling and approval vide its letter dated 06.02.2021. To the said application dated 06.02.2021, TANTRASCO vide its letter dated 26.02.2021 raised certain queries and remarks on the wheeling application submitted by the Petitioner. The said queries and remarks on the wheeling application of the Petitioner were clarified by the said Petitioner vide its letter dated 02.03.2021.

It was further highlighted by the Petitioner that one of the queries raised by the Respondent while processing the application of the said Petitioner was in relation to the usage of dedicated transmission line from the CGP of the Petitioner to its captive user viz. Respondent No.2. In this regard, a meeting was convened on 12.03.2021, in

the said meeting TANGEDCO was of the view that the aforesaid dedicated transmission line is part of the distribution system of TANGEDCO. Accordingly, TANGEDCO was of the opinion that the Respondent No.2 is liable to pay wheeling charges for the power consumed through the dedicated transmission line.

3.16. However, in the said meeting the Petitioner was of the view that sourcing of power from its CGP to its captive user through dedicated transmission line is permissible without payment of wheeling charges to TANGEDCO. Accordingly, it was concluded in the said meeting that the Petitioner shall pay the wheeling charges under protest with regard to the aforesaid sourcing of power from 01.04.2021 for the energy consumed by its captive user viz. Respondent No.2 till the time both Petitioner and the Respondent obtain an appropriate clarification from the Commission. It was also agreed in the said meeting that in case the decision of the Commission is in favour of the Petitioner, then TANGEDCO will refrain from charging wheeling charges and will also refund the amount as per the order of the Commission. As such, it is the submission of the Petitioner that in the event the Commission holds that no wheeling charges are to be payable, then the refund of the amount already paid towards such charges is required to be made along with applicable interest.

Accordingly, the Petitioner requested the Respondent to accord necessary wheeling approval for the period from 01.04.2021 to 31.03.2024.

3.17. Vide an internal letter dated 06.03.2021 issued by the Respondent, an NOC was forwarded from the office of the Superintending Engineer to the Chief Engineer of the Respondent. The said NOC was issued in the prescribed format in order to obtain

in-principle approval for wheeling of power under Open Access to the captive user(s) of the Petitioner from its CGP for the period from 01.04.2021 to 31.03.2024.

3.18. In furtherance to the above, the Petitioner entered into an EWA dated 30.03.2021 with the Respondent, for wheeling of energy generated from its CGP having an installed capacity of 17.5 MW located at Maruthur Village, Kuttalam Taluk, Nagapattinam District, to its 12 captive users. However, as concluded in the aforesaid meeting convened between the Petitioner and the Respondent, the Petitioner undertook to pay the wheeling charges from 01.04.2021, qua the Respondent No.2, under protest, without prejudice to its rights as to seeking a clarification in this regard before the Commission.

3.19. A proper metering arrangement via ABT meter and CMRI readings is present within the Petitioner's premises so as to measure the units transported via the dedicated transmission line of 11 KV to co-located captive user, the Respondent No.2.

3.20. In order to adjudicate the present petition, it is relevant to set out the statutory framework laid down under Electricity Act, 2003, in lieu of the issues prevailing in the present Petition. The following are reproduced hereinbelow:

“Section 2 (16) "Dedicated transmission lines" means any electric supply-line for point-to-point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in Section 10 to any transmission line or sub-station or generating stations, or the load centre, as the case may be.

Section 2(19): "Distribution System" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

Section 2(28): "Generating Company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, which owns or operates or maintains a generating station.

Section 2(76): "Wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

Section 9: "Captive Generation"

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

Section 10: Duties of a Generating Company

(1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected herewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

(3) Every generating company shall - (a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority; (b) co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

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"42. (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

3.21. The Ministry of Power issued the notification on dated 08.06.2005, The Electricity [Removal of Difficulty] (fifth) Order, 2005, states that:

“2. Establishment, operation or maintenance of dedicated transmission lines:

A generating company or a person setting up a captive generating plant shall not be required to obtain license under the Act for establishing, operating or maintaining a dedicated transmission line if such company or person complies with the following: (a) Grid code and standards of grid connectivity; (b) Technical standards for construction of electrical lines; (c) System of operation of such a dedicated transmission line as per the norms of system operation of the concerned State Load Despatch Centre (SLDC) or Regional Load Despatch Centre (RLDC). (d) Directions of concerned SLDC or RLDC regarding operation of the dedicated transmission line.”

3.22. A reading of the aforesaid provisions entails that a captive generating plant has a statutory right under section 9 to obtain open access, and to also source captive power to its captive users by laying down dedicated transmission lines. It is further evident that a CGP is not under any obligation to obtain any license from the Commission for effecting the sourcing of power through its own dedicated transmission line.

3.23. The power is sourced from a CGP to its captive user(s), then no cross subsidy surcharge is leviable as provided under section 42(2) of the Electricity Act, 2003. Furthermore, the said provision provides for payment of wheeling charges when open access is sought through the system of the distribution licensee. In the event power can be sourced without availing open access and consequently, not using the system of the distribution licensee, then no wheeling charges can be levied. Hence, it can be concluded that in a case where power is sourced by the CGP through a dedicated transmission line to its captive user(s), then neither wheeling charges nor any cross subsidy surcharge is applicable.

3.24. Therefore, it is the case of the Petitioner that in the present case the Respondent has no authority or jurisdiction to levy any wheeling charges as power is being sourced through the 11 KV dedicated transmission line, without using the system of the said Respondent.

3.25. The above statutory scheme has been analysed by the Hon'ble APTEL in various judgments. The Hon'ble APTEL vide its judgment dated 25.05.2009 passed in

the case of Nalwa Steel & Power Ltd. Vs CSPDCL &Anr. (Appeal No. 139 & batch – 2009 ELR (APTEL) 609] held that the dedicated transmission line can be laid by generating company to the place of consumption of the consumer when a place of consumption is a load centre. Similar decision was reiterated in Appeal No. 10 of 2008 on 22.9.2009 in the case of Dakshin Gujarat VidyutVitran Nigam Ltd. v. Gujarat Electricity Regulatory Commission. The relevant extract of the said judgment is reproduced hereinbelow:

“11) The new Act envisages grant of transmission license. The new Act also envisages supply by the generating company and the captive generating company to a consumer. When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of, if no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term 'subject to' is interpreted to mean 'only under' it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on complying with the relevant rules and on payment of the required charges and not that even if the existing lines are too far away, the generating company cannot directly supply to a consumer.

12) *The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16) means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of load and not an individual industry/factory as consumer. According to Mr.Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr.Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed dedicated transmission line when we treat the point of consumption as a 'load centre'. In other words, a single consumer can be a load centre. A dedicated transmission line can go from the captive generating station to a load centre and such load centre can also be a consumer. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a generating station under Section 10 of the Act. In this view one may say that a generating company may need license to supply to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it. JSPL is supplying from its captive generating plant to Nalwa for which it needs no license."*

3.26. In furtherance to the above, reference may also be made to the judgment of the Hon'ble APTEL passed in Appeal No. 119 of 2009 titled as Chhattisgarh State Power

Distribution Co. Ltd Vs. Aryan Coal Beneficiations Pvt. Ltd. The relevant extract of the said judgment is reproduced hereinbelow:-

- “12. The perusal of these Sections would make it clear that the first and 2” proviso to Section 9 when it is read together would clearly envisage for the supply of electricity generated to any consumer subject to regulations made under sub-section 2 of Section 42. Similarly, sub-section 2 of Section 10 also would envisage for the supply of electricity by a generating company to a consumer by a generating company to any licensee in accordance with this Act and the rules and regulations made thereunder and subject to the regulations made under sub-section (2) of Section 42. While the proviso to section 9 uses the expression “the supply of electricity by generating plant through the grid”, there is no such qualification provided for in sub-section 2 of section 10. Thus, these sections would make it evident that it is open to the generating company as well as captive plant to supply electricity to end users.*
- 13. Further the consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the Act. Similarly, the transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It is well settled in law that what is not barred or what is not prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. The following is the relevant portion of observations made by the Hon'ble Supreme Court in the case of Suresh Jindal Vs BSES Rajdhani Power Ltd. - (2008) Vol-1 SCC 341. “Section 20 operates one filed namely, conferring a power of entry on the licensee. The said provision empowers the licensee inter-alia to alter a meter which would include replacement of a meter. It is an independent general provision. In the absence of any statutory provision, we do not see any reason to put a restrictive meaning thereto. Even under the General Clauses Act, a statutory authority while exercising the statutory power may do all things which are necessary for giving effect thereto. There does not exist any provision in any of statutes referred to*

hereinbefore which precludes or prohibits the licensee to replace one set of meter by another.”

14. *It cannot be disputed that when the power plant from which electricity is made available is a captive power plant, no cross subsidy charge is payable. In the same way, if it is not a captive power plant then the cross subsidy is payable....”*

3.27. The Hon'ble APTEL in the judgment passed in Appeal Nos. 171, 172 & 10 of 2008 titled as Kadodara Power P Ltd. & Ors Vs GERC & Ors., while considering the moot question that whether any license is required for the CGPs to transmit power to the members of special purpose vehicle/ the captive user(s), examined the scope and ambit of Section 9 of the Electricity Act, 2003. In this regard, the Hon'ble APTEL observed that Section 9 grants the owner of a CGP the right to open access for the purpose of carrying electricity from the CGP to the destination of its use. It was further held that Section 9 also permits the CGP owner to have dedicated transmission lines. The relevant extract of the said judgment is reproduced hereinbelow:

“22) M/s. Kherani Paper Mills Ltd. claims to be a captive user and not a third party. In case M/s. Kherani Paper Mills Ltd. can be treated to be a captive user there is no question of any license because consumption by it will be equal to consumption by the owner of the captive generating plant. In case it is treated to be merely a consumer and not the owners of the CGP section 9 will come to the aid of M/s. Gayatri Shakti Paper & Board Ltd. which by a proviso exempts the captive generating plant from needing a license for supply to any consumer or to any licensee.

24) Even before the second proviso to section (1) was brought in, in June 2007, the section granted the owner of a CGP the right to open access for the purpose of carrying electricity from the CGP to the destination of its use. Section 9 also permitted the CGP owner to have dedicated transmission lines. Even if, M/s.

Kherani Paper Mills Ltd., is not the owner of the CGP it can get a supply from the CGP of M/s. Gayatri Shakti Paper & Board Ltd. as a consumer and for such a supply no license is required by the CGP. The newly added proviso, quoted above, requires that a supply to a consumer although without a license would be subject to Regulation for open access. In an earlier judgment in appeal No. 139 of 2007 titled M/s. Nalwa Steel & Power Ltd. Vs. Chhattisgarh State Electricity Board & Ors. Decided on 20.05.09 we expressed the view that open access regulations are required to be followed when open access is availed of and that if no open access is availed of as not necessary or because no existing network is available the captive generating company cannot be prevented from supplying to a consumer by laying its own dedicated line. The following part from our earlier judgment can be quoted with profit:

25) Hence we can conclude that M/s. Gayatri Shakti Paper & Boards Ltd. does not need any license for supplying power to M/s. Kherani Paper Mills Ltd.”

3.28. The law pertaining to the dedicated transmission line has been made crystal clear by the Hon'ble APTEL in the judgment of JSW Steel Limited v. Karnataka Electricity Regulatory Commission Appeal Nos. 136 of 2011, 162 of 2011, 167 of 2011, 137 of 2011 and 163 of 2011. In the said judgment the Hon'ble APTEL categorically held that so long as the power generated by the captive power plant is sourced to captive consumers through the own lines of the captive power plant and without using the network of transmission and distribution licensee it satisfies the requirement of dedicated transmission line as per section 9 of the Act. The relevant extract of the said judgment is reproduced hereinbelow:

“f) Whether there has been use of distribution or transmission network by the Appellant in Appeal no.136 of 2011. The issue no. e) (sic it is f) is whether the transmission line used by the Appellant is dedicated transmission line or not. The learned advocate for the Chief Electrical Inspector very forcefully argued that consumption in support of this argument, there is no evidence. The Commission also does not hold that the status of the transmission line from the captive power plant to the place of consuming entities is not dedicated transmission line. It goes undisputed that all the electric lines used for supply of electricity by JSW Steel to the place of use are within the premises of JSW Steel and not outside thereof. Where the conveyance of electricity by JSW Steel to the point of consumption is the own lines of JSW Steel it cannot be said that the lines of the distribution company namely Gulbarga Electricity Supply Company Ltd. has been used. The issue is decided in favour of the JSW Steel Ltd.

33. With regard to issue no. f), we confirm the finding of the Commission that so long as the power generated by the captive power plant is supplied to captive consumers through the own lines of the captive power plant and without using the network of transmission and distribution licensee it satisfies the requirement of dedicated transmission line as per section 9 of the Act.

3.29. In addition to the above, the Hon'ble APTEL in the judgment passed in Appeal No. 28 of 2005 titled as Kalyani Steels Limited Vs. Karnataka Power Transmission Corporation Limited and Ors.examined the scope and ambit of the applicability of wheeling charges in case of dedicated transmission line. In this regard, it was observed by the Hon'ble APTEL that the liability to pay wheeling charges arises only when distribution system and associated facilities of a transmission licensee or

distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62 and not when the consumer uses its dedicated lines of its own. The relevant extract of the judgment is reproduced hereinbelow:

“36. No such arrangement as relied in the said pronouncements has been pleaded or placed by the Respondents to show that it is a joint venture and that the Respondents have become the exclusive owners. To the contra, the Respondents have placed the Karnataka Government Notification, the portions of which are already extracted above would go to show that the Respondents are not the owners of the transmission line but it could, if at all invoke the rule in respect of service line. So long as the second Respondent or for that matter the first Respondent, is not the owner nor it had invested its funds in the said line nor there is a vesting by operation of statutory provision, it would be inequitable on the part of the Respondents to claim transmission charges when no part of the capital expenditure had been incurred by it. It would be inequitable on the part of the Respondents to claim transmission charges for the 7.25 km long dedicated 220 KV transmission line as the appellant has not relinquished its interest and the Respondents have not acquired title to the said line in a manner known to law. That apart when the Respondents could not in law include the value of line in its capital, and claim return according to the above pronouncements, it is legally not permissible for them to claim transmission charges. Of course, the Respondent who is operating and maintaining the line will be entitled to collect or reimbursement of the expenses incurred in that behalf and nothing more. Therefore, it follows the appellant is not liable to pay transmission charges for the said 7.25 km long dedicated line put up at its cost for exclusive transmission of power to its plant. However, the appellant shall be liable for O & M charges and it shall reimburse the same to the Respondent who maintains, besides bearing the cost when replacement of line is required by contingencies.

...

39. *Wheeling is defined in Section 2(76) and it reads thus:*

“(76) “wheeling” means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62” On careful analysis, it is clear that liability to pay wheeling charges arises only when distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62 and not when the consumer uses its dedicated lines of its own.

40. *In the present case and on the admitted facts, no part of the distribution system and associated facilities of the first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to appellant’s plant. Therefore, the definition as it stands, the appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.”*

3.30. In addition to the above the Hon’ble APTEL in Appeal No. 245, 176, 237 and 191 of 2012 titled as Steel Furnace Association of India Vs. Punjab State Electricity Regulatory Commission &Anr.,has categorically held that a consumer directly connected to the transmission system can avail open access by payment of transmission charges and surcharge, and further the consumers cannot be made to pay wheeling charges for the distribution system which has not been used by them in

conveyance of electricity under Open Access. The relevant paras of the judgement are reproduced hereinbelow:

“54. Thus, we find that the levy of wheeling charges on consumers not using the distribution system for conveyance of electricity in Open Access is contrary to the scheme of the Electricity Act, 2003, Tariff Policy and the dictum laid by this Tribunal. A consumer directly connected to the transmission system can avail open access by payment of transmission charges and surcharge (as determined by the State Commission). However, the surcharge has to be passed on to the distribution licensee for meeting the current level of cross subsidy. The levy of wheeling charges for such consumers connected to the transmission licensee (220 kV and 132 kV in the present case) is also in contravention with Regulation 25(1) and Regulation 15. The Amended Regulation 25(5) enable the State Commission to determine the wheeling charges applicable to open Access customers in the Tariff Order. The State Commission should have determined the wheeling charges in conformity to the Scheme of the Electricity Act, National Electricity Policy, Tariff Policy and various Sections of its Regulations (Regulation 15 and 25 (1)). The Open Access customers have to bear the surcharge as determined by the State Commission to meet the requirement of current level of cross subsidy. They cannot be made to pay wheeling charges for the distribution system which has not been used by them in conveyance of electricity under Open Access. If the existing consumers of the distribution licensee seeking Open Access are resulting in stranded costs to the distribution licensee due to its obligation to supply, then the remedy lies in levy of additional surcharge as provided for in the Electricity Act.

... ..

58. We feel that the wheeling charges for the period from 7.5.2012 to 31.3.2013 have not been determined according to the provisions of the Electricity Act, National Electricity Policy, Tariff Policy and

the comprehensive consideration of the Open Access Regulations for the following reasons:

- (i) *Levy of wheeling charges from the Open Access consumers directly connected to the transmission system of the transmission licensee and are not using the distribution system of the distribution licensee for conveyance of electricity under Open Access in contravention to the scheme of Open Access under the Electricity Act, Tariff Policy and the dictum of this Tribunal in earlier judgment.”*

3.31. In the view of the above, the statutory scheme as expressly elucidated hereinabove and also in view of the principles laid down by the Hon'ble APTEL in its various judgments, conclusively permit a CGP to construct and maintain dedicated transmission lines without the requirement of a license, and further, no wheeling or transmission charges are payable when power is sourced through such dedicated lines to the captive users.

3.32. In the current transaction, the Petitioner requested the Respondent and the SLDC to accord its approval to the said Petitioner for wheeling power to one of its captive user(s) viz. Respondent No.2 through 11 kV dedicated transmission line vide its application dated 05.02.2021. In its application, the Petitioner sought for the captive approval for sourcing power to the Respondent No.2, which owns more than 26% ownership in the CGP, viz., OPG Energy Pvt. Ltd. and that the consumption can be monitored by a dedicated ABT meter installed at the plant.

3.33. In view of the submissions made hereinabove whereby the legal position is clear that no wheeling charges can at all be imposed by the distribution licensee

(Respondent) upon the captive user or the CGP when such power is sourced through a dedicated transmission line in terms of section 9 of the Electricity Act, 2003.

3.34. Therefore, in view of the aforesaid, the Commission ought to clarify and hold that the Respondent cannot impose any wheeling charges for sourcing of captive power to the Respondent No.2. In the event the relief as sought is not granted by the Commission, then the same would lead to severe prejudice to be caused to the Petitioner.

4. Contention of the petitioner in I.A.No.1 of 2021 in M.P.No.42 of 2021:

4.1. The instant petition has been filed by the Petitioner seeking clarification from this Commission on whether Open Access charges out to be levied when a captive consumer is supplied with power through a dedicated transmission line. The captive consumer of petitioner is arrayed as the 2nd Respondent herein.

4.2. After filing of the petition, Applicant herein, vide written instructions dated 22.10/2021, instructed the counsel on record to submit at the hearing to withdraw the instant petition as the Respondent TANGEDCO had not proceeded with any demand.

4.3. The instant petition was listed for hearing on 26.10.2021, on which date such submission was made and withdrawal was conditional upon counsel/party filing a withdrawal memo or make an endorsement.

4.4. However, subsequent thereto, when the Applicant had discussions with the licensee, it was deemed appropriate that this issue received the regulatory

consideration. This is for the reason that the licensee is also awaiting a clear determination in this regard and on the basis of the ruling in the petition would take a final decision. It appears that the internal proposal of the licensee is still under consideration.

4.5. For this reason, the Applicant had instructed its counsel not to file a withdrawal memo and seeks to reinstate the instant petition and have a final adjudication by this Commission on whether OA charges are indeed payable when power is supplied through a dedication transmission line. Petitioner submits that the levy of OA charges in such a special circumstance requires regulatory adjudication which will provide clarity to all consumers, generators, and the Respondent TANGEDCO as this will be a final adjudication.

4.6. In view of the above, the petitioner prayed the Commission to post the instant petition for admission and hear it on merits.

5. Counter Affidavit filed by the Respondent:-

5.1. Section 2(76) of the Electricity Act, 2003-defines as follows:

Section 2(76) : "Wheeling" means the operation whereby the distribution system and associated facilities of transmission licensee and distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

From the above, it is observed that the liability to pay wheeling charges arises only when distribution system and associated facilities of transmission licensee or distribution licensee are used by another person for the conveyance of electricity on

payment of charges to be determined under section 62 and the wheeling charges shall not applicable when the consumer uses its dedicated lines of its own for wheeling, as per the Hon'ble APTEL's order dt. 29.03.2006 in Appeal No.28 of 2005 titled as Kalyani Steels Limited VsKarnataka Power Transmission Corporation Limited and Ors.

5.2. The Respondent has stated thatCross Subsidy Surcharge can be levied under Section 42 of the Electricity Act 2003. Section 42 of the Electricity Act, 2003 reads as under:-

"42. •----- The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such

distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply”.

As per the Section 42(3), the Cross Subsidy Surcharge is compensation to the distribution licensee irrespective of the fact whether the licensee's line is used or not. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end consumer if he falls in the category of subsidizing consumer.

5.3. The Hon'ble Supreme Court of India in M/s. SesaSterlite Ltd Vs Orissa Electricity Regulatory Commission &Ors reported in (2014) 8 SCC 444 held that the Cross Subsidy Surcharge is a compensation to the distribution licensee irrespective of the fact whether it's line is used or not. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end consumer if he falls in the category of subsidizing consumer. Once a CSS is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. Therefore, the when the consumer uses its dedicated lines of its own for wheeling, the Cross Subsidy Surcharge is applicable to that category of the consumer if he loses his captive status. Hence, the contention of the petitioner that where power is sourced by the CGP through a dedicated transmission line to its

captive user(s), the Cross Subsidy Surcharge is not applicable is not sustainable one in a circumstance of losing his captive status.

5.4. With the above submission, 1st Respondent has prayed the Commission to dispose of the above petition.

6. Written submission of the 1st Respondent:

The 1st Respondent furnished the similar submissions in its Written submission what are all the averments made in its Counter, hence it is not repeated here.

7. Findings of the Commission:

7.1. The petitioner has filed this petition seeking to clarify that no 'Wheeling charges' are payable wherein a captive consumer is being supplied electricity through a dedicated transmission line and is situated within the same premises of the generating plant.

7.2. M/s.OPG Energy Private Limited executed an Energy Wheeling Agreement with the TANGEDCO on 30th day of March 2021 for the parallel operation of the Captive Generating Plant (CGP) and wheeling of energy from such CGP to the destination of its use through Transmission / Distribution network of a quantum of 5.35 MW. The petitioner in their application has proposed to wheel energy from their CGP to 12 Captive users using TANGEDCO's distribution network and one No. M/s.AAA Plus Trading Pvt. Ltd., through their dedicated transmission line.

7.3. The petitioner also stated that AAA Plus Trading Private Limited is the captive consumer owning 26% shares of the Petitioner Company and as such, AAA Plus Trading Pvt Ltd., is availing power directly via an 11 kV dedicated transmission line from its CGP generator. The petitioner's application for granting of approval for

wheeling of 6.669 MW to its 13 number of captive users and one number of captive user i.e., Respondent No.2 AAA Plus Trading Pvt Limited situated within the plant premises of the Petitioner, not granted by the State Load Despatch Centre for the reason that the Captive user of the CGP are holding only 1.74% of the total paid-up equity share capital with voting rights. In this connection, the petitioner had a meeting with the TANGEDCO on 12.03.2021 during which the TANGEDCO stated that the dedicated transmission line from the CGP of the petitioner to its captive user, is part of the distribution system of the TANGEDCO. And TANGEDCO was of the opinion that the 2nd Respondent (AAA Plus Trading Pvt Ltd.) is liable to pay Wheeling charges for the power consumed through the dedicated transmission line.

7.4. The Petitioner is of the view that sourcing of power from its CGP to Captive user through dedicated transmission line is permissible without payment of Wheeling charges. The parties concluded between them, in that meeting held on 12.3.2021, that the Petitioner shall pay the Wheeling charges under protest for such wheeling arrangement until the parties get the issue clarified by the Commission.

7.5. TANGEDCO accorded wheeling approval subject to an understanding held between the parties, as below –

"3.0) In this connection, it is submitted that Sec 9(1) of the Electricity Act, 2003 states that a person may construct, maintain or operate a captive generating plant and dedicated transmission lines.

xxxx

xxxx

xxxx

As per the above, the lines connecting the generating station with the point of consumer's installation is deemed to be the distribution system of the licensee in whose area the consumer is located. The dedicated transmission lines even though laid by the generator / consumer would belong to the licensee as in any case the cost of lines would be collected from the party seeking such line

when the line is to be laid by the licensee. Further, as the line belongs to the distribution system of the licensee, necessary wheeling charges has to be paid by the Captive user as per the TNERC's tariff order. The above aspects have been dealt with by Hon'ble APTEL in A.No.171 of 2010 of 5th August 2011. In view of the above, the lines stated to be dedicated transmission line by M/s.OPG Energy Private Limited, can be considered only as part of the TANGEDCO's distribution network. As Distribution is a licensed activity as per Sec.12 of the Electricity Act. M/s.OPG Energy Private Limited is neither a licensee under Sec.12 nor exempted under Sec.13 of the electricity Act 2003. Therefore, in the light of the provisions contained in the Electricity Act 2003 and the orders of Hon'ble APTEL in A.No.171 of 2010 of 5th August 2011. The request was approved by CMD/TANGEDCO vide E-office Note E/;159/2021 dated 18.3.2021 to treat the dedicated transmission lines of M/s. OPG Energy Private Limited as part of TANGEDCO's distribution network and consequently necessary wheeling charges will be payable as per the orders of Hon'ble TNERC. Therefore, without prejudice to the clarification in this matter by TNERC, as requested by M/s.OPG Energy Private Limited the approval for wheeling to 12 No. captive users through TANGEDCO's Distribution network and 1 No. AAA Plus Trading Private Limited through the deemed distribution network of TANGEDCO is considered."

And accordingly, this petition has been filed by the petitioner to clarify on the applicability of Wheeling charges while sourcing the power from the CGP to its captive user through a dedicated transmission line.

7.6. Though the petitioner agreed to pay the Wheeling charges under protest initially without prejudice to the clarification of the Commission in this matter, it seems from the Interlocutory petition No.1 filed by the petitioner that the Respondent had not proceeded with any demand towards Wheeling charges and decided to withdraw the petition; however, the applicant wants to have adjudication on whether Open Access

conveyance of electricity on payment of charges to be determined under Section 62 and not when the consumer uses its dedicated lines of its own.

40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to appellant's plant. Therefore, the definition as it stands, the appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission."

7.9. The Respondent has not argued much, but has simply stated that as defined under Section 2(76) of the Electricity Act 2003 the liability to pay the wheeling charges arises only when distribution system and associated facilities of transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under section 62, and the wheeling charges shall not be applicable when the consumer uses its dedicated lines of its own for wheeling as per the Judgment dated 29.03.2006 of the Tribunal in A.No.28 of 2005 (M/s.Kalyani Steels Limited Vs Karnataka Power Transmission Corporation Limited and Ors).

7.10. From the submissions of the parties, we are of the considered view that the Respondent has accepted the averments of the petitioners with reference to the definition under the Electricity Act 2003 and agreed that the petitioner's case squarely

falls in line with the matter disposed by APTEL in A.No.28 of 2005. In accordance to that, we find that, the Respondent has not proceeded to demand the 'Wheeling charges' from the petitioner.

7.11. Under this wheeling arrangement, the petitioner sought the Respondent (TANGEDCO) and SLDC, to accord approval to wheel the power to its 12 nos. Captive user, and also to another captive user i.e., Respondent No.2 (AAA Plus Trading Limited) through 11 kV dedicated transmission line which is said to be located in the plant premises as per the Commission's order in R.A.7 of 2019 Clause 7.5.6. TANGEDCO held in this agreement that such 11 kV dedicated transmission line shall have to be considered as a part of its Distribution network, as dealt by the Hon'ble APTEL in A.No.171 & 187 of 2010 dated 05-08-2011. In that Appeal, the Tribunal held that the 11 kV dedicated transmission line feeding to Captive user shall be deemed to be a part of the distribution system of the Discom wherein the lines were terminated at the internal 11 kV supply system of a "consumer" of Discom. The Tribunal's findings could not be applied in this case since the petitioner's case is not identical one.

7.12. Further, the petitioner has argued that as the petitioner's plant is a Captive Generating Plant constructed for the purpose of Captive generation, as defined under Section 9 of the Electricity Act 2003, no Cross subsidy surcharge is leviable as provided under section 42(2) of the Act. In this connection, we observe that it is the obligation of the petitioner's Captive Generating Plant to fulfil the requirements as stipulated under Rule 3(1)(a) of the Electricity Rules 2005 and the revised procedure stated in Commission's Order dated 07.12.2021 in M.P.24 of 2020 & R.P.2,3,4 of 2020 in R.A.7 of 2019.

7.13. In result of our findings above, we clarify that Wheeling charge in respect of the petitioner's case which has an arrangement of in-house consumption of power transmitted through dedicated transmission line situated within the plant premises from the CGP (M/s.OPG Energy Pvt Ltd) to its Captive user (M/s.AAA Plus Trading Pvt. Limited) does not arise.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission