

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
Thiru K. Venkatasamy	...	Member (Legal)
	and	
ThiruR.Jarard Kishore	...	Member

M.P. No.44 of 2021

M/s.Nagai Power Pvt. Ltd.
Rep. by its authorized signatory – Mr.R.Srinivasan
1/691, Okkur Main Road
Okkur-KlivelurTaluk
Nagapattinam District – 611 002.

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

Vs.

1. State Load Despatch Centre
C/o. TANTRANSCO
Represented by the Chief Engineer (Grid Operations)
TANTRANSCO, SLDC Building
144, Anna Salai, Chennai – 600 002.
2. Tamil Nadu Transmission Corporation Ltd.
Represented by its Superintending Engineer
Commercial Operations
TANTRANSCO
144, Anna Salai, Chennai – 600 002.

... Respondents
(Thiru. V.Anil Kumar
Standing Counsel for SLDC &TANTRANSCO)

Dates of hearing : 09-11-2021; 30-11-2021; 21-12-2021;
11-01-2022 and 01-02-2022

Date of Order : 01-03-2022

The M.P.No.44 of 2021 came up for final hearing on 01-02-2022. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondents and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in M.P.No.44 of 2021:-

The prayer of the petitioner in the above M.P.No.44 of 2021 is to pass an order exercising Regulatory power and clarify that Transmission Charges are not payable for the month of September 2021 in respect of Format STOA2 dated 23.08.2021 conditional approval referring to letter bearing Ref: Lr.No.CE/GO/SE/CO/EE/OA/AEE3/F.NPPL. Cap/R0/21-22/D.92/21-22, dated 03/08/2021, that was not proceeded with for the month of September 2021 to avail open access by the Petitioner and pass such further or other orders as the Commission may deem fit proper in the facts and circumstances of the case and thus render justice.

2. Facts of the Case:-

In T.A. No.3 of 2021 and other petitions challenging the Open Access charges levied during the lockdown, the Commission vide its Order dated 29.06.2021 has, *inter alia*, held that open access charges

(of which transmission charges is a part) cannot be levied during a Force Majeure situation. The same may be applied to the Petitioner since the increase in coal prices are also beyond the contemplation of the parties and therefore, a force majeure condition and consequently, waive the transmission charges for the month of September 2021 in respect of the STOA approvals granted Petitioner's plant, especially in view of the fact that not even a single unit was transmitted during the relevant period. Furthermore, the Petitioner has sought for cancellation of the STOA approvals for the month of September, 2021 vide its letter dated 24.09.2021.

3. Contentions of the Petitioner:-

3.1. The Petitioner is in the business of power generation through coal-based thermal power plant in Nagapattinam. The present petition is being filed seeking the Commission to exercise its regulatory power with regard to the upfront Transmission Charges in respect of the Short Term Open Access (STOA) approvals granted to the Petitioner's thermal power plant for the month of September 2021 since open access was not proceeded with or availed. In this regard, the Petitioner sent a letter dated 24.09.2021 confirming waiver of the charges of Rs.70,76,566/- (Rupees Seventy Lakhs Seventy Six Thousand Five Hundred and Sixty Six Only) for the month of September 2021,

however, no response has been received for the same and the petitioner has been orally informed that necessary directives are to be obtained from the Commission.

3.2.The Petitioner has always duly remitted all of the charges payable by it for the effective and efficient use of the grid and transmission lines owned and operated by the TANTRANSCO, such as Transmission and Wheeling Charges, Scheduling and System Operation Charges, Grid Support Charges, Transmission Loss etc. Further, these charges are levied for utilization of the transmission and distribution infrastructure and has been fixed for normal operational times.

3.3.They applied for short open access approval on 13.8.2021 (provide application) for the period 01.09.21 to 30.09.21. The non refundable application fee of Rs.5,000 was also made for each application.

3.4.The approval was granted by the SLDC in Format STOA2 dated 23.08.2021 referring to letter bearing Ref: Lr.No.CE/GO/SE/CO/EE/OA/AEE3/F.NPPL.Cap/R0/21-22/D.92/21-22, dt: 03-08-2021, for a quantum of 71.757 MW for its 97 captive consumers for the period from 01.09.2021 to 30.09.2021. The approval incorporated a clause for advance payment in order to give effect to the Open Access.

"13)As per the Schedule of payment enclosed, the short-term open access customer shall deposit with SLDC the transmission charges and SLDC charges

for the entire period of open access within three working days of grant of the short-term open access by SLDC, but before the commencement of open access”.

3.5. It did not proceed with the open access in view of a substantial change in circumstances due to coal availability, coal costs as also certain technical issues. In fact none of the activities for which the transmission charges were required to be paid were conducted during September 2021. In fact, not a single unit was injected by the Petitioner's plant into the grid during the month of September 2021 and no scheduling was done. Thus the application was not proceeded with. This was due to the fact that the Petitioner was unable to operate its plant due to a colossal increase in the coal prices and a further technical issue at the evacuation point.

3.6. The levy of transmission charges is primarily to compensate the state transmission utilities ('STU') such as the 2nd respondent herein for allowing such captive generators to use the common grid for supply of power to captive consumers. The nature of the transmission charges is in the form of a charge and not fixed like a tax. The Petitioner states that none of the activities for which the transmission charges are levied were conducted during September 2021. In fact, not a single unit was injected by the Petitioner's plant into the grid during the month of September 2021. This was due to the

fact that the Petitioner was unable to operate its plant due to a sudden increase in the coal prices and a further technical issue at the evacuation point. These factors were beyond the control of the Petitioner thereby eliciting a Force Majeure situation, which effectively rendered it impossible to perform the terms of the contract between the petitioner and the Respondent TANTRANSCO.

3.7. The Open Access Regulations, 2014 specifically provide for Force Majeure –

"46. Force Majeure -

(1) Any event which is beyond the control of the parties to the open access agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either party such as, but not limited to, the following shall be classified as force majeure events for the purpose of these Regulations. –

(i) natural disasters (earthquakes, hurricane, floods);

(ii) wars, riots or Civil Commotions and other upheavals; and

(iii) grid / distribution system's failure not attributable to parties hereto.

(2) Both the parties to the open access agreement shall ensure compliance of the terms and conditions of the agreement. However, 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 open access agreement to the extent that such failure is due to force majeure. But, any party claiming the benefit of the force majeure shall satisfy the other party of the existence of such event(s)."

3.8. The transmission charges, by their very nature, unlike taxes, can be paid only when the actual service or activity takes place and thus in

the absence of the activity having been done and no service being provided, such charges cannot be levied. The transmission line was not utilised by the Petitioner during the relevant period. The levy of transmission charges contemplates utilization of the system. Pertinently, no provision in the Regulations or in the STOA mandate that these charges are fixed in nature or minimum charges and are to be paid under all circumstances. This is for the simple reason that the charges were never contemplated to be minimum or fixed charges such as in the case of a minimum demand or energy charge which a consumer has to pay.

3.9. In this regard, it may not be out of place to state that in T.A. No.3 of 2021 and other petitions challenging the Open Access charges levied during the lockdown, the Commission vide its Order dated 29.06.2021 has, *inter alia*, held that open access charges (of which transmission charges is a part) cannot be levied during a Force Majeure situation. The same may be applied to the Petitioner since the increase in coal prices are also beyond the contemplation of the parties and therefore, a force majeure condition and consequently, waive the transmission charges for the month of September 2021 in respect of the STOA approvals granted Petitioner's plant, especially in view of the fact that not even a single unit was transmitted during the relevant

period. Furthermore, the Petitioner has sought for cancellation of the STOA approvals for the month of September 2021 vide its letter dated 24.09.2021.

3.10. In the above circumstances, it is prayed that the Commission may be pleased to pass an order exercising Regulatory power and clarify that Transmission Charges are not payable for the month of September 2021 in respect of Format STOA2 dated 23.08.2021 conditional approval referring to letter bearing Ref: Lr.No.CE/GO/SE/CO/EE/OA/AEE3/F.NPPL.Cap/R0/21-22/D.92/21-22, dt: 03/08/2021, that was not proceeded with for the month of September 2021 to avail open access by the Petitioner and pass such further or other orders as the Commission may deem fit proper in the facts and circumstances of the case and thus render justice.

4. Contentions of the Respondent:-

4.1. The petitioner has filed this Miscellaneous Petition before the Commission and prayed that

"The Commission may be pleased to pass an order exercising Regulatory power and clarify that Transmission Charges are not payable for the month of September 2021 in respect of Format STOA2 dated 23.08.2021"

4.2. In the first instance that the above petition is either maintainable in law nor on facts, the short-term open access customer may either seek for cancellation or downward revision, through an application to the nodal agency, and the nodal agency shall be entitled to levy the open access charges only for two days in accordance with the Clause 40(3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 and hence total waiver of open access charges is not permitted and thus the petitioner is not entitled to any waiver in the circumstances of the present case.

4.3. M/s. Nagai power Private Ltd is a coal based Captive power plant with a capacity of 150 MW located at Okkur Village, Nagapattinam District. The petitioner had entered into a Wheeling Agreement with Tamil Nadu Generation and Distribution Corporation Limited to wheel power to its 97 Nos. captive users and wheeled power under Intra State Short Term Open Access (STOA) category.

4.4. SLDC being the Nodal agency, which accords permissions for Short Term Open Access transactions, granted STOA approval as requested by the petitioner to wheel power upto the quantum of 71.757 MW to its 97 Nos. Captive consumers for the period from

01.09.2021 to 30.09.2021. Accordingly Open access charges for the above approval also has been published in TNEBSLDC website.

4.5. Proviso (1) and (2) of the Clause 9 of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 reads as follows:

"9: Eligibility for Open Access and conditions to be satisfied. –

(1) Subject to the provisions of these Regulations, the licensees, generating companies, captive generating plants and consumers shall be eligible for open access to the intra-State transmission system of the State Transmission Utility or any transmission licensee on payment of transmission and other charges as may be determined by the Commission from time to time.

(2) Subject to the provisions of these Regulations, the licensees, generating stations, captive generating plants and consumers shall be eligible for open access to distribution system of a distribution licensee on payment of the wheeling and other charges as may be determined by the Commission from time to time.

4.6. Clause 20 of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 reads as follows;

"20. Transmission Charges. –

Open Access customer using transmission system shall pay the charges as stated hereunder:

- (1) For use of inter-State transmission system. – As specified by the Central Commission from time to time.*
- (2) For use of intra-State transmission system. –*

(a) By Long-Term, Medium-Term and Short-Term Open Access Customers. -

Existing Long-Term Open Access and Medium-Term Open Access customers (including existing distribution licensees and generating companies) shall share the Annual Transmission Charges (ATC) of the State Transmission Utility or transmission licensee, as determined by the Commission in the ARR for the relevant year, in the ratio of their allotted capacities. Transmission charges payable by other Long-Term Open Access, Medium-Term Open Access and Short Term Open Access customers to the STU or Transmission Licensee shall be determined as under:

Transmission Charges = ATC/ (ACs X365) (in Rs./MW-day)

Where,

ATC= Annual Transmission Charges determined by the Commission for the transmission system of the STU / Transmission Licensee for the relevant year.

ACs = Sum of Capacities allocated to all Long-term and Medium-term Open Access customers in MW.

Provided that where a dedicated transmission system used for open access has been constructed for exclusive use of an open access customer, the transmission charges for such dedicated system shall be worked out by transmission licensee for their respective dedicated systems and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used for by other persons or purposes:

Provided further that transmission charges for Short-Term open access shall be payable on the basis of capacity reserved for such customer.

(3) In case intra state transmission system or distribution system is used by an open access customer in addition to inter-state transmission system, transmission charges and wheeling charges as fixed and approved by the Commission shall be payable for use of intra-state system in addition to payment of transmission charges for inter-state transmission.

(4) The transmission charges payable by the Open Access Customer utilizing the Intra-State Transmission system for part of a day shall be on pro-rata basis.

4.7. Clause 21 of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 reads as follows;

"21. Scheduling and system operation charges. -

Scheduling and system operation charges shall be payable by the Open Access customers at the following rates:

(1) In respect of inter-State open access. –

(a) Long-term open access and Medium-term open access:-

(i) Regional Load Despatch Centre fees and charges including charges for the Unified Load Despatch and Communication Scheme as specified by the Central Commission under sub section (4) of section 28 of the Act;

(ii) State Load Despatch Centre charges as specified by the Commission under subsection (3) of section 32 of the Act;

(b) Short-term open access:-

(i) Regional Load Despatch Centre and State Load Despatch Centre charges as specified by the Central Commission.

(2) In respect of intra-State open access. –

(a) Long-term, medium-term and short-term open access:-

(i) The scheduling and system operation charges payable to State Load Dispatch Center by open access customer shall be such as determined by the Commission under section 32 of the Act;

(ii) The scheduling and system operation charges collected by the State Load Dispatch Center in accordance with clause (a)(i) shall be in

addition to the other fees and charges approved by the Commission under these Regulations;

(iii) The Scheduling and system operation charges shall be payable even when the open access customer happens to be a generating company or trading Licensee, availing open access under these Regulations”.

4.8. Clause 35(2) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 reads as follows;

"(2) Intra-State transactions. –

(a) Short-term Open Access. –

(i) The short-term open access customer shall deposit with SLDC the transmission charges and operating charges for the entire period of open access within three working days of grant of the short- term open access by SLDC, but before the commencement of open access;

(ii) In addition to the above, the short-term open access customer connected to distribution system of a distribution licensee shall also pay to SLDC, the charges payable to the distribution licensee for the entire period of open access within three days from the grant of the short-term open access by the Nodal agency, but before the commencement of open access. Such charges would be disbursed to the distribution licensee on a weekly basis.

(b) Long-term and Medium-Term open access. -

SLDC, transmission licensees and distribution licensee, where applicable, shall communicate to STU the details of the bills due to them by the 3rd day of the succeeding calendar month. STU shall separately indicate the above charges and raise the bill with the open access customer, together with the charges receivable by it, if any, before the 5th day of the above month. The open access customer shall pay the charges within seven days from the date of receipt of the bill. STU shall disburse the charges payable to SLDC, transmission licensee and distribution licensee on a monthly basis.

4.9. Clause 40 of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 reads as follows;

"40. Under-utilization or non-utilization of open access capacity in intra- State transmission system. –

1)

2) Medium-term Open Access customers. - A medium-term open access customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the Nodal agency:

Provided that the medium-term open access customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or for 30 days whichever is less.

(3) Short-term open access customer. –

(a) On an application made to the Nodal agency by the short-term open access customer, the short-term open access schedules already

accepted by the Nodal agency in advance or on first-come-first-served basis may either be cancelled or revised downwards:

Provided that such cancellation or downward revision of the short-term open access schedules shall not be effective before expiry of a minimum period of two (2) days:

Provided further that the day on which application for cancellation or downward revision of schedule is served on the Nodal agency and the day from which such cancellation or downward revision is to be implemented, shall be excluded for computing the period of two (2) days.

(b) The person seeking cancellation or downward revision of short-term open access schedule shall pay the transmission charges for the first two (2) days of the period for which the cancellation or downward revision of schedule, as the case may be, has been sought, in accordance with the schedule originally approved by the Nodal agency, and thereafter in accordance with the revised schedule prepared by the Nodal agency during the period of such cancellation or downward revision.

(c) In case of cancellation, operating charges specified in Regulations 21 of these Regulations shall be payable for two (2) days or the period of cancellation in days, whichever is less.

4.10. Not even a single unit was injected by the Petitioner's plant into the grid during the month of September, 2021 and no

scheduling was done. In this regard, the petitioner should have submitted an application for cancellation of STOA as per Clause 40 (3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014.

4.11. The Petitioner claims that the injection was not done at all for the month of Sep-2021, however, as per Clause 35(2) of the TNERC Grid Connectivity and Intra State Open Access Regulations-2014, STOA charges should be paid within three days from the date of approval or *before the commencement of open access* i.e., before 01.09.21 in this case.

"Clause 35(2) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations-2014 reads as follows;

(2) Intra-State transactions. –

(a) Short-term Open Access. –

(i) The short-term open access customer shall deposit with SLDC the transmission charges and operating charges for the entire period of open access within three working days of grant of the short-term open access by SLDC, but before the commencement of open access".

Since the petitioner had an option to cancel/downward revision of open access transactions under 40(3) of the Regulations, having

failed to do so at the relevant period, the present request of the petitioner on the pretext that the petitioner was unable to operate its plant due to a sudden increase in the coal prices and further due to technical issue at the evacuation point and above events culminate into a force majeure event, is an afterthought and hence denied.

4.12. The averments in the petition in any event doesn't qualify for a Force Majeure event as stipulated under TNERC Grid Connectivity and Intra State Open Access Regulations-2014, which provides for waiver of STOA charges. The petitioner grossly failed to notify the force majeure events which prevented its generation or evacuation due to the Force Majeure condition as stipulated under Sec. 46 of the Regulations-2014, at the earliest point of time or immediately after the alleged events, the letter seeking for cancellation was dated 24.09.2021, almost close to the end of the term and thus, the petitioner claim is untenable and in any event does not fall within the

" 46. Force Majeure. –

(1) Any event which is beyond the control of the parties to the open access agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either party such as, but not limited to, the following shall be classified as force majeure events for the purpose of these Regulations.

- (i) natural disasters (earthquakes, hurricane, floods);*
- (ii) wars, riots or Civil Commotions and other upheavals; and*
- (iii) grid / distribution system's failure not attributable to parties hereto.*

(2) Both the parties to the open access agreement shall ensure compliance of the terms and conditions of the agreement. However, 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 open access agreement to the extent that such failure is due to force majeure. But, any party claiming the benefit of the force majeure shall satisfy the other party of the existence of such event(s)".

4.13. The petitioner has referred the Commission's Order, dated 29.06.21 in T.A. No.3 of 2021. But, the T.A.No.3 was filed for the refund of Open access charges which was already paid for MTOA transactions during lockdown period from March, 2020 & April 2020, due to covid-19 pandemic and also when the lockdown was in force. The present set of facts does in any event come within the purview of the findings of this Commission and hence the same is not applicable for the facts of the present case.

4.14. The petitioner has stated that their cancellation application was not processed for the month of Sep-2021. In this regard it is stated that, as per Clause 40(3)(a) of the TNERC Grid Connectivity and Intra

State Open Access Regulations, 2014, the application could not be processed since the clause 40(3)(a) reads as follows:

"Provided that such cancellation or downward revision of the short- term open access schedules shall not be effective before expiry of a minimum period of two (2) days":

4.15. With respect to para 3, the petitioner has stated in their letter dated 24.09.2021 as follows;

"We had applied for STOA for supply of 71.757 MW of power to our Group Captive Consumers from our Plant for the period from 01.10.2021 to 31.10.21.

Eventhough we obtained STOA for the month of Sep'21 we were unable to operate our plant due to some technical reasons at our evacuation point.

We had not paid the upfront Transmission Charges of Rs. 70.74 Lakhs hence as per regulations we kindly request your goodselves to cancel the Short term open access approval for the month of September 2021".

The petitioner has stated that they were unable to operate their plant due to some technical reasons at their evacuation point" vide their letter dated 24.09.2021.

While the generator was unable to inject power during Sep 2021, instead of submitting application for cancellation of STOA for the period from 01.09.21 to 30.09.21, which was already approved on 23.08.2021, Petitioner had further submitted STOA application and

seeking approval for the period from 01.10.2021 to 31.10.2021 is not acceptable. Also the application was not processed since the application fee for the month of October 2021 and Open access charges dues for the month of September 2021 was not paid by the Petitioner. The cancellation of STOA application was submitted by the petitioner only on 24.09.21 without application fee and the same could not be processed as per Clause 12(1) & (3), 17 and 40 (3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations-2014.

4.16. With respect to para 4 to 7, the petitioner has done the short term open access transactions from the month of April 2021 by paying necessary open access charges before the commencement of open access transactions and the petitioner is well aware that the STOA transactions are subject to the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014. It is sole responsibility of the petitioner, to intimate their inability to inject power and for cancellation or downward revision of the approval which was already accorded.

4.17. With respect to para 8 to 11, the petitioners request for exemption under "Force Majeure" Clause is unreasonable, because there is an option available to cancel/downward revision of STOA

transactions. It is relevant to mention that the Captive generators, M/s. TCP Ltd, M/s. OPG Power Generation Pvt. Ltd., and M/s. ARS Energy Pvt. Ltd, M/s. Tulsyan NEC Limited were cancelled/revised the open access transactions even under MTOA which has to be applied by giving 30 days prior notice to the nodal agency per Clause 40 (2) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014. Hence, the petitioner's request cannot be accepted. In light of the above facts and circumstances, it is prayed that the Commission may be pleased to dismiss the above petition with exemplary cost and pass such further or other orders as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.

5. Written Submissions on behalf of the Petitioner:-

5.1. The instant petition is filed to pass an order exercising Regulatory power and clarify that TransmissionCharges are not payable for the month of September 2021 in respect of Format STOA2 dated 23.08.2021 conditional approval referring to letter bearing Ref: Lr.No.CE/GO/SE/CO/EE/OA/AEE3/F.NPPL.Cap/R0/21-22/D.92/21-22, dt.03/08/2021, that was not proceeded with for the month of September 2021 to avail open access by the Petitioner;

5.2. The Petitioner is not liable to pay transmission charges for the month of September 2021 due force majeure attributable to the availability of coal and sudden increase in coal prices.

5.3. The Petitioner states that they applied for short open access approval on 13.08.2021 for the period 01.09.2021 to 30.09.2021. The non refundable application fee of Rs.5,000 was also made for each application.

5.4. The approval was granted by the SLDC in Format STOA2 dated 23.08.2021 vide letter bearing Ref: Lr.No.CE/GO/SE/CO/EE/OA/AEE3/F.NPPL.Cap/R0/21-22/D.92/21-22, dt.03/08/2021, for a quantum of 71.757MW for its 97 captive consumers for the period from 01.09.2021 to 30.09.2021. The approval incorporated a clause for advance payment in order to give effect to the Open Access

5.5. As per the Schedule of payment enclosed, the short-term open access customer shall deposit with SLDC the transmission charges and SLDC charges for the entire period of open access within three working days of grant of the short- term open access by SLDC, but before the commencement of open access.

5.6. However, the Petitioner submits that it was unable to proceed with the open access due to the existence of force majeure events during the said period.

This is attributable to the unexpected unavailability of coal and the consequent abnormal increase in imported and domestic coal due to the rebound of the global economy after the first and second wave of the Covid-19 pandemic, supply chain restrictions and other factors, such as restriction on exports by Indonesia, the world's biggest thermal coal exporter, after heavy rainfall disrupted production. Further, bad weather in many places including China, the largest producer of coal, little incentive in investing in new production of coal worldwide due to public policy of phasing down coal to combat global warming all lead to the continuous surge in global coal prices. Prices at Australia's Newcastle port, considered an Asian benchmark, have almost doubled over the past year.

5.7. None of the activities for which the transmission charges were required to be paid were conducted during September 2021. In fact, not a single unit was injected by the Petitioner's plant into the grid during the month of September 2021 and no scheduling was done. Thus, the application was not proceeded with. The Petitioner was further unable to inject power due to a technical issue at the evacuation point. These factors were beyond the control of the Petitioner thereby eliciting a Force Majeure situation, which effectively rendered it impossible to perform the terms of the contract between the Petitioner and the Respondent TANTRANSCO.

5.8. The Open Access Regulations, 2014 specifically provide for Force Majeure –

“46. Force Majeure –

(1) Any event which is beyond the control of the parties to the open access agreement which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either party such as, but not limited to, the following shall be classified as force majeure events for the purpose of these Regulations.

(i) natural disasters (earthquakes, hurricane, floods); (ii) wars, riots or Civil Commotions and other upheavals; and (iii) grid / distribution system's failure not attributable to parties hereto.

(2) Both the parties to the open access agreement shall ensure compliance of the terms and conditions of the agreement. However, 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 open access agreement to the extent that such failure is due to force majeure. But, any party claiming the benefit of the force majeure shall satisfy the other party of the existence of such event(s).”

5.9. In this regard, it may not be out of place to state that in T.A. No. 3 of 2021 and other petitions challenging the Open Access charges levied during the lockdown, the Commission vide its Order dated 29.06.2021 has, *inter alia*, held that open access charges (of which transmission charges is a part) cannot be levied during a Force Majeure situation. The same may be applied to the Petitioner since the increase in coal prices are also beyond the contemplation of the parties and therefore, a force majeure condition and consequentwaive the transmission charges for the month of September 2021 in respect of the STOA approvals granted Petitioner's plant, especially in view of the fact that not even a single unit was transmitted during the relevant period. Furthermore, the Petitioner has sought for cancellation of the STOA approvals for the month of September 2021 vide its letter dated 24.09.2021.

5.10. The nature of the transmission charge is in the form of a charge and not fixed like a tax.

5.11. The levy of transmission charges is primarily to compensate the State Transmission Utilities ('STU') such as the 2nd respondent herein for allowing such captive generators to use the common grid for supply of power to captive consumers. The nature of the transmission charge is in the form of a charge and not fixed like a tax.

5.12. The transmission charges, by their very nature, unlike taxes, can be paid only when the actual service or activity takes place and thus in the absence of the activity having been done and no service being provided, such charges cannot be levied. It is an admitted fact that the transmission line was not utilised by the Petitioner during the relevant period. The levy of transmission charges contemplates utilization of the system. Pertinently, no provision in the Regulations or in the STOA mandate that these charges are fixed in nature or minimum charges and are to be paid under all circumstances. This is for the simple reason that the charges were never contemplated to be minimum or fixed charges such as in the case of a minimum demand or energy charge which a consumer has to pay.

5.13. The Respondents in their counter have relied on Clause 40(3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014, to state that the Petitioner ought to have made an application for cancellation or downward revision of the short-term open schedule to the Respondents for the relevant period. However, it is reiterated that the Petitioner is seeking for waiver of transmission charges only for the month of September, 2021, during which force majeure conditions were in place. Admittedly, the Petitioner did not inject a single unit into the Respondent's grid during the entire month of September 2021 and since the Petitioner had not utilised the Respondent's grid, the charges for the same ought not to be levied from the Petitioner. The unavailability of coal was beyond the control of the Petitioner and as such, the Petitioner could not have intimated the Respondent/ made an application to that effect. Further, it is relevant to point out that the mandate to apply under Clause 40(3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014, for withdrawal/downward revision is only under normal circumstances and not when force majeure is invoked. Furthermore, it must be noted that the waiver being requested due to force majeure is only for a short period during which time not a single unit was supplied by the Petitioner.

5.14. TANGEDCO has not proved that the transmission line was utilised by the Petitioner. In fact, it is not the Respondent's stand that the Petitioner utilised the transmission line during the month of September 2021 and therefore, the Petitioner must pay for the same. Admittedly, the Petitioner has not utilised the

transmission line during the relevant period and as such, there is no loss to the Respondent if a waiver of the charges is granted during the relevant period.

6. Findings of the Commission:-

6.1. We have heard the submissions of learned Counsel appearing for the Petitioner and the Respondents. The Petitioner has filed this petition for passing an order exercising Regulatory Power and clarify that Transmission Charges of Rs.70,76,566/- (Rupees Seventy Lakhs Seventy Six Thousand Five Hundred and Sixty Six Only) are not payable for the month of September 2021 in respect of Format STOA2 dated 23-08-2021.

Per contra, the Respondent states as under:

6.2. The short-term open access customer may either seek for cancellation or downward revision, through an application to the nodal agency and the nodal agency shall be entitled to levy the open access charges only for two days in accordance with Clause 40(3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 and hence total waiver of open access charges is not permitted and thus the petitioner is not entitled to any waiver in the circumstances of the present case.

6.3. The Petitioner M/s Nagai Power Pvt. Ltd. is a coal based Captive Power Plant with a capacity of 150 MW located at Okkur Village,

Nagapattinam District. The petitioner had entered into a Wheeling Agreement with TANGEDCO to wheel power to its 97 Nos. CaptiveUsers and wheeled power under Intra State Short Term Open Access (STOA) category.

6.4. SLDC being the Nodal agency, which accords permissions for Short Term Open Access transactions, granted STOA approval as requested by the petitioner to wheel power upto the quantum of 71.757 MW to its 97 Nos. Captive consumers for the period from 01-09-2021 to 30-09-2021. Accordingly Open access charges for the above approval also have been published in TNEB SLDC website.

6.5. It is the case of the petitioner that not even a single unit was injected by the Petitioner's plant into the grid during the month of September 2021 and no scheduling was done. In this regard, the petitioner should have submitted an application for cancellation of STOA as per Clause 40(3) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014.

6.6. The petitioner claims that the injection was not done at all for the month of Sep-2021, however, as per Clause 35(2) of the TNERC Grid Connectivity and Intra State Open Access Regulations-2014, STOA charges should be paid within three days from the date of approval or

before the commencement of open access i.e. before 01-09-2021 in this case.

6.7. Since the petitioner had an option to cancel/downward revision of open access transactions under 40(3) of the Regulations, having failed to do so at the relevant period, the present request of the petitioner on the pretext that the petitioner was unable to operate its plant due to a sudden increase in the coal prices and further due to technical issue at the evacuation point and above events culminate into a force majeure event, is an afterthought and hence denied.

6.8. The averments in the petition under TNERC Grid Connectivity and Intra State Open Access Regulations-2014, which provides for waiver of STOA charges. The petitioner grossly failed to notify the force majeure events which prevented its generation or evacuation due to the Force Majeure condition as stipulated under Sec.46 of the Regulations-2014, at the earliest point of time or immediately after the alleged events, the letter seeking for cancellation was dated 24-09-2021, almost close to the end of the term and the petitioner claim is untenable and in any event does not fall within the Force Majeure Clause in Regulation 46.

6.9. The application for the month of October 2021 was not processed since the application fee for the month of October 2021 and Open

Access Charges dues for the month of September 2021 was not paid by the Petitioner.

ORDER

Heard both sides. The short question which arises for consideration is whether the waiver of transmission charges as sought for by the petitioner by treating non-availability of coal as Force Majeure is sustainable. On perusal of the material records, we find that there are many procedural lacunae in the presentation of the instant claim and hence it is necessary to deal with the same in the first instance. Hence, for the present, we are not travelling into the larger question as to whether the non-availability of coal which is the focal point canvassed by the petitioner for the purpose of present relief as we find that there are many statutory prescriptions which are required to be followed even for staking a claim and to see whether such prescriptions have been complied with. Hence, let us see whether the statutory requirements have been complied with.

As per Clause 35(2) of the TNERC Grid Connectivity and Intra State Open Access Regulations-2014, the STOA charges should have been paid within three days from the date of approval but before the commencement of open access, which it is seen that the Petitioner has not complied with.

The Petitioner had the option to cancel/downward revision of open access transactions under 40(3) of the Regulations TNERC Grid Connectivity and Intra State Open Access Regulations-2014 within the time stipulated which it is seen that the Petitioner did not exercise.

The petitioner ought to have notified the force majeure events which prevented its generation or evacuation due to the Force Majeure condition as stipulated under Sec.46 of the Regulations-2014, at the earliest point of time or immediately after the alleged events. This has also not been done by the Petitioner.

Having failed to follow the statutory prescriptions for staking a claim for refund on the ground of force majeure, which are pre-requisites, we find that the petitioner has no case for refund. The larger question as to whether non-availability of coal is a force majeure or not cannot be gone into when the basic minimum procedures laid down in the regulations have not been followed in earnest. The reliance placed on T.A.No. 3 of 2021 is to be rejected summarily as the said decision was rendered in the context of waiver of transmission and other charges in view of the pandemic arising out of spread of Corona Virus which is an established case of force majeure having universal application and is not comparable with the present case where the force majeure is invoked in a case for non-availability of coal.

The pandemic situation indisputably is a totally unforeseen occurrence beyond the control of the parties whereas the non-availability of coal cannot be seen as something which would automatically fit into the ambit of force majeure. The case has to be examined on merits especially on the question whether the commercial impediments can frustrate the very spirit of the contract. This is however, a larger issue and need not be addressed when the essential requirements of notification of force majeure have not been done. It is to be stated here that though a plea can be taken that procedural law cannot override the substantive rights of the parties, the fact remains that the requirements in the regulation of the Commission are not mere procedures to supplement the force majeure which is a substantive provision. But these regulations have assumed substantive character in themselves and any relief granted waiving these procedural requirements would amount to supplanting the substantive law in the matter of claim for force majeure resulting in miscarriage of justice to the other side.

Further, it is a settled position of law that when a statute prescribes something to be done in a particular manner, it should be done in that manner alone. When the regulation prescribes the notification of force majeure immediately after the occurrence and

when there is a failure to notify the same on the part of the party seeking relief, no relief can be granted. The law cannot come to the rescue of the person who failed to exercise his right in time.

In view of the above, the Commission dismisses the plea of the Petitioner to waive the Open Access Charges of Rs.70,76,566/- (Rupees Seventy Lakhs Seventy Six Thousand Five Hundred and Sixty Six Only) for the month of September 2021.

With these observations, the petition is dismissed.

(Sd...)
(R.Jarard Kishore)
Member

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission