

already made by relaxing certain provisions of PPA/Addendum 3 as a one-time measure.

The prayer of the petitioner in I.A. No.1 of 2023 in M.P. No. 1 of 2023 is to permit the applicant herein to implead the respondent herein as the Respondent in M.P. No. 1 of 2023.

This petition coming up for final hearing on 28-05-2024 in the presence of Thiru Richardson Wilson, Advocate for the Petitioner and Ms. Gayatri Aryan and Thiru Rajesh Jha, Advocates from M/s. J.Sagar Associates and on consideration of the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

ORDER

1. Contentions of the Petitioner:-

1.1 The Commission in its order No.7 of 2022 in T.P.No 1 of 2022 dated 09.09.2022, vide clause 4.4.8 has approved the source- wise energy availability from Other Sources for the MYT Control period.

1.2. The Miscellaneous Petition is filed seeking approval and ratification for having purchased power from M/s.SEPC (1x525MW) Power Private Limited on pass through basis to meet out the power demand from April 2022 to November 2022, as a onetime measure, by relaxing certain provisions of PPA / Addendum 3.

1.3. In continuation to the order of the Commission in M.P.No.27 of 2016, Addendum # 3 drafted in line with the TNERC Tariff Regulations (Terms and Conditions for

determination of Tariff) 2005 was signed on 25.02.2021. Subsequently the Addendum-3 to the PPA was approved by the TNERC in M.P.No.26 of 2021. M/s.SEPC Power Private Limited had declared their Commercial Operation on 30.11.2021 at 19.45 hours.

1.4. Even after achieving CoD, due to the expiry of Consent to Operate (CTO) issued by TNPCB, M/s SEPC did not declare its capacity availability notice to the SLDC as per the PPA terms and conditions. Hence, a notice was issued to M/s SEPC in line with the PPA to furnish the CTO details and capacity availability notice to TANGEOCO on 21.01.2022.

1.5. M/s SEPC had filed a miscellaneous petition on 04.02.2022 before the Commission (M.P.No.3 of 2022) with the following prayers:

- Permit the petitioner to terminate the Coal Supply and Transportation Agreement (CSTA) Dated 09.02.2018 with M/s.JERRA.
- Permit the petitioner to execute a Fuel Supply Agreement (FSA) with CIL./any domestic Coal Supplier in order to procure Indian Domestic Coal and consequently to remove the Ceiling price Mechanism.
- Permit the Petitioner to procure Coal from alternate sources in the interim period between termination of the CSTA and execution of the FSA without ceiling price mechanism in order to commence supply of Electricity.
- Amend the PPA to incorporate the above changes and pass orders.

1.6. In the counter filed by TANGEDCO on 23.03.2022, TANGEDCO prayed the Commission not to remove the ceiling price mechanism, since it was based on the

directions of the Commission in its previous order and the same was mutually agreed by both parties as per the approved PPA /Addendum-3.

1.7. Even after getting the Consent to Operate from TNPCB on 30.03.2022, M/s.SEPC did not supply power to TANGEDCO till 28.04.2022, citing that the imported Coal price to be purchased vide the approved Coal Supply and Transport Agreement (CSTA) from M/s.JERRA had increased abnormally and because of the rise in imported Coal price, it is unviable for M/s SEPC to run their plant within the prevailing ceiling variable cost permitted by the approved Power Purchase Agreement (PPA).

1.8. In the mid of April 2022, precarious power demand crisis prevailed in the state due to the following reasons:-

- Public exams for schools/colleges were held during the 2022 summer period, IT firms and commercial establishments also resumed their operations, Industrial operations have also gained momentum post Covid lockdown, and thus demand increased during summer. The Demand in Tamil Nadu reached 17,196 MW on 29.03.2022 and increased further during summer period.
- Due to lesser availability of Coal, TANGEDCO's own thermal stations could not run-on required PLF.
- Unit I of KKNNP was under shut down during April & May 2022 for re-fuelling activities.
- Due to failure in dispatching the allocated quantum of power to the state grid by Central Generating Stations.
- Agreement for supply of 550 MW RTC power under Pilot Scheme -I had expired on 31.03.2022 .

- Intra State generators under long term PPA stopped supplying 1172 MW RTC power due to non-availability of Imported Coal.

1.9. The unprecedented power crisis arose in the state due to summer demand, coal crisis prevailed in the country, shortage of power dispatched by Central Generating Stations, etc. In spite of the corrective measures taken by TANGEDCO to tackle the power crisis as follows, there prevailed Demand-Supply gap:

- TANGEDCO had purchased 1205.61 MU of power through Power Exchanges at an average price of Rs.10.16 per unit through both exchanges (IEX and PXIL). From the end of February and during March, the prices at peak hours had gone up to Rs.20 per unit till the direction of CERC.
- The Hon'ble CERC vide Suo-moto Petition No. 4/SM/2022 dated 01.04.2022 had directed that the bidders to submit their bids at a maximum rate of Rs.12/kWh for the DAM and RTM purchase, which came in to effect from 03.04.22.
- In spite of reduction in the ceiling limit, even if TANGEDCO placed the bid at the maximum price of Rs.12/unit in the exchange purchase, TANGEDCO could get only 10 % of the bidded quantum block wise as buy bids were more than double of the sell bids in some blocks indicating higher demand and lower supply.
- Despite TANGEDCO availed the power through Power Exchanges from Indian Grid through 51- (52&53), for its utmost Transfer Capability, TANGEDCO faced power crisis during peak hours.

1.10. TANGEDCO procured more power through the method of swapping to abridge the demand-supply gap, wherein the surplus power in other states were supplied to TANGEDCO during summer period and the same was returned by TANGEDCO during

wind season. Only a quantum of 400 MW was contracted through the swap arrangement.

1.11. TANGEDCO met the morning peak and evening peak demand through hydro sources and wind generation during the above period. Based on day ahead forecast of demand and wind generation, additional peak requirement was managed through power procurement from exchanges. However, the power availability in exchanges had significantly reduced and TANGEDCO was able to procure only 300-500 MW in many slots against a requirement of 2000 MW. This left a gap of 1500 MW during evening peak hours. Despite bidding at the highest rate, the power could not be procured in exchanges because of limited availability of power.

1.12. Due to unprecedented increase in the price of imported coal, all the imported coal based plants in Tamil Nadu with the total capacity of 1697 MW having PPAs with TANGEDCO did not supply power from October 2021 including M/s SEPC, which achieved CoD on 30.11.2021. Despite the notices served to them as well but, as the penalty for non-generation is lower compared to high cost of generation using Imported coal, supply was almost nil and very intermittent in nature.

1.13. The all-time high demand met by TANGEDCO and the all-time high consumption in the State of Tamil Nadu was as below.

a. All time high demand	17563 MW	29.04.2022
b.All time high consumption	388.078 MU	29.04.2022

Restriction and Control measures (R&C) in the state were lifted with effect from 05.06.2015 and directions of the GoTN issued under Section-II of Electricity Act 2003 were revoked with effect from 01.06.2016.

1.14. In order to overcome the power demand prevailed all over India during March and April 2022, due to non-operationalization of Imported Coal based plants (ICB), Hon'ble Minister for Power and New & Renewable Energy convened a meeting on 12.04.2022 at New Delhi with the SEBs Heads and with the representatives of Power Plants and advised that the all Import coal based power plants should be operated as per Section 11 of Electricity Act, 2003 and be reasonably compensated, to overcome the power crisis.

1.15. Section 11 of Electricity Act, 2003 is extracted as follows:

"11. Directions to generating companies. -

(1) The Appropriate Government may specify that a Generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. For the purposes of this section, the expression—extraordinary circumstances means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate".

1.16. In the MoP Directions No.23/13/2021-R&R (Pt-1) Dt. 05.05.2022, the ICS Plants were directed that,

- *“All imported power plants shall operate and generate power to their full capacity.*
 - *Plants in the first instance shall supply power to the PPA holders and the surplus power with no PPA will be sold in the Power Exchanges.*
 - *A committee was constituted by MoP with representatives from Mop, CEA and CERC which will bench mark the rate of power supplied on pass through basis considering the coal price/ shipping cost and O&M cost with fair margin.*
 - *If the procurer is not willing to procure at the bench mark rate fixed by the Committee or is not able to make weekly payment then such quantity of power shall be sold in the Power Exchanges and the net profit shall be shared between the generator and PPA holder in the ratio of 50-50 on monthly basis and also giving effect to the order upto 31.10.22.*
- f) *The PPA holders shall have an option to make payment to the generating company according to the bench mark rate worked out by the Group or at a rate mutually negotiated with the generating company.*
- g) *Payment at the above rates shall be made to the Generating Company on a weekly basis.”*

1.17. Ministry of Power vide order No. 23/13/2021-R&R (Pt-1) dated 05.05.2022 had issued directions (which order valid upto 31.10.2022) to operationalise the imported coal based power plants by ensuring the bench mark rates of power so worked out meets all the prudent costs of using imported coal for generating power, including the present coal price, shipping costs and O&M costs etc. and a fair margin worked out by the above said committee constituted by the Ministry of Power (MoP) with representatives from MoP, CEA and CERC. It was further extended up to 31.12.2022.

1.18. Despite the precautionary measures taken by TANGEDCO, TANGEDCO was in need of power to maintain uninterrupted power supply and hence, purchase of power from the intra state generator became inevitable. Hence TANGEDCO had also reiterated all the Intra State Power Generators including SEPC to operationalize the plant as per the MoP directions.

1.19. Board of TANGEDCO vide Circulation Board Note dated 27.04.2022 accorded approval to TANGEDCO to allow the intra state Power Generators including M/s SEPC Power Private Limited to supply power on pass through basis by deviating the provisions of PPA Addendum, till May 2022 or may be extended, as one time measure. Board of TANGEDCO also approved that by way of filing petition before the Commission by TANGEDCO, the pass-through cost will be determined.

1.20. The Board of TANGEDCO in its 107th meeting held on 07.06.2022 had accorded approval to TANGEDCO to extend the period of power supply by "imported coal" based-plants in Tamil Nadu till December 2022 as pass through basis as a onetime measure considering the power requirement in the state and based on the directions of Ministry of Power by exempting certain provisions of PPA.

1.21. In view of the prevailing power demand and considering the Grid condition, M/s.SEPC being an Intra-State Generator, was requested to supply power on pass through basis as one time measure by deviating certain provisions of PPA from 29.04.2022 based on the dispatch instructions of SLDC as per Board directions.

1.22. M/s SEPC had commenced their supply of power to TANGEDCO from 30.04.2022 onwards by purchasing coal through stock on sales basis and e-auction tender. TANGEDCO vide its letters dated 18.05.2022, 27.05.2022, 07.06.2022, 24.06.2022 & 02.07.2022 had requested MoP to fix the bench mark ECR for M/s SEPC for which PPA was executed under Section 62 of EA 2003. The Ministry of power vide No.23/13/2021-R&R (Pt-1) Dt. 11.07.2022 had communicated the tariff fixed by the expert committee for M/s.SEPC as Rs.6.88 per unit w.e.f 10.07.2022 only. However, MoP did not fix the tariff for the period from 30.04.2022 to 09.07.2022.

1.23. TANGEDCO made VFC Payment made to SEPC for the power supplied from 30.04.2022 to 09.07.2022 considering the following parameters:

- M/s SEPC had furnished the invoices for the energy delivered on pass through basis from 30.04.2022 onwards based on the actual coal utilized by blending various consignment of coal and requested TANGEDCO to make VFC payment on weekly basis as per the directions of MoP letter dated 05.05.2022 under clause (g).
- TANGEDCO passed the invoices raised for the period from 30.04.2022 to 29.05.2022, by considering the price of coal on shipment basis i.e. First in" first out (FIFO) basis.
- For the invoices raised by M/s.SEPC from 30.05.2022 to 09.07.2022, TANGEDCO restricted the per unit cost, based on the bench mark Energy Charge Rate fixed by MoP for the similar generators that are supplying power to TANGEDCO through imported coal under Section 63.
- In the meanwhile, M/s SEPC vide letter dated 25.07.2022 had requested TANGEDCO to arrange the balance VFC charges for the invoices raised

from 30.04.2022 to 09.07.2022 as per the directions of MoP letter dt 05.05.2022 under clause (f) as follows:

"Clause 4(f) The PPA holders shall have an option to make payment to the generating company according to the bench mark rate worked out by the group or at a rate mutually negotiated with the generating Company".

1.24. Based on the request of SEPC, by adopting clause 4(f) of the MoP directions the invoices already submitted by M/s. SEPC for the period 30.04.2022 to 09.07.2022 were reworked by TANGEDCO

- i. by considering the GCV in the invoices for the calculation. However, GCV furnished as per the third party sampling and testing report of imported coal by Central Institute of Mining and Fuel Research, Dhanabad) will be final.
- ii. by considering the coal on shipment basis i.e First in first out (FIFO) basis since the blending of coal has impact on GCV and in per unit cost.
- iii. by considering the Station Heat rate and Auxiliary consumption on normative basis, as per the provisions of PPAI Addendum #3.
- iv. By considering the coal price of imported coal procured through various sources as per the invoices submitted by M/s. SEPC without ceiling limit.

1.25. M/s. SEPC vide their letter dated 13.09.2022 had stated that :

- the actual expenditure incurred for the period from 30.04.2022 to 09.07.2022 was Rs.311.29 Crs whereas TANGEDCO made payment for Rs.285.55 Crs.
- requested TANGEDCO to make arrangements, to get MOP rate for VFC charges from 30.04.2022 to 09.07.2022 and arrange to pay the balance VFC charges as additional temporary relief only towards VFC pending based on the variable charges claimed based on pass through Mechanism.

1.26. M/s. SEPC vide letter dated 10.11.12 had claimed invoice for an amount of Rs.26,03,61,256/- towards balance Variable fuel charges payable for the period

30.04.2022 to 11.07.2022 for the energy supplied on actual pass through basis enclosing an Undertaking for reimbursement of Variable Fixed charges towards outstanding amount to be paid to them. The same was placed before Board of TANGEDCO in its 109th meeting held on 19.11.2022 for direction, where the matter was deferred.

1.27. The Invoice was uploaded by M/s.SEPC in Praapti portal and the default trigger date falls on 25.01.2023. The balance claim of Rs.26,03,61,256/- by M/s.SEPC was disputed by TANGEDCO.

1.28. The payment of disputed amount is subjudice before the High Court of Madras. Further, the disputed amount has to be paid after settlement of disputes only and all the above payment is subject to the tariff to be approved / reconciled by the Commission.

1.29. TANGEDCO made VFC Payment made to M/s. SEPC for the power supplied from 10.07.2022 onwards at the benchmark rate fixed by the Committee constituted by Ministry of Power (MoP) every fortnight considering the updated prices of imported coal and shipping charges even though M/s.SEPC raised invoices as per actual pass through.

1.26. Aggrieved by Tariff determined by the MoP Committee and TANGEDCO's implementation of the MoP directives, M/s.SEPC has filed a Writ Petition No 28512 of 2022 before Hon'ble High Court of Madras praying that

- (a) To declare that the MoP's direction dated 05.05.2022 to the extend electricity tariff to be worked out by a Committee is null and void;

- (b) Declare that energy charges(part of tariff)determined by the Committee constituted by the MoP pursuant to its direction dated 05.05.2022 are non-est;
- (c) Declare that TANGEDCO ought to pay electricity tariff based on the actual generation;
- (d) Declare that Commission has the power to determine the Pass-through cost based on actual cost of generation of M/s.SEPC.
- (e) Direct the TANGEDCO to pay Rs.8.19/-per unit as interim measure tariff to M/s.SEPC for the period from 30.04.2022 to till 31.12.2022.

1.27. The case was listed for admission 01.11.2022. The Hon'ble Court had directed TANGEDCO in Para 9 of the Order as follows:-

"TANGEDCO to pay the tariff payable to M/s.SEPC as per the rate fixed by MoP from time to time from the month of July to the month of October 2022 within a period of one week from the date of receipt of a copy of this order. With regard to the other issues raised in the writ petition, that can be decided la~ on after filing the counter by the respective respondents"

1.28. On the basis of the interim directions of the Hon'ble High Court, TANGEDCO had made the payments as per the rates fixed by the MoP for the period from 10.07.2022 to 31.10.2022. As per the Interim directions of the Hon'ble Court, the bench mark rate fixed by MoP, the pending VFC amount payable to M/s SEPC for supplying power for the period from 22.08.2022 to 31.10.2022 was Rs.153,42,58,371/- out of which an amount of Rs.100 Cr was paid on 11.11.2022 and the balance amount of Rs.53,42,58,371/- was paid on 14.11.2022. TANGEDCO has paid the bench mark rate notified by the MoP once in fortnight.

1.29. As per the Clause 1 (Definitions) of the Addendum # 3 to the PPA,

"Ceiling VFC means the annual Merit Order cut off determined every year by the Commission upfront and in case no such Merit Order cut off is determined or published for the Year upfront, then the cap shall be on the basis of domestic coal (from Talcher mines) based variable cost applicable to the Company's Facility. However, the revised value of ceiling price for VFC shall be reviewed and mutually refixed at the end of 3 years under review mechanism."Since, the annual Merit Order cut off is not determined by the Commission, then the cap shall be on the basis of domestic coal (from Ta/Cher mines) applicable to the company's facility."

1.30. As per the above provisions of PPA /Addendum #3, the VFC has to be paid as a pass through subject to the ceiling limit. However, as per MoP guidelines, the VFC has to be paid as a pass through without ceiling limit / the benchmark rate fixed by the Committee constituted by Ministry of Power (MoP) every fortnight considering the updated prices of imported coal and shipping charges. Hence the above clause in PPA/ Addendum3 is exempted.

1.31. As per the Schedule 3 of the PPA / Addendum #3,

"Cost of Primary Fuel or CPF per unit shall mean an allowance for the cost of Coals, i.e. the Argus GAR 6000 Kcal/Kg (NAR 5500) for coal indices API3, API5, ICI2, ICI3 or any types of imported coal with GAR 5000 Kcal/Kg (4600 NAR Basis) coal indices, which is suitable for boiler specifications required for the Facility during the applicable Month calculated in accordance with the following formula in accordance with Regulation 43 of the TNERC Tariff Regulations."

1.32. As per the above provisions of PPA/Addendum #3, M/s.SEPC has to procure imported coal from the approved CSTA only.

1.33. M/s. SEPC is not procuring imported coal from M/s.Jera Global Markets as per the Coal Supply and Transportation Agreement (CSTA), but procuring coal of various ranges GCV through various sources like E-Auction/ Local Traders.

1.34. TANGEDCO vide its letter dated 23.11.2022 and 01.12.2022 intimated M/s.SEPC that TANGEDCO had withdrawn the provisions of pass through allowed up to 31.12.2022 to SEPC plant with effect from 01.12.2022 due to lesser demand by giving prior notice as per the direction of MoP dated 28.06.2022.Also, it was informed that the fixed charges and variable charges will be paid as per the terms of PPA/ADDENDUM #3 and not in pass through rate. M/s.SEPC Power private Ltd shall supply power as per provisions of PPA following the dispatch instructions of the SLDC without any deviation subject to the provisions of grid relating to scheduling and dispatch and the capacity charges and energy charges will be paid as per the provisions of PPA and not in pass through rate from 01.12.2022.

1.35. M/s SEPC in its letter dated 17.12.2022 intimated to TANGEDCO that JERA (Coal Supply Agreement and Coal Supply transportation Agreement), in view of material change in circumstances prevailing as on date, issued a notice of termination of CSTA on 07.10.2022 and FSA got terminated on 21.11.2022 . In this regard TANGEDCO had informed M/s.SEPC vide its letter dated 30.12.2022 that any modification /change in the agreements regarding procurement of coal shall be as per the directions/ approval of the Commission only. Also, it is mandatory that M/s. SEPC has to maintain valid FSA till the term of PPA in order to declare the plant availability and to claim invoices.

2. Contention of the Petitioner in I.A.:-

2.1. The above Miscellaneous petition is filed seeking approval and ratification for having purchased power from M/s.SEPC (1x525 MW) Power Private Limited on pass through basis to meet out the power demand from April 2022 to November 2022, as a onetime measure, by relaxing certain provision of PPA/ Addendum 3. The Applicant has prayed for the following:

- " a. The power dispatched from M/s.SEPC Power Private Limited to the grid on pass through basis as per the MoP guidelines dated 05.05.2022.
- b. To fix the tariff for the power supplied from 30.04.2022 to 30.11.2022 by considering the payment already made by relaxing certain provision of PPA/ Addendum 3 as one-time measure."

2.2. However, by oversight, the Respondent herein namely M/s.SEPC Power Private Limited who is the generator concerned was not arrayed as a party respondent in the above M.P. Since they are a necessary and proper party since the M.P. involves tariff fixation, it is prayed that the Commission may implead them in the above case.

3. Reply of behalf of Respondent:

3.1. The instant Reply is being filed on behalf of SEPC Power Private Limited SEPC Respondent") to the captioned Petition filed by Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO" "Petitioner") under Section 86(1)(b) of the Electricity Act, 2003 (Act) read with Regulation 16(1) of Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.

3.2. M/s. SEPC is an imported coal based ("ICB") thermal power project of 525 MW at Tuticorin ("Project). Apropos executing a power purchase agreement with TANGEDCO on 12.02.1998 PPA SEPC achieved its Commercial Operation Date (COD) on 30.11.2021. From 30.04.2022 to 30.11.2022 ("Supply Period), SEPC supplied power to TANGEDCO in terms of the letter dated 29.04.2022 which inter alia stated as follows:

" i. In order to avoid load shedding and to utilize the entire power, TANGEDCO board has allowed the intra state Power Generator, M/s SEPC Power Private Limited (Tuticorin)-525 MW to supply the power on pass through basis for a period of one month or may be extended till December 2022, as one time measure, by deviating the provisions of PPA...."

3.3. In respect of the above Supply Period, TANGEDCO has filed the captioned Petition seeking the following reliefs:

- "It is prayed that the Commission may be pleased to ratify/approve*
- a. The power dispatched from M/s SEPC Power Private Limited to the grid on pass through basis as per the MOP guidelines dt. 05.05.2022*
 - b. To fix the tariff for the power supplied from 30.04.2022 to 30.11.2022 by considering the payment already made by relaxing certain provisions of PPA/Addendum 3 as a one- time measure."*

3.4. At the outset, it is submitted that in reference to prayer 'a' above (ie. approval of power dispatched from SEPC to the grid), SEPC is agreeable to ratify the quantum of power supplied by SEPC to TANGEDCO during the Supply Period. SEPC has supplied (1) 431.047 million units of power to TANGEDCO from 30.04.2022 to 09.07.2022; and (ii) 430.971 million units of power from 10.07.2022 to 30.11.2022. The quantum of power supplied by SEPC to TANGEDCO is not disputed by either party. In fact, TANGEDCO is

correct in stating that the entire power supplied by SEPC to TANGEDCO between 30.04.2022 to 30.11.2022 is on pass through basis. However, the pass through ought to be allowed in terms of TANGEDCO's letter dated 29,04,2022. Hence, in terms of prayer 'a', the quantum of power supplied on pass through basis in deviation of the PPA by SEPC to TANGEDCO, may be ratified by the Commission.

3.5. M/s. SEPC is also opposing the captioned Petition on maintainability and merits as detailed hereinbelow. The Preliminary Objections and Main Submissions on behalf of M/s. SEPC are as follows:-

- i. Tariff for SEPC w.r.t. Supply Period ought to be filed under section 11(2) of the Act

3.6. It is an admitted position that the supply of power by SEPC to TANGEDCO during Supply Period i.e 30.04.2022 30.11.2022, was pursuant to directions under Section 11 of the Act, as also established by the following events/document :-

- (a) The meeting held on 12.04.2022 whereat the Minister of Power ("MOP") directed, and TANGEDCO agreed, to operationalize all the Intra State Power Generates as per section 11 of the Act;
- (b) TANGEDCO's letter dated 29.04.2022 allowing SEPC to supply power on pass through basis in deviation of the PPA to handle the precarious power shortage in the State.

- (c) MOP's directions dated 05.05.2022 issued under Section 11 of the Act (MOP Directions) and
- (d) TANGEDCO's letter dated 07.05.2022 referring to the MOP Directions and requesting for supply of power.

3.7. Section 11 of the Electricity Act is a special provision which provides power to the State Government to issue directions to generating companies for supply of electricity when extraordinary circumstances arise. Section 11 is extracted hereunder:-

“Section 11 (Directions to generating companies) (1) Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation - For the purposes of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the State public order or a natural calamity or such other circumstances arising in the public interest

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

3.8. As per the Act, the Commission has been given the power under Section 11(2) to offset the adverse financial impact of the directions passed under Section 11(1) on any generating company. Moreover, it is a settled position that the benchmark energy charges rate (Benchmark ECR) decided by the MOP are interim in nature and are subject to final determination of adverse financial impact by the Commission under Section 11(2) of the Electricity Act. [See Para 28 in GMR Energy Limited v. Karnataka

Electricity Regulatory Commission & Ors, Appeal No. 37 of 2013 and 303 of 2013 (APTEL judgment dated 23.5.2014) and Para 59 of Fata Power Company Lid v Gujarat Urja Vikas Nigam Limited & Ors., Petition No. 128/MP/2022 and L.A. No. 64 of 2022 (CERC-judgment dated 03.01.2023)

3.9. In view of the above, TANGEDCO's prayer requesting the Commission to fix the tariff for the power supplied from 30.04. 2022 to 30.11.2022 implies that the Commission is ought to determine tariff for SEPC and take into consideration the adverse financial impact of the power supplied for the Supply Period.

3.10. This determination of financial impact under Section 11 directions cannot be conducted within the scope of Section 86(1)(b) of the Act, Power supplied by a generator under the exclusive provision of Section 11 is different from general supply of power under the pre-agreed terms of power purchase agreements.

3.11. In this regard, reliance is placed on the following judgments:-

- (a) Judgment dated 23.05.2014 passed by APTEL in GMR. Energy Limited. Karnataka Electricity Regulatory Commission, Appeal Nos. 37 of 2013 and 303 of 2013, wherein it was held that:-

“34....

The State Commission under Section 86(1)(b) of the Electricity Act. 2003 has to regulate the electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies through agreements. This is not the case where the generator has supplied power against an agreement with the distribution licensee Therefore, the principles of determination of generation tariff on cost plus basis under Section 61, 62 and 86(1)(b) of

the Act shall not be applicable for determining the compensation to offset the adverse financial impact of the directions under Section 11(1) of the Act on a generating company.

53. Summary of our findings.

.....

v) The principles of determination of tariff under Section 61, 62 and 86(1)(b) of the Act shall not be applicable for determination of compensation to the generating company to offset the adverse financial impact of the direction under Section 11(1) of the Act

(b) Judgment dated 18.09.2017 passed by Hon'ble Karnataka High Court in Star Metalics and Power Private Limited v. State of Karnataka & Ors., Writ Petition Nos. 60231-233/2016 wherein it was held that:-

"29. The rate fixation under Section 11 (2) of the Act in peculiar circumstances is not the exercise of usual tariff determination as envisaged under Section 62 of the Act, but it is an independent quasi-judicial order envisaged under Section 112 of the Act for determination of the compensation to be given to the generating companies."

3.12. In view of the above, it is submitted that TANGEDCO's prayer 'b' seeking the Commission to fix the tariff for the power supplied by SEPC during the Supply Period cannot be entertained by the Commission in proceedings filed under Section 86(1)(b) of the Act. TANGEDCO ought to have approached the Commission under Section 11(2) of the Act for determination of tariff in respect of power supplied by SEPC pursuant to directions issued under Section 11(1).

3.13. TANGEDCO's prayer 'b' seeking the Commission to fix the tariff for power supplied by SEPC during Supply Period, TANGEDCO has failed to make any

submissions or furnish relevant information which is necessary for determination of tariff by the Commission.

3.14. For period between 30.04.2022 and 09.07.2022, TANGEDCO has admitted that SEPC raised invoices for Rs.311.29 Cr. based on actual cost incurred by it, however TANGEDCO reworked the invoices and made payment of Rs.285.55 Cr. to SEPC. TANGEDCO also records that the balanceclaim of Rs.26.03 Cr. is disputed by TANGEDCO. Even though the MOP Committee had not provided any a Benchmark ECR for SEPC for the period from 30.04.2022 to 09.07.2022, TANGEDCO applied the Benchmark ECR for similar generators and arrived at the figure of Rs.285.55 Crores, which TANGEDCO has failed to provide any justification for. In absence of Benchmark ECR for the said period, the payment ought to be made to SEPC as per actuals costs. Further, from 10.07.2022 onwards, TANGEDCO made payment to SEPC on Benchmark ECR against the invoices raised by SEPC based on actual costs. That Benchmark ECR was not adequate to cover the actual expenditure incurred by SEPC, hence SEPC has raised all its invoices based on actual costs. TANGEDCO has failed to make any submissions or furnish any data to establish that the rates determined by MoP which are temporary in nature, tantamount to or reflect the actual cost of purchase of power and is the appropriate tariff to be paid to SEPC for the Supply Period

3.15. For determining the final tariff for the Supply Period, the Commission is required to undertake an assessment of the actual cost incurred by the generator for supplying power. This is in line with settled law and TANGEDCO's own letter dated 29.04.2022 i.e.

that the power was to be supplied by SEPC to TANGEDCO under the Section 11 direction in deviation of ALL, provisions of the PPA. It is incorrect on part of TANGEDCO to contend that Section 11 direction was issued for supply of power in deviation to only some provisions of PPA. This understanding is neither borne out of the letters of TANGEDCO nor by directions issued by MoP.

3.16 In this view, the Commission ought to evaluate various parameters to determine the extent of financial impact of Section 11 directions on SEPC. As regards the VFC component, apart from the cost of coal import, the Commission is also required to take into consideration other expenses such as shipment costs, tax and customs, handling charges etc. Moreover, the technical parameters of the power plant also have a direct correlation with the quantum of power generated by a power plant and the cost incurred for the same viz

- (i) Plant Availability Factor
- (ii) Gross Station Heat Rate
- (ii) Secondary Fuel Oil Consumption
- (iv) Auxiliary Energy Consumption
- (v) Gross calorific value of coal
- (vi) Number of Start/Stops

3.17. M/s.SEPC also suffered losses due to abrupt and untimely withdrawal by TANGEDCO of its directions issued vide Letter dated 29.04.2022. Based on TANGEDCO's assurance to purchase power under pass through mechanism until 31.12.2022, SEPC had already made arrangements for coal and secondary fuel (oil) and advance money paid towards it 45 days in advance, as per the required procedure. As a

result, SEPC was subject to liability of Rs.117.27 Crores for withdrawal of the arrangement. Moreover, several other factors such as transportation cost, prevailing exchange rates, applied taxes, O&M costs etc. were also contributory in the overall cost of power generation for SEPC. In absence of these relevant and necessary details, the Commission cannot determine or fix the tariff for the Supply Period, as sought by TANGEDCO in the captioned Petition.

3.18. In respect of the power supplied during the Supply Period that the Benchmark ECR prices stipulated by the MOP Committee are inadequate and do not reflect the actual expenditure incurred by SEPC during the said time. In this regard, the following points may be noted:-

(a) For period from 30.04.2022 to 09.07.2022, no Benchmark ECR was fixed for SEPC. Accordingly, SEPC raised an invoice for Rs.311.29 Crores based on actual cost of power generation. According to SEPC, the ECR works out to be [Rs. 7.22 per kWh] for the period from 30.04.2022 to 09.07.2022.

(b) For period from 10.07.2022 to 30.11.2022, the Benchmark ECR determined by MOP Committee was followed by TANGEDCO, which stood at the following rates:-

Sl. No.	Control Period		MoP Benchmark ERC (Rs./kWh)	Actual Tariff (Rs./kWh)*
	From	To		
1	05 May 2022	28 May 2022	-	5.95
2	29 May 2022	11 Jun 2022	-	8.28
3	12 Jun 2022	25 Jun 2022	-	8.24

4	26 Jun 2022	09 Jul 2022	-	7.64
5	10 Jul 2022	22 Jul 2022	6.84 (Revised from 6.88)	7.68
6	23 Jul 2022	06 Aug 2022	6.54	6.86
7	07 Aug 2022	20 Aug 2022	6.00	7.38
8	21 Aug 2022	03 Sep 2022	5.36	7.18
9	04 Sep 2022	17 Sep 2022	5.31	7.28
10	18 Sep 2022	01 Oct 2022	5.76	6.05
	02 Oct 2022	15 Oct 2022	6.56	NA
11	16 Oct 2022	29 Oct 022	6.77	6.77
12	30 Oct 2022	12 Nov 2022	6.71	NA
13	13 Nov 2022	26 Nov 2022	6.45	NA
	27 Nov 2022	30 Nov 2022	6.26	NA

*Rates are approximate as the billing cycle was on weekly basis as per MoP directions and MoP rates issued were on fortnightly basis. Column reflecting NA reflects non-scheduling of power by TANGEDCO.

3.19. M/s. SEPC supplied power for the Supply Period as per Section 11 of the Act on pass through basis in deviation of the PPA, however SEPC has suffered an adverse financial impact on account of this supply. The actual cost of production incurred by SEPC is much more than the stipulated ECR, hence the Benchmark ECR determined by the Committee are not adequate to cover the cost of generation actually incurred by SEPC.

3.20. For the Supply Period, SEPC has raised invoice about Rs.613.10 Crores, out of which SEPC has received about Rs.526.81 Crores from TANGEDCO as Variable Fuel Cost ("VFC") and HT Bills adjusted about Rs.11.65 Crores. This payment is deficient by an amount of Rs.74.64 Crores (as VFC) which remains to be paid by TANGEDCO as SEPC's actual cost of generation.

3.21. The tariff for the Supply Period has to be evaluated according to such principles which focus on the existent conditions and actual costs incurred during the Supply Period, and not on the principles used in determining the general tariff of a generating company for long term basis. It is reiterated that the principles of tariff determination are not applicable in cases where the rate is to be determined under Section 11(2) of the Electricity Act by the State Commission. In this regard, reliance is placed on the judgment dated 03.10.2012 passed by the Hon'ble APTEL in case of Himatsingka Seide Ltd. v. Karnataka Electricity Regulatory Commission, Appeal No. 141 of 2012 and batch.

3.22. The directions issued under Section 11 as well as TANGEDCO's letter dated 29.04.2022, are unequivocal that the power supplied during the Supply Period will be in deviation of the PP A. Since the directions to supply power were issued under Section 11(1), the terms and conditions thereof were also notified along with Section 11 directions itself. Hence, during the Supply Period, the terms of the PP A were kept in abeyance and power was supplied by SEPC to TANGEDCO on basis of the terms decided by the MOP and followed by TANGEDCO.

3.23. As per SEPC, the proposed ECR worked out on basis of actual expenditure incurred by SEPC during the Supply Period is Rs.7.11 per kWh. SEPC is simultaneously filing a Miscellaneous Petition before the Commission seeking determination of pass through of financial impact suffered by SEPC for power supplied to TANGEDCO during the Supply Period. SEPC reserves its right to make detailed submissions regarding the

actual costs incurred by SEPC for power supplied during the Supply Period in the said Petition filed by SEPC.

3.24. The Commission may consider the following preliminary objections and submissions made by SEPC while deciding the captioned Petition and disregard prayer 'b' in the captioned Petition.

3.25. M/s. SEPC could not commence operations despite obtaining the Consent to Operates because the cost of coal had risen to an unprecedented level, making it unviable for SEPC to procure coal and generate power within the terms of the CSTA and PPA. The ceiling limit on the VFC is under the agreed provisions of the PPA and has no relevance in the present matter which is regarding directions issued and power supplied under Section 11 of the Electricity Act. It is submitted that SEPC has filed a separate petition before the Commission seeking relief due to the issues arising out of rise in imported coal. As far as the variable cost is concerned, the order of the Commission being referred to in Par 8 of the petition, which states that power will be supplied at a particular variable cost, was based on the “prevailing” circumstances existing at the said time. In fact, this understanding was based on mutual consent of both parties because the prevailing rates of imported coal at the said time were less than even the domestic coal prices. Considering that the existing circumstances during the Supply Period had considerably changed and admittedly, the cost of imported coal had risen to an unprecedented level, TANGEDCO itself directed power to be supplied on pass through

basis, in deviation of PPA or any earlier agreed terms. Thus, there is no violation of Order/directions passed by this Commission, as sought to be alleged.

3.26. The MOP had directed generators to supply power at the rate of interim tariff to be determined by a Committee, until final determination of tariff based on actual costs by the appropriate commission. Further, as per TANGEDCO's own admission, (i) there was unprecedented rise in the price of imported coal; (ii) the cost of power available at the said time was upto Rs.20 per kWh, which was subsequently subjected to a ceiling of Rs.12 per kWh. In contrast to this, the Benchmark ECR stipulated by MOP in the range of Rs.5.31 per kWh to Rs.6.84 per kWh is evidently not adequate.

3.27. The power supply during the Supply Period was exempted from only 'certain' provisions of the PPA. As per the directions under Section 11, SEPC was directed to supply power (i) on pass through basis, (ii) in deviation from the PPA / Addendum 3, (iii) wherein pass through will be determined by the Commission. Moreover, the deviation from the PPA was applicable in its entirety, which means that deviation was allowed from all terms and conditions of the PPA. The MOP Directions and TANGEDCO's letter dated 29.04.2022 are unambiguous that the power supply will be in 'deviation of the PPA' which encompasses all existing terms and conditions of the PPA. TANGEDCO cannot read into the clear and unequivocal terms of power supply to suit its own erroneous interpretation.

3.28. TANGEDCO had assured SEPC that the power generation and supply during Supply Period will be on pass through basis and SEPC will be reimbursed the actual cost

of power generation, along with a fair margin. The Benchmark ECR were released by the MOP as interim tariff, however the final tariff will be determined by the Commission based on actual expenditure incurred. Since power was supplied on pass through basis under Section 11 directives, SEPC is entitled to be paid as per the actual cost of power generation. In view thereof, an amount of about Rs.26 Crores is still outstanding from TANGEDCO to SEPC for the power supplied between 30.04.2022 to 09.07.2022. In fact, in its letter dated 13.09.2022, SEPC informed TANGEDCO that out only a part payment of Rs.285.55 Crores out of total payment of Rs.311.29 Crores had been received by SEPC and requested TANGEDCO to pay the balance VFC. Moreover, the request for payment as per MOP Benchmark ECR was made for interim payment, without prejudice to SEPC's right to recover actual cost of power generation, which is evident from the fact that SEPC continued to raise its invoices based on actual costs incurred from time to time.

3.29. The Benchmark ECR were released by the MOP committee as interim tariff to be paid to generators during the Supply Period and the final determination of the financial impact of pass through is to be made by the Commission based on actual expenditure incurred by SEPC.

3.20. TANGEDCO has however rightly pointed out that supply of power under Section 11 Direction is on pass through basis without ceiling mechanism. However, it is denied that the supply of power has to be as per MoP rates. It is submitted that supply of power under Section 11 directions once made on temporary rates fixed by the Govt., are bound

to be assessed by the Commission in order to determine actual cost of generation. It is also denied that SEPC was obligated to procure coal only from JERA. Without prejudice to the fact that supply of power under Section 11 is in deviation of provisions of the PPA, PPA provides for procurement of alternate coal in certain circumstances. Be that as it may, for supply under Section 11, SEPC approach JERA and requested for supply of imported coal after TANGEDCO's direction dated 29.04.2022. However, JERA categorically responded stating that a 45 days prior notice was required for coal to be procured through the CSTA arrangement. In order to supply power on immediate basis, SEPC procured alternate coal and commenced power supply from 30.04.2022. This was duly informed to TANGEDCO. Power supplied during the Supply Period was pursuant to directions issued under Section 11 of the Electricity Act in an extraordinary situation of power crises. The MOP Directions and the TANGEDCO letter were unequivocal that the power shall be supplied during this period in deviation from the PPA, hence, SEPC was not bound by any provisions of the PPA/Addendum 3 as alleged or at all. The terms of power supply during the Supply Period were fixed by MOP and TANGEDCO in deviation from the PPA, hence, the terms of the PPA have no relevance in the present case.

3.21. M/s. SEPC had written to TANGEDCO vide letter dated 13.01.2023 appropriately objecting to such contention. Declaration of capacity by SEPC is no way dependent on a valid CSTA.

3.22. As regards the 'Prayer' in the Petition, SEPC is in support of the relief sought by TANGEDCO in prayer 'a' as stated, however, the relief sought in prayer "b" ought to be

rejected by the Commission in view of the Preliminary Objection and Main Submissions stated in the present Reply.

4. Rejoinder to the Counter filed by the Respondent:-

4.1. Though this petitioner vide its letter dated 29.04.2022 had directed the respondent to dispatch power on pass through basis based on the directions of the Ministry of Power, Government of India, the committee constituted by the Ministry had fixed tariff for the respondent only on 11.07.2022. The said committee has fixed the Energy Charge Rate (ECR)/ Variable Fuel Cost (VFC) at a rate of Rs.6.88 kWh for this Respondent with effect from 10.07.2022 and the same was communicated to the respondent on 18.07.2022. Thereafter the respondent is bound by the tariff fixed by the MoP Committee only.

4.2. The respondent had not disputed the letter directing them to supply power on pass through basis dated 29.04.2022 nor the communication sent to them on 18.07.2022 where tariff was fixed by the Committee as per MoP directions. Even in these proceedings, the Respondent has not challenged the letter dated 05.05.2022 of the MoP where the manner of fixation of tariff has been set out by the Ministry.

4.3. The respondent never achieved CoD within the stipulated period nor has met the demands of TANGEDCO by procuring coal through FSA and had obtained CoD only on 30.11.2021. The respondent had obtained its Consent to Operate from TNPCB only on 30.03.2021 and had not supplied power till 28.04.2022 citing the reason that the

imported coal price to be purchased from JERRA had increased abnormally and therefore it was unviable for the respondent to run the plant with the prevailing ceiling variable cost as per PPA and thereafter commenced their supply only from 30.04.2022 by purchasing coal through stock on sales basis and e-auction tender.

4.4. From the counter filed by the respondent, it could be seen that there arises no dispute with prayer "a" and therefore the same may be allowed by the Commission.

4.5. A claim under Section 11 (2) must be made by the Respondent if it requires offsetting of any adverse financial impact. Section 11 (2) reads as under:

“(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

4.6. In the present case, it is not the case of the Petitioner that the Respondent has suffered any adverse financial impact. According to the Petitioner, the rates fixed by the MoP Committee under section 11 (1) are just and proper and the Petitioner is seeking to ratify the same. If the Respondent is aggrieved by the rates fixed by the MoP committee, it is for the Respondent to file an appropriate petition under section 11 (2) of the Act.

4.7. The letter dated 29.04.2022 of the Petitioner has clearly enunciated that they had allowed the respondent to supply power on pass through basis for a period of one month or may be extended till December 2022 as one time measure, by deviating the provisions of PP A. Since MoP has fixed the tariff for this respondent from July, the same has been given effect to and the same was not disputed nor challenged by this

respondent at all. Since the above actions are at variance of the agreed PPA, the Petitioner has filed the present petition for ratification. Therefore, there is no infirmity in the Petitioner filing the present petition under section 86(1)(b). That apart, section 86(1)(b) is an overarching provision and confers general power on the Commission. Therefore, the power under section 86(1)(b) will also include the power under section 11(2) and the same have to be read harmoniously. Section 11(2) does not begin with any non-obstante clause and therefore cannot be said to be overriding the general powers under section 86. Therefore, there is no infirmity in the present petition filed by the Petitioner.

4.8. The ECR fixed under Addendum#3 is Rs.2.42 per unit whereas as per the MoP Committee's directions, the ECR paid to this respondent was Rs.6.80 per unit. Therefore, there is no financial loss or impact to the Respondent and therefore they cannot claim any relief under section 11 (2) of the Act. The pass through rates is much higher than the PPA rates. In fact, it was also to the Respondent's advantage. This can be inferred from the fact that the Respondent had not supplied power despite achieving COD on 30.11.2021 but had chosen to supply power only by pass through phase. M/s. SEPC are already under an obligation to supply power to TANGEDCO in terms of the long term PPA entered into between the SEPC and TANGEDCO. In such circumstances, a direction to supply power at a higher tariff cannot be said to cause "adverse financial impact" that requires to be offset.

4.9. On the contrary, as noted by the MoP in its directions, there is no provision in the existing PPAs for pass-through for increase in cost under any circumstances. In the absence of any such provision, payment of higher tariff requires the approval/ ratification of the Commission.

4.10. Scheduled CoD (SCOD) was to be achieved by this respondent on 08.04.2021(6 months from the date of Start-up Power) but this respondent had only achieved CoD only on 30.11.2021 and the respondent did not declare its capacity availability to the SLDC as per the PPA terms and conditions even after achieving CoD on 30.11.2021 due to the expiry of Consent to Operate (CTO) issued by TNPCB. Hence its TANGEDCO who had faced adverse financial impact by procuring power at higher cost to meet out the Grid demand due to the actions of the respondent. Therefore, the respondent had not only breached its obligations but had caused severe financial impact on the petitioner.

4.11. The judgements relied by the respondent in paragraph no. 11 is not relevant to the present case as the facts of the case are different.

4.12. The respondent had furnished invoices for the energy delivered on pass through basis from 30.04.2022 based on the actual coal utilized and TANGEDCO had approved the invoices raised for the period 30.4.2022 to 29.05.2022 by restricting the cost of coal on procurement of coal based on shipment on first in first out (FIFO) basis.

Period	Units generated in KWH	SEPC Claim in Rs.	Payment already made by TNAGEDCO in Rs.	VFC claimed by M/s. SEPC	Revised VFC worked by TANGEDCO	VFC already passed for payment	Difference in VFC to be considered for payment	Amount of be passed for payment in Rs.
			A	C	D	E	F=D-E	Units X G
30.04.2022	5676363.64	20,714,,255	18,618,473	3.6492	3.6559	3.2800	0.3759	2,134,017
01.05.2022 to 08.05.2022	74087272.73	314,096,614	268,935,810	4.2395	4.2661	3.6300	0.6361	47,125,555
09.05.2022 to 15.05.2022	515945454.6	318,703,899	300,244,728	6.1354	5,4172	5.7800	-0.3628	-18,847,270
16.05.2022 to 22.05.2022	16803636.38	159,853,906	117,457,418	9.5100	7.0646	6.9900	0.0746	1,254,387
23.05.2022 to 29.05.2022	24414545.48	214,841,907	170,657,673	8.7998	7.4725	6.9900	0.4825	11,779,869
Total	1,02,82,10,581	87,59,14,102						

4.13. The payments claimed by the respondent are arbitrary and inflated and TANGEDCO had made the payments bound on the actual coal cost incurred by the respondent and the additional charges of GCV of imported coal, Aux consumption, and station capacity as per the provisions of PPA. The Petitioner is supposed to take pass through only for cost of coal and calculate the other parameters as per the PPA.

4.14. For the invoices raised by the respondent for the period 30.05.2022 and 09.07.2022, TANGEDCO had restricted the per unit cost based on the bench mark ECR foxed by Mop for similarly placed generators supplying power to TANGEDCO through imported coal under Section 63, since MoP had not fixed any tariff for the abovementioned period. An amount of Rs.258 Crores was sanctioned towards VFC

Period	Units generated in KWH	SEPC Claim in Rs.	Payment already made by TNAGEDCO in Rs.	VFC claimed by M/s. SEPC	Revised VFC worked by TANGEDCO	VFC already passed for payment	Difference in VFC to be considered for payment	Amount To be passed for payment in Rs.
			A	C	D	E	F=D-E	Units X G
30.05.2022 to 05.06.2022	58854545.51	477,197,504	400,210,909	8.1080	7.6942	6.8000	0.8942	52,627,164
06.06.2022 to 13.06.2022	51596363.64	437,768,991	350,855,275	8,4845	7.6942	6.8000	0.8942	46,136,968
13.06.2022 to 20.06.2022	61636363.64	504,976,676	403,101,818	8.1928	7.4116	6.5400	0.8716	53,722,781
20.06.2022 to 27.06.2022	5523636.364	48,743,379	36,124,582	8.8245	7.5436	6.5400	1.0036	5,543,601
27.06.2022 to 04.07.2022	42916363.64	337,120,911	278,098,036	7.8553	7.4317	6.4800	0.9517	40,843,103
04.07.2022 to 09.07.2022	37592727.27	277,595,976	243,600.873	7.3843	7.1558	6.4800	0.6758	25,405,568
Total		2,08,34,03437	1,71,19,91,493					

S. No	VFC claimed by SEPC	Amount paid by TANGEDCO
1.	3,111,614,018	Rs.2,58,79,05,595
2.		(additional amount paid after reworking) Rs.267,549,753
Total		2,855,455,348/-

4.15. The VFC claimed by the respondent for the period 30.04.2022 to 09-07-2022s Rs 3,111,614,018 and as per the workings of TANGEDCO, the amount paid by the TANGEDCO Rs.2,587,905,595. Thereafter, this respondent had requested for payment of pending VFC charges for the same period by letter dated 13.09.2022 for which TANGEDCO had also reworked and had again made a payment of Rs.267,549,753 as

additional VFC and therefore the total amount paid by TANGEDCO for the above mentioned period is Rs.2.855,455,348/-

4.16. For the power procured from 30.04.2022 to 09.07.2022, even though the respondent had purchased coal through stock on sale basis and e-auction tender at a higher rate compared to the other similar imported coal based plants, TANGEDCO had paid VFC to the tune of Rs.285 Crores by admitting the entire fuel cost on pass through basis. However, SEPC had originally filed a revised claim of Rs.311.16 crores but in the reply statement, they are claiming a sum of Rs.311.29 crores.

4.17. The committee formed by MoP did not recognize the respondent company in their ICB plants, the committee later on after request of the petitioner, on 11.07.2022 had included the respondent company in their report and had fixed the benchmark rate for the respondent and thereafter the benchmark ECR was fixed for this respondent and TANGEDCO had made the VFC payments to SEPC for the supply in accordance with the bench mark rate fixed by MoP.

MoP Direction	Benchmark ECR Fixed by Mop	Control period
11.07.2022 – 5 th report	Rs.6.88/kWh Revised in 02.08.2022 directions to Rs.6.84/kWh	w.e.f 10.07.2022
02.08.2022-6 th report	Rs.6.54/kWh	w.e.f 23.07.2022
12.08.2022-7 th report	Rs.6.00/kWh	w.e.f 07.08.2022
29.08.2022-8 th report	Rs.5.36/kWh	w.e.f 21.08.2022
09.09.2022-9 th report	Rs.5.31/kWh	w.e.f 04.09.2022
06.10.2022-10 th report	Rs.5.76/kWh Rs.6.56/kWh	w.e.f 18.09.2022 w.e.f 02.10.2022

26.10.2022-11 th report	Rs.6.77/kWh	w.e.f 16.10.2022
09.11.2022-12 th report	Rs.6.71/kWh	w.e.f 30.10.2022

4.18. On 23.11.2022 & 01.12.2022, TANGEDCO vide its letter Lr.No.CE/PPP SE/IPP/EE/IPP/AEE3/F.SEPC/D.394/2022 and Lr.No.CE/PPP/SE/IPP/EE/IPP/AEE3/F.SEPC/D.406/2022 respectively had directed the respondent to supply power as per provisions of PPA following the dispatch instructions of the SLDC without any deviation to the PPA and this respondent had in its letters vide SEPC/TANGEDCO/HO/OPN/2022/02 dated 29.11.2022 & SEPC/TANGEDCO/HO/OPN/2022/03 dated 07.12.2022 had requested TANGEDCO to off-take power as per the arrangement under pass through mechanism until December 2022 or to compensate for the losses incurred in view of the preparations to run the unit till the end of December 2022.

4.20. Considering the directions of MoP, the imported coal based plants in Tamil Nadu viz. M/s.Coastel Energen, M/s.IL&FS, M/s OPG and M/s.SEPC were requested to commence supply of power on pass through basis, as a one-time measure by deviating the provisions of PPA to meet out the power crises and accordingly supply is scheduled by all the Generations as per Merit order dispatch and TANGEDCO paid VFC as per the MoP rates only.

4.22. The respondent's claim on pass through towards parameters like Station Heat rate, Auxiliary energy consumption, GCV etc., could not be considered, since MoP had insisted pass through of imported coal price only and not on the other working

parameters. Hence TANGEDCO had considered the parameters as per the terms of the PPA. The other ICB power generators, the VFC was paid in accordance with MoP only and the other parameters were determined in accordance with PPA.

4.23. Therefore, the respondent cannot now claim that the ECR fixed by MoP is not adequate to cover the cost of generation actually incurred by SEPC and therefore this petitioner had fixed the rates for the other parameters in accordance with the PPA.

4.24. The respondent themselves had admitted that they have not commenced to supply the power even after getting consent to operate, which is not only against the provisions of the PPA but had also incurred financial loss to TANGEDCO.

4.25. The respondent did not procure even one consignment of imported coal as per FSA from M/s.JERRA even from the date of CoD, i.e. from 30.11.2021. Even according to the provisions of PPA/Addendum #3, the respondent has to procure imported coal from the approved CST A only in accordance with Clause 16 of the PPA, but instead the respondent had procured coal through stock on sales basis and e-auction tender and had unilaterally terminated the FSA with M/s.JERRA. Hence this respondent cannot claim compensation to offset the adverse financial impact under Section 11 (2) of the Act.

4.26. The tentative benchmark rates were arrived at by the Committee of Members after considering all requisite parameters necessary such as:

(i) Coal Price; Ocean Freight; (ii) GCV (iii) SHR; (iv) APC; (v) Secondary Oil Fuel Consumption; (vi) Transit Loss; (vii) Forex Rate; (viii) Clean Energy Cess; (ix)

GST; (x) Port Handling/Inland Transportation, (xi) Primary Fuel Cost including ocean freight, (xii) Secondary Fuel Cost; (xiii) ECR total.

Therefore, all the parameters are decided in determining the benchmark ECR and the payments towards this is paid by TANGEDCO and only the fixed charges/capacity charges are paid in accordance with the PP A by this petitioner.

4.27. In view of the above, the necessary pre-requisite for applicability of Section 11 (2), that this respondent must have suffered adverse financial impact by virtue of the directions issued under Section 11 (1) of the Act, 2003 does not stand fulfilled in the present case. Therefore, in the present case, there arises no occasion for the Appropriate Commission to intervene under Section 11 (2) of the Electricity Act, 2003.

4.28. To summarize, it is submitted that-

- (a) TANGEDCO has considered the price of imported coal as claimed by SEPC as per their Invoices in pass through basis but restricted claim towards other parameters for the period from 30.04.2022 to 09.07.2022 and had admitted the VFC as fixed by the MoP for the period from 10.07.2022.
- (b) MoP has fixed the tariff for each and every generator separately, duly considering their Operational parameters and all requisite parameters necessary such as transport, taxes, handling charges etc., Hence the request of SEPC has no merits.

- (c) Allowing this respondent more than MoP bench mark rate will jeopardize other generators who had entered in competitive bidding and who were supplying power at the same period.
- (d) In this regard, the Hon'ble CERC in the petition No.128/MP/2022 filed by Tata Power Company Limited seeking compensation for supplying power under pass through has directed vide Order dated 03.01.2023 as follows:

"The operational parameters as worked out on monthly basis. shall be lower of the actual or as specified in the Tariff Regulations, 2009 during the operation of the Section 11 Directions.

ECR shall be worked out as a per the following formula:

$$\text{ECR [Rs/kWh]} = (\text{Heat Rate [kCal/kWh]} \cdot 1(1 - \text{Auxiliary Consumption [\%]}) \cdot \text{IGCV of coal consumed [kal/kg]} \cdot \text{Coal cost [Rs/MT]} / 1000$$

In respect of the respondent plant, Addendum # 3 to the PP A is as per the TNERC Tariff regulation and hence operational parameters as per PPA were considered.

- (e) The respondent has not procured imported coal as per the FSA approved by the Commission but from various other sources. Therefore, the respondent is incurring unnecessary, unapproved additional expenditure and trying to pass on the burden to TANGEDCO under the pretext of the directions issued by MoP, Government of India under Section 11(1) of the Act.
- (f) The Respondent, having accepted the offer of TANGEDCO to supply power on passthrough basis, cannot turn around and challenge the parameters of fixing

tariff as per the MoP directions dated 05.05.2022 and the committee constituted by the MoP.

- (g) In the instant case, no direction has been issued upon generating companies to supply power which saddles the generating company with any additional obligation or burden, or mandates supply of power beyond, or extraneous to the PPAs that have already been entered into between such generating companies and the respective procurers. Generators such as the respondent are already under an obligation to supply power to TANGEDCO in terms of the long-term PPA entered into between the respondent and TANGEDCO. A direction to a generating company to comply with the obligations under the PPA cannot be construed as an event that has "adverse financial impact" that requires to be offset in any manner.

4.29. The Respondent had originally accepted to supply power on pass through basis by complying with the MoP's method to fix tariff. It is only by letter dated 13.09.2022 that the Respondent challenged the tariff. Therefore, the Respondent has acquiesced to the tariff fixation method and tariff fixed by the MoP Committee and is estopped from challenging the same.

4.30. In a similar case, another generator has filed a petition before the CERC raising similar grounds in the case of petition No.128/MP/2022, in which by order dated 03.01.2023, the CERC has held as follows:

"123 (l) the operational parameters as worked out on monthly basis shall be lower of the actual cost or as specified in the Tariff Regulations, 2009 during the operation of the Section 11 Directions.

(m) ECR shall be worked out as a per the following formula:

ECR [Rs/kWh} = (Heat Rate [kCal/kWh) I (J - Auxiliary Consumption [%]) I GCV of coal consumed [kal/kg]) X Coal cost [Rs/MT] /1000"

4.31. The Respondent has also not filed any document to justify its claim that the actual expenditure incurred by it is Rs.7.11 per kWh except vague and self-serving statements. Therefore, the Respondent has not discharged the burden of proof on its shoulders to prove that it has incurred more expenditure from the cost of coal than what the MoP committee has fixed.

4.32. The Defendant cannot seek relief in a case filed by the plaintiff. Therefore, even on law, if the Respondent was aggrieved by adverse financial impact, it was for the Respondent to file an appropriate petition under section 11 (2) of the Act.

4.33. Under the scheme of the Electricity Act, 2003, directions issued under section 11 are mandatory and binding on the generators and they cannot shrug off their responsibility to follow such directions.

5. Findings of the Commission:-

5.1. The seminal point which arises for consideration in the present petition is whether the bench mark rate fixed by the MoP is applicable for the period from 30-04-2022 to 30-11-2022 and thereafter pursuant to the direction issued under section 11 of the

Electricity Act, 2003 for the purpose of supply of power by SEPC to the Distribution Licensees is interim in nature as contended by the respondent herein.

5.2. It is not in dispute that an expert committee was constituted solely for this purpose with a clear direction that such Benchmark price for supply on pass through basis shall be arrived at considering the coal price, shipping cost and O&M cost with fair margin. The Committee is a high powered committee consisting of representatives from MoP, CEA and CERC. On perusal of material records, we find that the Government of India issued a direction to all Generating Companies under Section 11 of Electricity Act 2003 on 05.05.2022 making it obligatory on the part of all imported coal based plants to operate and generate power to their full capacity with options to supply power to the licensee i.e., the procurer at the tariff worked out by the Experts Committee constituted by it or in the alternative to supply power at a rate mutually negotiated with PPA holder i.e., the licensee. It is also seen that further directions have been issued from time to time on the same lines set out in the original communication dated 05.05.2022.

5.3. On a careful consideration of the communication dated 05.05.2022 of the Government of India, it emerges that the rate fixed by the committee is not mandatory and not binding upon of the generator and it is exactly for the said reason that clause 4(f) finds place in the said communication. Situated thus, the rate fixed by the expert committee can be said to be only interim in nature in all cases where a generating company finds that the rate so fixed is not good enough to meet its cost of generation. In the present case the respondent has made it explicitly clear that the rate fixed by the

expert committee is not viable from its point of view and hence approached the commission for pass through of the actual cost of generation.

5.4. Coming to the prayers sought for by the petitioner, it is seen that there is no divergence of stand between the petitioner and the respondent in this regard except for the fact that while the petitioner seeks the actual pass through on the basis of cost of generation on the basis of rates worked out by the expert committee of Gol, the respondent seeks the actual pass through on the basis of the entire cost of generation. There is no difference in the stand taken by the petitioner and respondent in regard to the period of supply for which ratification is sought and the relaxation of the PPA to make way for payment for the supply of energy at the MoP rates.

5.5. Thus, the issue now boils down to a single point i.e., whether the rate fixed by the MoP is final or interim in nature. In our view, given the explicit provision in para 4(f) of the Government of India communication dated 05.05.2022 there is no manner of doubt that the rate fixed by the Committee can be said to be final only in cases where the generating company is agreeable to the rates fixed by the committee and not in cases where the generating company prefers to supply power at a mutually agreed rate with the licensee i.e., the procurer. As a natural corollary, it goes without saying that in the absence of any such broad agreement between the parties on the price for the supply of the energy, it is the Commission which is empowered to determine the adverse impact on the generating company arising out of the Section 11 direction and issue direction for offsetting the same.

5.6. It is further seen that the respondent herein has preferred the separate petition for offsetting the adverse financial impact under Section 11 of the Electricity Act 2003, and the same is pending before the Commission. Needless to say that the extent to which respondent herein suffered adverse financial impact requires long drawn arguments between the parties and extensive perusal of material records which cannot be done in the instant petition and it can only be a subject matter of the separate petition which has already been filed. Insofar as the present petition is concerned, we confine ourselves to the ratification of the power supply for the period stated in the prayer and the relaxation of the PPA for such purpose. As there is no disagreement between the parties on these aspects, we are inclined to ratify the dispatch of power from the respondents generating station to the petitioner's grid for the period from 30.04.2022 to 30.11.2022 by relaxing the provisions of the PPA to make way for supply of power as per Section 11 direction outside the purview of PPA.

5.7. With regard to rate payable by the petitioner to the respondent for the energy supplied from 30.04.2022 to 30.11.2022, the rate fixed by the expert committee constituted by the Government of India and the payments made hitherto based on the same shall be treated as an interim arrangement subject to the outcome of the separate petition preferred by the petitioner under Section 11 of the Electricity Act 2003.

In fine, it is directed as follows:-

(1) The power dispatched from M/s SEPC Power Private Limited (Tuticorin) 525 MW to the grid on pass through basis as per the guidelines issued by the Ministry of Power, Government

of India dated 05.05.2022 under Section 11 of the Electricity Act, 2003 from 30-04-2022 to 30-11-2022 is hereby ratified.

(2) The cost of generation of power dispatched by the Respondent to the petitioner's grid from 30.04.2022 to 30.11.2022 is allowed on pass through basis as per the rates from time to time fixed by the Expert Committee constituted by MoP vide its communication dated 05-05-2022 as a stop-gap arrangement and payment based on such rates shall be treated as an interim one with liberty to the respondent to agitate all the issues concerning the adverse impact suffered on account of Section 11 directions in the separate petition which has been preferred specifically for this purpose.

(3) To the extent of power supplied by the respondent to the petitioner's grid from 30.04.2022 to 30.11.2022 as per the guidelines of the Committee constituted by MoP, the provisions in the PPA concerning the payment for the supply of power from the respondent to the petitioner stand relaxed.

(4) Both parties shall bear their respective costs.

Petition is ordered accordingly.

(Sd.....)
Member (Legal)

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**