

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 27thDay of June 2024

PRESENT:

ThiruM.Chandrasekar Chairman
ThiruK.Venkatesan Member
and
ThiruB.Mohan Member (Legal)

M.P. No. 30 of 2023

Tamil Nadu Generation and Distribution
Corporation Limited
144, Anna Salai
Chennai – 600 002.
Represented by its Chief Financial Controller /
Deposits and Documentation

... Petitioner
Thiru Richardson Wilson
Advocate for the Petitioner

Vs.

M/s. SEPC Power Private Limited,
Represented by its Chief General Manager (CGM),
MEIL House, 1st Floor, 395, Anna Salai,
Teynampet, Chennai 600 018.

... Respondent
Ms.Gayatri Aryan and
Thiru Rajesh Jha, Advocates
from M/s. J. Sagar Associates

The Miscellaneous Petition No.30 2023 filed under the Electricity Act, 2003 seek to ratify / approve the following:-

- (a) 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 20.02.2023 under Section 11 of the Electricity Act 2003, to meet out the Tamil Nadu's growing demand- supply gap caused by the extension of summer 2023, on an 'as and when required' basis, from March 2023 till September 2023 or thereafter if required;

- (b) To fix the tariff for the power supplied from 16.04.2023 to 30.09.2023 as per the tariff fixed by Ministry of Power, Government of India stated in para 14 above by relaxing certain provisions of PPA/Addendum 3 as a one-time measure and to take into consideration the sums already paid by TANGEDCO as per the MoP direction;
- (c) The payment for VFC made by TANGEDCO to SEPC for the power supplied from 29.05.2023 to 17.07.23 was by restricting their claim to the tariff by restricting the cost of secondary oil as per PPA .
- (d) Pass such other or further orders as the Commission may deem fit and proper in the facts and circumstances of the case and thus render justice.

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&Mr.RajeshJha, Advocates from M/s. J.Sagar Associates, Advocate for the Respondent 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 Petitioner is engaged in the business of generation and distribution of electricity to various categories of consumers in the State of Tamil Nadu and is a distribution licensee in the State of Tamil Nadu. The electricity so required is availed from various sources such as its own generating stations, and purchase of power from various Central Generating Stations of its share, Independent Power Plants, Captive Power Plants, Wind Generators, Co-generation plants, Bio mass plants, Merchant power plants, Power exchanges etc.

1.2. The Petitioner and the Respondent originally entered into a PPA dated 12.02.1998, which underwent subsequent amendments based on various orders of the Commission. Based on the order of the Commission dated 10.01.2020 in M.P. No. 27 of 2016, Addendum 3 was entered into by which the Respondent was supposed to achieve COD by 08.04.2021 (actually achieved on 30.11.2021).

1.3. 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.

1.4. The Ministry of Power, Union of India ("MoP") had issued a directive Section 11 of the Electricity Act, 2003 in March and April, 2022 to overcome the demand for power that prevailed all over India due to non-operationalization of ICB power plants. The Hon'ble Minister for Power had convened a meeting on 12.04.2022 at New Delhi with heads of State Electricity Boards and representatives of the power plants and advised that all ICB plants should be operated. The MoP had issued a direction dated 05.05.2022 to form a Committee with representatives from MoP, CEA and CERC to calculate the rate at which the power shall be supplied to PPA holders.

The State of Tamil Nadu and TANGEDCO implemented the said orders and the Respondent herein supplied power on pass through basis.

1.5. Thereafter the respondent supplied power under the section 11 direction on passthrough basis from 30.04.2022 The MoP extended the directions from time to time up to 31.12.2003.

1.6. The petitioner herein filed M.P.No. 1 of 2023 praying for:-

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

1.7. The aforesaid M.P.No.1 of 2023 is still pending adjudication before this Commission.

1.8. The Ministry of Power, Gol again vide order dated 20.02.2023 has issued direction u/s 11 of the Electricity Act, 2003, in order to ensure sufficient availability of electricity across the country to meet the anticipated demand in larger public interest. The said order dated 20.02.2023 was in operation from 16.03.2023 to 15.06.2023. The directions issued in the said order dated 20.02.2023 are as follows:

"5. In the light of the above, to ensure availability of electricity to meet the anticipated demand, the generation from ICB plants needs to be increased. Accordingly, in larger public interest, for ensuring optimum generation from ICB plants, the following directions are issued under Section-11 of the Electricity Act, 2003:

(a) All ICB power plants shall operate and generate power to their full capacity. Where the imported coal based plant is under NCLT, the Resolution Professional shall take steps to make it functional.

(b) Considering the fact that the present PPAs do not have adequate provision for pass through of the present high cost of imported coal, the rates at which the power shall be supplied to PPA holders shall be worked out by a Committee, constituted by the

Ministry of Power (MoP), with representatives from MoP, CEA and NTPC. This Committee shall ensure that the bench mark rates of per costs 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 cost etc. and a fair margin.

(c) The fixed charge will be as per the Power Purchase Agreements, or as has already been agreed mutually between the generating company and the producers.

(d) The PPA holder shall have an option to make payment to the generating company according to the benchmark rate worked out by the Committee or at a rate mutually negotiated with the generating company.

(e) These plants will supply power in the first instance to the PA holders. Any surplus power left thereafter or any power for which there is no PPA will be sold in the Power Exchanges.

(f) Where the plant has PPA with multiple DESCOS, if one DISCOM does not schedule any quantity of power according to its PPA, that power will be offered to other PPA holder(s) and any remaining quantity thereafter will be sold through the Power Exchanges.

(g) Where any DISCOM / State is not able to enter into mutually negotiated rates with the generating company and is also not willing to procure power at the bench mark rate worked out by the Committees, or is not able to make weekly payment, then such quantity of power shall be sold in the Power Exchanges.

(h) If the PPA holder does not wish to requisition power from ICB plant for the following week/weeks, then it will inform the ICB plant at least three days in advance indicating the period of intended non-requisitioning. The minimum period of requisitioning / non-requisitioning shall be for a minimum of one week. Where a PPA holder does not send a requisition three days in advance for the following week, the ICB plant may generate and sell power to any other Distribution Licensee at the benchmark rate calculated by the Committee plus the fixed charge. In case of sale of power under above arrangement, the PPA holder shall not be liable to pay fixed charges for the duration of sale of power to any other distribution licensee. Once an intimation for not requisitioning power for a specified period as mentioned above, is given, the PPA holder shall not be entitled to get power from the ICB plant for that period.

(i) If power is not scheduled by the procurer, the generator will bid the power in the power exchange, at the tariff to be determined by the Committee or at the mutually agreed tariff with the procurer. However, the bid will be cleared on MCP discovered on the power exchanges. In case the average MCP is less than the tariff determined by the Committee or the mutually agreed tariff with the procurer, then the generator will not be bound to sell power in the power exchange. However, if the average MCP is more than the tariff determined by the Committee or the mutually agreed tariff with the procurer, then the generator will mandatorily sell power in the power exchange.

(j) The net profit, if any, by sale of power which is not sold to the PPA holder and is sold in the Power Exchanges, shall be shared between the generator and PPA holder in the ratio of 50:50, on a monthly basis.

(k) As per the PPA, the Payment Security Mechanism (PSM) shall be maintained. A Letter of Credit (LC) is to be maintained by the procurer for the contracted power to be purchased. In case there is no LC advance payment shall be made. The LC shall be unconditional. The LC shall be promptly encashed for payment and it should be timely recouped by the procurer for purchase of power from the generator. If there is no LC or advance payment or if the LC has not been recouped after encashment, then the generator will not schedule power to the procurer and will be entitled to sell the power in power exchanges. No formal consent from the procurer will be required for such sale. The net profit, if any, from such sale on power exchanges shall be shared with the procurer(s), on a monthly basis.

(l) Payment by the procurer will be made on a weekly basis. A rebate in accordance with CERC norms or as per the PPA, whichever is higher shall be applicable.

(m) The generator shall maintain coal stock as per the extant norms so that the plant operates at its full capacity.

(n) The Generator shall submit a weekly report to MoP for the generation and sale of power from the ICB plants

(o) If the plant is made available as per the directions issued under Section 11 of the Act, no penalty can be imposed by the procurer on account of availability under PPA

(p) The plant will have to operate as per the directions, notwithstanding any prior outstanding dues of the generating company. Such outstanding dues shall be dealt with separately.

(q) The Committee will calculate the benchmark ECR based on the index linked with lowest cost of imported coal.

(r) The Committee will calculate the mining profit based on the index used for calculation of benchmark ECR. The generating company will deduct the mining profit, if the coal consumed by the ICB plants is sourced, from its own mines or owned by the group companies of the ICB plants.

(s) The ECR will be capped to the benchmark ECR calculated by the Committee using the index linked with lowest cost of imported coal minus the mining profit (in case mines is owned by seller or its group companies) or actual ECR based on the price of the imported coal consumed by ICB plants, whichever is lower.

(t) In case of non-compliance of the direction given by Ministry of Power, penalty shall be imposed as per the provisions of the Electricity Act, 2003.

(u) The Bench Mark worked out by the Committee shall be reviewed every 15 days, taking into consideration the change in the price of imported a shipping costs, etc.

1.9. The directions issued by the MoP was further extended by Order dated 12.06.2023 from 16.06.2023 to 30.09.2023.

1.10. SEPC on its part had filed M.P.No.3 of 2023 praying for the following reliefs:

"(i) Direct and/or permit the petitioner to terminate the Coal Supply and Transportation Agreement (CSTA) dated 09.02.2018,

(ii) 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 remove the ceiling price mechanism,

(iii) 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.

(iv) amend the PPA to incorporate the above changes and such other changes as this Commission may deem fit and pass such further or other orders as this Commission may deem fit and pass such further or other orders as this Commission may deem fit proper in the facts and circumstances of the case and thus render justice."

When the said matter was being heard by the Commission vide interim Order dated 09.03.2023, this Commission has directed as follows:

"On consideration of the rival submissions this Commission is inclined to pass the following Interim Order in the best of interest of both the parties.

1) Termination of CSTA by JERA is hereby approved by the Commission. The Petitioner SEPC is directed to get FSA / CoalLinkage from Coal India Ltd (ECC/SCCL) expeditiously.

2) The respondent TANGEDCO shall give NOC to facilitate the petitioner SEPC to procure the Fuel Supply Agreement for arranging suitable Domestic Coal for running their machine from the Indian Coal field. There will not be any ceiling price in the Indian Coal

3) The Petitioner BEPC shall commence supply of power to the Respondent TANGEDCO on pass through basis as per the rates fixed by the Ministry of Power and as revised from time to time by MoP...."

1.11. The MoP, Gol, vide Lr. No.23/13/2021-R&R (Pt.3) Dt.31.03.2023 had modified the directions dated 20.02.2023 about calculation of the benchmark ECR based on the index price

linked with the lowest cost of imported coal. The MoP had provided for the calculation of ECR as hereunder:

“5(q) The ECR will be calculated as under:

- (i) The cost of coal based on the index linked with the lower cost of imported coal, (or)*
- (ii) The cost of coal minus the mining profit as per the provision of 5(r)-(or)*
- (iii) Actual ECR based on the price of imported coal provided by the seller.*

5(r) In case the coal is sourced from the country, in which the coal mine owned by the seller or its group companies is located, the mining profit will be calculated based on the index used from imported coal from such country and the same will be deducted by the generating company.

5(s) The clause 5(s) will be deleted.”

Therefore, clearly, if the price of coal used by the respondent is higher than the benchmark ECR fixed by the MOP Committee, only the benchmark ECR price can be paid by the petitioner.

1.12. The bench mark Energy charge rate is issued by the committee constituted by Ministry of Power (MOP) every fortnight considering the updated prices of imported coal and shipping charges as follows:

Sl. No.	MoP Letter date	Bench Mark ECR Period		SEPC
		From	To	
1.	31.03.2023	15.03.2023	29.03.2023	4.83
2.	03.04.2023	30.03.2023	12.04.2023	4.89
3.	19.04.2023	13.04.2023	26.04.2023	4.98
4.	04.05.2023	27.04.2023	10.05.2023	4.97
5.	19.05.2023	11.05.2023	24.05.2023	5.02
6.	29.05.2023	25.05.2023	07.05.2023	4.96
7.	13.06.2023	08.06.2023	21.06.2023	4.93
8.	03.07.2023	22/06.2023	05.07.2023	4.70
9.	25.07.2023	06.07.2023	19.07.2023	4.23
10.	28.07.2023	20.07.2023	02.08.2023	3.81
11.	16.08.2023	03.08.2023	16.08.2023	3.80
12.	23.08.2023	17.08.2023	Till Date	3.91

1.13. Anticipating the necessity availing power from ICB power plants during summer months of 2023, Board of TANGEDCO in its 111th meeting accorded approval to extend the period of power supply by the imported coal-based power plants within Tamil Nadu from February 2023 to May 2023 on pass through basis as a onetime measure.

1.14. Despite the precautions taken by TANGEDCO, TANGEDCO was in need of power to maintain uninterrupted power supply, summer crisis and hence, purchase of power from the intra state generator became inevitable. Hence TANGEDCO had also reiterated all the user Generators including SEPC to operationalize the plant as per the MoP directions anticipating the necessity of availing power from ICB power plants during summer months of 2023. The Board of TANGEDCO in its 114th meeting accorded approval to extend the period of power supply by the imported coal-based power plants within Tamil Nadu from June 2023 to September 2023 on pass through basis as a onetime measure.

1.15. 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 16.04.2023 based on the dispatch instructions of SLDC as per Board directions. Ministry of Power vide No. 23/13/2021-RSR (Pt-3) Dt. 31.03.2023 had communicated the bench mark Energy Charge Rate (ECR) fixed by the expert committee for M/s. SEPC as Rs.4.83 per unit w.e.f. 16.03.2023.

1.16. As expected, an all-time high demand of 19387 MW and 423.785 MU was met on 20.04.2023 against 10% increase in last year all time high demand of 17563 MW and 388.078 MU. Despite the availability of Solar, Wind power, own generations and CGS Generations, the demand during solar hours of Jun' 23 was 18522 MW /412.487 MU on 16.06. 2023 and in all

other days it was in the range of 17000 MW. The demand was met through purchasing power from power exchanges in DAM, RTM along with the ICB plants within Tamil Nadu. Due to prolonged summer period this year, the peak hour power demand had reached the level of 18238 MW on 15.06.2023 on account of AC load during night hours. The wind generation pattern was in the decreasing trend after 21.00 hrs. every day and the demand was met by purchasing power through Real Time Market from Power exchanges. TANGEDCO met out the peak demand effectively in summer in June 2023 by purchasing power through Power Exchanges at an average price of Rs.5.857/- per unit through both exchanges (IEX and PXIL) from Indian Grid through S1-(S2&S3), for its utmost Transfer Capability of 4000 MW to 4100 MW and managed without load shedding.

1.17. TANGEDCO made VFC Payment to SEPC for the power supplied from 16.04.2023 to 29.5.2023 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. TANGEDCO has paid M/s. SEPC the variable charge as per the directions of the MoP viz. on the actuals or the tariff fixed by the MoP whichever is lower. However, M/S. SEPC has raised invoices as per actual pass through. The fixed charge tariff is paid as per PPA term and for the month of June 2023 it is Rs.1.81 per unit. The payment for VFC made by TANGEDCO to SEPC for the power supplied from 29.05.2023 to 17.07.2023 was by restricting their claim to the tariff by restricting the cost of secondary oil as per PPA.

1.18. TANGEDCO is continuing to procure power from SEPC to meet out the Grid demand and until 30.09.2023 if necessary. TANGEDCO is bound to follow a directive issued by the Ministry of Power, Government of India, u/s 11 of the Electricity Act, 2003, to meet out the anticipated demand for power in the larger public interest. However, since the same is in

variance of the PPA, the present petition is necessitated seeking the ratification and approval of this Commission and to fix the tariff for such period.

2. Reply on behalf of Respondent:-

2.1. This Reply is filed on behalf of M/s SEPC Power Private Limited EPC/Respondent) to the captioned Petition by Tamil Nadu Generation and Distribution Corporation Ltd. ("TANGEDCO/Petitioner) filed for ratification of power supplied by SEPC to TANGEDCO under Section 11(1) of the Electricity Act, 2003 ("Act) in 2023.

2.2. 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. During the following supply periods, SEPC supplied power to TANGEDCO under Section 11(1) of the Act in terms of Ministry of Power's ("MoP") directions dated 05.05.2022 and 20.02.2023, at the benchmark energy charges rate ("Benchmark ECR") against the actual cost of generation viz.

Sl. No.	Supply Periods	TANGEDCO's requisition	Quantum supplied (MU)	Actual Cost (In Rs. Cr.)	Adjustment HT Bills (In Rs. Cr.)	Payment received / expected from TANGEDCO (In Rs. Cr.)	Adverse impact (in Rs. Cr.)
1.	From 30.04.2022 to 30.11.2022 (Supply Period 1)	29.4.2022 and 07.05.2022	862.01	613.10	11.65	526.87	74.58
2.	From 16.04.2023 to 29.04.2023 (Supply Period 2)	15.4.2023	122.69	84.60	2.64	54.38	23.58

3.	From 16.04.2023 to 26.05.2023 (Supply Period 3)	16.05.2023	98.21	58.60	0.93	48.21	9.46
4.	From 29.05.2023 to 06.11.2023 (Supply Period 4)	29.05.2023	1442.87	660.68	6.48	587.52	66.68
	TOTAL		2525.78	1416.98	21.70	1220.98	174.30

2.3. TANGEDCO filed M.P. No. 1 of 2023 (TANGEDCO v. M/s. SEPC Power Private Ltd) ("2022 Ratification Petition") seeking ratification of power supplied during Supply Period 1. TANGEDCO has now filed the present petition ("2023 Ratification Petition") seeking ratification for power supplied in 2023 during Supply Periods 2, 3 and 4. TANGEDCO prays in M.P. No. 1 of 2023 and the present petition i.e. M.P. No. 30 of 2023 are similar viz.

	TANGEDCO's Prayers in M.P. No. 1 of 2023	TANGEDCO's Prayers in M.P. No. 30 of 2023
	It is prayed that the Commission may ratify / approve	In the facts and circumstances stated above, it is humbly 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. 05.03 2022.	the power dispatched from M/s. SEPC Power Private Limited (Tuticorin)-525 MIF to the grid on pass through basis as per the guidelines issued by the Ministry of Power, Government of India dated 20.02.2023 under Section 11 of the Electricity Act 2003, to meet out the Tamil Nadu's growing demand-supply gap caused by the extension of summer 2023, on an "as and when required" basis, from March 2023 till September 2023 or thereafter if required.

(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.	to fix the tariff for the power supplied from 16.04.2023 30.09.2023 as per the tariff fixed by Ministry of Power, Government of India stated in para 14 above by relaxing certain provisions of PPA/Addendum 3 as a one-time measure and to take into consideration the sums already paid by TANGEDCO as per the MoP direction: In addition to TANGEDCO's petitions, SEPC also filed a petition under Section 11(2)
(c)	NA	the payment for VFC made by TANGEDCO to SEPC for the power supplied from 29.05.2023 to 17.07.23 was 'by restricting their claim to the tariff by restricting the cost of secondary oil as per PPA (Annexure-A) may please be approved....."

2.4. In addition to TANGEDCO's petitions, SEPC also filed a petition under Section 11 (2) of the Act seeking compensation for adverse impact for power supplied in supply periods mentioned in Para 2 above i.e. D.R.P. No. 17 of 2023 [M/s. SEPC Power Pvt. Ltd v. TANGEDCO &Ors.] ("SEPC Section 11(2) Petition")

2.5. M/s. SEPC filed its counter in 2022 Ratification Petition on 28.03.2023 in which SEPC conveyed its no objection to Prayer (a) and objected to Prayer (b). SEPC submits the same no objection for Prayer (a) in the present petition and submits its contentions for Prayer (b) and (c). SEPC's objections viz legal framework of Section 11(2) of the Act and facts substantiating actual cost of generation are stated as follows:

2.6. M/s. SEPC's submissions on legal framework of Section 11 (2) of the Act also form part of SEPC's counter affidavit dated 28.03.2023 in 2022 Ratification Petition, along with SEPC's Section 11(2) Petition. The contentions are summarised in the following manner:

- (a) The Commission is vested with the powers under Section 11(2) to offset the adverse financial impact of the directions passed under Section 11(1) on any generating company.
- (b) Benchmark ECR decided by the MoP is interim in nature which is subject to final determination of adverse financial impact by the Commission under Section 11(2) of the Act. This has been settled by courts i.e. Hon'ble Supreme Court. Hon'ble Appellate Tribunal for Electricity ("APTEL") and Central Electricity Regulatory Commission ("CERC") viz:
 - (i) APTEL's judgment dated 23.05.2014 in Appeal No. 37 of 2013 (GMR Energy Limited v. Karnataka Electricity Regulatory Commission &Drs.) (Para 29)
 - (ii) Above judgment attained finality in view of Hon'ble Supreme Court's Order dated 30.03.2022 in Civil Appeal No. 8439-8440 of 2014 titled Bangalore Electricity Supply Company Ltd &Ors.) (Para 59)
 - (iii) CERC also adopted the approach as per APTEL's judgment, [Order dated 03.01.2023 in Petition No. 128/MP/2022 (Tata Power Company Ltd. v. Gujarat UrjaVikas Nigam Limited &Ors) (Para 59)]
- (c) Tariff for all Supply Periods has to be evaluated according to the provision enshrined in the Act. i.e the Commission having power under Section 11(2) to 'offset' adverse impact, and principles settled by the Hon'ble Tribunal (APTEL).

- (d) Tariff for all Supply Periods has to be determined as per actual cost incurred during the Supply Periods. This is also in line with MoP's directions dated 20.02.2023 recognising that the tariff payable to generating companies is required to take into consideration 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 [Para 5(b)]
- (e) It is noteworthy that determination of compensation under Section 11(2) is different from determination of tariff under Section 62 of the Act. [See Para 34 in APTEL's Judgment dated 23.05.2014 in Appeal No. 37 of 2013 (GMR Energy Limited v Karnataka Electricity Regulatory Commission &Ors.), Para 11.8 and 13.1 in APTEL's Judgment dated 03.10.2012 Appeal No.141 of 2012 (HimatsingkaSeide Ltd. v. Karnataka Electricity Regulatory Commission) and Para 29 in Judgment dated 18.09.2017 passed by Hon'ble Karnataka High Court in Writ Petition No. 60231/2016 (Star Metallies and Power Private Limited v. State of Karnataka &Ors)]

2.7. In view of the settled position of law, the Commission is prayed to take into consideration the actual cost of generation incurred by SEPC for the sole purpose of supply of power to TANGEDCO. Submissions in this regard have also been made in SEPC's Section 11(2) Petition along with submissions made under in Section B of this Reply.

2.8. On 20.02.2023, MoP issued fresh directions under Section 11(1) of the Act to all ICB power plants to supply power to the PPA holders on priority, on requisition basis, either according to the benchmark rate worked out by the "Committee' constituted by the MoP or at a rate mutually negotiated by the generating company and the procurer. The said directions

categorically noted that the present PPAs of ICB power plants do not have adequate provisions for pass through of the high cost of imported coal and that the MoP Committee was to ensure that the benchmark rates of power meet all the prudent costs of using imported coal for generating power.

2.9. However, the benchmark rate notified by MoP has not been adequate to cover the actual cost of generation for SEPC and has resulted in adverse impact. It is noteworthy that:

- (a) Pursuant to MoP's Section 11 directions dated 20.02.2023, TANGEDCO requisitioned supply of power for Supply Periods 2, 3 and 4 vide letters dated 15.04.2023, 16.05.2023 and 29.05.2023 respectively.
- (b) For Supply Period 2, SEPC commenced power supply on short notice i.e. received TANGEDCO's direction on 15.04.2023 and commenced supply starting from 16.04.2023. During Supply Period 2, the spot market imported coal prices were less than imported coal prices in Supply Period 1. However, SEPC was constrained to use the old coal stock ("2022 coal stock") due to direction on short notice by TANGEDCO. The same was also communicated to TANGEDCO vide SEPC's letter dated 20.04.2023.
- (c) For Supply Period 3, SEPC once again commenced power supply upon TANGEDCO's short notice direction on 16.05.2023, partly using 2022 coal stock and partly using fresh coal received on 18.05.2023.
- (d) For Supply Period 4, similar to earlier occasions, SEPC yet again commenced power supply on short notice i.e, received TANGEDCO's direction on 29.05.2023 and commenced supply on that day itself using the old coal stock in possession of SEPC.

2.10. So far as supply in 2023 is concerned, in view of the above, SEPC's plant remained shut down in several periods of reserved shutdowns (RSD) and re-initiation of supply of power. In this regard, following is noteworthy

Sl. No.	Non-supply period	Status of requisition	Adverse Impact under Section 11 (2)
1.	30.04.2023 and 01.05.2023	RSD due to no requisition.	Additional Secondary fuel i.e. oil consumption and expenses incurred on start-up power due to RSD.
2.	02.05.2023 to 08.05.2023	RSD despite requisition by TANGEDCO on 26.04.2023, for supply of power starting from 02.05.2023. RSD occurred due to the following reasons: a) On 01.05.2023, as the SEPC'S Unit was about to initiate Boiler Light-Up, State Load Despatch Centre ("SLDC) revised the scheduled generation to 0 MW SLDC issued similar direction on 02.05.2023. b) On 05.05.2023, TANGEDCO withdrew the Section 11 requisition with immediate effect from 09.05.2023.	Entitlement of SEPC for fixed charges
3.	09.05.2023 to 15.05.2023	RSD due to no requisition	Additional Secondary fuel
4.	27.05.2023 and 28.05.2023	RSD due to withdrawal of Section 11 requisition with immediate effect from 27.05.2023, vide TANGEDCO's letter dated 26.05.2023.	i.e oil consumption and expenses incurred on start-up power due to RSD.

2.11. In view of the above, owing to frequent lighting up of the unit, ramping up, ramping down and RSDs of the unit as per instructions from TANGEDCO/SLDC, there was a higher consumption of secondary fuel, thus leading to greater variance in the VFC. SEPC has suffered losses to the tune of Rs.4.09 crores due to abrupt and ultimately withdrawals of the arrangement by TANGEDCO. Accordingly SEPC ought to be compensated for the costs of secondary fuel on actual basis.

2.12. Benchmark ECR prices stipulated by the MoP Committee have been inadequate to cover SEPC's actual cost of generation in all supply periods. For supply periods in 2023, following Benchmark ECR was notified by MoP.

Sl. No.	Date of MoP's clarification	Control Period		MoP Benchmark ECR (Rs./kWh)	Actual Tariff (Rs./kWhr)*
1.	19.4.2023	13.4.2023	26.4.2023	4.98	6.82
2.	19.5.2023	27.4.2023	10.5.2023	4.97	7.14
3.	19.5.2023	11.5.2023	24.5.2023	5.02	6.09
4.	29.5.2023	25.5.2023	7.6.2023	4.96	4.89
5.	13.6.2023	8.6.2023	21.6.2023	4.93	4.55
6.	3.7.2023	22.6.2023	5.7.2023	4.70	4.26
7.	25.7.2023	6.7.2023	19.7.2023	4.23	4.23
8.	28.7.2023	20.7.2023	2.8.2023	3.81	4.32
9.	16.8.2023	3.8.2023	16.8.2023	3.80	4.30
10.	23.8.2023	17.8.2023	30.8.2023	3.91	4.37
11.	12.9.2023	31.8.2023	13.9.2023	3.91	4.39
12.	22.9.2023	14.9.2023	27.9.2023	3.97	4.51
13.	13.10.2023	28.9.2023	11.10.2023	3.96	4.57
14.	20.10.2023	12.10.2023	25.10.2023	4.05	4.63
15.	7.11.2023	26.10.2023	8.11.2023	4.24	4.74
Weighted Average				4.36	4.92

*Rates are approximate as the billing cycle was on weekly basis as per MoP directions and MoP rates issued were on fortnightly basis.'

2.13. The Commission may take into consideration the above aspects along with SEPC's pleadings in SEPC Section 11(2) Petition, to adequately compensate SEPC for supply of power to TANGEDCO under Section 11(1).

2.14. The Commission, vide final Order dated 31.08.2023 in M.P. No. 3 of 2022 [M/s. SEPC Power Private Limited v. TANGEDCO] has allowed SEPC to procure imported coal as per Argus Index and use the same for supplying power to TANGEDCO on pass through basis as an interim measure. Accordingly, on 12.09.2023, SEPC has submitted draft Addendum to the PPA to TANGEDCO for necessary approval on supply of power in compliance with the Commission's final Order dated 31.08.2023. SEPC has also written reminder letters dated 25.09.2003 and 21.10.2023 to TANGEDCO for according the requisite approval to the addendum. There is no response to the same by TANGEDCO.

2.15. M/s. SEPC is ready and willing to comply with the Commission's final Order 31.08.2023 in MP. No. 3 of 2022 [M/s SEPC Power Private Limited v TANGEDCO]. The Commission may pass appropriate directions to TANGEDCO for ensuring such compliance.

2.16. In view of the above, TANGEDCO's prayer 'b' seeking the Commission to fix the tariff fee for the power supplied by SEPC during the Supply Periods, ought not be entertained without adjudicating SEPC's Section 11(2) Petition. Further, TANGEDCO's prayer 'e' seeking the Commission's approval to payment of costs of secondary fuel as per PPA ought not be approved as the same is required to be paid on actuals, in accordance with the mandate of Section 11(2) of the Act.

2.17. It is clarified that TANGEDCO's attempt to raise the issue regarding date of achieving CoD by SEPC is frivolous at the present stage. In this regard, following is noteworthy:

- (a) During the hearings in MP. No. 26 of 2021 [M/s. SEPC Power Private Ltd v. TANGEDCO], SEPC had set out the effect of COVID-19 related government mandated lockdowns on the project and also how the project itself was affected by the same directly.
- (b) The Commission in its Order dated 09.11.2021 in MP. No. 26 of 2021 has already taken note of SEPC seeking an extended date for COD citing the COVID-19 pandemic restrictions and lockdowns as a reason for delay and had directed SEPC and TANGEDCO to invoke the revised clause 12.7(e)(ii) in the Addendum 3 for amicable settlement.
- (c) Further, the Commission vide same Order has already noted the delay and had directed SEPC and TANGEDCO to bring the project into operation without any further delay.
- (d) In view of the same, the issue with respect to delay in COD has already been discussed between SEPC and TANGEDCO, adjudicated upon by the Commission and appropriately settled.

2.18. The following is clarified:-

- (a) The Commission vide Order dated 09.03.2023 in M.P. No. 3 of 2022 [M/s SEPC Power Private Ltd. V. TANGEDCO] directed SEPC to commence supply of power to TANGEDCO on pass through basis as per the rates fixed and as revised from time to time by the MoP.
- (b) However, SEPC was also granted the liberty to approach the Commission for offsetting the adverse financial impact or to claim compensation under Section 11 of the Act.
- (c) This makes it abundantly clear that the Commission prima facie recognised that the MoP determined rates were not enough to cover prudent costs incurred by SEPC for supplying power to TANGEDCO by using imported coal.

2.19. It is erroneous to contend that if the price of coal used by SEPC is higher than the benchmark ECR fixed by the MoP Committee, only the Benchmark ECR price can be paid by TANGEDCO. In this regard, following is noteworthy:

- (a) MoP's Section 11 direction dated 20.02.2023 categorically noted that the present PPAs do not have adequate provisions for pass through of the present high cost of imported coal and that the MoP Committee was to ensure that the benchmark rates of power meet 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. Section 11(2) provides for the Commission's statutory power to determine compensation to a generator on any adverse impact suffered due to supply of power under Section 11(1) of the Act. Accordingly, TANGEDCO cannot be allowed to read clause 5(q), 5(r) and 5(s) of direction so as to contend that the benchmark ECR determined by MoP Committee restricts the amount payable by TANGEDCO. It is a settled position of law that a document has to be read as a whole and the spirit of it should be taken note of, and not to be carried away by the mere letters found therein [Ref. J. Chandrasekaran&Ors. v. V.D. Kesavan, 2012 SCC OnLine Mad 3910]
- (b) The MoP is authorised to issue directions under Section 11(1) of the Act, which it has done vide Notification dated 20.02.2023. However, that does not preclude the Commission's power for final determination of adverse financial impact. It is settled law that the scope of the instruments issued under a statutory mandate ought to be interpreted within the four corners of the said statute [Ref. KunjBehariLalButail&Ors. v. State of Himachal Pradesh &Ors., (2000) 3 SCC 40]
- (c) Clause 5(s) of MoP Notification dated 20.02.2023 read "The ECR will be capped to the benchmark ECR calculated by the Committee using the index linked with lowest cost of imported coal minus the mining profit (in case mines is owned by seller or its group companies) or actual ECR based on the price of the imported coal consumed by ICB plants, whichever is lower" However, vide clarification dated 31.03.2023, clause 5(s) was deleted. Clause 5(s) which had introduced the capping mechanism to Benchmark ECR was withdrawn by MoP vide clarification dated 31.03.2023. This itself spells out the intention of MoP to not restrict the VFC payable by PPA holders to generating companies.
- (d) Be that as it may, under the scheme of the Act, the MoP Committee is not empowered for final determination of ECR. Accordingly, TANGEDCO cannot be allowed to seek ratification of tariff paid as determined by the MoP Committee.

2.20. It is clarified that the basis of calculation of Benchmark ECRs by MoP Committee is beyond the knowledge of SEPC. As per TANGEDCO, MoP Committee has determined the Benchmark ECR considering the updated prices of imported coal and shipping charges. In terms of clause 5(b) of MoP direction dated 20.02.2023, the Committee was also required to consider O&M costs etc. and a fair margin for determination of the ECRs.

2.21. M/s. SEPC is not responding to the facts within exclusive knowledge of TANGEDCO. However, SEPC reserves its right to respond to such averments at an appropriate stage, if such a need arises.

2.22. M/s. SEPC contends that the rates of tariff paid by TANGEDCO are not sufficient to cover the costs incurred by SEPC. In this regard, the contents of the present reply and SEPC, Section 11(2) Petitions are hereby reiterated and reaffirmed. Further, TANGEDCO allowed to arbitrarily restrict SEPC's claim by paying for secondary oil supply of power by SEPC to TANGEDCO is under Section 11 directions on SEPC ought to be assessed both for the primary as well as secondary fuel.

2.23. Since M/s. SEPC has been directed to supply power under Section 11 of the Act in variance to the PPA, the tariff for the same pass through basis to mitigate the adverse financial impact on SEPC.

2.24. As regards the 'Prayer' in the Petition, SEPC is in support of the relief sought by TANGEDCO in prayer 'a', however, the relief sought in prayer 'b' and 'c' ought to be rejected by the Commission in view of the above submissions.

3. Findings of the Commission:-

3.1. The seminal point which arises for consideration in the present petition is whether the bench mark rate fixed by the MoPis applicable for the period from 16-04-2023 to 30-09-2023 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.

3.2. 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.

3.3. 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.

3.4. 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 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 actual 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.

3.5. 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.

3.6. 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 16.04.2023 to 30.09.2023 by relaxing the provisions of the PPA to make way for supply of power as per Section 11 direction outside the purview of PPA.

3.7. With regard to rate payable by the petitioner to the respondent for the energy supplied from 16.04.2023 to 30.09.2023, 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 20.02.2023 under Section 11 of the Electricity Act 2003, to meet out the Tamil Nadu's growing demand-supply gap caused by the extension of summer 2023, on an as and when required basis, from March 2023 till September 2023 is hereby ratified.

(2) The cost of generation of power dispatched by the Respondent to the petitioner's grid from 16-04-2023 to 30-09-2023 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 16-04-2023 to 30-09-2023 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**