

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 1st Day of August 2024

PRESENT:

Thiru M.Chandrasekar Chairman
Thiru K.Venkatesan Member
and
Thiru B.Mohan Member (Legal)

D.R.P. No.17 of 2023

M/s.SEPC Power Pvt. Ltd.
Represented by its Managing Director,
MEIL House, First Floor,
395, Anna Salai, Teynampet,
Chennai – 600 018.

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

Vs.

Tamil Nadu Generation and Distribution
Corporation Ltd, (TANGEDCO),
Rep. by its Chairman cum Managing Director,
N.P.K.R.R Maaligai,
144, Anna Salai,
Chennai – 600 002.

.... Respondent
Thiru.Richardson Wilson,
Advocate

This Dispute Resolution Petition stands preferred by the Petitioner M/s. SEPC Power Private Ltd., with a prayer to :-

- (a) Hold and declare that as per Section 11(2) of the Electricity Act, 2003, SEPC is entitled to receiving actual cost of generation for power supplied under Section 11(1) including Supply Periods mentioned in Para 1 above in order to mitigate adverse impact.
- (b) Direct TANGEDCO to compensate SEPC for:
 - (i) 'actual' cost of generation for power supplied by SEPC to TANGEDCO as per Section 11(1) including Supply Periods mentioned in Para 1 above along with interest and
 - (ii) court fee (paid as per Rs.122,69,82,905 Cr. till 12.06.2023 including interest computed i.e, Rs.18,65,27,398) paid by SEPC to the Commission for filing the present petition;
- (c) Pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.

This Dispute Resolution Petition coming up for final hearing on 30.05.2024 in the presence of Ms. Gayatri Aryan and Mr. Rajesh Jha, Advocates from J .Sagar Associates and Thiru.Richardson Wilson, Advocate for the Respondents upon hearing the arguments on both sides and on perusal of relevant material records and the matter having stood over for consideration till this date this Commission passes the following

ORDER

1. Contentions of the Petitioner :-

1.1. M/s.SEPC Power Pvt. Ltd. ("SEPC") is filing the present petition praying for direction from the Commission under Section 11(2) of the Electricity Act, 2003 ("Act") for rate of tariff / compensation based on 'adverse impact' resulting from supply of power by SEPC to Tamil Nadu Generation and Electricity Distribution

Company Ltd. ("TANGEDCO / Respondent No.1"). The power was supplied by SEPC as per TANGEDCO's directions akin to direction under Section 11 of the Electricity Act, 2003 ("Act") for the following periods with cumulative adverse impact of Rs. 104.04 Cr.viz.

Sl. No.	Supply Periods	Cost of Generation (In Rs.Cr)	Tariff received / expected from TANGEDCO (In Rs.Cr.)	Adjustment HT Bills (In Rs. Cr.)	Adverse Impact till date (In Rs.)
1.	From 30.04.2022 to 30.11.2022 ("Supply period 1")	613.10	526.87 (Received)	11.65	74.55 Cr.
2.	From 16.04.2023 to 29.04.2023 ("Supply period 2")	84.60	61.10 (Expected to be received)	2.64	20.86 Cr.
3.	From 16.05.2023 to 26.05.2023 ("Supply period 3")	58.60	49.04 (Expected to be received)	92.58 Lacs	8.63 Cr.
4.	From 29.05.2023 to 12.06.2023 (continuing) ("Supply period 4")	65.80	65.80 (Expected to be received)	Nil	Nil
		822.1	702.81	15.25	104.04 Cr

1.2. On 29.04.2022, TANGEDCO gave its directions akin to those under Section 11 of the Act to supply power in deviation of the PPA, for the Supply Period 1. SEPC supplied power from its imported coal based ("ICB") thermal power project of 525 MW at Tuticorin ("Project"). SEPC followed TANGEDCO's direction to supply power in deviation to the executed power purchase agreement dated 12.02.1998 with TANGEDCO (along with amendments) ("PPA"). TANGEDCO has been issuing letters subsequently for remaining

Supply Periods. In its first letter dated 29.04.2022, TANGEDCO inter alia stated as follows:

- (a) Since April-June 2021, there was an exorbitant rise in prices of imported coal. This made operation of all ICB thermal power generators in the country (including SEPC) commercial unviable since most power purchase agreements with ICBs did not incorporate pass through of imported coal price.
- (b) Due to inability of operation by the ICBs and high demand of power creating huge demand - supply gaps, MoP along with Ministry of New and Renewable Energy ('MNRE') convened a meeting on 12.04.2022 with representatives from State Electricity Commissions. In this meeting, MoP decided to direct all ICBs to commence operations for which they shall be adequately compensated.
- (c) SEPC to supply power on pass through basis in deviation of the PPA. Pass-through cost payable to SEPC shall be determined by the Commission on the basis of documents submitted by SEPC.

1.3. As on the date of filing this petition, SEPC is continuing to supply power under TANGEDCO's Section 11 direction. Relevant list of dates in this regard are as follows:

Sl.No.	Date	Event
Supply period 1		
1.	April-June 2021	Exorbitant rise in prices of imported coal. This made operation of all ICB thermal power generators in the country (including SEPC) commercial unviable since most power purchase agreements with ICBs did not incorporate pass through of imported coal price.
2.	12.04.2022	Due to inability of operation by the ICBs and high demand of power creating huge demand - supply gaps, MoP along with Ministry of New and Renewable Energy ("MNRE") convened a meeting with representatives from State Electricity Commissions. In this meeting, MoP decided to direct all ICBs to commence operations for which they shall be adequately compensated.
3.	29.04.2022	Pursuant to MoP's direction, TANGEDCO issued a letter to SEPC stating that in view of the precarious shortfall of availability of power in the State, SEPC is to supply power on pass through basis in deviation of the PPA. TANGEDCO also inter alia stated that such direction to operate was in view of rising imported coal prices and that Pass-through cost payable to SEPC shall be determined by the Commission on the basis of documents submitted by SEPC.
4.	05.05.2022	MoP issued a direction under Section 11 of the Act to the ICB power plants to supply power on bench mark rates to be determined by a Committee constituted by the MoP. MoP recognised that due to increase in imported coal prices, ICB Plants in the country have shut down and direction is being issued in view of deficit in supply.
5.	13.05.2022	MoP appointed a 'Committee' which periodically fixed benchmark energy charges rate ("Benchmark ECR") for supply of power by concerned generators.
6.	07.05.2022	TANGEDCO issued a letter to SEPC requesting SEPC to supply power on pass through basis in accordance with the MoP Directions. TANGEDCO erroneously took a U-turn on its commitment to off take power on pass through basis.
7.	23.11.2022	TANGEDCO abruptly withdrew the Section 11 direction and sought for supply of power as per the PPA with effect from 01.12.2022.
Supply Period 2		

8.	20.02.2023	MoP issued directions to Gencos (including SEPC) under Section 11 of the Act to maximize generation in the light of circumstances due to sharp increase in electricity demand.
9.	15.04.2023	TANGEDCO again directed SEPC to supply power under Section 11 until 29.04.2023.
10.	26.04.2023	TANGEDCO directed SEPC to supply power under Section 11 from 02.05.2023. However, supply could not be initiated due to no scheduling done by SLDC.
11.	05.05.2023	TANGEDCO withdrew the directions dated 26.04.2023, effective from 09.05.2023.
Supply period 3		
12.	16.05.2023	TANGEDCO again directed SEPC to supply power under section 11 until 29.05.2023
Supply period 4		
13.	29.05.2023	TANGEDCO again directed SEPC to supply power under Section 11 starting from 29.05.2023.
14.	12.06.2023	MoP issued 'Extension of Directions to generating companies under Section 11' up to 30.09.2023.

1.4. It is settled law that for supply of power under Section 11 (1), the generator ought to be compensated for adverse commercial impact(s) by the State Commission. Such supply is subject to the restitutive principles enshrined in the Act. Hon'ble Appellate Tribunal for Electricity ("APTEL") in Judgment dated 23.05.2014 in Appeal No. 37 of 2013 and 303 of 2013 (GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors) held that:

- (a) Only the Appropriate Commission has the power to offset the adverse financial impact of directions under Section 11(2) of the Act.
- (b) The rate specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licerrsees have to make payment to the generating company in the interim period till the State Commission under Section

11(2) decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions of the State Government under Section 11(1).

1.5. The said 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 Banga/ore Electricity Supply Company Ltd. & Ors. v. M/s. GMR Energy Ltd. & Ors. In terms of the said judgment, the compensation to be granted to the generating company under Section 11(2) of the Act is to be based on the actual cost of generation in addition to a reasonable return on equity.

1.6. Pursuant to the settled law by the Hon'ble Tribunal, Ld. Central Electricity Regulatory Commission ("CERC") passed Order dated 03.01.2023 in Petition No. 128/MP /2022 [Tata Power Company Ltd. v, Gujarat Urja Vikas Nigam Ltd. & Ors.] allowing adverse impact due to actual cost of generation under Section 11.

1.7. In view of the above, the actual cost of generation incurred by SEPC which is much more than the tariff paid or undertaken to be paid by TANGEDCO as per the Benchmark ECRs in the Supply Periods ought to be reimbursed to SEPC by TANGEDCO subject to adjudication by the Commission.

1.8. In 1995, SEPC was awarded the Project based on Memorandum of Understanding ("MoU") route pursuant to which the Petitioner executed the PPA dated 12.02.1998 pursuant to the government order ("GO") issued by Government of Tamil Nadu ("Go TN") vide GO (Ms) No.4 dated 07.01.1997.

1.9. On 30.10.1998, PPA was amended through Addendum # 1 to incorporate the terms of the GO dated 22.04.1998 of Go TN.

1.10. On 10.01.2012, Parties signed Addendum # 2 to PPA. SEPC filed P.P.A.P. No.5 of 2012 for approval of Addendum # 2 by the Commission. Meanwhile, the EPC Contract and the revised estimated capital cost were also submitted to the Commission.

1.11. . On 30.10.2015, SEPC achieved financial closure which was approved by the Commission vide order dated 10.01.2020 passed in M.P.No.27 of 2016.

1.12. On 06.03.2018, SEPC submitted the Coal Supply and Termination Agreement dated 09.10.2018 ("CSTA") and Coal Handling Agreement ("CHA") to TANGEDCO for approval as per the direction of the Commission. The same was approved by the Commission in M.P. No. 27 of 2016 vide Order dated 10.01.2020 and by TANGEDCO vide letter dated 10.05.2021. The CSTA inter alia provided for:

(a) Clause 3.2.8 - Shipment schedules and shipment quantities: As per this, SEPC was required to give a minimum of 45 days' notice to JERA for planning of shipment for each month of loading as "Monthly Firm Quantity".

(b) Clause 3.2.10 - In case of alternate coal arrangements made by SEPC from other coal suppliers, 10% of the coal price was payable as compensation to JERA.

1.13. In March 2020, due to COVID-19, the implementation of the Project got delayed.

1.14. On 02.09.2020, SEPC and TANGEDCO jointly discussed various key issues arising out of orders of the Commission issued in P.P.A.P. No.5 of 2012, M.P. No. 36 of 2015 and M.P. No. 27 of 2016 and signed the minutes of meeting ("MoM").

1.15. On 25.02.2021 i.e. pursuant to the signing of above MoM, SEPC and TANGEDCO executed Addendum #3 to the PPA. SEPC filed M.P.No.26 of 2021 before the Commission to inter alia, take on record the Addendum #3 to the PPA in compliance to the orders of the Commission in P.P.A.P. No.5 of 2012, M.P. No. 36 of 2015 and M.P.No.27 of 2016.

1.16. On June 2021 onwards, an abnormal increase in the Imported Coal price was seen. Subsequently in 2022, prices at Australia's Newcastle port, considered an Asian benchmark, almost doubled even after retreating almost 40% from a record in October, 2021 .The price increased from USD 39.16 PMT (November 2020) to USD 98.67 PMT (December 2021) to USD 149.40 (November 2022).

1.17. On 21.09.2021, SEPC achieved synchronization (within 20 days from approval of Grid connectivity granted by TANTRANSCO) and thereafter successfully declared COD on 30.11.2021. TANGEDCO gave formal acceptance for the COD on 04.01.2022.

1.18. On 25.11.2021, SEPC received a letter from TNPCB directing SEPC to not operate the Plant beyond 30.11.2021 without a valid CTO.

1.19. On 27.01.2022, SEPC informed TANGEDCO that CTO had expired for which application was made by SEPC on 11.03.2021. SEPC assured TANGEDCO that renewal is expected to be granted shortly.

1.20. On 02.03.2022, SEPC filed M.P. No.3 of 2022 before the Commission seeking inter alia permission to procure coal from alternate sources without any price ceiling mechanism.

1.21. On 28.03.2022, SEPC obtained a valid CTO from TNPCB and the same was

communicated to TANGEDCO.

1.22. On 23.04.2022, SEPC declared its plant availability to TANGEDCO with available Coal stock of 55,008 MT.

1.23. On 29.04.2022, TANGEDCO wrote to SEPC directing SEPC to supply power akin to direction under Section 11 of the Act by stating that as per the power supply situation and high cost of coal in international market, the generating cost has gone up for imported coal-based plants viz.

"Considering the extraordinary circumstances prevailing in the country and the state, the board of TANGEDCO has approved:

- 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 ...*
- iii. By filing a Petition before the TNERC, the pass through cost will be determined based on the documents submitted by generator. "*

1.24. TANGEDCO by way of its letter dated 29.04.2022 in effect conceded that sudden and unexpected increase in generating costs of ICB plants including SEPC resulted in a demonstrably unviable position for ICBs to continue operations, This is specially so in case of SEPC's PPA where a ceiling price mechanism for Variable Fuel Costs ("VFC") had been stipulated.

1.25. Pursuant to TANGEDCO's assurance, SEPC commenced alternate arrangements for specified GCV coal from open market by stock on sale ("SOS") basis and secondary fuel (Oil) which was available immediately to generate electricity. the same was done in clear contravention of the terms of CSTA with JERA, with the singular

objective of honouring the power supply obligations towards TANGEDCO. SEPC craves leave of the Commission to place on record details of shipment-wise coal stock its GCV and landed cost of coal procured through alternate sources during Supply Period 1.

1.26. On 30.04.2022, SEPC started supplying power to TANGEDCO pursuant to the directions dated 29.04.2022.

1.27. On 02.05.2022, SEPC addressed a letter to TANGEDCO formally acknowledging the directions dated 29.04.2022 and clarifying the following:

(a) SEPC already has a concluded CSTA with coal supplier JERA whereunder shipment schedules and shipment quantities are already stated.

(b) Import of coal viz shipment schedules take time and SEPC is required to give 45 days' advance notice for each shipment planned. In order to supply power from 30.04.2022, SEPC should have requested the supplier on 16.03.2022 to supply coal as per CSTA terms.

(c) Due to TANGEDCO's request for immediate supply of power, JERA could not supply, coal owing to short notice. SEPC made alternate coal sourcing arrangement from other suppliers at such short notice.

(d) For such alternate coal sourcing arrangement, SEPC shall have to bear charges at the rate of 10% of the Coal Price for the quantity purchased as per Clause No, 3.2.10 of CSTA. SEPC reserves its right to take recourse to appropriate legal remedies in case such claim is raised by JERA.

1.28. On 04.05.2022, SEPC requested JERA to supply coal as per CSTA looking into on- going power crisis in India. JERA by citing CSTA terms confirmed that they will be able to supply coal only after the month of October 2022.

1.29. On 05.05.2022, while acknowledging inter alia the unprecedented rise in price of imported coal and PPAs for ICB plants not having adequate provisions for pass through of the increase in the international coal prices, MoP issued the Section 11 directions inter alia directing all ICB thermal power plants to operate at full capacity viz:

- "3. In order to ensure that all power plants based on imported coal start functioning the States have been advised that the price of coal should be a pass through*
- 4. In the light of the present emergent circumstances, the following directions are issued under Section-11 of the Electricity Act: ...
d. Considering the fact that the. present PPAs do not provide for the 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 CERC. This Committee shall ensure that 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 ..
j. Bench Mark rates worked out by the Committee shall be reviewed every 15 days taking into consideration the change in the price of imported coal; shipping costs etc.
5. This order shall remain valid upto 31.10.2022."*

1.30. On 07.05.2022, in continuation of its letter dated 29.04.2022 and in pursuance of MoP's directions dated 05.05.2022, TANGEDCO requested SEPC to supply power on pass through basis in accordance with the MoP Directions.

1.31. On 18.05.2022, SEPC declared the details of coal stocks having been procured, maintained and used, and additional stocks being procured by SEPC in pursuance of TANGEDCO's directions dated 29.04.2022. SEPC also disclosed the VFC of Rs.7.03/kWh of the current coal stock from vessel Pacific 01 being utilised for generation of power. Further, vide letter dated 20.05.2022, SEPC also highlighted the VFC of Rs.8.15/kWh for imported coal as per the approved CSTA.

1.32. On 21.05.2022, SEPC informed TANGEDCO of additional 75,000 MT of coal having been procured from Agarwal Coal Corporation Pvt. Ltd., in order to ensure continuous supply of power as per schedule of SLDC and in accordance with TANGEDCO's directions dated 29.04.2022 and 07.05.2022. TANGEDCO was also informed about the applicable VFC of Rs. 7.67/kWh on the same.

1.33. On 16.06.2022, TANGEDCO issued a direction to SEPC, in continuation of its directions dated 29.04.2022 and 07.05.2022, allowing supply of power on pass through basis for the period up to 31.12.2022 at the rate of VFC to be notified by Ministry of Power from time to time.

1.34. On 28.06.2022, MoP issued another clarification inter alia stating as follows:

(a) . It has come to notice that ICB plants are neither able to sell power to PPA holders due to non-requisitioning nor able to sell power through the power exchanges owing to low rates. This leads to the capacity lying idle.

(b) Some of the States having power shortage desire to tie up with such power as it will ensure availability of firm power for a specified duration against the uncertainty of volume getting cleared in the power exchange.

(c) Volume traded in power exchange is very less and it meets only marginal requirement of the States.

(d) In order to ensure that the capacity does not lie idle, MoP directed that the certain additional mechanism shall be adopted by the ICBs viz:

"a) 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.

b) Where a PPA holder does not send a requisition three days in advance for the following week, the ICB may generate and sell power to any other Distribution Licensee at the benchmark rate calculated by the Committee plus the fixed charge.

c) 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.

d) Once 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.

e) This arrangement shall be effective only for the period of validity of aforesaid order issued under Section 11 of the Act by MoP."

1.35. On 11.07.2022, MoP issued a clarification regarding bench mark ECR for the generators in view of the 5th report of the Committee, wherein SEPC was included as one of the ICB generators:-

3. In this regard, the Committee has submitted its 5th Report. As per the request received from TANGEDCO, the Benchmark Tariff for the plants M/s.OPG and M/s.SEPC has been calculated based on the technical Parameters of the Plants (Gross Heat Rate and Auxiliary Power Consumption etc.) submitted by TANGEDCO. Accordingly, the proposed tariff calculated for eight ICB plants, based on the recommendations of the 5th Report of the Committee, for the control period starting from 10.07.2022 are as under:

(a) The energy charges rate (ECR) calculated for eight plant are as under :-

Plant	Capacity	Benchmark ECR (Rs./kWh)
SEPC Power Private Ltd	1x525	6.88

1.36. Vide subsequent clarifications, the Committee constituted by MoP revised the benchmark ECRs for Supply Period 1:

S. No.	Date of MoP's clarification	Relevant control period	Benchmark ECR/kWh (in Rs.)
1	11.07.2022	10.07.2022 to 22.07.2022	6.84
2	02.08.2022	23.07.2022 to 06.08.2022	6.54
3	12.08.2022	07.08.2022 to 20.08.2022	6.00
4	29.08.2022	21.08.2022 to 03.09.2022	5.36
5	09.09.2022	04.09.2022 to 17.09.2022	5.31
6	06.10.2022	18.09.2022 to 01.10.2022	5.76
7	06.10.2022	02.10.2022 to 15.10.2022	6.56
8	26.10.2022	16.10.2022 to 29.10.2022	6.77
9	09.11.2022	30.10.2022 to 12.11.2022	6.71
10	02.12.2022	13.11.2022 to 26.11.2022	6.45
11	02.12.2022	27.11.2022 to 30.11.2022	6.26

1.37 . On at least 14 occasions, TANGEDCO instructed for reserve shut-downs and re-initiation of supply of power. The same was done in non-conformity with MoP's directions dated 28.06.2022. Owing to frequent lighting up of the unit, ramping up, ramping down and reserve shut-downs 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.

1.38. On 25.07.2022, while seeking payment of balance VFC as per invoices for the period of 30.04.2022 to 09.07.2022, SEPC duly informed TANGEDCO about varying VFC during the said period owing to:

- (a) non-availability of specified GCV Coal as per boiler design on short notice and the consequent higher consumption of coal than specified; and
- (b) frequent reserve shut-downs and lighting ups leading to higher consumption of secondary fuel.

1.39. On 13.09.2022, SEPC issued a follow-up letter to TANGEDCO, acknowledging the part-payment of Rs. 285.55 Crs. (approx.) out of total amount of Rs. 311.29 Crs. (approx.) for the period of 30.04.2022 to 09.07.2022 and requested for payment of balance VFC charges claimed as per pass through mechanism.

1.40. On 28.09.2022, the MoP issued another direction viz operation of ICB Plants whereunder the MoP directions dated 05.05.2022 were extended for further two months beyond 31.10.2022 i.e. upto 31.12.2022.

1.41 On 29.09.2022, SEPC filed a Writ Petition before Hon'ble Madras High Court being W.P. No. 28512 of 2022 challenging MoP's Section 11 Directive limited to:

- (a) MoP stepping into the shoes of the 'Appropriate Commission' i.e. the electricity regulatory commission under the Electricity Act, where the commission is empowered to determine tariff / rate of power to be supplied by generators; and
- (b) Ministry of Power constituting a 'Committee' to work out the rate at which power will be supplied by generators already having executed and operationalized power purchase agreements (PPAs).

1.42. SEPC also sought interim protection in the form of a direction to TANGEDCO to make payment for supply of power since August 2022 (due to non-payment by TANGEDCO) along with payment on pass through basis i.e. actual cost of generation.

1.43. On 01.11.2022, Hon'ble Madras High Court was pleased to grant interim protection to SEPC in W.P. No. 28512 of 2022 viz payment by TANGEDCO to the SEPC at rates fixed by MoP vide subsequent directives.

1.44. On 10.11.2022, SEPC addressed a letter to TANGEDCO claiming an amount of Rs.26.03 Crores towards balance VFC payable for the period between 30.04.2022 to 09.07.2022 for the energy supplied on actual pass-through basis. Despite repeated requests to clear the outstanding dues for this period, TANGEDCO failed to make the requisite payment. Hence, SEPC was constrained to upload the said pending invoice for Rs. 26.03 Crores on the Praapti portal.

1.45. On 23.11.2022, TANGEDCO abruptly withdrew the Section 11 direction and sought for supply of power as per the PPA with effect from 01.12.2022. However, based on TANGEDCO's assurance vide letter dated 16.06.2022 to purchase power under pass through mechanism till 31.12.2022, SEPC had already made arrangements for procurement of coal and secondary fuel. TANGEDCO's abrupt withdrawal of arrangement under pass through mechanism resulted in idle coal stock worth Rs. 117 Cr. with SEPC, which was duly brought to the notice of TANGEDCO vide SEPC's letter dated 29.11.2022.

1.46. On 01.12.2022, TANGEDCO reiterated the withdrawal of mechanism for payment

of VFC on pass-through basis and instructed SEPC for supply of power as per provisions of PPA. On 07.12.2022, while expressing its inability to supply power in terms of the PPA using high cost of imported coal without being effectively compensated against the same, SEPC once again requested TANAGEDCO to off-take power on pass through basis until 31.12.2022. SEPC also proposed the option of supplying power under PPA, provided the price ceiling mechanism was done away with.

1.47. In view of TANGEDCO not scheduling power since 01.12.2022 and advance coal procurement already having been made in view of TANGEDCO's directions for procuring power on pass-through basis until 31.12.2022, SEPC was left with 90,700 MT of coal. It is noteworthy that the cost of this coal procured by SEPC was less than price of coal under the CSTA. Further, despite TANGEDCO not scheduling power after 01.12.2022, SEPC kept declaring its capacity for each day, based on availability of fuel, in view of honouring its obligations, These facts were also highlighted to TANGEDCO in SEPC's letter dated 13.01.2023.

1.48. On 05.01.2023, TANGEDCO filed a Miscellaneous Petition being M.P. No.1 of 2023 under Section 86(1)(b) of the Electricity Act before the Commission seeking the following reliefs:-

- (a) Ratification / approval of the power dispatched from SEPC to the grid on pass through basis as per the MoP guidelines dt 05.05.2022; and
- (b) to fix the tariff for the power supplied by SEPC 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.

1.49. On 20.02.2023, the 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.

1.50. Vide subsequent clarifications, the Committee constituted by MoP revised the benchmark ECRs for relevant Supply Periods viz .

S. No.	Date of MoP's clarification	Relevant control period	Benchmark ECR/kWh (in Rs.)
1	19.04.2023	13.04.2023 to 26.04.2023	4.98
2	04.05.2023	27.04.2023 to 10.05.2023	4.97
3	19.05.2023	11.05.2023 to 24.05.2023	5.02
4	29.05.2023	25.05.2023 to 07.06.2023	4.96
5	13.06.2023	08.06.2023 to ongoing	4.93

1.51. On 23.02.2023, during the hearing in M.P. No.3 of 2022, the Commission duly took into consideration the current issue faced by SEPC regarding inability to supply power with a ceiling price mechanism and was pleased to conclude that:

(a) SEPC to supply power to TANGEDCO from 01.03.2023 at MoP determined Benchmark ECR rates as and when notified, with liberty to SEPC to approach Ld. TNERC for fixation of actual tariff in case SEPC faces any adverse impact.

(b) Parties to jointly inspect the coal stock lying with SEPC in order to essentially determine the price of coal and consequent fixation of tariff for supply of power using this coal stock.

(c) This interim arrangement for supply of power is in furtherance of Section 11 direction by MoP.

(d) . SEPC to compare the prices of Eastern Coalfields Ltd. ("ECL") (domestic) coal and imported coal on spot market and only in case domestic coal prices are higher, then SEPC is to purchase imported coal.

(e) SEPC will make an effort to purchase coal with price lower than Argus index i.e. SEPC is to make an effort of being competitive.

1.52. The Commission subsequently uploaded the Daily Order dated 23.02.2023 with the following direction:

"Ms.Gayatri Aryan, Advocate from M/s.J.Sagar Associates appeared for the petitioner. Thiru.Richardson Wilson, Advocate appeared for the respondent. Affidavit filed by TANGEDCO. Brief arguments heard from both parties. Commission directed both parties to negotiate on the ceiling price for the coal to be used in the generation and further directed that joint Inspection shall be conducted by the TANGEDCO and the petitioner for verifying the quantity of imported coal available at present in the petitioner's plant on or before 28-02-2023. In view of the consensus of opinion reached by both counsel, the petitioner has agreed to supply power to TANGEDCO from 01.03.2023 at the rates fixed by Ministry of Power (MoP). At the request of the both parties, the case is adjourned to 09-03- 2023 for further arguments."

1.53. On 09.03.2023, Ld. TNERC passed the Daily Order dated 09.03.2023 in M.P.No.3 of 2022 by acknowledging SEPC's submissions viz

(a) Since the price of the imported Coal has risen manifold in the International market, it is practically impossible for SEPC to operate the plant.

(b) Plant cannot be operated with Talcher Coal due to its low calorific value.

(c) SEPC is agreeing to supply power to TANGEDCO under pass through mechanism declared by MoP under Section 11 of the Electricity Act, 2003 provided

liberty is accorded to SEPC to file petition to claim compensation under Section 11(2) in case the rate fixed by MoP is not adequate.

(d) TANGEDCO who did not raise any serious objection in this matter impressed upon the Commission that SEPC shall supply power to TANGEDCO under Section 11 of the Electricity Act.

1.54. The Commission vide Daily Order dated 09.03.2023 passed the following directions:

"1) Termination of CST A by JERA is hereby approved by the Commission. The Petitioner SEPC is directed to get FSA / Coal Linkage 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 on the Indian Coal.

3) The Petitioner SEPC 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. The Petitioner is given the liberty to approach the Commission for offsetting the financial impact or to claim compensation under Section 11 of the Electricity Act 2003, with necessary documents in support of its claim ..."

1.55. Since passing of the above Daily Order dated 09.03.2023, SEPC time and again requested TANGEDCO to offtake power from SEPC under Section 11 direction as committed by TANGEDCO. Despite best attempts from SEPC, TANGEDCO did not requisition power from SEPC under Section 11 direction until 15.04.2023.

1.56. On 15.04.2023, TANGEDCO issued a letter to SEPC requisitioning supply of power under Section 11 from 16.04.2023 till 29.04.2023. As per the letter, TANGEDCO has conveyed payment of variable fuel cost at benchmark rate fixed by MoP and fixed charges as per the PPA.

1.57. On 20.04.2023, SEPC issued a letter to TANGEDCO highlighting that as per the Commission's Order dated 09.03.2023, SEPC has been given the liberty to approach the Commission for offsetting the financial impact or to claim compensation under Section 11(2) of the Act. Further, SEPC provided details of coal stock and coal procurements and re-assured TANGEDCO of procuring coal at most competitive prices.

1.58. On 26.04.2023, TANGEDCO issued a letter to SEPC requisitioning supply of power under Section 11 from 02.05.2023. As per the letter, TANGEDCO has conveyed payment of variable fuel cost at benchmark rate fixed by MoP.

1.59. In pursuance of aforesaid letter dated 26.04.2023, SEPC made all the required arrangements including imported coal so as to start the supply as instructed by TANGEDCO. On 01.05.2023, SLDC scheduled the generation for 492.14 MW power from SEPC. However, on 02.05.2023, as the Petitioner's Unit was about to initiate Boiler Light- Up, SLDC revised the scheduled generation to 0 MW.

1.60. On 05.05.2023, TANGEDCO withdrew the approval given to SEPC to supply power under Section 11 of the Act with effect from 09.05.2023.

1.61. On 16.05.2023, TANGEDCO issued a letter to SEPC requisitioning supply of power under Section 11 from 16.05.2023 to 26.05.2023 at the benchmark rates fixed by MoP.

1.62. On 29.05.2023, TANGEDCO issued a letter to SEPC requisitioning supply of power under Section 11 from 29.05.2023 till further instructions. As per the letter, TANGEDCO has conveyed payment of variable fuel cost at benchmark rate fixed by MoP and fixed charges as per the PPA.

1.63. On 12.06.2023, MoP issued 'Extension of Directions to generating companies under Section 11' upto 30.09.2023. SEPC was included list of generating stations provided.

1.64. Since the generation and supply of power is being done in terms of directions under Section 11 of the Act, SEPC is required to be compensated on the basis of actual cost of generation, which is based on landed cost of coal procurement.

1.65. Despite achieving COD on 30.11.2021 and obtaining valid CTO on 28.03.2022, SEPC was not in a position to declare capacity and commence power generation, owing to exorbitant prices of imported coal. The cost of power generation had become commercially unviable for SEPC as per PPA. Same was the case with other ICBs in the country.

1.68. It was only upon TANGEDCO's assurance (vide letter dated 29.04.2022) that the proposed power supply will be on a pass-through basis, SEPC procured coal from alternate sources on SOS basis and commenced power generation and supply to TANGEDCO from 30.04.2022 onwards. It is noteworthy that:

- (a) TANGEDCO had directed SEPC to commence power generation knowing that the existing coal prices were exorbitantly high and will cause huge expenditure for SEPC.
- (b) TANGEDCO had acknowledged that the power supply will be on pass through basis, however, no interim charges or tariff was fixed by TANGEDCO to enable the pass through benefits.

(c) SEPC was assured that the determination of pass-through cost will be done through filing a petition before this Ld. Commission based on documents furnishing 'actual cost' of production.

1.67. MoP Directions, which came after SEPC started supplying power to TANGEDCO, also acknowledged that the present power purchase agreements did not provide for pass through of high cost of imported coal and suggested that power shall be supplied under Section 11 based on Benchmark ECR.

1.68. Benchmark ECRs determined by MoP are only an interim tariff fixed under Section 11 of the Act and cannot be considered as the final tariff to be paid to SEPC for were supplied during the Supply Periods.

1.69. Determination of tariff (including energy charges) constitutes a primary statutory function of the Appropriate Commission as per Section 62 read with Section 64 and Section 86 of the Electricity Act. The Electricity Act confers the statutory power to determine tariff only upon the Appropriate Commission and not the government. In this regard, reliance is placed on the following judgments of the Hon'ble Supreme Court: -

(a) A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 see 34: -

"36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3

read with Section 11 of the Reform Act, 1998 which in terms of Sections 11 (1)(c) and (e) is expected to fix the tariff as well as the terms of licence"

(b) *GUVNL vs. Tarini Infrastructure (2016) 8 see 743, wherein it was held as under:*

"12 ... On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paragraphs 36 and 64 of Transmission Corporation of Andhra Pradesh v. Sai Renewable Power Pvt. Ltd .."

1.70. In the present case, the directions were passed under Section 11 of the Electricity Act, which is invoked in case of extraordinary circumstances. The said provision is reproduced herein below:-

"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 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."

1.71. Pertinently, Section 11(2) also states that the adverse financial impact of the directions passed in Section 11(1) may be offset by the Appropriate Commission in such manner as it considers appropriate. In the present case, directions under Section 11(1) of the Electricity Act have been issued to SEPC to operate the plant at full capacity using imported coal, with an assurance that cost of generation will be subject to pass through

mechanism. In terms of Section 11(2) of the Electricity Act, it is only the Commission and not the MoP or Committee which has the statutory power to offset the financial implication of such directions, i.e., to determine energy charges payable to the SEPC on pass through basis.

1.72. This position, that even for directions passed under Section 11 of the Electricity Act, only the Appropriate Commission can offset the financial impact, has been settled in the following cases:-

(a) In the judgment dated 23.05.2014 passed in the case of GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors, Appeal No. 37 of 2013 and 303 of 2013, the Hon'ble Tribunal held that.-

“28 Thus, the State Government can only give directions under Section 11(1) for operation and maintenance of the generating station in accordance to its directions. The State Commission alone has been empowered under Section 11(2) of the Electricity Act to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1). The State Government is not empowered to determine the rate or terms and conditions at which the generating companies will supply power to the State Grid against directions u/s 11(1) of the Act. The rate specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licensees have to make payment to the generating company in the interim period till the State Commission under Section 11(2) decides the compensation to be given to the generating company, if any to offset the adverse financial impact of the directions of the State Government under Section 11(1).”

(b) Relying on the above judgment, CERC has recently decided a similar petition on 03.01.2023 in case of Tata Power Company Ltd. v. Gujarat Urja Vikas Nigam Ltd. & Ors., Petition No. 128/MP /2022 and I.A. No. 64 of 2022, wherein it was held that :-

“58. The question arises with regard to the legal sanctity of the rates determined by MoP for supply of power during the operation of Section 11 Directions. In this connection, the following observations of the APTEL in GMR judgment are relevant:

“28. Thus, under Section 11(1).”

In the light of the above observations of APTEL, the rates specified by MoP on the recommendations of the Committee are the rates at which the Respondent Procurers have to make payment to the Petitioner in the interim period till the Appropriate Commission, in the present case this Commission, decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions issued under Section 11(1) of the Act.

59. The Commission while admitting the present petition vide its order dated 17.6.2022

had observed as under:

"24. We have considered the submissions made by the parties. Since the Petitioner is no longer insisting upon/ praying for the interim reliefs as prayed in the Petition, the question of granting such reliefs is no longer relevant. The Commission also notes that the Petitioner and the Respondents have now acted upon the direction issued by the MoP inasmuch as the Petitioner has started supplying the power to the Procurers (barring the Procurers which are not availing such supply from the Petitioner under Section 11 of the Act) and the Procurers (as stated presently only GUVNL) are making payments as per the tariff/ rate worked out by the Committee constituted in terms of direction of MoP dated 5.5.2022. Accordingly, till the time the Commission examines the claims of the Petitioner under Section 11(2) of the Act in the present case, the parties are directed to comply with the directions issued by MoP dated 5.5.2022 along with subsequent clarifications issued by MoP in letter and spirit."

Thus, the Commission issued the above interim directions directing the Respondent Procurers to make payment as per the rates determined by the MoP till the claims of the Petitioner are examined and decided by the Commission. The Commission vide its second interim order dated 13.9.2022 in I.A. No. 50/2022 adjudicated the disputes between the Petitioner and the Respondent Procurers with regard to some aspects of the rates to be paid in compliance with the first interim directions issued vide order dated 17.6.2022. Therefore, it follows that the rates decided by the MoP read with the clarification of the Commission thereon vide order dated 13.9.2022 are interim in nature and are subject to determination of adverse financial impact by the Commission under Section 11(21) of the Act...

68. As per the above observations of APTEL. the rate of power decided by the Commission should cover the variable cost of the power plant plus a reasonable profit.

APTEL has reasoned that this is necessary to cover the eventuality when the market rate is lower than variable cost of generation as the generator would not like to run its power plant at the market rate as it would not compensate even for the expenses incurred for operating the plant. The Petitioner is required under Section 11 (1) Directions to supply power to the PPA holders (Respondent Procurers) in the first instance and only in case of refusal or non- scheduling, the Petitioner has been permitted to sell power at the power exchange. Therefore, while determining the adverse financial impact the comparison has to be made between the energy charge agreed in the PPA and the variable cost of production in compliance with the directions under Section 11 (1) of the Act. In the present case, the energy charge under the PPA is lower than the variable cost of generation with imported coal in order to supply power in compliance with the MoP directions under Section 11 of the Act. Therefore, in order to ensure that the Petitioner maintains and operates its power plant to generate and supply power to the Respondent Procurers in compliance with the directions of the MoP under Section 11(1) of the Act the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit in the light of the principles decided by APTEL in GMR judgment.”

1.73. In view of the above, it is submitted that only the Commission is statutorily empowered to determine the energy charges payable to SEPC. Such statutory powers conferred only on the 'Appropriate Commission' cannot be transferred to any committee. The Electricity Act does not envisage creation of a parallel regime for tariff fixation by constituting a committee to determine energy charges payable to SEPC on pass through basis.

Sl. No.	MoP Direction dt.	Control period		Mop Tariff in (per kWh)	
		from	To		
1	13-May -2022	05-May-22	28-May-22	-	
2	27-May-2022	29-May-22	11-Jun-22	-	
3	17-Jun-2022	12-Jun-22	25-Jun-22	-	
4	29-Jun-2022	26-Jun-22	09-Jul-22	-	

5	11-Jul-2022	10-Jul-22	22-Jul-22	6.84 (Revised from 6.88)
6	02-Aug-2022	23-Jul-22	06-Aug-22	6.54
7	12-Aug-2022	07-Aug-22	20-Aug-22	6.00
8	29-Aug-2022	21-Aug-22	03-Sep-22	5.36
9	09-Sep-2022	04-Sep-22	07-Sep-22	5.31
10	06-Oct-2022	18-Sep-22	01-Oct-22	5.76
		02-Oct-22	15-Oct-22	6.56
11	26-Oct-2022	16-Oct-22	29-Oct-22	6.77
12	09-Nov-2022	30-Oct-22	12-Nov-22	6.71
13	02-Dec-2022	13-Nov-22	26-Nov-22	6.45
14		27-Nov-22	30-Nov-22	6.26
15	31-Mar-2023	16-Mar-23	29-Mar-23	4.83
16	03-Apr-2023	30-Mar-23	12-Apr-23	4.89
17	19-Apr-2023	13-Apr-23	26-Apr-23	4.98
18	04-May-2023	27-Apr-23	10-May-23	4.97
19	19-May-2023	11-Mar-23	24-May-23	5.02
20	29-May-2023	25-May-23	07-June-23	4.96
21	13-June-2023	08-June-23	Ongoing	4.93
			Weighted Average of MoP Tariff	5.73
			Weighted Average of Actual per Unit Costs	6.52

1.75. Benchmark ECR is not adequate to cover the cost of generation and accordingly, SEPC is seeking the Commission to offset the adverse financial impact of the MoP Directions on SEPC.

1.76. For Supply period 1, SEPC had to commence operations at its plant on immediate basis SEPC informed TANGEDCO vide its letter dated 02.05.2022 that SEPC already has an existing CSTA with JERA, under which SEPC is required to place an order for coal supply atleast 45 days before scheduled shipment. However, SEPC was

constrained to purchase imported coal from other sources at spot prices, which admittedly were exorbitantly high at the time.

1.77. Further, pursuant to TANGEDCO's direction to supply in and beyond Supply Period 1, SEPC procured fuel till 01.12.2022. Meanwhile, TANGEDCO on 23.11.2022 erroneously withdrew the direction. SEPC had already made arrangements for coal and secondary fuel (oil) (with advance money paid 45 days prior), as per the required procedure, As a result, SEPC bore a cost of Rs. 117 Cr for arrangement of fuel until 01.12.2022 as per TANGEDCO's direction.

1.78. This fuel procured in 2022, was utilised during supply made in Supply Period 2. In this view, in Supply Period 1, SEPC incurred about Rs. 117 Cr.

1.79. During Supply Period 1, scheduling of power was deficient/not matching the declared capacity of the Plant. In this regard the following is noteworthy:

- (a) From 30.04.2022 till 30.11.2022, 80% of scheduling done by TANGEDCO was significantly below the contracted capacity.
- (b) SEPC was forced to shut down/Reserved Shut Down on many occasions due to zero scheduling by TANGEDCO.
- (c) Particularly on an average there were 6 revisions per day for ramp up and ramp down.

1.80. SEPC has not able to operate its Plant at full capacity due to Grid conditions and repeated back-down instructions from TANGEDCO, which leads to the Unit becoming unstable and inefficient. Due to this reason various parameters were affected which led to increase in cost.

1.81. For Supply Period 2, SEPC again commenced power supply on short notice i.e. received TANGEDCO's direction on 15.04.2023 and commenced supply starting 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. To ascertain the cost incurred by SEPC during Supply Period 2 which ought to be reimbursed.

1.82. 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. To ascertain the cost incurred by SEPC during Supply Period 3 which ought to be reimbursed,

1.83. 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. To ascertain the cost incurred by SEPC during Supply Period 4 which ought to be reimbursed.

1.84. The meaning and scope of the phrase 'offsetting adverse financial impact' has been analysed in several judgments wherein it was unanimously held that the generator is entitled to be compensated so as to not bear any financial losses due to power supply. Reliance is placed on the following cases:

- (a) *Judgment dated 03.10.2012 passed by Hon'ble APTEL in Himatsigka Seide Limited vs. KERC & Ors, M/s.K Cement Limited v. KERC & Ors and MPPL Renewable Energy Private Limited v. KERC & Ors, Appeal Nos. 141, 142 of 2011 & 10 of 2012:-*

"13.1 We are in agreement with the principle adopted by the State Commission in offsetting the adverse financial impact on the generators complying with the directions of the State Government u/s 11(1) of the Act by fixing rate keeping in view the revenue that a generator could have realized by selling power in the short term market, subject to the said rate covering the cost of generation, so that the generating company does not incur a loss

13.2 The Appellants are entitled to payment of interest charges for the delay in actual payment by the distribution licensees."

- (b) *Judgment dated 23.05.2014 passed by Hon'ble APTEL in Appeal No, 37 of 2013 and Appeal No. 303 of 2013 being G.M.R. Energy Limited v. KERC & Ors and Bangalore Electricity Supply Company Limited & Ors v. G.M.R. Energy Limited & Ors-*

"22. The only check that is to be exercised is that the rate of power decided by the State Commission should cover the variable cost of the power plant plus a reasonable profit. This is necessary to cover the eventuality when the market rate is lower than the variable cost of generation. Under such a condition, the generator would not like to run its power plant as the market rate would not compensate even for the expenses incurred for operating the plant. If under such an eventuality, the generator has to run the power plant to supply power to the State Grid against directions of the State Government under Section 11(1) then the State Commission under Section 11(2) of the Act, shall compensate the power plant to cover the variable cost plus a reasonable margin of profit. In the present case the short term market price prevailing during the period of Section 11(1) directions as decided by the State Commission, covers the variable cost of the power generation and, therefore, the compensation has to be based on basis of the short term market price as determined by the State Commission

53. Summary of our findings:

i) Off setting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11(1) of the Electricity Act, 2003 would mean fixing a

rate keeping in view the revenue the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss."

- (c) *Judgment dated 18.09.2017 passed by Karnataka High Court in W.P. Nos. 60231- 233 of 2016 being Star Metallics and Power Private Limited v. State of Karnataka & others:*

"24. Moreover, the words "adverse financial impact" sought to be compensated by an appropriate order under Section 11(2) of the Act necessarily envisages an exercise of considering the facts and evidence for individual Generating Companies who were affected and governed by the order passed under Section 11(1) of the Act by the State Government. Such an adverse financial impact of the directions issued under sub-Section (1) of Section 11 on "any generating company" as specified in Section 11 (2) of tile Act, definitely envisages a hearing of the concerned Generating Company itself, because, without hearing the concerned Generating Company itself, the adverse financial impact on each Generating Company cannot even be determined by the concerned appropriate Commission. The relevant individual facts to determine the extent of 'Adverse Financial Impact' may be different for different Generating Companies and by leading evidence in the form of. existing Power Purchase Agreements (PPAs), their cost of generating Electricity at full capacity as directed by the State, the present market conditions or rates etc. or peculiar adverse factors which may increase their cost of production in the given period are all relevant individual facts, which have to be brought on record of KERC and after due application of mind to the same only, the appropriate Commission can decide the 'adverse financial impact', if any, on the Generating Companies and can pass appropriate orders for compensating the same.

25. The words "adverse financial impact" does not include within its ambit a further loss to be caused to such power generating companies by fixation of a still lower rate by the Respondent KERC. It will be adding insult to the injury, if the power generating companies are not only first mandatorily required to generate power at full capacity of their Plants and supply the same exclusively to the State Grid only to meet the public demand and emergent situations in the larger public interest and then later on to be paid even a lesser rate than the provisional rate agreed and assured to them by the State, in the Order passed under Section 11 (1) of the Act. . . ."

- (d) *Judgment dated 03.01,2023 passed by Ld. CERC in Tata Power Company Ltd. v.*

Gujarat Urja Vikus Nigam Limited & Ors., Petition No. 128/MP /2022 and I.A. No. 64 of 2022, wherein the following has been held:-

"68 .. ,.

As per the above observations of APTEL, the rate of power decided by the Commission should cover the variable cost of the power plant plus a reasonable profit. APTEL has reasoned that this is necessary to cover the eventuality when the market rate is lower than variable cost of generation as the generator would not like to run its power plant at the market rate as it would not compensate even for the expenses incurred for operating the plant. The Petitioner is required under Section 11 (1) Directions to supply power to the PPA holders (Respondent Procurers) in the first instance and only in case of refusal or non-scheduling, the Petitioner has been permitted to sell power at the power exchange. Therefore, while determining the adverse financial impact, the comparison has to be made between the energy charge agreed in the PPA and the variable cost of production in compliance with the directions under Section 11(1) of the Act. In the present case, the energy charge under the PPA is lower than the variable cost of generation with imported coal in order to supply power in compliance with the MoP directions under Section 11 of the Act. Therefore, in order to ensure that the Petitioner maintains and operates its power plant to generate and supply power to the Respondent Procurers in compliance with the directions of the MoP under Section 11 (1) of the Act, the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit, in the light of the principles decided by APTEL in GMR judgment."

1.85. The supply of power under Section 11(1) of the Act is subject to the restitutive principles enshrined under Section 11(2) of the Act. In the interest of having regulatory certainty, the rate/compensation for such supply of power may be determined in terms of Section 11(2), which entrusts the Commission to offset the adverse financial impact to the generating company. That the compensation to be granted to the generating company under Section 11(2) of the Act must be based on the actual cost of generation (including return on equity) of power from the Project.

1.86. In view of the above, M/s.SEPC is entitled to be granted to offset the adverse financial impact caused due to supply of power under the directions of TANGEDCO, which includes re-imburement of cost of power generation along with a reasonable profit margin.

1.87. M/s. SEPC has a vested right to recover its actual cost of generation in terms of Section 61(d) of the Electricity Act and thus, a legitimate expectation to receive monthly tariff payments as per its actual cost of generation (pass through basis). However, TANGEDCO's withholding of amount due to SEPC as per actual cost of generation affects SEPC's legitimate expectation to recover its viability tariff under Section 61(d) of the Act and also to be protected against violations of regulatory consistency and certainty. In this regard, the following is noteworthy: -

- (a) Legitimate expectation is a doctrine arising out the principle of reasonableness and , constitutes an enforceable right. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in *Monnet Ispat & Energy Ltd. vs. Union of India*, (2012) 11 SCC 1, wherein it was held as under:

"186. In M.P. Oil Extraction v. State of M.P. [(1997) 7 sec 592] this Court considered an earlier decision in Hindustan Development Corpn. [(1993) 3 SCC 499] and in para 44 (p. 612) of the Report held that the doctrine of legitimate expectation had been judicially recognised. It operates in the domain of public law and in an appropriate case, constitutes a substantive and enforceable right. In J.P. Bansal v. State of Rajasthan [(2003) 5 SCC 134: 2003 SCC (L&S) 605] it was stated that both doctrines- promissory estoppel and legitimate expectation-require satisfaction of the same criteria and arise out of the principle of reasonableness."

(b) It is trite law that private parties in dealing with the government authorities have legitimate expectation to be dealt with regularity, predictability and certainty. In this regard, Hon'ble APTEL in Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission, 2014 SCC OnLine APTEL 168 held as under: -

"165. The Doctrine of Promissory Estoppel and Legitimate Expectations are applicable in the present case since it is settled position of law that the doctrine of Promissory Estoppel and Legitimate Expectations are applicable when: ...

- (c) Private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty.*
- (d) Legitimate Expectation is capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis."*

1.88. In that light, SEPC has a legitimate expectation to be protected against any regulatory uncertainty.

1.89. Non-payment of cost of generation to SEPC by TANGEDCO without any tenable justification defeats the legitimate expectation of SEPC to attain viability as per Section 61 (d) of the Act and also to be protected against violations of regulatory inconsistency and certainty. In this regard the following judgments are noteworthy:

- (a) Monnet Ispat & Energy Ltd. v. Union of India (2012) 11 SCC 1 (para 186);
- (b) GUVNL v. GERC 2014 SCC Online APTEL 168 (para 165);
- (c) Hinduja National Power Corporation Limited v. APERC & Ors. 2020 sec Online APTEL 3 (para 107)
- (d) M/s Fortune Five Hydel Projects Pvt. Ltd. v. KERC 2019 SCC Online APTEL 51 (para 299)

1.90. In addition, principles of natural justice being an integral part of Article 14 of the Constitution, mandate that every decision taken by a state entity must be in compliance

with natural justice and non-arbitrariness. In this regard, the following judgments are noteworthy:

- (a) Shivagangagiri Vidyabiruddi v. State of Karnataka (2011) 15 sec 543 .(para 6);
- (b) Hindustan Lever Ltd. v. Director General 2001 (1) SCALE 219 (para 14).

1.92. In view of the above, SEPC is seeking for the Commission to offset the adverse impact caused to SEPC due to supply of power in Supply Periods 1, 2, 3 and 4.

1.93. The Commission has the jurisdiction under Section 11 (2) and no other petition has been filed by SEPC seeking relief as prayed for in the present Petition. SEPC craves leave to place on record any document necessary for adjudication of the present matter.

2. Counter affidavit of the Respondents :-

2.1. The petitioner herein has filed the above Dispute Resolution Petition (D.R.P) No.17 of 2023, seeking declaration from the Commission that SEPC is entitled to tariff on the basis of 'actual' coal generation for the power supplied by Petitioner. At the outset all the averments and allegations contained in this petition are denied except those that are specifically admitted hereunder.

2.2. In the interests of coherence and brevity, the answering Respondent has set out its responses issue-wise as raised by the petitioner in the grounds of the DRP.

2.3. The present Dispute Resolution Petition is an abuse of process of law, in the facts and circumstances of the case and that the present Dispute Resolution Petition ought to be dismissed in limine.

2.4. The petitioner has suffered a cumulative adverse impact of Rs.104.04 Crores. The calculations made by the petitioner are grossly erroneous and cannot be countenanced in law as explained in detail below.

2.5. The Ministry of Power, Union of India (referred as "MoP" hereunder) had issued a directive under 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.

In view of the above,

a. Board of TANGEDCO vide Circulation Board Note dated 27.04.2022 accorded approval to TANGEDCO to allow the intra state Power Generators including the Petitioner 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.

b. Board of TANGEDCO also approved that by way of filing petition before Commission by this Respondent the pass-through cost will be determined.

c. SEPC was requested to supply power on pass through basis as one time measure by deviating certain provisions of PPA from 29.04.2022 as and when required based on the dispatch instructions of SLDC as per MoP guidelines.

d. The MoP had issued a direction dated 05.05.2022 to form a Committee with representatives from MoP, CEA and CERC to calculate the Bench Mark rate at which the power shall be supplied to PPA holders.

e. 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 based on the directions of Ministry of Power.

2.6. The Petitioner had commenced their supply of power to this Respondent from 30.04.2022 onwards by purchasing coal through stock on sales basis and e-auction tender. This Respondent 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 the Petitioner, which PPA was executed under Section 62 of EA 2003. The Ministry of Power vide No.23/ 13/2021-R&R (Pt-I) dated. 11.07.2022 had communicated the tariff fixed by the expert committee for the Petitioner 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 for the petitioner's power plant but had done so for other power plants within the State.

2.7. Since SEPC has not accounted for the revised bill submitted, TANGEDCO has filed the details of invoices along with this counter affidavit. The segregated details for the same period and the details of generation as per actuals worked out by TANGEDCO are also filed along with the counter and may be treated as part and parcel of the counter. Further, M/s.SEPC has not furnished their detailed workings on quantity of coal

used invoice wise as purchased from Coal supplier with respect to billing period. Thus, they are put to strict proof of the claims made in their petition.

2.8. TANGEDCO has requested vide petition M. P. No.1 & 30 of 2023 before the Commission 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.

b. To fix the tariff for the power supplied from 30.04.2022 to 30.11.2022 & 16.04.2023 to 30.09.2023 by considering the payment already made by relaxing certain provision of PPA/ Addendum 3 as one-time measure. "

2.9. The petitioner needs to establish its case of adverse financial impact based on documents and evidence.

2.10. The SEPC cannot claim to offset any alleged financial impacts without any proper workings as detailed below:

a. SEPC claimed VFC considering actual coal cost, Station Heat rate, Auxiliary compensation, Secondary oil consumption, GCV, Start stops and has not furnished working details on quantity of coal used invoice wise as purchased from Coal supplier with respect to billing period.

b. TANGEDCO worked out VFC considering actual coal cost but other parameters like Station Heat rate, Auxiliary compensation, Secondary oil consumption, GCV, Start stops are considered as per PPA / Addendum 3 terms.

2.11. The Petitioner did not procure even one consignment of imported coal as per PSA from M/s.JERA even from the date of CoD, i.e. from 30.11.2021. M/s.SEPC had procured coal not only from M/s.JERA, but also from M/s.Balaji malt for trial operation, in violation of the terms of Coal Supply and Termination Agreement (hereunder referred as CSTA). Even according to the provisions of PPA/ Addendum #3, the petitioner has to procure imported coal from the approved CSTA only (clause 16). Instead, the petitioner has procured coal through stock on sales basis and e-auction lender and had unilaterally terminated the FSA with M/s.JERA. Hence the petitioner cannot claim compensation to offset the adverse financial impact under Section 11(2) of the Act.

2.12. The Petitioner, has consciously agreed at the lime of signing the Addendum-3 that the COD for the project shall be 6 months from 09.10.2020 viz. 08.04.2021. But the petitioner achieved CoD only on 30.11.2021 after a lapse of almost 7 months. In fact, even before signing Addendum #3, there was constant delays by the petitioner under one pretext or the other. Therefore, any impact to the petitioner due to the failure of the Petitioner to adhere to the COD date as agreed by the parties in the addendum-3 all the costs and consequences should be borne exclusively by the Petitioner and cannot be attributed to TANGEDCO under any circumstances.

2.13. As during the negotiation meeting held on 02.09.2020, TANGEDCO insisted SEPC to use proper coal and it was accepted by both the parties to finalise the same with M/s.BHEL. And in the meeting with M/s.BHEL, TANGEDCO suggested to go for domestic coal during 2020 itself due to the high cost and issues surrounding imported coal. But SEPC did not accept the suggestion and was insistent about using imported coal. Because of SEPC's actions, now TANGEDCO is only facing financial losses lot by purchasing costlier power from available sources. This respondent has been facing severe supply constraints on account of failure in dispatching the power by the Petitioner and this respondent had been constrained to purchase power at higher tariffs through other sources/ Exchanges. Such non supply was in breach of the PPA.

2.14. The Petitioner unilaterally selected higher grade imported coal as primary fuel and stoutly refused to use Indian coal during the negotiations of Addendum-3 to the PPA. In fact, it was well open to the Petitioner to seek use of Indian coal at that stage. Therefore, the Petitioner selected imported coal, knowing full well the consequences and therefore is estopped from using this as an excuse to not perform the contract. This, in fact, was analysed during mutual negotiation and informed to the Commission which is duly approved by the Commission vide M.P.No.27 of 2016 order dated 10.01.2020.

2.15. Though there was rise in imported coal price, all other imported coal based generators who supplied power to TANGEDCO on pass through basis did not terminate their Fuel Supply Agreement. In fact, even in the case of SEPC, the termination of CSTA

was due to default of SEPC in not providing a standby letter of credit as mentioned in the termination letter of JERA dated 07.10.2022.

2.16. In M.P.No 26 of 2021 filed by the Petitioner, while signing the Addendum # 3, the 6 months delay in extending start up power due to Covid-19 Pandemic situation and consequent lock-down announced by the Government was already considered and duly agreed as "the date of extending the start-up power shall be 09.10.2020 and SCoD shall be within 6 months from the date of Start-up Power. Hence the Petitioner should not claim any delay under Force Majeure thereafter, citing COVID situation during the year 2021-22 as there was no restrictions was imposed on construction related activities during the delay period. Further, 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. Finally, based on the order of the Commission dated 10.01.2020 in M.P. No. 27 of of 2016, Addendum #3 was entered into by which the Respondent was supposed to achieve COD by 08.04.2021, however actually achieved on 30.11.2021.

2.17. SEPC received a letter from TNPCB directing SEPC to not operate the Plant beyond 30.11.2021 without a valid CTO as false and untrue. It is submitted that the Petitioner has suppressed the fact that the Consent to Operate (CTO) issued by the Tamil Nadu Pollution Control Board (TNPCB) had expired on 30.11.2021 itself. This was not intimated to TANGEDCO during declaration of COD but was revealed only on 11.02.2022 by the Petitioner. This shows the Petitioner's mala fide intention.

2.18. Non-renewal of CTO by this Petitioner has to be treated as a default under clause '5.2 (g) company events of Default' of PPA which reads as follows:

"(g) failure by the Company to obtain or maintain any material license or permit necessary at such time for the construction or operation of the Project and the failure of the Company to diligently pursue appropriate legal and administrative proceedings under Indian law for the issuance or renewal of such licence or permit; "

2.19. As the TANGEDCO filed its counter on 23.03.2022 in the petition M.P.No. 3 of 2022 seeking permission to go for domestic coal, outlining the facts along with PPA/ Addendum 3 and has no objection to terminate the existing CSTA executed with JERA. However, TANGEDCO is not liable to bear any cost or consequences due to this termination of the existing CSTA / CHA. In fact, the termination by M/s JERA was due to the default of SEPC in not following the terms of the contract between them. Further, TANGEDCO has submitted that power cannot be purchased without a ceiling on variable charges.

2.20. As this petitioner had obtained its Consent to Operate from TNPCB only on 28.03.2021 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.

2.21. The Petitioner had purchased coal of 76,997 MT from M/s.JERA GLOBAL Markets Pvt Ltd in the month of March 2021 and 23,876 MT from M/s.Balaji Malts on

Stock on Sales basis in the month of September 2021 to conduct trial operations for COD process. Only the balance quantum available on Stock/ Site was utilized for power Generation during this tenure.

2.22. As per the direction of Ministry of Power (MoP) dated 12.04.2022 for Imported Coal based plants under Section 11 of the Electricity Act, and on request from this Respondent dated 29.04.2022, the Petitioner has commenced supply on pass through basis from 30.04.2022 till date by procuring imported coal from various sources instead of from M/s,JERA GLOBAL Markets Pvt Ltd.

2.23. 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 Talcher mines) applicable to the company's facility.

2.24. As per the above provisions of PPA / Addendum #3, the Variable Fuel Costs (hereunder referred to as 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 i.e., 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/ Addendum 3 is exempted.

2.25. M/s.SEPC commenced supply by procuring available coal on Open market. However, as per the above provisions of PPA/ Addendum #3, the Petitioner has to procure imported coal with GAR 5000 Kcal / Kg (4600 NAR Basis) coal indices only, whereas the GCV in the lower range was procured and in turn consumption of the coal was increased which this respondent had to pay as' pass through.

2.26. As the Petitioner in the letter dated 02.05.2023; it is stated in last para:

"" Further, we seek your kind cooperation to grant us to supply the Power on pass through till the month of December 2022 and advise us your Power Schedule accordingly. It will enable us to provide required shipment schedules and quantities to JERA for sourcing Coal through CSTA and supply Power without any interruptions....."

It is pertinent to note that from the above letter, it is clear that SEPC had not taken any steps to procure coal from JERA till getting consent to operate on 28.03.2022. Even though it is well known fact that SEPC has to place order for coal 6 months before itself SEPC must have placed order for procurement of coal well ahead before achieving CoD. Instead SEPC had not taken any valid steps to place order till 02.05.2022.

2.27. M/s.SEPC had procured only one consignment from JERRA on 08.03.2021 and the VFC worked out to Rs.3.28/- KWh, and thereafter SEPC neither placed order nor procured coal from JERRA, but stated that they would be able to get coal from JERRA only

after the month of October 2022 citing CSTA TERMS. Further, it is evident that the VFC for the coal procured through Balaji Malts is Rs.5.06/- KWh during September 2021, much higher than the CSTA tariff. Hence SEPC cannot claim compensation for the price difference since it is due to SEPC acting in violation of CSTA/PPA terms.

2.28. This Respondent vide its letter dated 29.04.2022 had directed the Petitioner 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 (i.e., BENCH MARK RATE).

2.28. Even in these proceedings, the Petitioner 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. Moreover, TANGEDCO has issued the same letter to all the imported coal plants and not only to SEPC and paid the MoP tariff only.

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

a. The Petitioner 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 this Respondent to make VFC payment on weekly basis as per the directions of MoP letter dated 05.05.2022 under clause (g).

- b. Respondent 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.
- c. For the invoices raised by the Petitioner from 30.05.2022 to 09.07.2022, this Respondent 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 Respondent through imported coal under Section 63.
- d. In the meanwhile, the Petitioner vide letter dated 25.07.2022 had requested this Respondent 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 dated 05.05.2022 under clause (f) as mentioned below.

2.30. As per "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".

- a. Based on the request the Petitioner, by adopting clause 4(f) of the MoP directions the invoices already submitted by the Petitioner for the period 30.04.2022 to 09.07.2022 were reworked by this Respondent.

- b. 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.
- c. 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.
- d. By considering the Station Heat rate and Auxiliary consumption on normative basis, as per the provisions of PPA / Addendum #3.
- e. By considering the coal price of imported coal procured through various sources as per the invoices submitted by the Petitioner without ceiling limit.
- f. Rs.26,75,49,753 - was paid as difference in VC from 30.04.2022 to 09.07.2022 vide cheque no.056217 /16.08.2022 after deducting TDS of Rs.2,67,550/-

2.31. The Respondent TANGEDCO had clearly indicated in the letter to supply power on pass through basis at the rate to be notified by VFC. And since SEPC had no valid FSA, continued to supply power as per the TANGEDCO requirement.

2.32. In the directions of MoP for imported coal plants, it is clarified that "d) Once 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". And TANGEDCO has given notice on requisition of power as per the MoP directions.

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

2.34. The MoP has given the benchmark rate for every 15 days and instructed to make weekly payment as detailed below:

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

2.35 Due to lesser demand by giving prior notice as per the direction of MoP dated 28.06.2022, the Petitioner shall supply power following the dispatch instructions of the SLDC without any deviation subject to the provisions of grid relating to scheduling and dispatch. And SLDC shall be responsible for optimum scheduling and despatch of electricity within the State, in accordance with the contracts entered into with the

licensees or the generating companies operating in the State and to keep accounts of the quantity of electricity transmitted through the State Grid.

2.36 That SLDC shall be responsible for carrying out real time operations for Grid control and despatch the electricity within the State through secure and economic operation of the State Grid in accordance with the Grid standards and this Code. It is further stated that as per section 32(2)(c) of Electricity Act, 2003, SLDC is the authority to keep accounts of the quantity of electricity transmitted through the State Grid.

2.37. Due to the non-availability of specified GCV coal in short time and as per the Boiler design, the unit consumed more quantum of coal than what was specified. Based on the above, the Petitioner claimed their invoices for the period 30.04.2022 to 09.07.2022 based on the actual coal utilized. In the meanwhile, the Petitioner vide letter dated 25.07.2022 requested Respondent No. 2 to arrange the balance VFC charges for the invoices raised from 30.04.2022 to 09.07.2022 as per the directions of Respondent No. 1 letter dated 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".

Based on the request of the Petitioner, by adopting clause 4(f) of the Respondent No 1 directions , the invoices already submitted by Petitioner for the period 30.04.2022 to 09.07.2022 were reworked

- a. by considering the GCV in the invoices, 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.
- b. by considering the coal on shipment basis i.e. first considered the coal on stock and after it was fully utilised, the next consignment of coal is accounted as First in first out (FIFO) basis since the blending of coal has impact on GCV and in per unit cost.
- c. the Station Heat rate and Auxiliary consumption were on normative basis, as per the provisions of PPA / Addendum #3.

2.38. The Petitioner has claimed the invoices based on coal utilized without considering the normative parameters and GCV was also considered based on the local test reports, Respondent No 2 has restricted the claim of Petitioner and the VFC value was passed for payment. It is submitted that the VFC claimed by the Petitioner for the period 30.04.2022 to 09-07-2022 is Rs.3,111,614,018/ - and as per the workings of TANGEDCO, the amount paid by the TANGEDCO is Rs.2,587,905,595/-. Thereafter, the Petitioner 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/ -.It is pertinent to note that for the power procured from 30.04.2022 to 09.07.2022, even though the Petitioner

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.

2.39 TANGEDCO vide its Letter 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.

2.40. 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 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 Ld TNERC 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.

2.41. W.P. No 28512 of 2022 was listed for admission 01.11.2022. The 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 later on after filing the counter by the respective respondents"

2.42. 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. The Writ Petition was dismissed as withdrawn on 25.09.2023.

2.43. M/s.SEPC vide letter dated 10.11.2022 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.

2.44. TANGEDCO abruptly withdrew the directions. It is submitted that 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.

2.45. 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.

2.46. 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 TNERC only. Further, 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.

2.47. The MP.No.1 of 2023 is still pending for adjudication before the Commission.

2.48. The Ministry of Power, Government of India 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 and was extended by Order dated 12.06.2023 from 16.06.2023 to 30.09.2023. The Petitioner being an Intra - State Generator, was requested again to

supply power on pass through basis by deviating certain provisions of PPA from 16.04.2023 based on the dispatch instructions of SLDC as per Board directions.

2.48. 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, it is clear that if the price of coal used by the Petitioner is higher than the benchmark ECR fixed by the MOP Committee, only the benchmark ECR price can be paid by this Respondent.

2.49. The Ministry of Power vide No.23/13/2021-R&R (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. And 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	16.03.2023	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	07.06.2023	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	30.08.2023	3.91
13.	12.09.2023	31.08.2023	13.09.2023	3.91
14.	22.09.2023	14.09.2023	27.09.2023	3.97
15.	13.10.2023	28.09.2023	11.10.2023	3.96
16.	20.10.2023	12.10.2023	25.10.2023	4.05
17.	07.11.2023	26.10.2023	Till date	4.24

2.50. The Petitioner is attempting to reopen renegotiate settled prices and tariffs in the PPA by a backdoor method, citing the Section 11(2). This Respondent approved pass through method only for the imported coal, in deviation from the PPA. The Petitioner cannot take advantage of the same and attempt to modify the variable costs in the PPA under the guise of the Section 11 (2). Even for the tariff fixation for the imported coal, the same is subject to outcome of the petitioner.

2.51. The impugned Order is exorbitant in terms of revenue loss to the Appellant. The petitioner SEPC signed the PPA in the year 1996. Other IPPs who had signed the PPA along with the SEPC herein have completed two third of their PPA term period. Moreover, the SEPC herein has not run the plant after declaring COD (30.11.2021) since consent to operate issued by TN PCB expired on 30.11.2021. Further, without any Prior intimation /Approval of this Respondent, SEPC unilaterally tripped the Generator after 72 hours trial run test. Due to unavailability of the plant even after declaring COD, the Respondent was constrained to purchase power from other sources with higher cost. It is pertinent to note that the plant had not generated a single unit as per PPA norms with ceiling mechanism or the Respondent Commission's order from COD, instead supplied power only on pass through basis without ceiling mechanism. Further, the TANGEDCO could not avail any discount till date since the petitioner has supplied power only on pass through basis.

2.52. By the Impugned Order, the Commission has while allowing the reliefs claimed by the SEPC erroneously removed the ceiling price mechanism for variable Fuel Charge

(VFC) on the basis of the 9th March Interim Order and also erroneously issued permission and directions regarding procurement of imported coal as an interim arrangement, stipulating the Argus index as a ceiling without clearly specifying the grade of coal indices.

2.53. If the prayer of the Petitioner were accepted, it would lead to an unjustifiable burden upon the TANGEDCO and the consumers of the State of Tamil Nadu and would amount to unjust enrichment by the Petitioner.

2.54. The averments made in 57 is false as only on the basis of Grid demand, TANGEDCO has issued letter to SEPC to supply power on pass through basis.

2.55. The Respondent vide its letter dated 26.04.2023, had directed the Petitioner 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. The said committee has fixed the Energy Charge Rate (ECR)/ Variable Fuel Cost (VFC) for this Respondent with effect from 10.07.2022 and the same was communicated to the respondent. Thereafter the respondent is bound by the tariff fixed by the MoP Committee only (i.e., BENCH MARK RATE).

2.56. The Petitioner is already under an obligation to supply power to this respondent in terms of the long term PPA entered into between the Petitioner and respondent. 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.

2.57. Even in these proceedings, the Petitioner has not challenged the Ministry of Power where the manner of fixation of tariff has been set out by the Ministry.

2.58. The Petitioner 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 JERA 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.

2.59. In view of the precarious power demand and considering the Grid condition, the Petitioner 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. Further, the MoP had issued a direction dated 05.05.2022 to form a Committee with representatives from MoP, CEA and CERC to calculate the Bench Mark rate at which the power shall be supplied to PPA holders.

2.60. The pass through rates is much higher than the PPA rates. In fact, it was also to the Petitioner's advantage. This can be inferred from the fact that the Petitioner had not supplied power despite achieving COD on 30.11.2021 but had chosen to supply power only by pass through phase.

2.61. The payments claimed by the Petitioner are arbitrary and inflated and this Respondent had made the payments based on the MoP tariff, wherein MoP has worked out based on actual coal cost incurred by the Petitioner and the additional charges of GCV of imported coal, Aux consumption, and station capacity applicable to SEPC plant every fortnight considering the updated prices of imported coal and shipping charges. Hence additional claim could not be entertained.

2.62. M/s.SEPC claim of Rs.6.52/KWh by taking weighted average on the tariff supplied over the tariff fixed by MoP viz.Rs.5.73/KWh has made it clear how exorbitant their claim was. According to the averment raised by the Petitioner, the rates fixed by the MoP Committee under section 11(1) are just and proper and this respondent is seeking to ratify the same from the Commission.

2.63. 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. Moreover as per MoP directions, there is no provision in the existing PPAs for pass-through for increase in cost under any circumstances.

2.64. As per PPA/CSTA the petitioner herein has to order imported coal from a coal supplier for a period of six months based on the average of the lowest priced coal among the approved coal grades in CSTA, from the coal price index of previous six months. Accordingly as per PPA the petitioner has to get an approval from the respondent before placing any order to the coal supplier. However in the present case the petitioner herein

had served a letter to TANGEDCO on 03.03.2022, seeking approval to place purchase order to the coal supplier for the period starting from October 2021 to March 2022. SEPC had not proceeded as per the CSTA terms and did not place order for shipment with JERA. Instead procured coal at higher rate and caused heavy financial burden to TANGEDCO.

2.65. As per amended PPA (Addendum-3) regarding Fuel linkage, Fuel Supply and transportation of fuel, all are at the risk of the Petitioner only. The relevant clause in the signed PPA (Addendum-3) is extracted hereunder:

The following terms are added in Clause 16 "FUEL SUPPLY" in the PPA, after 16. 1.2 (a).

"CSTA and CHA are approved subject to incorporating through amendment the following conditions which are to be complied as per the TNERC Order in MP No.110. 27 of 2016.

(i) Provided that TANGEDCO has no liability on CSTA and CHA (other than the payment of Variable Fuel Cost), TANGEDCO has no liability for Fuel Nomination for generation and no liability to pay Liquidated Damages for under drawal or Fuel Incentive for over drawal of coal (as per the TNERC order in M.P.No.27 of 2016).

2.66. As per amended PPA (Addendum-3) regarding Fuel linkage, Fuel Supply and transportation of fuel, all are at the risk of the Petitioner only. The relevant clause in the signed PPA (Addendum-3) is extracted hereunder:

43. The following terms are added in Clause 16 "FUEL SUPPLY" in the PPA, after 16.1.2 (a).

“CSTA and CHA are approved subject to incorporating through amendment the following conditions which are to be complied as per the TNERC Order in MP no. 27 of 2016.

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2.67. 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.

2.68. In the para 4.3 of the Gol notification issued on 6th November 1995 stated as follows:

"4.3 The responsibility of either indigenous or imported fuel linkage would be that of the Independent Power Producer(IPP) and any fuel supply risks would have to be shared between the IPP/ Fuel suppliers. The State Electricity Board will not take any fuel supply risk"

Based on the above Gol notification Hon'ble Supreme Court of India in the order in C.A.No.706 of 2014 between M/s.Pioneer Power Limited and Tamil Nadu Electricity Board has stated as follows:

"In terms of the notification referred to above, it is clear that the responsibility of fuel linkage-either heavy fuel or natural gas would be that of the appellant to the generator. if there is any risk in the supply, the same has to be shared between the generator and the fuel supplier.

The notification has classified that the Board will not take any fuel supply risk and is not supposed to indemnify in the given situation".

2.69. SEPC had specifically agreed not to approach the Commission for any upward revision of norms and had agreed in Addendum # 3 to the PPA to approach the Commission for any modification of the existing PPA terms only as per regulation 35 (2) of the TNERC (Terms and Conditions for Determination of Tariff Regulations, 2005).

2.70. TANGEDCO cannot accept any additional liability. It is a known fact that the price and transportation of imported coal depends on many unpredictable factors and the petitioner should be well aware of the risks and facts before signing the Addendum to PPA and Coal Supply and Transportation Agreement (CSTA). After signing the agreement this petitioner has to supply power as per the agreement and this respondent has no liability on the CSTA as ordered by the TNERC.

3. Rejoinder filed by the petitioner SEPC to Counter Affidavit of TANGEDCO :-

3.1. M/s.SEPC is filing the present Rejoinder to the Counter Affidavit filed by Tamil Nadu Generation and Distribution Corporation ("TANGEDCO") dated 12.12.2023. At the outset, SEPC denies and disputes all the averments and allegations raised in Counter Affidavit filed by TANGEDCO. It is respectfully submitted that any omission on part of SEPC to deal with any specific averments of TANGEDCO in the present Rejoinder should not be construed as an admission/ acceptance thereof.

3.2. TANGEDCO has raised several erroneous objections to which SEPC's Rejoinder submissions are as follows

Sl.No.	TANGEDCO's Objections	SEPC's Rejoinder Submissions						
MoP Rate v. Actual Cost								
1.	On 11.07.2022, Ministry of Power ("MoP") appointed a Committee which fixed the VFC for SEPC at Rs.6.88/kWh with effect from 10.07.2022. TANGEDCO is bound by rates fixed by MoP Committee only.	<p>(a) SEPC has made detailed submissions with regard to the framework of provisions under section 11(1) and Section 11(2) of the Electricity Act, 2003 ("Act") in the petitioner itself. The same are not being repeated herein for the sake of brevity. It is hereby reiterated that in view of judgment dated 23.05.2014 of Hon'ble APTEL in Appeal No.37 of 2013 and 303 of 2013 (GMR Energy Limited v.Karnataka Electricity Regulatory Commission & Ors.), it is no longer res integra that:</p> <p>(i) Only the Appropriate Commission (in the present case, this Ld. Commission) has the power to offset the 'adverse financial impact' of directions under section 11 of the Act.</p> <p>(ii) The rates specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licensees have to make payment to the generating company in the interim period till the State Commission under Section 11 (2) decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions of the State Government under Section 11 (1).</p> <p>(b) TANGEDCO has failed to prove how SEPC would unjustly enrich itself in case actual cost incurred is reimbursed to SEPC. SEPC is a Section 62 Project which inherently requires licensees to pay the cost of generation to generating companies. There is no unjust enrichment especially since MoP benchmark rates are not adequate for covering actual costs incurred by SEPC. The difference between MoP Committee's calculation of Benchmark ECR and costs actually incurred by SEPC are on account of following factors viz:</p> <table border="1" data-bbox="855 1910 1315 2018"> <thead> <tr> <th data-bbox="855 1910 927 2018">Sl. No.</th> <th data-bbox="927 1910 1106 2018">MoP Committee's bases of</th> <th data-bbox="1106 1910 1315 2018">SEPC's requirements</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	Sl. No.	MoP Committee's bases of	SEPC's requirements			
Sl. No.	MoP Committee's bases of		SEPC's requirements					
2.	TANGEDCO has paid the MoP tariff to all the imported coal-based plants and not just to SEPC.							
3.	<p>Parameters for payment by TANGEDCO between 30.04.2022 and 09.07.2022:</p> <p>(i) From 30.04.2022 to 29.05.2022 – By considering price of coal on shipment basis i.e. FIFO basis.</p> <p>(ii) From 30.05.2022 to 09.07.2022 – On Benchmark ECR fixed for similar generators supplying power through imported coal under Section 63.</p> <p>The same was later revised under Clause 4(f) of MoP's letter dated 05.05.2022 pursuant to SEPC's request dated 25.07.2022 and Rs.26,75,49,753/- was paid as difference in Variable Fuel Charge sale basis and e-auction tender at a higher rate compared to other similar imported coal-based plants.</p>							
4.	MoP vide directions dated 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. Therefore, it is clear 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.		calculation	
	1.	5000 GCV (ARB) coal is the basis of computation.	SEPC's boiler design requires coal of higher grade. The boiler design coal is 5450 GCV(ARB). In case MoP's benchmark ECR is based on lesser GCV, the generators with superior boiler designs (including SEPC) would inevitably face loss. Needless to say, SEPC has used coal of lesser GCV depending upon availability. The benefit of the same has been passed on to TANGEDCO. SEPC also uses coal of higher GCV, i.e. 5450 kCal/kg based on availability. Therefore, since requirement of GCV of coal differs with different plant types, a standardised benchmark ECR may not be adequate.
	2.	FOB cost based on	SEPC's coal imports were

			<p>lowest of Argus, Platts and HBA Index.</p>	<p>primarily made from Indonesia, South Africa and Australia. The coal miners and traders sell coal on Argus and Global Coal Index. Since Section 11 demand is always subject to abrupt discontinuation by the PPA holder (in this case TANGEDCO), SEPC could never order bulk consignments of coal. Accordingly, each consignment was purchased at the cheapest price available at that time.</p>	
		3.	<p>Freight has been calculated based on Clarkson Shipping Index value for Panamax vessels (70,000 MT Size)</p>	<p>SEPC mostly procures Indonesian coal. Most Indonesian ports have the capacity to load only Supramax (58,000 MT Size) vessels. The freight for smaller vessels is higher. Maximum stock on sale happens with</p>	

			<p>Supramax vessels and such constraint is inter alia due to Section 11 power procurement being short term and uncertain. The benchmark ECR considering freight for a bigger vessel is therefore unviable.</p>										
<p>c) In addition, the MoP Committee has not considered following cost components at the time of calculating Benchmark ECRs viz:</p>													
<table border="1"> <thead> <tr> <th data-bbox="858 992 927 1099">Sl. No.</th> <th data-bbox="927 992 1125 1099">Cost not considered by MoP</th> <th data-bbox="1125 992 1332 1099">SEPC's submission</th> </tr> </thead> <tbody> <tr> <td data-bbox="858 1099 927 1760">1.</td> <td data-bbox="927 1099 1125 1760">Finance Cost of opening of LCs.</td> <td data-bbox="1125 1099 1332 1760">Imported coal sellers also add finance charges of Letters of Credit ("LC") for supply of coal. Financing costs of opening such LCs before vessel arrival at load port ought to be included in VFC payable to SEPC.</td> </tr> <tr> <td data-bbox="858 1760 927 2016">2.</td> <td data-bbox="927 1760 1125 2016">Miners' premium</td> <td data-bbox="1125 1760 1332 2016">No coal is being traded without Miners' premium' and the same is included in the Invoices raised</td> </tr> </tbody> </table>					Sl. No.	Cost not considered by MoP	SEPC's submission	1.	Finance Cost of opening of LCs.	Imported coal sellers also add finance charges of Letters of Credit ("LC") for supply of coal. Financing costs of opening such LCs before vessel arrival at load port ought to be included in VFC payable to SEPC.	2.	Miners' premium	No coal is being traded without Miners' premium' and the same is included in the Invoices raised
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				by the coal suppliers on SEPC. The same ought to be included in VFC.	
		3.	Exchange Rate	The Customs Exchange Rate for import is to be considered instead of RBI Reference Rate since coal supplier charges rates notified by Central Board of Indirect Taxes and Customs.	
		4.	Actual cost of coal handling at Discharge Port and inland transportation.	These expenses are incurred by SEPC and are legitimate. The same ought to be included in VFC.	
5.	SEPC claimed VFC considering actual coal cost, Station Heat rate, Auxiliary compensation. Secondary oil consumption, GCV. Start stops but has not furnished their detailed workings on quantity of coal used – invoice wise – as purchased from Coal supplier with respect to billing period.	<p>(d) In view of the above, it is evident that MoP has conservatively calculated the Benchmark ECR while failing to consider that several cost components are unique to respective plants and ports. It is humbly prayed that this Ld. Commission takes into consideration the components not included/ inadequately included in calculation by MoP.</p> <p>SEPC is currently in the process of reconciling data with respect to invoice wise coal consumptions and will share the same as and when required by this Ld. Commission.</p>			

Legality of MoP Rates	
6.	<p>SEPC has not challenged the letter dated 05.05.2022 of MoP where the manner of fixation of tariff has been set out.</p>
	<p>(a) This Ld. Commission under Section 11(2) of the Act is empowered to offset the 'adverse financial impact' of supply under Section 11(1). This Ld. Commission is not the legally appropriate forum to challenge the manner of fixation of tariff by MoP.</p> <p>(b) As correctly pointed out by TANGEDCO, SEPC had challenged the MoP directives under W.P.No.28512 of 2022 [M/s.SEPC Power Pvt. Ltd. Vs.Uol & Anr.] before Hon'ble Madras High Court. At such time TANGEDCO was not even making payments to SEPC as per MoP tariff. Moreover, the Commission was not functioning. SEPC was constrained to approach the Hon'ble Madras High Court. However, SEPC withdrew the writ petition on 25.09.2023 in view of the present petition.</p>
7.	<p>Aggrieved by Tariff determined by the MoP Committee and TANGEDCO's implementation of the MoP directives, SEPC filed a Writ Petition No.28512 of 2022. TANGEDCO made the payment for the period 22.08.2022 to 31.10.2022 as per the interim directions of the Hon'ble Madras High Court. The Writ Petition was dismissed as withdrawn on 25.09.2023.</p>
	<p>(a) This Ld. Commission under Section 11(2) of the Act is empowered to offset the 'adverse financial impact' of supply under Section 11(1). This Ld. Commission is not the legally appropriate forum to challenge the manner of fixation of tariff by MoP.</p> <p>(b) As corrected pointed out by TANGEDCO, SEPC had challenged the MoP directives under W.P.No. 28512 of 2022 [M/s.SEPC Power Pvt. Ltd. v. Uol & Anr.] before Hon'ble Madras High Court. At such time TANGEDCO was not even making payments to SEPC as</p>

		per MoP tariff. Moreover, this Ld. Commission was not functioning. SEPC was constrained approach the Hon'ble Madras High Court. However, SEPC withdrew the writ petition on 25.09.2023 in view of the present petition.
MoP Rates v. PPA VFC		
8.	Grant of relief under the present petition shall cause unjustifiable burden on TANGEDCO and consumers of Tamil Nadu and unjust enrichment of SEPC.	<p>(a) SEPC vide the present Petition is only seeking compensation in terms of payment of VFC for the costs actually incurred by it for supplying power under Section 11 of Act . The supply of power under Section 11 was in deviation to PPA as per TANGEDCO's direction. Be that as it may, this Ld. Commission has directed parties to bring the PPA in-line with market trend [Ref.Order dated 31.08.2023 in M.P.No.3 of 2022 (SEPC v. TANGEDCO)].</p> <p>(b) So far as MoP benchmark rates being higher than current PPA (Addendum #3) is concerned, TANGEDCO's submissions are baseless since:</p> <p>(i) Supply under Section 11 is in deviation to the PPA and hence the VFC of PPA cannot be compared to VFC that ought to be received by the generator.</p> <p>(ii) Central Electricity Regulatory Commission ("CERC") has already held that in order to assess 'adverse impact', PPA tariff does not assume significance. It is humbly prayed that this Ld. Commission adopts the same view in order to maintain judicial certainty.</p>
9.	Pass through rates were much higher than the PPA rates and was also to the petitioner's advantage.	
10.	SEPC is already under an obligation to supply power to TANGEDCO in terms of the long term PPA entered into between SEPC and TANGEDCO. A direction to supply power at a higher tariff cannot be said to cause "adverse financial impact" that is required to be offset.	

		<p>(iii) Be that as it may, this Ld. Commission vide Order dated 31.08.2023 has already directed for Addendum #3 to be modified by parties by virtue of tariff being unviable for SEPC and hence contrary to the Act. Order dated 31.08.2023 has not been stayed until the date of filing of the present affidavit and hence assumes finality. In this view without prejudice, PPA tariff under Addendum #3 cannot be compared for assessing adverse impact.</p> <p>(iv) Section 11 was invoked for the very reason of high cost of imported coal prices and all imported coal based power purchase agreements not having a pass through mechanism. The intent of MoP's direction cannot be ignored. Cost of generation ought to be reimbursed to SEPC.</p>
11.	SEPC is attempting to reopen/ renegotiate settled prices and tariffs on the PPA by a backdoor method, citing the Section 11(2). TANGEDCO approved pass-through method only for the imported coal, in deviation from the PPA. SEPC cannot attempt to modify the Variable Fuel Charge ("VFC") in the PPA under the guise of Section 11(2).	<p>(a) The present Petition is merely concerned with offsetting 'adverse financial impact' for supply under Section 11 (2).</p> <p>(b) The Tariff compensation being sought in the present Petition is for the periods during which supply was made pursuant to Section II directions. SEPC is not seeking modification of VFC in the PPA in the present Petition.</p> <p>(c) It is TANGEDCO's admission that supply under Section 11 (2) was sought in deviation to the PPA.</p>
Stock on Sale v. Coal under CSTA		
12.	SEPC procured coal through stock on sale basis and e-auction tender and had unilaterally terminated the FSA	(a) SEPC has procured cheaper coal wherever available. Even PPA provides for a provision which

	<p>with M/s.JERA Global Markets Pvt. Ltd. (“JERA”) Thus, SEPC cannot claim compensation to offset adverse financial impact under S.11 (2).</p>	<p>allows cheaper procurement of coal than coal under CSTA.</p> <p>(b) The requisition for Section 11 was immediate due to which no advance notice could be given to JERA under the CSTA for procurement of coal. In fact. when on 04.05.2022 SEPC requested JERA for supply of coal till the month of December 2022, JERA refused to supply coal before October 2022. In addition, due to uncertainty in Section 11 off take by TANGEDCO, no coal consignment could be ordered much in advance. The above was also a contributing factor to non-procurement of coal by SEPC under the CSTA. This led to termination of CSTA by JERA. TANGEDCO has already conveyed its no-objection to this termination. [Ref Order dated 09.03.2023 and 31.08.2023 in MP. No.3 of 2022 (SEPC v. TANGEDCO)].</p>
GCV of Coal used		
13.	<p>SEPC in its letter dated 25.07.2022 had stated that due to non-availability of specified GCV coal in short time and as per the Boiler design, unit consumed more quantum of coal than what was specified. As per Addendum # 3, SEPC has to procure imported coal with GAR 5000 kCal/Kg (4600 NAR basis) coal indices only, whereas GCV in the lower range was procured which in turn increased the consumption of coal. SEPC has claimed the invoices based on coal utilized without considering the normative parameters.</p>	<p>(a) It is an admitted fact that SEPC had to procure coal on spot market and tried its best to procure coal of quality around 5000 GAR kCal/kg basis only. However, SEPC was constrained to procure coal less than 5000 GAR kCal/kg owing to short notice of procurement by TANGEDCO. The cost benefits derived due to low GCV of coal have been passed-on to TANGEDCO.</p> <p>(b) The weekly generation VFC bills submitted to TANGEDCO were as per actual expenditure incurred by SEPC.</p>

14.	GCV considered for calculation of VFC is based on local reports. As per Addendum # 3, the GCV is to be calculated on the basis of the CIMFR report.	<p>(a) SEPC got coal testing done by CIMFR as per PPA. For a few shipments, the coal suppliers were not agreeable for payments as per CIMFR reports. In such cases, SEPC was constrained to get the testing done through mutually agreed independent inspection agencies, in addition to CIMFR. The record of reports can be provided by SEPC as and when required by this Ld. Commission for prudence check.</p> <p>(b) As per the methodology adopted by such independent inspection agency, the GCV of coal was not at much variance to CIMFR analysis reports.</p>
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3.3. TANGEDCO's objection that SEPC despite being aware of risks associated with procuring imported coal decided to purchase imported coal for its plant and therefore SEPC be estopped from using the same as an excuse to not perform the contract and no liability arising therefrom can be imposed upon TANGEDCO, is incorrect. In this regard, following facts are germane:

- (a) Imported coal prices till 2020 were almost equal to domestic coal prices.
- (b) SEPC had appointed CRISIL and Price Waterhouse Coopers to advise on the coal linkage for the Project. Based upon their research, they had advised SEPC to go for imported coal. This was also informed to TANGEDCO.
- (c) Even at the time of signing Addendum # 3, TANGEDCO consented to SEPC using imported coal for its plant and even agreed to coal indices pertaining to imported

coal for the purpose of pricing under PPA. TANGEDCO ought not to be permitted to raise the above contention about imported versus domestic coal at this stage.

(d) So far as TANGEDCO's liability to pay for energy charges is concerned, TANGEDCO is bound by both the Act and Orders passed by the Commission viz

- (i) Act provides that in case of a Section 62 Project, the generator ought to be reimbursed for its cost of generation in the form of tariff.
- (ii) This Commission vide Order dated 31.08.2023 in M.P. No.3 of 2022 [SEPC v. TANGEDCO] has already directed both parties to modify the PPA since Addendum #3 tariff is unviable and hence contrary to the Act. Order dated 31.08.2023 has not been stayed until the date of filing of the present affidavit and hence assumes finality.
- (iii) It is TANGEDCO's own admission that there has been an unprecedented rise in imported coal prices. The same has been ratified by the MoP and this Ld. Commission. TANGEDCO ought not to be allowed to approbate and reprobate.

3.4. M/s. SEPC delayed execution of the Project and therefore (a) SEPC cannot claim benefits of Force Majeure event beyond 08.04.2021 and (b) all impacts due to failure in adhering to COD ought to be borne by SEPC, is incorrect.

3.5. The alleged delay in the Project is not a subject matter of the present petition. TANGEDCO is attempting to re-agitate an issue which has already been settled by this Ld. Commission vide latest Order dated 31.08.2023 in M.P. NO.3 of 2022 –M/s. SEPC Power Pvt. Ltd. v. TANGEDCO- Para 10.10]

3.6. TANGEDCO's objections regarding CTO do not form subject matter of the present petition. Be that as it may, SEPC vide letter dated 03.08.2021 informed TANGEDCO regarding expiration of CTO on 30.11.2021. The same was also taken note of by TANGEDCO vide letter dated 21.01.2022. Further, SEPC had timely applied for renewal of CTO i.e. on 11.03.2021. The Commission ought to dismiss TANGEDCO's contentions at the outset.

3.7. TANGEDCO 'has raised various objections with respect non-procurement of coal from JERA under the CSTA and termination thereof. In this regard, SEPC's Rejoinder submissions are as follows:

- (a) Relevant facts for consideration are as follows:
 - (i) On 28.02.2021, SEPC procured 76,997 MT of coal from JERA for trial operations. Out of this stock, 45,348 MT of coal was used for trial operations. VFC for this shipment was Rs. 3.45 per KWh. By the time SEPC received connectivity from TANGEDCO, the imported coal prices had shot-up. SEPC apprehended requirement of more coal for trial operations. In order to avoid any coal shortage during trial operations, SEPC procured 23,876 MT of alternate coal from Balaji Malts on 28.09.2021 which was cheaper than the CSTA price. SEPC successfully achieved the COD using JERA's shipment i.e. balance coal quantity of 31,649 MT. SEPC accordingly was left with Balaji Malts' shipment which was later used for Section 11 supply.

- (ii) Post COD i.e. on 30.11.2021, SEPC could not supply power under Addendum #3 due to exorbitant rise in prices of imported coal. Therefore, SEPC did not procure coal under the CSTA post COD.
- (iii) On 04.02.2022, SEPC filed M.P. No. 3 of 2022 [SEPC v.TANGEDCO] seeking appropriate directions from this Ld. Commission including permission to terminate the CSTA and procure domestic coal linkage for the Project.
- (iv) On 29.04.2022, TANGEDCO directed SEPC to supply power under Section 11. SEPC conveyed to TANGEDCO that a period of 45 days (Clause 3.2.8 of CSTA) is required for procurement of coal under the CSTA. Since TANGEDCO required power supply immediately, SEPC was constrained to procure coal from spot market. It is denied that SEPC cited 6 months schedule for coal procurement under CSTA.
- (v) On 23.03.2022, TANGEDCO filed its Counter Affidavit and conveyed its no-objection to termination of CSTA. The same has also been approved by the Commission vide Order dated 09.03.2023 in M.P. No.3 of 2022 [M/s. SEPC Power Pvt. Ltd. v. TANGEDCO]. TANGEDCO cannot be allowed to re-agitate the same issues.

(b) In view of the above, contentions regarding non procurement of coal under CSTA ought to be dismissed. Moreover, as already submitted, procurement of coal from spot market was cheaper than CSTA coal. Article 16.2 of the PPA provides for procurement of coal from alternate sources in case the same is beneficial to TANGEDCO.

(c) It is incorrect to suggest that SEPC unilaterally terminated the CSTA with JERA. On 07.10.2022, in view of the prevailing material change in circumstances JERA issued a notice of termination of CSTA to SEPC. SEPC vide letter dated 17.12.2022 informed TANGEDCO about the notice of termination. Be that as it may, SEPC's claim in the present petition is strictly restricted to offsetting 'adverse financial impact' for supply under Section 11 directions and nature of termination of CSTA does not form subject matter of the present petition.

3.8. TANGEDCO's contends that (a) withdrawal of Section 11 directions vide TANGEDCO's letter dated 23.11.2022 was not abrupt (b) TANGEDCO vide notices dt. 23.11.2022 and 01.12.2022 intimated SEPC regarding withdrawal of directions for supply on pass through basis with effect from 01.12.2022, in accordance with MoP directions (c) TANGEDCO also informed SEPC that fixed charges and VFC will be paid as per the terms of PPA/Addendum #3 and not as per pass through rates. TANGEDCO's contentions are incorrect except those forming part of record.

In this regard, following facts are germane for consideration:

- (a) On 16.06.2022, TANGEDCO extended the applicability of supply of power under pass through mechanism until 31.12.2022. Further, vide direction dated 28.09.2022, MoP also extended the applicability of supply of power under pass through mechanism till 31.12.2022.
- (b) Based on the aforesaid, SEPC made arrangements for coal and secondary fuel (oil). SEPC spent about Rs. 117 Cr. for procuring coal and oil for supply of power till 31.12.2022.

- (c) On 23.11.2022, TANGEDCO withdrew the Section 11 direction.
- (d) On 29.11.2022, SEPC requested TANGEDCO to continue off-taking power as per pass through mechanism since the same was promised until 31.12.2022. However, the request was of no avail.

3.9. In view of the above, withdrawal of TANGEDCO's Section 11 direction on 23.11.2022 was abrupt. The coal and oil procured in November 2022, was used in Section 11 supply of 2023. SEPC has a claim of adverse impact on the actual cost.

3.10. TANGEDCO has raised the objection that due to non-supply of power as per PPA, TANGEDCO has faced severe financial constraints by purchasing power at higher tariffs. M/s.SEPC was not able to operate the Project as per the PPA due to factors beyond its control. This aspect is not the subject matter of the present petition. Without prejudice, non-supply of power has been acknowledged by this Commission vide Order dated 31.08.2023 in M.P. No.3 of 2022 [SEPC v. TANGEDCO]. Order of this Commission is binding on both SEPC and TANGEDCO until stayed or set aside. TANGEDCO is not only in blatant violation of the Order but is also attempting to challenge the same before this Commission.

3.11. It is an admitted position that SEPC procured 23,876 MT of coal from M/s. Balaji Malts on Stock on Sale basis in September 2021 for trial operations. The VFC for this shipment was Rs.5.55/kWh while the VFC under CSTA for coal procurements during the same period would have been Rs.5.80/kWh. In terms of Article 16.2 of PPA, SEPC is entitled to procure coal in deviation of CSTA if the same is available at cheaper rates.

The cost benefits derived out of such procurement will automatically be passed on to TANGEDCO.

4. Memo dated 7th May 2024 filed by Respondent :-

4.1. The above DRP has been filed by SEPC seeking for the following prayer ;

“Hold and declare that as per Section 11(2) of the Electricity Act, 2003, SEPC is entitled to receive actual cost of generation of power supplied under section 11(1) including supply periods and direct the TANGEDCO to compensate a total sum of Rs.122,69,82,905/- crores till 12.06.2023 towards actual cost of generation for power supplied including interest of Rs.18,65,27,398/-”

4.2. On 16.04.2024, the Commission directed M/s SEPC to file data supporting their claim of actual cost of generation under Section 11(2) of Electricity Act 2003.

4.3. M/s. SEPC has filed an additional affidavit dated 25.04.2024 with some data on monthly basis, with which it is not possible to reconcile or scrutinise SEPC's claims, for the following reasons:

(1) The Committee constituted by Ministry of Power which comprises of the representatives from MOP, CEA and CERC fixed the benchmark rate considering the updated prices of imported coal and shipping charges to the PPA holders, on a fortnight basis.

(2) The Tariff invoices were submitted by SEPC on weekly basis and TANGEDCO is making payment accordingly.

(3) Weekly tariff is different from that of monthly tariff. SEPC has submitted a fresh invoice on monthly basis which could not be correlated with already passed bills.

(4) It is possible to reconcile their additional claim only with the already passed tariff on weekly basis.

(5) In view of the above, M/s. SEPC was requested to file supporting documents to substantiate their claims on weekly basis with respect to the already claimed / processed bills on weekly basis.

(6) This Respondent vide letter dated 02.05.2024 has called upon M/s SEPC to furnish data on a weekly basis.

(7) In the light of above facts, Commission may direct the Petitioner to furnish data supporting their claim of actual cost of generation on a weekly basis for the period of claim and pass such further or other orders.

5. Memo dated 28th May 2024 filed by the Respondent :-

5.1. The present D.R.P. has been filed by the petitioner praying for recovery of the “actual cost of generation” from the Respondent for the period of “pass through of coal” as per the directions issued under section 11 of the Electricity Act, 2003 by the Ministry of Power, Government of India.

5.2. On 19.03.2024, after hearing both parties, the Commission directed the Petitioner to file documents and data supporting its claim of actual cost of generation. The said documents and data was filed by the Petitioner on 13.05.2024. Upon going through the documents, the Respondent finds preliminarily that the Petitioner has not furnished

certification from CIMFR for all the shipments claimed by it for the GCV value. As per clause 1 (definition) of the Addendum No.3 dated 25.02.2021, which was approved by the Commission, GCV sampling and testing must be done by CIMFR only. This is to ensure a fair standard of the GCV. Variation in GCV would vary the price of the coal and thus, will incur price correction. In the present case, the petitioner has submitted data with test certificates from IGI, LEON and SGS, which are not the agreed testing agency as per PPA. It is learnt that the petitioner has sent samples to CIMFR for testing but has not furnished the CIMFR test certificates to calculate the GCV value which leads to a reasonable suspicion of price manipulation.

5.3. The Petitioner has included the transportation cost as part of its shipping cost despite the fact that the conveyor cost has been added as part of the capital cost. Similarly, the Petitioner has also added the cost of sampling and testing in its calculations, which have to be borne by the petitioner only.

5.4. The petitioner has purchased domestic coal through MV Nefeli GR invoiced from the Central Coal Field through e auction for G7 grade coal (GCV range 5201 to 5500). However, from the CIMFR test certificate obtained on two different dates - 17.08.2022 and 23.11.2022, it was observed that the GCV values were equivalent to G12 grade (GCV 3701 to 4000). Thus, price correction has to be done for this consignment. Also the transportation cost to Tuticorin port is twice of that the amount being paid by TANGEDCO.

5.5. Under the heading Handling Charges, at anchorage and Port, the Petitioner has charges which has already been disallowed by the Commission in order dated 02.09.2020 in M.P. No. 27 of 2016.

5.6. After correcting the above discrepancies (except the GCV test certificates requirement), the actual cost of generation over and above the MoP value works out to Rs. 44.31 Crs as against the claim of Rs.122,69,82,905/-. However, even this value is subject to further verification based on the test report since the price can be calculated only on the actual GCV value of the coal used by the petitioner for which the petitioner has to produce a test certificate from CIMFR.

5.7. The Commission may direct the Petitioner to produce the test certificates from CIMFR for the consignments of coal used by it during the relevant period of claim and pass such other or further orders.

6. Reply by the petitioner SEPC to TANGEDCO's MEMO dated 27.05.2024 :-

6.1. After the Commission's direction vide Daily Order dated 07.05.2024, SEPC and TANGEDCO engaged into daily reconciliation meetings. On 21.05.2024, the present Petition was listed before the Commission. During the hearing, SEPC circulated a Note capturing in brief the discussions that had happened between SEPC and TANGEDCO during the daily reconciliation meetings. The information in the Note was also filed on Affidavit before the Commission on the same date, i.e. 21.05.2024. Vide Daily Order dated 21.05.2024, the Commission directed TANGEDCO to furnish response to SEPC's Note.

6.2. On 28.05.2024, TANGEDCO filed a memo dated 27.05.2024 before the Commission, in response to data submitted by SEPC on 13.05.2024, laying down several objections to SEPC's data and computation of actual cost of generation.

6.3. In response to TANGEDCO's objections, SEPC on 28.05.2024 during the hearing before the Commission submitted that as per the law settled by Hon 'ble Appellate Tribunal for Electricity ("APTEL"), the mandate of Section 11 (2) is reimbursement of actual cost of generation to the generator since the generator, under emergency conditions, ensures power supply in a situation of power shortage. Hon'ble APTEL in GMR Energy Limited v. Karnataka Electricity Regulatory Commission, 2014 SCC Online APTEL 78 ("GMR Judgment") held as under:

22. The only check that is to be exercised is that the rate of power decided by the State Commission should cover the variable cost of the power plant plus a reasonable profit. ...

53. Summary of our findings:

i) Offsetting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11 (1) of the Electricity Act, 2003 would mean fixing a rate keeping in view the revenue the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss.

The intention may be to assess situation prior to Section 11 condition, however, the compensation under Section 11(2) mandatorily has to cover full cost of generation, causing no loss to the generator.

6.4. The Hon'ble CERC in Tata Power Company Limited v. GUVNL & Ors., 2023 SCC Online CERC 266, has relied on Hon'ble APTEL's GMR Judgment and granted actual cost of generation to the generator [Para 68].

6.5. The Component of power purchase agreement that is applicable under the present Section 11 supply situation is payment of Fixed Charges, as mandated by the Ministry of Power ("MoP").

6.6. TANGEDCO is erroneously attempting to fall-back on clauses of the PPA to restrict SEPC's claim, which ought to be disallowed. SEPC's point-wise reply to TANGEDCO's objections in the Memo dated 27.05.2024 has been furnished hereunder.

Sl. No.	TANGEDCO's Objections	SEPC's Response
CIMFR Results of Analysis for all coal shipments		
1.	SEPC has not furnished certification for Gross Calorific Value ("GCV") from Central Institute of Mining and Fuel Research ("CIMFR") for all the coal shipments received by SEPC. Instead, SEPC has furnished test certificates from IGI, LEON and SGS, which are not the agreed testing agencies as per the Power Purchase Agreement ("PPA").	<p>1. On 28.05.2024, SEPC furnished the copies of CIMFR's Results of Analysis ("RoA") for all the fourteen (14) shipments received by SEPC.</p> <p>2. Under the present Section 11 (1) supply, SEPC has been procuring coal from sellers on spot market.</p> <p>The coal purchased is in deviation to the PPA as also stipulated by TANGEDCO in its own Section 11 direction dated 29.04.2022. This means that pursuant to Section 11 direction by the Central Government as well as by TANGEDCO, imported coal-based power generators restarted their plant operations based on the promise of pass-through mechanism of Variable Fuel Charges ("VFC") which was not provided for in the respective power purchase agreements. Resultantly, the condition for coal testing by CIMFR under PPA between TANGEDCO and SEPC is not applicable on coal purchased through spot market. This is so for the following reasons viz:</p>

		<p>(a) Spot market purchase happens on short-term basis, i.e. the coal is procured within a short span of time. SEPC was constrained to procure coal on short term basis throughout Section 11 supply period in the absence of TANGEDCO's commitment for long term scheduling of power.</p> <p>(b) Sellers on spot market do not at many instances agree for third party coal testing by CIMFR. In the present case, out of fourteen (14) shipments, only six (6) coal sellers agreed to receive payment based on CIMFR's RoA.</p> <p>(c) So far as the remaining eight (8) shipments are concerned, SEPC made the payment to the coal sellers based on GCV arrived at by other reputed IIA. Details of testing reports by IIAs have already been provided by SEPC to TANGEDCO vide Compliance Affidavit dated 25.04.2024. For instance, the coal supplier for Shipment No.10 (MV Big Bang) executed an Addendum to the Coal Sale and Purchase Contract for insisting on coal testing through a third-party Independent Inspection Agency ("IIA"). Further, the coal supplier for Shipment Nos. 5, 7 and 8 (MV Chola Melody, MV Akij Glory, and MV JR Summer) specifically denied considering CIMFR test reports for GCV and insisted for third party IIAs.</p> <p>(d) As abundant caution and due to a subsisting agreement between SEPC and CIMFR, SEPC got samples from all fourteen (14) shipments tested by CIMFR. Accordingly, CIMFR Reports for the fourteen (14) shipments have been provided by SEPC to TANGEDCO vide letter dated 28.05.2024.</p> <p>3. TANGEDCO has agreed to pay SEPC</p>
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	<p>the VFC calculated based on normative parameters. Without prejudice, SEPC will suffer a loss of about Rs. 67 Cr. on this aspect alone, i.e. SEPC will not be compensated for deviation in normative parameters which occurred due to factors like inadequate scheduling by TANGEDCO and non-commitment of long-term scheduling by TANGEDCO due to which SEPC was constrained to procure coal from spot market at cheapest available price. SEPC tried to procure coal, as far as possible, near to the plant's boiler design GCV. Had SEPC operated its plant under a viable PPA, it would have been able to do long-term planning for procurement of adequate quality of coal as per plant's boiler design. For this reason alone, Section 11(1) supply cannot be made subject to conditions under the PPA which result in a loss to SEPC.</p> <p>4. In view of the Commission's directions, SEPC has prepared a tabular summary for payments actually made by SEPC to coal sellers based on IIA-ascertained GCV along with CIMFR GCV for the eight (8) shipments, without prejudice to SEPC's claims for actual cost, which demonstrates shortfall of approx. Rs. 71.21 Cr. in payment by TANGEDCO, as against Rs. 44 Cr. stated by TANGEDCO in the Memo. The pro-rata adjustment based on CIMFR GCVs, has been demonstrated This means that the per unit cost for SEPC as per the actual payments made to coal seller remains the same despite variation in CIMFR GCV. For this reason, SEPC does not gain in cases where CIMFR GCV is higher than IIA GCV and does not lose in a situation which is vice versa.</p> <p>5. If TANGEDCO is allowed to calculate SEPC's cost of coal shipments based on CIMFR's RoAs, especially when payments to coal suppliers have been made as per the GCV Reports of IIAs, SEPC will suffer a loss of</p>
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		approximately Rs. 4.50 Cr. Accordingly, if TANGEDCO wishes to rely upon the CIMFR's RoAs for GCV, SEPC's cost of shipments ought to be adjusted on pro-rata basis.
Cost of sampling and testing by CIMFR		
2.	SEPC has included cost of sampling and testing in its calculations which is required to be borne by SEPC as per Addendum # 3 to PPA.	As per settled position of law, SEPC ought to be compensated for actual cost of generation for supply under Section 11 directions. Actual cost incurred by SEPC for getting the coal samples tested from CIMFR ought to be reimbursed on pass-through basis.
Grade slippage of domestic coal		
3.	For domestic coal purchased by SEPC through shipment MV Nefeli GR, CIMFR test certificates show that the GCV values were equivalent to G12 grade as against G7 grade as invoiced from Central Coal Field.	<ol style="list-style-type: none"> 1. It is a fact of common knowledge that such grade slippages ordinarily happen in case of domestic coal. SEPC, like all other generators procuring domestic coal, was constrained to make the payment of shipment based on G7 grade of coal under spot e-auction, where the coal is available on as-is where is basis with no assurance on grade /quality of coal. 2. SEPC procured domestic coal on 15.02.2022 and the shipment for the same, i.e. MV Nefeli GR arrived at the V.O.Chidambaranar Port, Tuticorin ("Port") on 01.07.2022. During this period SEPC made various payments (including statutory payments) for procurement of this coal. 3. SEPC used this domestic coal only in July 2022. The same was cheaper than imported coal then available. Through the purchase of domestic coal, a total saving of Rs.8,01,30,536/- (Rs. 3,007 PMT x 26,648 MT) was passed on to TANGEDCO.
Transportation Cost		
4	(a) SEPC has included transportation cost as part of its shipping cost despite the conveyor cost having been	1. TANGEDCO has erroneously contended that SEPC has included the cost of conveyor in its capital cost. In this regard, SEPC's abstract of the capital cost for External Coal Handling System

	<p>added as part of the capital cost.</p> <p>(b) With regard to the domestic coal purchased by SEPC through shipment MV Nefeli GR, Transportation cost to Tuticorin port is twice the amount being paid by TANGEDCO.</p>	<p>(“ECHS”), as formed part of Addendum #3 to the EPC Contract, is provided hereunder :</p> <table border="1" data-bbox="767 322 1275 927"> <thead> <tr> <th>S.No.</th> <th>Cost component</th> <th>Cost (In Rs.Cr.)</th> </tr> </thead> <tbody> <tr> <td>1.</td> <td>External Coal Handling and Port Facility Works – Civil works</td> <td>35.00</td> </tr> <tr> <td>2.</td> <td>External Coal Handling System – Supplies</td> <td>109.00</td> </tr> <tr> <td>3.</td> <td>Port Facility and ECHS – Services</td> <td>10.00</td> </tr> <tr> <td></td> <td>Total</td> <td>154.00</td> </tr> </tbody> </table> <p>The EPC Contract along with the said Addendums was also shared with TANGEDCO vide letter dated 30.01.2017.</p> <p>2. It is evident from the table provided hereinabove that the total contemplated cost of the ECHS and coal jetty was Rs.154.Cr. The ECHS comprised conveying coal from ‘Receiving Hoppers’ on Port Facility i.e. ‘Captive Coal Jetty’. along with conveying coal from Port Facility i.e. ‘Captive Coal Jetty’ to the crusher house located inside the power plant area. As per Minutes of Meeting dated 02.09.2020 (“MoM”), cost of Rs.154 Cr. was excluded from the provisional capital cost. This cost included the cost for both conveyor belt and coal jetty.</p> <p>3. In view of the aforesaid exclusion of ECHS cost i.e. conveyor cost from the provisional capital cost, SEPC did not construct the coal jetty and ECHS. In absence of captive jetty facility, SEPC has been transporting coal through trucks, the costs of which ought to be</p>	S.No.	Cost component	Cost (In Rs.Cr.)	1.	External Coal Handling and Port Facility Works – Civil works	35.00	2.	External Coal Handling System – Supplies	109.00	3.	Port Facility and ECHS – Services	10.00		Total	154.00
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3.	Port Facility and ECHS – Services	10.00															
	Total	154.00															

		<p>allowed on pass-through basis to SEPC as per the mandate of Section 11(2).</p> <p>4. It is noteworthy that SEPC's Coal Handling Agreement ("CHA") was approved by this Commission vide Order dated 10.01.2020 in M.P.No.27 of 2016 [SEPC v. TANGEDCO] and TANGEDCO vide letter dated 10.05.2021. CHA provides for inclusion of cost of transportation of coal by trucks viz:</p> <p>(a) Clause 6.1: Logistics Provider is obligated to maintain an adequate fleet of <i>inter alia</i> tipper trucks.</p> <p>(b) Clause 10.1: The coal discharged from the vessel shall be immediately transported by trucks to the designated storage yard/ stacking areas hired by Logistics Provider or to the power plant storage yard.</p> <p>(c) Clause 20: Includes provisions specific to coal received from trucks.</p> <p>5. Accordingly, SEPC ought to be compensated for transportation cost incurred under CHA, which was consented to by TANGEDCO. Further, regarding SEPC's transportation cost to Tuticorin port for domestic coal being twice the amount being paid by TANGEDCO, the rates prevalent at the time of spot procurement of domestic coal by SEPC (i.e. MV Nefeli GR) cannot be compared with the TANGEDCO's suggested rates which may be based on TANGEDCO's long-term contracts. Accordingly, SEPC's transportation cost ought to be allowed on pass through basis.</p>
Handling Charges at anchorage and Port		
5	Certain charges under Handling Charges at anchorage and Port have already been disallowed by	1. This commission in Order dated 10.01.2020 in M.P.No.27 of 2016 [SEPC v.TANGEDCO] allowed 'Handling Charges' as per the rates given in CHA

	<p>the Commission in Order dated 10.01.2020 in M.P.No 27 of 2016.</p>	<p>Clause 3.2 read with 3.3 of CHA provides that 'Handling Fees and Expenses', other than Stevedoring Charges and Transportation and Inter-carting Charges, are to be paid as per the prevailing Schedule of Rates ('SoR') published by TAMP or Customs or such appropriate authorities from time to time. Schedule 2 provides for all the components of Handling Fees and Expenses, which includes <i>inter alia</i> PPP Charges for Harbour Mobile Crane ("HMC") and conveyor charges.</p> <p>It is not possible for any coal procurer / generator to unload coal from ships and transport it to port without using the crane and conveyor (in the case of Berth No.9 at the Port). Therefore, the HMC and conveyor qualify as essential services for operation of the plant. In view of SEPC's Handling Charges at anchorage and Port being determined by Port's SoR, the same cannot be denied to SEPC. SEPC will be subjected to an annual estimated loss of Rs.30Cr.if the handling charges at anchorage and port is denied to SEPC. The same is against the mandate of Section 11(2).</p>
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7. Findings of the Commission :-

Heard the counsel for the Petitioner and the Respondent. Pleadings of both parties traversed. Records perused. Written Submissions placed on record on behalf of the Petitioner and the Respondent considered.

8. Factual matrix of the case :-

8.1 The Respondent on 29.04.2022 gave its directions akin to those under Section 11 of the Act for Petitioner to supply power in deviation of the PPA on temporary basis

till December 2022. The Respondent stated that in view of the precarious shortfall of availability of power in the State of Tamil Nadu, the Petitioner is to supply power on pass through basis in deviation of the PPA. The Respondent also stated that such direction to operate was in view of rising of imported coal prices and that pass-through cost payable to SEPC shall be determined by this Commission on the basis of documents submitted by SEPC.

8.2 The Petitioner commenced power supply to TANGEDCO under Section 11 (1) on 30.04.2022. The Petitioner used coal procured through alternate arrangements. Thereafter the Petitioner on 02.05.2022 wrote a letter to TANGEDCO stating that coal cannot be procured under the CSTA on short notice as a minimum notice of 45 days is required under the CSTA to procure coal through JERA. The Petitioner with its affidavit dated 25.04.2024 placed some documents on record demonstrating its communication with JERA where JERA proposed the initial supply month to be September or October 2022. It is known to both parties that the CSTA thereafter was terminated on 07.10.2022. On this basis the Petitioner stated that coal could not be procured under CSTA on short notice. No objection has been expressed by TANGEDCO to such contention after 25.04.2024.

8.3 Ministry of Power issued Section 11 directions vide its memorandum/order dated 05.05.2022. By way of this memorandum/order, Ministry of Power stated as follows:

“3. In order to ensure that all power plants based on imported coal start functioning the States have been advised that the price of coal should be a pass through.....

4. In the light of the present emergent circumstances, the following directions are issued under Section-11 of the Electricity Act:...

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

d. Considering the fact that the present PPAs do not provide for the 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 CERC. This Committee shall ensure that 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....

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 of the above rates shall be made to the Generating Company on a weekly basis

j. Bench Mark rates worked out by the Committee shall be reviewed every 15 days taking into consideration the change in the price of imported coal; shipping costs etc.

5. This order shall remain valid upto 31.10.2022.”

8.4 Ministry of Power issued a follow Order for constitution of the committee on the like date i.e. 05.05.2022 wherein terms of reference provided:

“i. To find out the impact on variable charges due to rise in cost of imported coal.

ii. To suggest indicative tariff for Imported Coal Based (ICB) generating stations.

iii. To also factor into mining profits....”

8.5 MOP by way of follow up Section 11 directions dated 13.05.2022 specified that fixed charges will be paid to the generator as per the power purchase agreements or as mutually agreed between generating company and the procurers. TANGEDCO has been paying fixed charges to the Petitioner as per the PPA. The present petition is limited to payment of VFC by TANGEDCO to the Petitioner.

8.6 On various dates thereafter, MoP's constituted committee notified benchmark rates. The Petitioner was included in the notification starting 11.07.2022. Before this date the Respondent made payment to the Petitioner based on benchmark rates of other generators on pass through basis. On 11.07.2022 MoP notified the following:

“3. In this regard, the Committee has submitted its 5th Report. As per the request received from TANGEDCO, the Benchmark Tariff for the plants M/s.OPG and M/s. SEPC has been calculated based on the technical Parameters of the Plants (Gross Heat Rate and Auxiliary Power Consumption etc.) submitted by TANGEDCO. Accordingly, the proposed tariff calculated for eight ICB plants, based on the recommendations of the 5th Report of the Committee, for the control period starting from 10.07.2022 are as under:

(a) The Energy Charges Rate (ECR) calculated for eight plants are as under:

Plant	Capacity	Benchmark ECR (Rs./kWh)
...		
SEPC Power Private Ltd	1X525	6.88

8.7 Subsequently MoP notified the following benchmark rates in FY 2022-23 for the Petitioner as per which the Respondent made payments to the Petitioner:

S. No.	Date of MoP's Directions	Relevant control period	Benchmark ECR/kWh (in Rs.)
1.	11.07.2022	10.07.2022 to 22.07.2022	6.84
2.	02.08.2022	23.07.2022 to 06.08.2022	6.54
3.	12.08.2022	07.08.2022 to 20.08.2022	6.00

4.	29.08.2022	21.08.2022 to 03.09.2022	5.36
5.	09.09.2022	04.09.2022 to 17.09.2022	5.31
6.	06.10.2022	18.09.2022 to 01.10.2022	5.76
7.	06.10.2022	02.10.2022 to 15.10.2022	6.56
8.	26.10.2022	16.10.2022 to 29.10.2022	6.77
9.	09.11.2022	30.10.2022 to 12.11.2022	6.71
10.	02.12.2022	13.11.2022 to 26.11.2022	6.45
11.	02.12.2022	27.11.2022 to 30.11.2022	6.26
12.	31.03.2023	16.03.2022 to 29.03.2023	4.83
13.	03.04.2023	30.03.2023 to 31.03.2023	4.89

8.8 As per Petitioner contention TANGEDCO gave shut down instructions to Petitioner on fourteen occasions in FY 2022-23. The Petitioner in its petition submitted that due to Respondent instructions SEPC's plant had to go under reserve shut down and again restart the supply of power after a day. Due to frequent start up of SEPC's plant and due to ramp up and down instructions the Petitioner was constrained to deviate from the normative operational parameters like station heat rate, auxiliary consumption and secondary oil consumption etc. The Petitioner with the petition has provided a record of Plant Load Factor (PLF) achieved in FY 2022-23 along with auxiliary power consumption etc. As per Respondent, the Petitioner is bound by instructions given by State Load Despatch Centre (SLDC) since it is responsible for optimum operation of the grid

and as per Section 32 (2)(c) of the Act, SLDC is the authority which keeps account of the quantity of electricity transmitted through the grid.

8.9 In November on 23.11.2022 Respondent withdrew the Section 11 requisition w.e.f. 01.12.2022 and Petitioner was asked to supply power as per the PPA. The Petitioner objected to such withdrawal contending that coal stock arrangement for December 2022 were already made. The Petitioner further contended that such coal procured for December 2022 was used in FY 2023-24 Section 11 (1) supply period.

8.10 In FY 2023-24, the Respondent requisitioned Section 11 (1) power from Petitioner starting 16.04.2023. The Petitioner placed on record material to show that the supply under Section 11 (1) starting 16.04.2023 was sporadic i.e. from 16.04.2023 to 29.04.2023, from 16.05.2023 to 26.05.2023 and from 29.05.2023 till 12.06.2023 (being the cut off date for claim in the present petition).

8.11 In FY 2023-24 (till claim cut off date of 12.06.2023) MoP notified the following benchmark rates for Petitioner as per which Respondent made payments to Petitioner:

S. No.	Date of MoP's Directions	Relevant control period	Benchmark ECR/kWh (in Rs.)
1.	19.04.2023	13.04.2023 to 26.04.2023	4.98
2.	04.05.2023	27.04.2023 to 10.05.2023	4.97
3.	19.05.2023	11.05.2023 to 24.05.2023	5.02

S. No.	Date of MoP's Directions	Relevant control period	Benchmark ECR/kWh (in Rs.)
4.	29.05.2023	25.05.2023 to 07.06.2023	4.96
5.	13.06.2023	08.06.2023 to 12.06.2023	4.93

9. Section 11 batch petitions preferred by SEPC and TANGEDCO:-

The Respondent and Petitioner filed separate petitions seeking relief under Section 11 of the Act:

(a) TANGEDCO filed ratification petition on 05.01.2023 i.e. M.P. No. 1 of 2023 seeking ratification for tariff paid by TANGEDCO to SEPC for supply of power under Section 11 from 30.04.2022 till 30.11.2022.

(b) SEPC filed dispute petition on 30.08.2023 as per liberty sought by SEPC from this Commission, seeking compensation for adverse impact suffered in generation under Section 11 (1) for power supplied from 30.04.2022 till 12.06.2023.

(c) TANGEDCO filed ratification petition on 21.09.2023 i.e. M.P. No. 30 of 2023 seeking ratification of tariff paid by TANGEDCO as per MoP Tariff to SEPC for supply of power under Section 11 from 16.04.2023 till 30.09.2023.

10. Gist of the submissions of the petitioner SEPC as discerned from the petition averments:-

The Petitioner with its petition made the following broad submissions:

- (a) As per Respondent's assurance on 29.04.2022 Petitioner procured coal from alternate sources on SOS basis and commenced power generation from 30.04.2022.
- (b) The supply under Section 11 commenced for the sole reason of ICB not functioning in view of exorbitant rise in prices of imported coal. This is recognised by both TANGEDCO and MoP. The Respondent requested Petitioner to supply power on pass through basis without notifying any interim charges or tariff.
- (c) Benchmark rates fixed by MoP are only interim in nature and cannot be considered final.
- (d) Determination of tariff is the function of this Commission under Section 62 read with Section 64 and 86 of the Act. Only this Commission has the statutory power to fix the determine tariff [*A.P. TRANSCO v. Sai Renewable Power (P) Ltd. (2022) 11 SCC 34, GUVNL v. Tarini Infrastructure (2016) 8 SCC 743*]
- (e) Section 11 (1) directions were issued to Petitioner to operate at full capacity using imported coal with the assurance that cost of generation will be subject to pass through mechanism. Under Section 11 (2) this Commission has the statutory power to offset the adverse financial impact. [*APTEL Judgment dated 23.05.2014 in GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors. – Appeal No. 37 and 303 of 2013*]
- (f) CERC recently relied on APTEL's 2014 judgment and passed an Order dated 03.01.2023 in Petition No. 128/MP/2022 titled as Tata Power Company Ltd. V. GUVNL & Ors. And allowed pass through cost to Tata Power Company.

(g) Meaning of offsetting adverse financial impact was provided by APTEL in Judgment dated 03.10.2012 in HimatsigkaSeide Ltd. v. KERC & Ors. in Appeal No. 141, 142 of 2011 which means rate covering cost of generation so that generating company does not incur a loss.

(h) Benchmark rate is not adequate to cover cost of generation for SEPC.

(i) SEPC has a vested right under Section 61(d) of the Act to recover its cost of generation and TANGEDCO holding such payment affects SEPC's legitimate expectation.

11. Substratum of the contentions raised by the respondent TANGEDCO in the counter affidavit:-

(a) Since MoP benchmark rates were much higher than PPA rate SEPC was at an advantage to supply power under Section 11.

(b) SEPC procured coal through stock on sale basis and e-auction tender and unilaterally terminated the CSTA with JERA.

(c) SEPC has not challenged the manner of MOP's fixation of rates. SEPC's writ petition before Madras High Court was withdrawn.

(d) SEPC procured lower GCV coal due to which SEPC had to consume more coal than required.

(e) MoP fixed benchmark rates on index price linked with lowest cost of imported coal. Therefore if price of coal used by SEPC is higher than benchmark rate, only benchmark rate is payable.

(f) Grant of relief to SEPC will unjustifiably burden consumers of TANGEDCO.

(g) SEPC has claimed the invoices based on coal utilized without considering the normative parameters.

(h) GCV considered for calculation of VFC is based on local reports and not CIMFR which cannot be permitted.

12. Essence of the submissions made by the petitioner SEPC in the Rejoinder dated 05.03.2024:-

(a) Rates notified by MoP are temporary in nature and SEPC is entitled to actual cost of generation as per settled law by APTEL.

(b) TANGEDCO has failed to prove how SEPC has unjustly enriched itself.

(c) MoP's committee did not consider pertinent commercial components at the time of calculating benchmark rates such as Miners' premium, Finance Cost of opening of LCs, actual ocean freight, Customs exchange rate, actual cost of coal handling at Discharge Port and inland transportation. MoP conservatively calculated the benchmark rate while failing to consider that several cost components unique to respective plants and ports.

(d) Benchmark rate or Section 11 supply cannot be compared with supply under the PPA to deny SEPC of the compensation for adverse impact. Section 11 supply was made in deviation to the PPA as requested by TANGEDCO. CERC in its Order dated 03.01.2023 in Petition 128/MP/2022 already held that in order to assess adverse impact, power purchase agreement tariff does not assume significance. This Commission vide Order dated 31.08.2023 in M.P. No. 3 of 2022 already held that Addendum #3 to the PPA is unviable.

- (e) SEPC has procured cheaper coal whenever it was available. Even PPA provides for a provision which allows cheaper procurement of coal than coal under CSTA. SEPC could not procure coal from JERA due to conditions under the CSTA for advance notice of about 45 days. Due to uncertainty in Section 11 off take by TANGEDCO, no coal consignment could be ordered much in advance.
 - (f) TANGEDCO has already conveyed its no objection to termination of CSTA.
 - (g) Due to short term planning SEPC was constrained to procure coal of lesser GCV than 5000 GAR kcal/kg. The cost benefits derived due to low GCV of coal have been passed-on to TANGEDCO amounting to about Rs. 105 Crs.
 - (h) SEPC got coal testing done by CIMFR as per PPA. For a few shipments, the coal suppliers were not agreeable for payments as per CIMFR reports. In such cases, SEPC was constrained to get the testing done through mutually agreed independent inspection agencies, in addition to CIMFR.
13. Besides the Petitioner is dispute resolution petition, pleadings were completed in TANGEDCO's ratification petitions i.e. M.P. No. 1 and 30 of 2023. In the ratification petitions TANGEDCO submitted as follows:
- (a) TANGEDCO expressed its objection to SEPC's Petition M.P. No. 3 of 2022 to remove ceiling price in the PPA.
 - (b) In April 2022 the precarious power demand crisis occurred due to factors like public exams held during summer, IT firms and commercial establishments resuming operations after COVID lockdown, lesser availability of coal, unit of KNNP generating station being shut down etc.

- (c) Despite corrective measures taken by TANGEDCO the demand supply gap persisted. TANGEDCO purchased power on the exchange along with swapping method. Despite such there was a gap of about 1500 MW.
- (d) SEPC despite achieving commissioning on 30.11.2021 did not supply power to TANGEDCO as per the PPA in spite of several notices. SEPC did not operate the power plant since the penalty of non-generation was lower compared to high cost of generation using imported coal.
- (e) In order to overcome the demand supply gap, MoP convened a meeting on 12.04.2022 with representatives from State Electricity Boards to decide that ICBs should be operated under Section 11 of the Act. Accordingly MoP vide order dated 05.05.2022 issued directions to operationalize all imported coal based power plants by ensuring that bench mark rates meet prudent costs of using imported coal, shipping cost, O&M cost etc. and a fair margin. TANGEDCO accordingly requested SEPC to operate the plant as per MoP directions till December 2022.
- (f) SEPC commenced power supply as per Section 11 directions by purchasing coal through stock on sale basis and e-auction tender. TANGEDCO by way of its letters dated 17.05.2022, 18.05.2022, 07.06.2022, 24.06.2022 and 02.07.2022 requested MoP to fix benchmark rate for SEPC. On 11.07.2022 and after MoP fixed benchmark rate for SEPC.
- (g) From 30.04.2022 till 10.07.2022, TANGEDCO made VFC payment to SEPC by considering coal on shipment basis i.e. first in first out basis till 29.05.2022.

Afterward, TANGEDCO made payment to SEPC based on benchmark rates of other similarly placed plants. SEPC vide letter dated 25.07.2022 made request to TANGEDCO to make payments as per MoP directions dated 05.05.2022. TANGEDCO reworked the invoices and by considering the following:

1. GCV as per invoices subject to GCV determined by CIMFR.
2. Coal as per shipment wise i.e. FIFO basis.
3. SHR and auxiliary consumption as per PPA/Addendum #3.
4. Coal price as per various sources as per invoices submitted without ceiling limit.

(h) SEPC by way of its letter dated 13.09.2022 to TANGEDCO stated that actual expenditure from 30.04.2022 till 09.07.2022 was Rs. 311.29 Cr. Whereas TANGEDCO has paid only Rs. 285.55 Cr. SEPC requested TANGEDCO to make balance payments.

(i) Certain provisions of the PPA/Addendum #3 are exempted i.e. ceiling on VFC. However SEPC has to procure coal as per Schedule 3 of Addendum # i.e. SEPC is to procure coal under approved CSTA only.

(j) SEPC informed TANGEDCO that CSTA was terminated on 21.11.2022. TANGEDCO on 30.12.2022 informed SEPC that any modification/change in agreements regarding procurement of coal shall per as per approval of this Commission.

(k) After 30.11.2022 TANGEDCO was in need of power to maintain uninterrupted supply. TANGEDCO reiterated all intra state generators including SEPC to

operationalize the plant as per MoP directions for ICB plants in 2023. TANGEDCO made VFC payment to SEPC from 16.04.2023 to 29.05.2023 at benchmark rate notified by MoP. Payment from 29.05.2023 to 17.07.2023 was made by TANGEDCO by restricting the cost of secondary oil as per PPA.

14. The Petitioner in response to TANGEDCO's ratification petitions has broadly taken the same submissions as taken by SEPC in their dispute petition D.R.P.No.17 of 2023.

15. The sum and substance of the arguments advanced by the counsel for the petitioner SEPC is as hereunder:-

15.1 (a) When SEPC's plant achieved COD on 30.11.2021 it could not supply power as per the PPA due to expiration of consent to operate. Meanwhile imported coal prices also rose multi-fold which made the PPA (Addendum #3) unviable. This Commission acknowledged the imported coal price rise vide Order dated 31.08.2023 in M.P. No. 3 of 2022 held Addendum #3 to be unviable for SEPC. Therefore, SEPC could only supply power on pass through basis starting April 2022 based on TANGEDCO's request.

(a) Upon TANGEDCO's request dated 29.04.2022, SEPC immediately started supplying power from the next day i.e. 30.04.2022. SEPC attempted to procure coal from JERA under the CSTA however the same was impeded by JERA's refusal to supply before September/October 2022. SEPC therefore purchased coal on spot market for all Section 11 supply periods.

(b) In FY 2022-23, TANGEDCO caused frequent ramp up and ramp down situations for SEPC due to which SEPC deviated from its normative parameters of SHR, Secondary Oil consumption, auxiliary consumption etc. For this additional expenditure on account of excess consumption of fuel SEPC ought to be compensated under Section 11 (2).

15.2 SEPC summarised the data provided in the Petition:

1. 80% scheduling done by TANGEDCO was significantly below the normative plant load factor viz

S.No.	Expected units in a day	Exported units	
		Period	Units
1.	1,00,80,000	April 2022	56,76,364
2.		8 Days of May 2022	7,40,87,273
3.		9 th to 15 th May 2022	5,19,45,455
4.		23 rd to 29 th May 2022	2,44,14,545
5.		22 nd to 29 th May 2023	4,30,50,909

2. On an average there were 6 revisions per day for ramp up and ramp down. SEPC was also forced to go in reserve shut down on many occasions due to zero scheduling by TANGEDCO. The Petition provides the details for such occasions.

3. In view of the above SEPC's fuel consumption was more than what it would have ideally consumed in a situation where the plant was operated at 80% PLF.
- (c) In 2022, the difference between MoP rate and actual cost of generation was about Rs. 1.22/unit.
- (d) In 2023, the initial supply was sporadic i.e. from 16.04.2023 till 29.05.2023. SEPC continuously started supplying to TANGEDCO only from 29.05.2023. Difference between MoP rate and actual generation was about Rs. 0.46/unit.
- (e) MoP has notified temporary rates which do not take the following vital multiple factors into consideration:
- (i). MoP rates consider coal cost based on GCV of 5000 kCal/kg (ARB). Whereas usage by SEPC's plant is ideally a coal of higher grade i.e. 5450 kCal/kg and above. In case benchmark rate is based on 5000 kCal/kg GCV then every purchase of higher GCV coal adds to SEPC's fuel cost.
 - (ii). MoP rates consider FOB (free on board) cost based on lowest of Argus Index. However this lowest index coal is not always available since the coal is purchased on spot market in the absence of long term commitment of schedule from TANGEDCO under Section 11 of the Act.
 - (iii). MoP rates consider an ocean freight calculation based on Clarkson Shipping Index for Panamax vessels. Since SEPC procures Indonesian

coal in Supramax vessels due to short term planning, the freight for SEPC is higher since smaller vessels invite higher freight.

- (iv). MoP rates do not include the following costs:
 - i. Cost of letter of credit.
 - ii. Miner's Premium.
 - iii. Exchange rate as per Customs Exchange Rate.
 - iv. Handling costs at discharge ports along with inland transportation to the extent of Rs. 100 PMT.
- (f) MoP organised a meeting on 26.12.2023 where representatives of various ICB plants expressed that MoP rates do not meet the actual cost of generation of the plants. SEPC also participated in the meeting and conveyed that it has suffered a loss in terms of different of cost of about Rs. 200 Cr. till date. Committee after discussion concluded that generators ought to approach State Commissions for grant of any relief in this regard.
- (g) As per settled law by APTEL, this Commission is empowered to grant compensation for adverse financial impact on generator based on actual cost of generation. CERC has followed the same law and granted such relief to Tata Power. It is prayed that in principle, this Commission may hold that SEPC is entitled to actual cost of generation under Section 11 (2) of the Act.

16. Substance of the arguments advanced on behalf of the respondent TANGEDCO on 19.03.2024:-

- (a) TANGEDCO's letter dated 29.04.2022 records that MoP and MNRE had directed for the power plants to be 'reasonably compensated' and the same cannot be read to mean complete reimbursement. TANGEDCO had directed SEPC to supply power on pass through basis for a period of one month, which may be extended till December 2022. Accordingly, offtake of power till December 2022 was not cast in stone.
- (b) SEPC through letter dated 02.05.2022 requested TANGEDCO to make payment of VFC on weekly basis.
- (c) As per MoP's letter dated 05.05.2022, the pass-through of cost was contemplated only for cost of imported coal and not the entire generation cost. MoP Committee took into consideration all the prudent costs of using imported coal for generating power including the present coal price, shipping costs, O&M costs etc. and a fair margin, thus reasonably compensating the power generators.
- (d) As per MoP's Order dated 05.05.2022, the Committee constituted by MoP for determination of VFC was a high-level committee. The terms of reference to the Committee were very wide, which inter alia included finding out the impact of rise in imported coal prices on variable charges.
- (e) MoP's directive takes into consideration a wide range of situations comprehensively. MoP's costing is dynamic. SEPC's tariff should be fixed as per amounts paid to it by TANGEDCO in-line with MoP determined rates.
- (f) SEPC is required to submit data to prove adverse impact.

17. The Petitioner in response to Respondent's arguments made on 19.03.2024 submitted that SEPC filed the petition seeking in principle prayer that SEPC ought to be allowed compensation for the cost of generation under Section 11 (2). SEPC further submitted that it has always been Petitioner's argument that MoP tariff is inadequate and adverse impact ought to be determined by this Commission under Section 11 (2) of the Act. The Petitioner submitted that it had submitted weekly invoices which contained data including GCV, name of the vessel, source of coal, price of coal, grade of coal, quantity procured etc. and SEPC is willing to produce more data if required. SEPC reiterated that since this Commission held Addendum #3 to be unviable as per Order dated 31.08.2023, the comparison may be drawn between actual cost incurred by SEPC and MoP determined rates. Many cost parameters were not considered by MoP while determining the benchmark rates and the only basis MoP had to determine SEPC's rate was SEPC's SHR and auxiliary consumption stated in the PPA. This was the only information furnished to MoP by TANGEDCO. Other parameters like boiler design, freight prevailing, shipping, insurance etc. were not provided. Further, SEPC has been procuring cheapest coal from the market. SEPC is even willing to compare the prices with procurements done by TANGEDCO for its own plants. SEPC is also open to receive coal from TANGEDCO and use it for generation. Argus Index for coal procurements are not always congruent with the price actually paid for such procurements. Actual prices include the FOB value,

miner premium, LC opening finance charges etc. that is added by coal sellers/traders.

18. In view of the submissions made by Petitioner and Respondent, this Commission directed SEPC to bring on record supporting documents for its claims and to furnish all such data as was furnished by Tata Power before CERC.
19. On 25.04.2024, the Petitioner furnished the data comprising 19 shipments starting 30.04.2022 till 30.06.2023. The Petitioner carried out calculations on monthly basis. In the affidavit SEPC by way of its data demonstrated as follows:
 - (a) Spot market coal was cheaper than CSTA price (in 90% cases-supported by data). In seventeen (17) out of total nineteen (19) shipments, SEPC cumulatively extended benefit to TANGEDCO to the extent of about Rs. 104 Cr.
 - (b) SEPC procured coal with mostly lesser GCV than design GCV of 5500 kCal/kg.
20. On 07.05.2024, the Respondent filed a memo stating that computation ought to be done on weekly or bi-weekly basis since MoP rates are notified bi weekly and SEPC in the past submitted invoices on weekly basis. The Petitioner objected to weekly or bi-weekly computation since it would only mean creating more voluminous data with no difference in substance. In addition, the Petitioner submitted that MoP's notification of bi weekly rates has no bearing on the present case where one shipment is used for six to ten weeks. Without prejudice in this case it is relevant to compare shipment purchase price with the imported coal price relevant at that time. So far SEPC's submission of weekly invoices is concerned, the same was done to receive payment from TANGEDCO on weekly

basis. However, TANGEDCO in most cases did not make payment to SEPC on weekly basis despite MOP's direction. So far as TANGEDCO's contention about different tariff for weekly and monthly is concerned, the same is vague. TANGEDCO has not demonstrated how the tariff is different. The calculation cannot be different for weekly and for monthly.

21. On 07.05.2024 after hearing arguments this Commission directed both parties that the data can be computed shipment wise since weekly or bi-weekly data computation is too short a period to carry out calculations for a 9-10 month period i.e. period of supply from 30.04.2022 till 12.06.2023. TANGEDCO expressed its reservation regarding SEPC's usage of coal i.e. if SEPC used the coal procured in a particular month in some other month rather than continuous usage of coal. TANGEDCO stated this to be an issue since GCV of the coal varies once it is blended. The Petitioner clarified that except for the period where Section 11 requisition was withdrawn by Respondent w.e.f. 01.12.2022, SEPC has used the coal on FIFO basis. This Commission thereafter specified wherever the coal from a shipment is used in some other period, SEPC can specify the same. The following order was passed on 07.05.2024:

Ms. Gayatri Aryan, Advocate from M/s. J Sagar Associates appeared for the petitioner. Thiru. Richardson Wilson, Advocate appeared for the respondent. Memo filed by TANGEDCO seeking a direction to the petitioner to furnish details on weekly basis as the details furnished on monthly basis by the petitioner are

not sufficient to verify the sustainability of the claim of the petitioner. The counsel for the petitioner submitted that it is impracticable to furnish weekly details and that the merit of the claim of the petitioner can be decided on the basis of the monthly data already produced. On consideration of the rival submission, the Commission directs the petitioner to furnish shipment details correlating the same with the coal stock and coal usage. On furnishing of the shipment and coal usage details, both parties shall sit together and arrive at the rate on pass through basis on shipment basis less the rate already notified by Ministry of Power (MoP). At the request of the petitioner's counsel, the case is adjourned to 21.05.2024 for further hearing.

22. As per submissions of the parties both parties reconciled the data from 09.05.2024 to 20.05.2024. Based on arguments of both parties after reconciliation, the following issues emerged where TANGEDCO contended as follows:
- (a) Full cost of Shipment No. 9 (MV Nefeli.GR) where SEPC procured domestic coal on spot market -denied. Payment is to be made as per final grade of coal used. In addition, cost of transportation etc. paid by Petitioner was more than what was applicable.
 - (b) Cost of conveyor already included as part of capital cost for which TANGEDCO is paying fixed charges to SEPC so the Petitioner SEPC cannot claim local transportation charges from Port to Plant.
 - (c) Expenses towards coal sampling and testing to be borne by SEPC as per the PPA.

- (d) Third party coal sampling and testing to be done by CIMFR as per the PPA.
 - (e) Handling charges at anchorage, port charges and certain charges are to be disallowed.
 - (f) Indonesian, South African and Australian have a price variation for which reason ought to be explained.
23. By way of affidavit dated 07.05.2024 and 21.05.2024 SEPC made the following submissions:-
- (a) Shipment No.9 (MV Nefeli.GR) was ordered in February 2022 whereas it was delivered in July 2022. SEPC paid several charges which included statutory charges such as railway freight, load port charges etc. which could not have been avoided. Grade slippage in domestic coal quality is a market reality. In addition, at the time of consumption of this shipment, other alternate imported coal was costlier than Shipment No. 9. A benefit of about Rs. 8 Cr. through this shipment has been passed on to TANGEDCO.
 - (b) For cost of sampling and testing, Section 11(2) supply is a special provision and the generator should not be made to suffer a loss on account of its cost of generation. PPA ought not be looked at in situation of Section 11 supply.
 - (c) For testing to be done by CIMFR:
 1. Not all coal suppliers were agreeable to CIMFR coal analysis and testing.
 2. Since SEPC was required to supply power to TANGEDCO under an emergency situation, SEPC procured coal from sellers on spot market i.e. on

short term planning. For this reason about 8 shipments were procured without sellers agreeing to CIMFR testing of their coal.

3. SEPC nonetheless got such coal samples tested by CIMFR due to the Bilateral Agreement between SEPC and CIMFR.
4. As per CIMFR reports, the GCV was sometimes less and sometimes more as compared to reports by independent inspection agencies. In this view SEPC ought to be paid as per actual GCV as per which SEPC made payments to the sellers. Price correction may be carried out where CIMFR GCV is to be considered.

(d) Conveyer cost and jetty cost were excluded from the capital cost. SEPC therefore had to deploy trucks for transportation of coal from port to plant. In addition transportation and handling charges forms a part of CHA which was approved by TANGEDCO and this Commission. Total transportation ought to be reimbursed to SEPC.

(e) TANGEDCO has calculated SEPC's adverse impact by way of a different methodology i.e. in terms of excess coal used instead of value per unit as calculated by SEPC. SEPC is agreeable to different manner of calculation so long as SEPC is compensated for the adverse impact.

Issues

24. On analysis of the competing contentions the following issues crop up for consideration of this Commission:-

- (1) Whether this Commission has the jurisdiction under Section 11 (2) of the Act to decide the rate that is to be finally paid to a generator for the power supplied under Section 11 (1) direction ?
- (2) Whether 'adverse impact' under Section 11 (2) ought to be considered in the backdrop of PPA between TANGEDCO and SEPC?
- (3) Whether the petitioner SEPC has suffered any adverse impact while supplying power to TANGEDCO under Section 11 (1) direction for FY 2022-23 and FY 2023-24?
- (4) In case the petitioner SEPC has suffered adverse financial impact, what are the parameters to be considered in assessing the quantum of the adverse financial impact suffered?
- (5) What is the relief, if any, the Petitioner is entitled to?

25. Findings of the Commission:-

Issue No. 1: Whether this Commission has the jurisdiction under Section 11 (2) of the Act to decide the rate that is to be finally paid to a generator for the power supplied under Section 11 (1) direction ?

25.1 Section 11 (1) of the Act provides that 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. The explanation to Section 11(1) provides that extraordinary

circumstances may include those affecting public interest. Section 11 of the Act is extracted as under:

“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 the circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in 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.”

25.2 One such extraordinary circumstance arose in this Country when the imported coal prices started rising exorbitantly starting from June-July 2021. As a result, the ICB plants in the country stopped operating their power plants in the absence of a pass through mechanism of VFC in their respective power purchase agreements. This caused a demand supply gap of electricity where the procurers/ discoms were constrained to purchase expensive power from the power exchange. To combat such situation, MoP convened a meeting with representatives of the independent power producers as well as the discoms on

12.04.2022, to discuss the viable way forward. Consequently TANGEDCO issued a letter dated 29.04.2022 to the Petitioner akin to directions under Section 11 of the Act, to operate the plant at full capacity.

25.3 Subsequently MoP, vide its letter dated 05.05.2022 issued directions under Section 11 of the Act to all ICBs to operate their plants at full capacity. These MoP directions which were originally valid till 31.10.2022 came to be extended till 31.12.2022. Relevant portion of MoP's letter is extracted hereinbelow:

"The demand for power has gone up by almost 20% in energy terms. The supply of domestic coal has increased but the increase in the supply is not sufficient to meet the increased demand for power. This is leading to load shedding in different areas. Because of the mismatch between the daily consumption of coal for power generation and the daily receipt of coal at the power plant, the stocks of coal at the power plant has been declining at a worrisome rate. The international price of coal has gone up in an unprecedented fashion. It is currently around 140 US Dollars per tonne. As a result of this, the import of coal for blending, which was of the order of 37 Million Tonnes in 2015-16 has gone down, leading to more pressure on domestic coal. The imported coal based generation capacity is around 17,600 MW. The PPAs for imported coal based plants do not have adequate provision for pass through of the entire increase in the international coal price. At the present price of imported coal, running of imported coal based plants

and supply of power at the PPA rates will lead to huge losses to the generators and therefore the generators were not willing to run those plants...

3. In order to ensure that all power plants based on imported coal start functioning; the States have been advised that the price of coal should be a pass through. Most states have done that and about 10,000 MW out of 17,600 MW imported coal based generation capacity has started operating. However, some imported coal based capacity is still not operating.

4. In the light of the present emergent circumstances, the following directions issued under Section 11 of the Electricity Act:

- a. All imported coal based 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. These plants will supply power in the first instance to the PPA holders. Any surplus power left thereafter or any power for which there is no PPA will be sold in the Power Exchanges.*
- c. Where the plant has PPA with multiple DISCOMs then in such cases, 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.*
- d. Considering the fact that the present PPAs do not provide for the 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 CERC. This Committee shall ensure that 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.

- e. Where the generators/group companies own coal mines abroad, the mining profit will be set off to the extent of the shareholding of the generating/group company in the coal mine.*
- 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.*
- h. 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 Committee; or is not able to make weekly payment then such quantity of power shall be sold in the Power Exchanges.*
- i. 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 ration of 50:50 on monthly basis.*

- j. Bench Mark rates worked out by the Committee shall be reviewed every 15 days taking into consideration the change in the price of imported coal; shipping costs etc.”*

25.4 MoP issued another Order of the like date i.e. 05.05.2022, for constitution of the committee as per 4(d) above. MoP in such follow up direction stated as follows:

“Terms of reference:

- i. To find out the impact on variable charges due to rise in cost of imported coal.*
- ii. To suggest indicative tariff for Imported Coal Based (ICB) generating stations.*
- iii. To also factor into mining profits....”*

25.5 MoP thereafter appointed a Committee to work out the rates at which power was to be supplied to the power purchase agreement holders. Based on the recommendation of the Committee, MoP vide its letter dated 13.05.2022 issued the proposed tariff to be paid by the procurers to the generating companies.

Relevant portion of the letter/order is extracted as under:

“5. The Committee has given the following recommendations:

- (a) The Energy Charges Rate (ECR) calculated for six plants have been worked out as under:*

....

- (b) The fixed charge will be as per the Power Purchase Agreements or as has been already agreed mutually between the generating company and Procurers.*

...

(d) The benchmark, ECR, given above, is subject to revision every week or every fortnight, if required, on the basis of the updated prices of imported coal and shipping charges.

25.6 MoP thereafter continued issuing the rates for supply of power from time to time based on the recommendations of the Committee. On 20.05.2022, MoP further notified conditions of Section 11 (1) supply by generators including conditions of payment which read as follows:-

“2. MoP has received representations from some stakeholders. To resolve the issues raised by the stakeholders, directions on certain aspects are given as under:

(a) As per the PPA, the Payment Security Mechanism (PSM) shall be maintained. 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 Letter of Credit 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 monthly basis.

(b) Payment by the procurer will be made on weekly basis. If the payment is made within 5 days of presentation of weekly bill, then rebate of 0.375% on weekly basis in accordance with CERC norms or as per the PPA whichever is higher shall be applicable.

(c) If power is not scheduled by the procurer, the generator will bid the power in the power exchange at the tariff up to the tariff given under Section 11 or 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 given under Section 11 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 given under Section 11 or the mutually agreed tariff with the procurer, then the generator will mandatorily sell power in the power exchange.

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

(e) Generator shall submit weekly report to MoP for the generation and sale from the ICB plants.

(f) 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.

(g) 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.

(h) The committee have determined the tariff based on the Argus index. However, some of the plants, to begin with, which are required to purchase coal from “High Seas” due to inadequate stock being available at plant shall be given tariff accordingly for such imported coal to build stock up to three weeks requirement and subject to condition that plant is made operational within 15 days of such purchase. The generator shall submit the relevant documents for verification by the Committee.”

25.7 MoP included the Petitioner in its notification of benchmark rates on 11.07.2022. The Petitioner filed the present petition under Section 11(2) of the Act which entrusts the Appropriate Commission with the responsibility for offsetting the adverse financial impact caused to the generating company as a consequence of the directions given by the Appropriate Government. The Petitioner further submitted that:

(a) Supply of power under Section 11(1) of the Act is subject to the restitutive principles enshrined in the Act.

(b) APTEL in its judgement dated 23.05.2014 in Appeal No. 37 of 2013 and 303 of 2013 (GMR Energy Limited V. Karnataka Electricity Regulatory Commission & Ors) laid down the principle that only the Appropriate

Commission has the power to offset the adverse financial impact of directions under Section 11(1) of the Act. In terms of the said judgement, the compensation to be granted to the generating company under Section 11(2) of the Act is to be based on the actual cost of generation.

(c) Since the said judgement has attained finality in terms of dismissal of civil appeal filed against the judgement by Hon'ble Supreme Court, this Commission has the power to determine the appropriate rate/compensation for the generation and supply of power from SEPC's project to TANGEDCO in terms of the order dated 05.05.2022 issued by MoP under Section 11(1) of the Act.

25.8 The Respondent did not object to this Commission's jurisdiction under Section 11 (2), however TANGEDCO submitted that Petitioner did not suffer any adverse impact during supply of power under Section 11 (1). The Respondent submitted that since as per PPA, Petitioner would have supplied power at a lesser VFC, the supply under Section 11 (1) by SEPC has only caused a gain to SEPC.

25.9 We have considered the submissions of the Petitioner and Respondent Procurers. As per Section 11 power has been vested in the Appropriate Commission, in this case this Commission, to offset the adverse financial impact of the directions under Section 11(1) on the generating company in such manner as the Commission may consider appropriate. So far as nature of MoP rates is concerned, the same is clearly determined by APTEL in the GMR Judgment as being temporary in nature. In fact CERC in its final order dated 03.01.2023 in

Petition No. 128/MP/2022 while deciding Section 11 (2) relief for Tata Power, also relied on APTEL's GMR Judgment to hold that:

57....However, in the present case, the Central Government has not only issued directions under Section 11(1) of the Act but has also been issuing orders from time to time with regard to the rates to be paid by the Respondent Procurers to the Petitioner during the operation of Section 11 Directions based on the recommendations of the committee constituted for the purpose. It is the case of the Petitioner that the rates of supply of power determined by the Committee are not adequate to even cover the cost of generation and the Petitioner has accordingly sought determination of adverse financial impact by this Commission under Section 11(2) of the Act.

58. The question arises with regard to the legal sanctity of the rates determined by MoP for supply of power during the operation of Section 11 Directions. In this connection, the following observations of the APTEL in GMR Judgement are relevant:

“28. Thus, the State Government can only give directions under Section 11(1) for operation and maintenance of the generating station in accordance to its directions. The State Commission alone has been empowered under Section 11(2) of the Electricity Act to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the

State Government under Section 11(1). The State Government is not empowered to determine the rate or terms and conditions at which the generating companies will supply power to the State Grid against directions u/s 11(1) of the Act. The rate specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licensees have to make payment to the generating company in the interim period till the State Commission under Section 11(2) decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions of the State Government under Section 11(1).”

In the light of the above observations of APTEL, the rates specified by MoP on the recommendations of the Committee are the rates at which the Respondent Procurers have to make payment to the Petitioner in the interim period till the Appropriate Commission, in the present case this Commission, decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions issued under Section 11(1) of the Act.

59...This Commission issued interim directions directing the Respondent Procurers to make payment as per the rates determined by the MoP till the claims of the Petitioner are examined and decided by the Commission. The Commission vide its second interim order dated 13.9.2022 in I.A. No. 50/2022 adjudicated the disputes between the Petitioner and the Respondent Procurers with regard to

some aspects of the rates to be paid in compliance with the first interim directions issued vide order dated 17.6.2022. Therefore, it follows that the rates decided by the MoP read with the clarification of the Commission thereon vide order dated 13.9.2022 are interim in nature and are subject to determination of adverse financial impact by the Commission under Section 11(2) of the Act.”

25.10 In this view we are inclined to agree with CERC's decision. It is settled law by APTEL in its judgment dated 24.03.2015 in Maruti Suzuki India Ltd. v. HERC that State Commission may be guided by decisions of Central Commission in the absence of a specific decision/regulation by a State Commission. In view of the above elaborate discussion there remains no shadow of doubt that this Commission has jurisdiction u/s 11(2) of the Electricity Act 2003 to decide the question off-setting the adverse financial impact of the directions issued by the Appropriate Government on any generating company. The issue is decided accordingly.

26. Issue No. 2: Whether 'adverse impact' under Section 11 (2) ought to be considered in the backdrop of PPA between TANGEDCO and SEPC?

26.1 The next question that arises is as to whether Petitioner SEPC actually suffered adverse financial impact while supplying power under Section 11 (1) from 30.04.2022 to 12.06.2023 and if so, how this adverse financial impact is to be determined.

26.2 So far as what constitutes as 'adverse financial impact' under Section 11 is concerned, it is the financial adversity that a generator faces while supplying

power under Section 11 as a result of receiving lower tariff than what is expected to fully compensate the cost of generation. Whether a generator received a lower tariff or not has to be considered in view of facts and circumstances peculiar to every generator since 'cost of generation' for every generator would differ. In the scenario before APTEL in the case of *HimatsigkaSeide* (supra) and *GMR Energy Limited* (supra), the generators which supplied power under Section 11 to the respective procurers, were short term power generators. The cost of generation for such merchant power generators was assessed by considering the rate they would have received from the short term market had Section 11 direction not been in operation. In the present case, the cost of generation could ideally have been assessed through terms and conditions of the PPA between TANGEDCO and SEPC. However, since the PPA (Addendum #3) between TANGEDCO and SEPC was rendered unviable due to rise in price of imported coal, it is nothing but just and proper that the compensation for adverse impact for Petitioner will have to be decided by this Commission based on data furnished. The unviability of Addendum #3 due to ceiling and discount on SEPC's tariff has already been decided by this Commission vide reasoned Order dated 31.08.2023 in M.P. No. 3 of 2022 and the same is binding on both parties, more so when the order neither has been stayed by APTEL as yet nor has there been a challenge by TANGEDCO to the aspect of rise in imported coal prices and Addendum #3 becoming unviable for SEPC to supply power in the appeal preferred by TANGEDCO.

26.3 In fact CERC in its Order dated 03.01.2023 has already analysed the aspect of assessing adverse financial impact for generators in the following manner:

“61. The term “Adverse financial impact” has not been defined. However, both the Petitioner and the Respondent Procurers have placed strong reliance on some of the decisions of APTEL namely, judgement dated 3.10.2012 in Appeal Nos. 141, 142 of 2011 & 10 of 2012 (HimatsigkaSeide Limited Vs. KERC & Others, M/s J.K. Cement Limited Vs. KERC & Ors and MPPL Renewable Energy Private Limited Vs KERC & Ors) and judgement dated 23.5.2014 in Appeal No. 37 of 2013 (G.M.R. Energy Limited Vs KERC & Ors) and Appeal No. 303 of 2013 (Bangalore Electricity Supply Company Limited & Ors Vs G.M.R. Energy Limited & Ors) with regard to the factors which should be considered for determining adverse financial impact of the directions issued under Section 11(1) of the Act.

65. From the above judgements of APTEL, the following broad findings emerge with regard to determination of the adverse financial impact arising out of the directions issued under Section 11(1) by the Appropriate Government:

(a) In case of generators having no Power Purchase Agreements with distribution licensees, off setting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11(1) of the Electricity Act,

2003 would mean fixing a rate keeping in view the revenue which the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss.

(b) The generators with existing PPAs are obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs. However, such generators are entitled to the rate determined by the State Commission for the quantum of energy in excess of the energy that they would have normally supplied to the distribution licensees under the PPA.

66. The Petitioner has Power Purchase Agreement with the distribution licensees of five States namely, Gujarat, Maharashtra, Rajasthan, Punjab and Haryana and its entire contracted capacity is covered under the PPA. Therefore, the first finding is not applicable in the case of the Petitioner. As regards the second finding, it is to be noted that the Petitioner's generating station is based on imported coal for which the Petitioner had arranged supply of coal from a mine in Indonesia in which the Petitioner has 30% stake. ...Consequent to the issue of the policy directive, the Petitioner and Respondent Procurers have been negotiating for finalization of the Supplementary PPA. MoP has from time to time held various meetings and passed directions to the Petitioner and Respondent Procurers to reach amicable settlement of the issues. The Petitioner has submitted that the Petitioner and the Procurer States (mainly

GUVNL) are at an advanced stage of resolution of issues which subsequently would be followed by other Procurer States, in terms of MoP's directions.

67. While the negotiation between the Petitioner and Procurer States was going on, the Petitioner continued to supply power to the Procurers at the PPA rates till 17.9.2021. On account of increase in the price of imported coal, the Petitioner withdrew all its units and stopped supplying power to the Respondent Procurers. After negotiations with GUVNL reached an advanced stage, the Petitioner pending formal execution of Supplementary PPA, supplied power to GUVNL in the months of January, February, March, April 2022 and up to 5.5.2022 at the negotiated rates. The Petitioner also supplied power to MSEDCL as per the negotiated rates from 12.4.2022 to 5.5.2022 on same terms in line with the proposed supplementary PPA. Pending the resolution of the issues and formal execution of the Supplementary PPA between the Petitioner and Procurer States, MoP in view of the energy crisis being faced by the country issued directions under Section 11(1) of the Act vide its letter dated 5.5.2022 mandating all imported coal based power plants to operate and generate power to their full capacity and supply power in the first instance to the PPA holders. The said directions recognized that the present PPAs do not provide for pass through of present high cost of imported coal and appointed a committee to work out benchmark rates of power which would meet all 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. Thereafter, the Petitioner declared

availability of power to all Procurers and based on the schedules received from GUVNL and MSEDCL supplied power to them as per the directions of MoP under Section 11(1) of the Act and at the rates fixed by the Committee appointed by MoP, subject to determination of adverse financial impact by this Commission under Section 11(2) of the Act. Even the MoP while issuing directions under Section 11(1) recognized that power cannot be supplied at the PPA rates on account of high cost of imported coal. Therefore, the second finding in GMR judgement is not applicable in the instant matter as the Petitioner and the Respondent Procurers are aware that on account of high cost of imported coal, power cannot be supplied by the Petitioner at PPA rates and have sat down to negotiate for finding out a mutually acceptable negotiated rate for supply of power which would be formalized through signing Supplementary PPA. Thus, MOP having issued directions under Section 11(1) of the Act, it is mandatory for the Petitioner to follow the directions and for this Commission to offset the adverse financial impact of the directions on the Petitioner under Section 11(2) of the Act.

68. Notwithstanding our observations in paras 64 to 66 above, we notice that the following observations of APTEL in GMR judgement are relevant for guidance to determine the adverse financial impact of generation and supply of power under Section 11 Directions:

“22. The only check that is to be exercised is that the rate of power decided by the State Commission should cover the variable cost of the power plant plus a reasonable profit. This is necessary to cover the eventuality when the market rate is lower than the variable cost of generation. Under such a condition, the generator would not like to run its power plant as the market rate would not compensate even for the expenses incurred for operating the plant. If under such an eventuality, the generator has to run the power plant to supply power to the State Grid against directions of the State Government under Section 11(1), then the State Commission under Section 11(2) of the Act, shall compensate the power plant to cover the variable cost plus a reasonable margin of profit. In the present case the short term market price prevailing during the period of Section 11(1) directions as decided by the State Commission, covers the variable cost of the power generation and, therefore, the compensation has to be based on basis of the short term market price as determined by the State Commission.”

As per the above observations of APTEL, the rate of power decided by the Commission should cover the variable cost of the power plant plus a reasonable profit. APTEL has reasoned that this is necessary to cover the eventuality when the market rate is lower than variable cost of generation as the generator would not like to run its power plant at the market rate as it would not compensate even

for the expenses incurred for operating the plant. The Petitioner is required under Section 11(1) Directions to supply power to the PPA holders (Respondent Procurers) in the first instance and only in case of refusal or non-scheduling, the Petitioner has been permitted to sell power at the power exchange. Therefore, while determining the adverse financial impact, the comparison has to be made between the energy charge agreed in the PPA and the variable cost of production in compliance with the directions under Section 11(1) of the Act. In the present case, the energy charge under the PPA is lower than the variable cost of generation with imported coal in order to supply power in compliance with the MoP directions under Section 11 of the Act. Therefore, in order to ensure that the Petitioner maintains and operates its power plant to generate and supply power to the Respondent Procurers in compliance with the directions of the MoP under Section 11(1) of the Act, the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit, in the light of the principles decided by APTEL in GMR judgement.”

26.4 In view of this, the two conditions stated (in Para 65 above) for comparison of rate received by a generator under Section 11 versus a rate that the generator would have received had there been no Section 11 directions, were held to be inapplicable in Tata Power’s case. The present situation is similar to Tata Power’s situation i.e. where both parties were negotiating a mutually acceptable rate on account of high cost of imported coal. CERC in Para 68 above also held that since

the energy charge under Tata Power's power purchase agreement is lower than the variable cost of generation with imported coal which Tata Power was required of, to supply power in compliance with the MoP directions under Section 11 of the Act, CERC is required to compensate Tata Power to cover cost plus a reasonable margin of profit in light of APTEL's GMR Judgment. In view of this we conclude as follows:

- (a) The adverse impact for SEPC is to be considered in isolation of tariff under the PPA (Addendum #3) which has already been held to be unviable, by this Commission in the Order dated 31.08.2023 in M.P. No. 3 of 2022.
- (b) The rate to be paid under Section 11 (2) ought to cover cost of generation of a power plant.
- (c) So far as reasonable profit or fair margin is concerned, the same is covered by fixed charges under the PPA as already being paid by TANGEDCO to SEPC.

This issue is decided accordingly.

27 Issue No. 3: Whether Petitioner SEPC suffered any adverse impact while supplying power to TANGEDCO under Section 11 (1) direction for FY 2022-23 and FY 2023-24?

27.1 The Petitioner filed an additional affidavit dated 25.04.2024 upon direction of this Commission, to place on record the data supporting the Petitioner's claim in the petition. Accordingly the Petitioner submitted the data for the period 30.04.2022 till

30.06.2023 where as the claim period in the petition was 30.04.2022 till 12.06.2023. As per submissions made by Petitioner during the course of hearing, the court fee for the remaining period i.e. 13.06.2023 till 30.06.2023 was paid by Petitioner on 24.04.2024. The Respondent on the other hand submitted that the claim period ought to be considered only till 12.06.2023 as stated in the petition. We agree with contention put forward by Respondent and limit our adjudication to the claim period stated in the petition. We direct the registry that the excess court fee if any paid by the petitioner shall be refunded to the Petitioner.

27.2 The Petitioner by way of its affidavit dated 25.04.2024 submitted the following details:

(a) Shipment wise details (19 Shipments) including the following information:

1. Shipment confirmation email with coal supplier along with details regarding quantity and landed cost with details of GST and Cess.
2. Email proof of enquiries floated to various sellers along with contact details.
3. Certificate of sampling analysis.
4. Parallel offers by others sellers (if any).
5. Argus Index chart for the relevant period.
6. Details of plot rent charges (wherever applicable), inspection agency charges and coal transportation charges.
7. Shipment ledger file for payments made.
8. Details of contract and actual GCV.
9. Tax invoice.

10. Credit/Debit notes (wherever applicable)
 11. Coal sale and purchase contract with the sellers.
 12. Weighment details.
 13. Coal stock register.
 14. Details of coal received at the plant on daily basis.
 15. Daily consumption of coal.
- (b) Monthly invoices issued to TANGEDCO based on the above said details.
 - (c) Email exchange with JERA demonstrating non supply by JERA upon SEPC's request.
 - (d) Letters written by SEPC to TANGEDCO seeking permission for grant of open access.

27.3 This Commission thereafter directed SEPC to furnish shipment wise details instead of monthly invoices vide Order dated 07.05.2024 in the following manner:

Ms. Gayatri Aryan, Advocate from M/s. J Sagar Associates appeared for the petitioner. Thiru. Richardson Wilson, Advocate appeared for the respondent. Memo filed by TANGEDCO seeking a direction to the petitioner to furnish details on weekly basis as the details furnished on monthly basis by the petitioner are not sufficient to verify the sustainability of the claim of the petitioner. The counsel for the petitioner submitted that it is impracticable to furnish weekly details and that the merit of the claim of the petitioner can be decided on the basis of the monthly data already produced. On consideration of the rival submission, the Commission

directs the petitioner to furnish shipment details correlating the same with the coal stock and coal usage. On furnishing of the shipment and coal usage details, both parties shall sit together and arrive at the rate on pass through basis on shipment basis less the rate already notified by Ministry of Power (MoP). At the request of the petitioner's counsel, the case is adjourned to 21.05.2024 for further hearing.

27.4 As regards the details of coal procured by SEPC during the relevant period i.e. from 30.04.2022 till 12.06.2023 i.e. 14 shipments, Petitioner SEPC made the following submissions:

- (a) Coal was procured on spot market based on Argus Index. The coal was procured mostly from Indonesia. Other sources were Australia and South Africa.
- (b) For all 14 Shipments, the purchased coal was cheaper than what Petitioner would have procured under the CSTA had Section 11 direction not been issued. The Petitioner accordingly passed on savings of about Rs. 100.12 Cr. to Respondent by purchasing the coal on spot market. Details of price comparison between Petitioner's purchased coal and CSTA price are as follows:

(Rs.)

S.No.	Shipment	GCV (in kCal/kg)	CSTA cost	Spot landed cost	Difference	Quantity (in MT)
1.	W-Ace	5155	7,059	6,776	283	70,000
2.	Mona KH	5460	11,342	10,868	474	30,000
3.	Intuition	4750	15,340	14,690	651	5000
4.	Pacific 01	4110	13,273	11,508	1765	27,150
5.	Chola Melody	4742	15,588	14,470	1,119	60,000
6.	Thunder Island	4101	13,106	10,831	2,275	10,000
7.	Akij Glory	4719	15,081	14,273	807	40,000
8.	JR Summer	5060	16,259	14,913	1,346	75,000
9.	Nefeli GR (Domestic coal)	3895	11,894	8,888	1346	26648
10.	Big Bang	4811	15,044	12,666	2379	60,000
11.	Navios Hyperion	4911	13,913	13,757	156	60,000
12.	Golden Beijing	4805	14,155	10,625	3530	80,000
13.	Comanche	4811	14,492	12,804	1,688	70,000
14.	Indian Harmony	5281	11,026	10,178	848	50,000
				Savings	100.12 Cr.	

(c) In the above, the CSTA price considered is the cheapest index price in the past 6 months out of the indices specified in the PPA i.e. either one of API 3, ICI2, API5 or average of API3, ICI2, API5 and ICI3. The cheapest index being API5 was considered for October 2021 till March 2022. The cheapest index of ICI 2 was considered for the period between April 2022 till September 2022. This was informed to TANGEDCO by SEPC vide letter dated 01.04.2022.

- (d) Since 13 out of 14 shipments were procured on spot market due to short term planning i.e. Shipment no. 2 to 14, the coal price on FOB basis was never available with SEPC. The shipments were procured on Stock on Sale based on landed cost of coal offered by the seller.
- (e) At the time of sale, SEPC chose the cheapest coal available from the sellers to whom the inquiries were sent.

27.5 The Respondent upon analysis of the data provided by the Petitioner expressed its objections and denied the following costs to Petitioner:

- (a) Actual cost of generation. The cost ought to be calculated on normative parameters stipulated in the PPA.
- (b) Full cost of shipment No. 9 i.e. Nefeli.GR since the actual grade of coal used by Petitioner was lower than the grade for which SEPC paid the seller. In addition, transportation cost paid by SEPC was higher than what is paid by TANGEDCO.
- (c) Transportation and handling cost since cost of conveyer is already included in capital cost.
- (d) Cost paid by SEPC as per GCV tested by independent agencies and not CIMFR. Only cost as per GCV determined by CIMFR is applicable as provided by the PPA.
- (e) Third party sampling and testing charges since PPA disallows the same.

27.6 In addition TANGEDCO sought an explanation from SEPC as to why there is a variance in Indonesian, South African and Australian coal. Further as per SEPC's

affidavit dated 07.05.2024, TANGEDCO calculated SEPC's adverse impact in terms of quantity of coal used in excess instead of per unit cost as calculated by SEPC.

27.7 We have considered arguments advanced by both parties and also carried out the analysis of data provided by the Petitioner. Details of data provided for coal procured by the Petitioner as provided by SEPC is as follows:

Ship ment No.	Name of the Vessel	Country of Origin	Supplier Name	Quantity (MT)	Contra ct Date	Testing Agency	Actual Test Certificate GCV of Coal (kCal/kg) (ARB)	Actual Cost of Coal (Rs./MT)	Auxilia ry consu mption	Cost of primary fuel (Rs./kWh)	Cost of seconda ry fuel (Rs./kWh)	VFC (Gros s) (Rs./k Wh)	VFC (Net) (Rs./k Wh)	Amount to be paid on pass through basis in Rs.
1	MV W-Ace	South Africa	JERA Global Markets Pte. Ltd.	31,117	28-Jan-21	SGS	5370	6,776	7.12%	3.26	0.38	3.64	3.92	25,97,53,762
2	MV Mona KH	Australia	Balaji Malts Private Limited	23,876	28-Sep-21	IGI	5460	10,868	7.10%	5.13	0.28	5.41	5.82	30,11,74,076
3	MV Intuition	Indonesia	Taranjot Resources Pvt. Ltd.	4,978	05-May-22	CIMFR	4750	14,690	7.09%	7.97	0.22	8.19	8.82	8,27,21,206
4	MV Pacific 01	Indonesia	Jayam Tech	25,036	03-May-22	CIMFR	4110	11,508	7.09%	7.23	0.22	7.45	8.02	32,73,56,350
5	MV Chola Melody (Lot-1)	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	59,993	20-May-22	SGS	4742	14,470	7.07%	7.72	0.10	7.82	8.41	94,94,35,206
	MV Chola Melody (Lot-2)	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	10,004	03-Jun-22	SGS	4741	14,470	7.07%	7.72	0.10	7.82	8.41	15,83,20,892

6	MV Thunder Island	Indonesia	Balaji Malts Private Limited	6,393	11-Jun-22	CIMFR	4101	10,831	7.06%	6.66	0.07	6.73	7.24	7,53,10,552
7	MV Akij Glory	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	42,012	09-Jun-22	SGS	4719	14,274	7.06%	7.61	0.07	7.68	8.27	65,03,28,712
8	MV JR Summer	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	75,511	20-Jun-22	SGS	5054	14,913	6.15%	7.58	0.14	7.72	8.23	1,25,82,58,153
9	MV Nefeli.GR	Domestic (India)	Central Coalfields Limited	26,676	15-Feb-22	CIMFR	3895	8,888	6.08%	5.89	0.14	6.03	6.42	26,76,19,077
10	MV Big Bang	Australia	Adani Enterprises Limited	59,999	29-Jul-22	LEON	4811	12,666	6.17%	6.74	0.08	6.82	7.27	84,07,44,116
11	MV Navios Hyperion (Lot-1)	Indonesia	Taranjot Resources Pvt. Ltd.	30,066	16-Aug-22	CIMFR	4813	13,757	6.13%	7.34	0.11	7.45	7.94	46,06,29,201
	MV Navios Hyperion (Lot-2)	Indonesia	Taranjot Resources Pvt. Ltd.	19,987	16-Aug-22	CIMFR	5058	13,757	6.13%	6.99	0.11	7.10	7.56	30,62,88,509
12	MV Golden Beijing	Australia	Adani Enterprises	79,997	02-Sep-22	SGS	4805	10,625	6.12%	5.75	0.12	5.87	6.25	96,33,18,004

			Limited											
13	MV Comanche	Australia	Adani Enterprises Limited	69,998	12-Oct-22	SGS	4801	12,804	6.17%	6.72	0.12	6.84	7.29	98,09,13,071
14	MV Indian Harmony	South Africa	Balaji Malts Private Limited	31,592	19-May-23	CIMFR	5281	10,178	5.66%	4.66	0.08	4.74	5.02	33,75,23,334
				5,97,235										8,21,96,94,220

27.8 Based on the data furnished by Petitioner SEPC, TANGEDCO calculated the landed cost of coal in the following manner:

[TANGEDCO's Table]

WITHOUT PREJUDICE TO THE RIGHTS AND CONTENTIONS OF TANGEDCO

M/s. SEPC ADDITIONAL DATA TO BE FURNISHED AS PER TNERC IN D.R.P NO17 OF 2023 – DETERMINATION OF ADVERSE FINANCIAL IMPACT UNDER SEC 11 (2) OF EA, 2003

Parameters consider	Unit	Stabilisation	Post stabilisation
SHR	kCal/kWh	2342	2342
GCV	kCal/kg	5500	5500
Aux	%	6.75%	6.25%
Station capacity	MW	525	525
NET HR	KCal/KwH	2512	2512
Secondary fuel cost	Per kWh	0.04	0.04

Shipment No.	Name of the Vessel	Country of Origin	Supplier Name	Quantity of Coal Purchased (MT)	Shipment date	Testing Agency	Test Certificate GCV of Coal (kCal/kg) (ARB)	Cost of Coal/ MT in Rs.	Cost of primary fuel in Rs.	VFC (Gross)	VFC (Nett)	Net U generated	Amount to be paid on pass through basis in Rs.
1	MV W-Ace	South Africa	JERA Global Markets Pte. Ltd.	31,460.06	27.02.2021	SGS	5,430	6,579	2.86	2.90	3.10	68,017,603	210,854,569
2	MV Mona KH	Australia	Balaji Malts Private Limited	23,876.42	09.10.2021	IGI	5,460	10,601	4.58	4.62	4.95	51,906,745	256,938,388
3	MV Intuition	Indonesia	Taranjot Resources Pvt. Ltd.	4,983.00	08.05.2022	CIMFR	4,750	14,574	7.26	7.30	7.82	9,424,242	73,697,572
4	MV Pacific 01	Indonesia	Jayam Tech	25,036.00	10.05.2022	CIMFR	4,110	11,392	6.57	6.61	7.08	40,970,259	290,069,434
5	MV Chola Melody (V 01-22)	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	59,993.34	23.05.2022	SGS	4,742	14,283	7.12	7.16	7.63	113,880,398	868,907,437
				10,003.68	07.06.2022		4,741	14,280	7.12	7.16	7.63	18,985,154	144,856,725
6	MV Thunder Island	Indonesia	Balaji Malts Private Limited	6,397.00	13.06.2022	CIMFR	4,101	10,655	6.16	6.20	6.61	10,501,479	69,414,776

7	MV Akij Glory	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	42,011.70	13.06.2022	SGS	4,719	14,086	7.06	7.10	7.57	79,360,540	600,759,288
8	MV JR Summer	Indonesia	Agarwal Coal Corporation Pvt. Ltd.	75,510.86	27.06.2022	SGS	5,054	14,726	6.89	6.93	7.39	152,766,820	1,128,946,800
9	MV Nefeli.GR	Domestic (India)	Central Coalfields Limited	26,676.00	04.07.2022	CIMFR	3,895	5,481	3.33	3.37	3.59	41,592,263	149,316,224
10	MV Big Bang	Australia	Adani Enterprises Limited	60,000	26.08.2022	LEON	4,811	12,557	6.17	6.21	6.62	115,550,277	764,942,834
11	MV Navios Hyperion	Indonesia	Taranjot Resources Pvt. Ltd.	25,066.22	16.08.2022	CIMFR	4,813	13,595	6.68	6.72	7.16	48,293,545	345,781,782
				19,987.40	09.09.2022	CIMFR	5,058	13,852	6.47	6.51	6.94	40,468,724	280,852,945
12	MV Golden Beijing	Australia	Adani Enterprises Limited	79,996.68	17.09.2022	SGS	4,805	10,567	5.20	5.24	5.58	153,868,507	858,586,269
13	MV Comanche	Australia	Adani Enterprises Limited	69,998	19.10.2022	SGS	4,801	12,250	6.03	6.07	6.47	134,524,604	870,374,188
14	MV Indian Harmony	South Africa	Balaji Malts Private Limited	64,055.60	18.05.2023	CIMFR	5,281	10,165	4.55	4.59	4.89	135,412,157	662,165,448
				625051.96								1,215,523,317	7,576,464,678
												Already paid	7,133,346,705
												Balance	443,117,973

27.9 On scrutiny of the above data's it is evident that SEPC has suffered adverse financial impact while supplying power under Section 11 (1) directions to TANGEDCO.

This issue is decided accordingly.

28. In case the petitioner SEPC has suffered adverse financial impact, what are the parameters to be considered in assessing the quantum of financial impact so suffered?

28.1 There are basic differences in calculation of landed cost of coal by SEPC and TANGEDCO, pertain to the following:

Normative operational parameters

Upon assessment of the data provided by Petitioner, the total cost of generation for Petitioner from 30.04.2022 till 12.06.2023 comes out to be Rs. 822,10,36,853/-. Out of this, the Petitioner submitted that the Respondent paid Rs. 697,20,71,672/- to SEPC (as per MoP rates) and the difference amount which remains payable as adverse impact is Rs.108,99,81,244/- after HT Bills adjustment of Rs. 15,21,18,640/- and TDS of Rs. 68,65,297.

This total cost of generation is however based on actual operational parameters achieved by the Petitioner while supplying power to the Respondent under Section 11 directions. The Petitioner submitted that there was deviation in normative operational parameters on many occasions which occurred due to (1) irregular

scheduling of power by TANGEDCO which caused low loading and frequent shut downs of the plant and (2) use of inferior quality of coal due to short term planning. TANGEDCO did not deny the aspect of irregular scheduling or lack of long term commitment to SEPC under Section 11. TANGEDCO however submitted that VFC has to be calculated based on normative parameters as stipulated in the PPA.

28.2 We have considered the submissions by SEPC and TANGEDCO. CERC in its Order dated 03.01.2023 also decided the issue of whether actual operational parameters ought to be considered or normative. CERC held that norms of operation shall be considered as per Tariff Regulations 2009 for calculation of adverse impact.

28.3 We are inclined to follow CERC's decision and hold that so far as operational parameters for the Petitioner are concerned normative parameters will be considered while calculating adverse financial impact suffered by the Petitioner.

28.4 Since normative operational parameters for Petitioner were approved by this Commission vide Order dated 10.01.2020 in M.P. No. 27 of 2016 based on Petitioner SEPC's submissions, the same will be applicable. The Petitioner operational parameters accordingly be considered in the following manner:

Station Heat Rate (SHR)- 2342 kCal/Kwhr

Auxiliary Consumption - 6.25%

Coal Losses - 50kCal/kg

28.5 Any claim of the petitioner in deviation from the normative parameters due to SLDC's direction for operation below target plant availability but above technical minimum has to be considered as per Commission's Tariff Regulations 2005 para 37 (vii) notified in TNERC Notification No. TNERC/TR/5/3, dated 26-05-2021.

28.6 **GCV as per CIMFR or Independent Inspection Agency**

The Petitioner has submitted that not all coal suppliers agreed to get the coal samples tested by CIMFR. In this view, in 8 shipments, the payment to coal sellers was made as per GCV determined by Independent Inspection Agencies. TANGEDCO on the other hand submitted that since PPA provides for GCV to be determined by CIMFR, the calculation for 8 shipments ought to be done on the basis of GCV determined by CIMFR and not Independent Inspection Agencies. We have considered the submissions by both parties. Upon assessment of data furnished by SEPC it comes to fore that CIMFR's GCV of 2 shipments out of the 8 shipments is higher than the GCV determined by Independent Inspection Agency. In case TANGEDCO's submission is accepted, payment to SEPC as per CIMFR's GCV in case of these 2 shipments will cause undue gain to the Petitioner SEPC. Whereas for remaining 6 shipments, in case SEPC is compensated as per CIMFR's GCV, the petitioner SEPC will have to bear undue loss.

28.7 As per clause (1) definition of Addendum No.III which was approved by this Commission, GCV value and testing has to be done by CIMFR only. This is to ensure fair standards of GCV. The petitioner has obtained report from CIMFR for

all the consignments. This Commission therefore decides that report of CIMFR alone has to be considered while computing the adverse financial impact suffered by the petitioner.

28.8 Transportation and coal handling charges

The Petitioner has included the cost of transportation and handling charges in its computation of cost of generation. The Respondent has objected to the same stating that transportation charges will be denied since cost of conveyer is included in the capital cost for which TANGEDCO is paying the capacity charges. For handling charges, TANGEDCO stated that the same have been disallowed by this Commission vide Order dated 10.01.2020 in M.P. No. 27 of 2016.

28.9 We have considered the submissions of both parties. So far as inclusion of conveyer belt cost in capital cost is concerned, the same is subject matter of SEPC's true up petition M.P. No. 6 of 2023 where adjudication of final capital cost for SEPC's plant is pending. According to the Petitioner, there is no conveyer belt which forms part of SEPC's plant or ancillary facilities. In view of this actual transportation cost in the absence of conveyer cannot be denied. So far as handling charges are concerned, the same have been allowed by this Commission as per charges stipulated in the CHA. Denial of transportation and handling charges to the petitioner SEPC in the present case will prevent SEPC from recovering its cost of generation. This would be in direct contravention to the law settled by APTEL in GMR 2014 Judgment (supra). In view of this, this

Commission decides that the actual transportation and handling charges are to be considered while calculating the adverse impact.

28.10 **Domestic coal on spot market**

The Petitioner purchased Shipment No. 9 (MV Nefeli.GR) having domestic coal, on spot market. The Respondent has objected to coal grade slippage since the invoice was billed for Grade G7, whereas the CIMFR test reports reflect a grade of G12. The Petitioner submitted that coal grade slippages are a market reality and that this coal used in July 2022 was cheaper than the CSTA price.

28.11 We have considered submissions made by both parties. We have perused the documents for this particular Shipment No. 9 (Nefeli.GR) placed on record by the Petitioner. The coal was purchased from Central Coalfields Limited (CCL) through e-Auction. Therefore there was no condition for the Petitioner to penalise CCL for an inferior GCV received. Since this Domestic coal procured was cheaper than CSTA at the relevant point in time, we are inclined to direct TANGEDCO to compensate SEPC for actual cost of Shipment No. 9.

28.12 **Cost of sampling and testing**

The Petitioner has prayed that it ought to be compensated for the cost it incurred on carrying out coal sampling and testing. The Respondent objected to the same by submitting that this cost may be denied to the petitioner SEPC since the PPA provides for SEPC to bear such cost.

28.13 We have considered submissions by both parties. Since cost of sampling and testing is a part of cost of generation without any profit, we are inclined to allow such expense to be passed through in view of law settled by APTEL.

This issue is decided accordingly.

In the result this Commission doth order as follows:-

(a) It is hereby declared that the petitioner SEPC having suffered adverse financial impact in the course of supplying power to the respondent TANGEDCO in obedience to the directions issued by the Appropriate Government u/s 11 (1) of the Electricity Act 2003, is entitled to have the adverse impact offset as per the mandate of Section 11(2) of the Electricity Act 2003.

(b) In the exercise of ascertaining the adverse financial impact suffered by the petitioner the following factors shall be considered.

(i) In so far as the operational parameters for the petitioner is concerned normative parameters have to be considered while calculating the adverse financial impact. The operational parameter has to be considered in the following manner

Station Heat Rate - 2342 K.cal/Kwhr

Auxiliary consumption - 6.25%

Coal losses - 50 Kcal/Kg

(ii) Any claim of the petitioner in deviation from the normative parameters due to SLDC's direction for operation below target plant availability but

above technical minimum has to be considered as per Commission's Tariff Regulations 2005 para 37 (vii) notified in TNERC Notification No. TNERC/TR/5/3, dated 26-05-2021.

- (iii) For ascertaining the adverse financial impact in regard to coal utilized by the petitioner during the currency of Section 11(1) direction period, GCV as determined by CIMFR alone shall be considered in respect of imported coal. In regard to Indian Coal utilized by the petitioner actual shall be considered.
- (iv) In respect of transportation and handling charges, actual charges shall be considered.
- (v) Cost of sampling and testing of coal incurred by the petitioner shall be taken in to account while reckoning the adverse financial impact.
- (vi) The final quantum of the adverse financial impact payable by the respondent to the petitioner arrived at shall carry simple interest at the rate of 12% per annum from the date on which the payment is due till the date of actual payment by the respondent.
- (vii) The above quantified adverse financial impact suffered by the petitioner shall be paid on pass through basis.
- (viii) The petitioner shall raise revised invoices with the respondent in regard to the power supplied during the currency of the Section 11(1) direction period. The respondent on scrutiny of the revised invoices shall make

earnest endeavour to make payment of the amounts due within thirty days from the date of receipt of the revised invoices.

(ix) Considering the nature of dispute involved in the petition, both parties directed to bear their respective cost.

Petition ordered accordingly.

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

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**