

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
[Constituted under Section 82 (1) of the Electricity Act 2003
Central Act 36 of 2003]

PRESENT:-

Thiru.S.Kabilan ... **Chairman**

Thiru.K.Venugopal ... **Member**

and

Thiru.S.Nagalsamy ... **Member**

M. P. No. 18 of 2010

M/s. SPIC Electric Power Corporation (Private) Limited,
Rep. by its General Manager (Projects)
Thiru P. Sathyakumar
TPL House, No.3, Cenotaph Road,
Teynampet
Chennai – 600 018

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

Vs

Tamil Nadu Electricity Board,
Rep by its Chairman,
No. 144, Anna Salai,
Chennai – 600 002

... Respondent
(Thiru. H.S.Mohammed Rafi,
Advocate for Respondent)

Dates of hearing

11-6-2010, 17-08-2010, 07-09-2010, 19-10-2010, 03-11-2010, 15-11-2010, 06-12-2010,
10-01-2011 and 07-03-2011

Date of Order 9-5-2011

The Miscellaneous Petition No.18 of 2010 came up for hearing before the Commission on 11-6-2010, 17-08-2010, 07-09-2010, 19-10-2010, 03-11-2010, 15-11-2010, 06-12-2010, 10-01-2011 and 07-03-2011. The Commission upon perusing the above Miscellaneous Petition No. 18 of 2010 and other connected records and after hearing both sides passes the following:-

ORDER

I. **Prayer in M.P.No.18 of 2010:**

The prayer in M.P.No.18 of 2010 is to direct the Respondent to act in accordance with the terms contained in the concluded PPA between the petitioner and Respondent for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage – IV and pass such further or orders as may be deemed fit in the facts and circumstances of the case and thus render justice.

II. **Facts of the Case:-**

- a. Spic Electric Power Corporation (SEPC) was registered as a company on 27-03-1995 and it was converted as a private limited Company on 29-08-1997.
- b. The petitioner company obtained clearance from the Respondent Board and GoTN on 4-12-1996 and 24-5-1997 respectively for enhancement of capacity to 525 MW. NOC from Tamil Nadu Pollution Control Board was obtained by the petitioner on 20-9-1995. Aviation clearance was obtained on 18-12-2009, which was valid for 7 years. On 26-6-1996, Ministry of Power, Government of India granted permission to the petitioner to modify the Plant design for imported coal. In principle clearance for the project was received by the petitioner from the CEA on 19-10-1995. Cost approval for the project from GoTN was obtained on 24-7-1997. Techno Economic Clearance (TEC) was obtained on 1-8-1997. Amendments to TEC were approved on 24-10-1997 and 22-4-1998. GoTN recommended extension of time limit for submission of final financial package by the petitioner. On 21-3-1998 the Respondent Board agreed in principle for the allocation of ESCROW. In letters dated 19-9-2000 and 8-11-2000 addressed to the Respondent Board, the petitioner pointed out the huge

expenditure incurred by them on land lease and the impending expiry of validity of TEC and requested for immediate allocation of ESCROW. The Power Purchase Agreement (PPA) between the petitioner and the Respondent Board was first initialled on 29-01-1997 in accordance with GO. No.4 dated 07-01-1997 and it was finally signed on 12-2-1998. In G.O.Ms.No.114 dated 13-7-1998 the GoTN ratified the PPA. The petitioner sent a letter on 3-8-2009 requesting the Respondent Board to confirm the taking up of the project for implementation. The Respondent Board replied on 18-8-2009 confirming that the PPA has been signed and ratified. In that letter the Respondent Board further stated that the petitioner is to take up the matter with the appropriate authority – TNERC – for necessary approval for implementation of the project. In view of the above letter of the TNEB, the petitioner has filed the present petition.

III. **Contention of the Petitioner**

- a) The petitioner in his letter dated 30-12-1999 addressed to the Respondent Board has stated that the petitioner has duly complied with his obligations well within the stipulated time of 31-12-1999 and the Respondent Board was to comply with its part of the obligations.
- b) The PPA was finally signed on 12-2-1998. Fuel supply agreement was signed on 11-12-1998. Engineering Procurement Contract was signed on 22-1-1999. It is, therefore, clear that in so far as the petitioner is concerned, the stage at which the PPA stands is concluded PPA.
- c) It is significant to note that some of the essential obligations of the Respondent Board were not complied with leading to delay in execution of ESCROW and disbursement agreement.
- d) Clause 5.1 of the PPA makes it clear that the PPA is effective from the date of execution and remains valid for 30 years from the commercial Operation Date (COD). It is significant to state that some of the essential obligations of the Respondent Board were not complied with, leading to the delay in the execution of escrow and disbursement agreement and security and hypothecation agreement. Further, the GoTN guarantee, as originally envisaged, has not been granted. The validity of the PPA is not

in doubt since no notice of default or notice of termination has been issued by either party. The issue that has now arisen is consequent upon the enactment of the Electricity Act, 2003 that consolidated all enactments pertaining to Electricity.

- e) In pursuance of the Electricity Act 2003, the Ministry of Power, Government of India notified the Tariff Policy on 6-01-2006. It appears that in view of the pendency of the power projects at various stages of approvals and certain concluded contracts as well as projects, which were under implementation, the applicability of the Tariff Policy came up for consideration. The CERC therefore, sought a clarification from the Ministry of Power which was issued on 28-03-2006 and 15-02-2008.
- f) As per clause 5.1 of the Tariff Policy, all future requirement of power should be procured competitively by distribution licensees. Thereafter, consequent upon a clarification sought by the CERC, the MOP, Government of India in letter dated 28-03-2006 clarified that the following cases would be treated as falling outside the scope of the above clause in the tariff policy:

i) Where the Power Purchase Agreement (PPA) has been signed and approved by the Appropriate Commission prior to 6.1.06 or PPA has been signed and is pending before the Appropriate Commission on 6.1.06,

ii) where the appraisal of any power project has started before 6.1.2006 by the relevant financial institutions for lending funds to the project on the basis of appropriate evidence of process of procurement of power by any utility. , such procurement would be treated as falling outside the scope of clause 5.1 of the Tariff Policy provided that in all such cases final PPA is filed before the appropriate Commission by 30th September, 2006.

The Ministry of Power, Government of India issued a further clarification on 15-02-2008 which specifically stated as follows:

“An issue had arisen recently as to what would be the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January 2006. The issue has been examined in consultation with the Department of Legal Affairs. It has been advised that the provisions of the Tariff Policy would not alter the legal enforceability of the

already concluded contracts unless until it is mutually altered on agreeable terms and conditions”

- g) The clarification issued by the MOP on 15-02-2008 protects concluded contracts from the application of the competitive bid route and therefore there is no bar in implementation of the petitioner’s PPA which is indisputably a concluded contract. This is for the reason that all aspects of the petitioner’s project had been concluded and confirmed by a duly finalized, approved and signed PPA, The petitioner herein is setting forth an extract of the relevant portion from the said clarification dated 15-02-2008 which specifically states that *‘what would be the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January 2006..... It has been advised that the provisions of the tariff policy would not alter the legal enforceability of the already concluded contracts’*
- h) It is further significant that MOP in consultation with Ministry of Law and Justice in its communication dated 24-02-2010 clarified that
- i. *Since the Tariff Policy, 2006 is subsequent to the date of the PPA, and its approval by Government of Tamil Nadu, which has been concluded earlier it appears that the same cannot alter legal enforceability of the already concluded contract.*
 - ii. *Apart from the above, in the instant case admittedly there is no material change in the agreed terms and conditions of the concluded PPA between M/s SEPC and TNEB and the changes such as land, are only consequential due to delay arising out of inability of one of the parties to fulfill its obligations as per contract / PPA.*
 - iii. *Therefore, it is legally not correct to say that the Tariff Policy and the procedure laid down thereunder as per the provisions of Electricity Act 2003 is applicable. Hence in the instant case of SEPC and TNEB it is concluded that the changes such as land would not alter the legal enforceability of already concluded PPA between them”*
- i) Both in terms of the Tariff Policy as also the clarifications issued by the MOP, the contract between the petitioner and the Respondent Board is

one of concluded PPA and hence it is liable to be implemented. The insistence of the Respondents on getting approval therefore does not arise.

- j) The Respondent Board cannot take advantage of its delay in compliance with the terms of the PPA viz., non-provision of escrow, which the petitioner has also challenged by way of a writ petition in W.P.No.7241 of 2001 before the Hon'ble High Court, Madras which is still pending and seek to further delay and deny the rights accrued to the petitioner.

IV. Contention of the Respondent in the counter affidavit:

- a. The signed PPA was sent to GoTN for its approval and ratification. The GoTN in its letter dated 13-07-1998 ratified the action of the Respondent Board, subject to three amendments.
- b. All other IPPs achieved financial closure without escrow cover and commissioned the project. The following conditions have not been fulfilled by the petitioner for providing escrow cover (i) Fuel Supply Agreement (FSA) has not been approved by the Respondent Board. (ii) After taking possession of the land, the rent for leased land has been paid upto the year 2003 and no payments were made thereafter and therefore the lease agreement was terminated by the Tuticorin Port Trust.
- c. The petitioner has filed a writ petition WP No.7241 of 2001 against the non provision of escrow cover. The case came up for hearing during 2003 and in the WP notice of motion was ordered. Along with the WP an interim order directing the Board to grant escrow cover was sought for by the petitioner. After arguments, the WP was admitted but the interim petition for grant of escrow cover was dismissed. The case is still pending before the Hon'ble High Court of Madras.
- d. The Tuticorin Port Trust eventually cancelled the allotment of land on 5-5-2003, stating that the petitioner had failed to comply with the terms and conditions contemplated in the allotment order / indenture based on which land water front area was allotted to them.
- e. The petitioner in his letter dated 12-05-2009 requested the Respondent Board to approve joint submission of PPA to the Commission for

ratification as this is required for financing of the project. The Respondent Board informed the petitioner in letter dated 28-05-2009 that submission of the PPA referred in the petitioner's letter dated 12-05-2009 before the Hon'ble TNERC has already expired on 30-09-2006 and if the petitioner feels that they still have a case for submission, they may enlighten the Respondent.

V. Contention of the Respondent in the additional counter affidavit:

The Respondent Board filed an additional counter affidavit as directed by the Commission. In the additional counter affidavit the Respondent Board while referring to the letter dated 24-2-2010 of the Government of India, Ministry of Power, has stated that the Respondent Board is treating the PPA as a concluded PPA. The Respondent Board has further stated that the Tamil Nadu Electricity Board is desirous of procuring power from the petitioner so as to meet the power requirement of the State subject to the condition that the capital cost of the project shall not exceed the capital cost in the PPA as per the Techno Economic Clearance letter dated 31-7-1997. The Respondent Board has confirmed that it stands by the PPA.

VI. Contention of the petitioner in the reply affidavit to the counter statement filed by the Respondent Board:

- a) The PPA is clearly a concluded contract binding the parties as clarified by the Government of India. It is protected under both the provisions of the Electricity Act, 2003 and Clause 28 of the TNERC (Terms and Conditions for determination of tariff) Regulations 2005.
- b) The averment of the Respondent Board in paragraph 3 of the counter to the effect that the tentative Firm Financial Package (FFP) lapsed on 31-12-2000 is not correct. The petitioner as directed by CEA obtained the recommendation of GOTN for the extension of deadline for submission of FFP.
- c) With regard to the contention of the Respondent Board in paragraph 8 of the counter to the effect that other IPPs have achieved financial closure without ESCROW it is submitted that in respect of other IPPs they could achieve

financial closure as they were apparently assured of ESCROW cover prior to financial closure. It is further submitted that the Respondent cannot claim breach of its contractual obligation as a virtue. In this regard, the Escrow Cover was also essential for financing of the said project, as the same was repeatedly insisted by Banks and Institutions.

- d) The petitioner as per condition 2.3 in the letter dated 13-10-97 and as per the procedure earlier laid down by the Respondent Board, finalized the FSA and submitted the same to the Respondent Board for approval. The Respondent Board insisted on several changes now and then culminating in the final FSA being submitted to the Respondent on 26-4-1999. However, the Respondent Board even as of 30-12-1999 which was beyond the 60 days deadline agreed to in clause 6.2(h) of PPA did not take a stand on the said communication of the petitioner. Therefore, the petitioner left with no other alternative, invoked the deemed approval clause for the FSA submitted on 26-4-1999 by its letter dated 30-12-1999 and the same was not contested by the Respondent. Various correspondence and approvals relating to FSA was enclosed as Annexure 1 to the said letter dated 30-12-1999.
- e) The petitioner filed the Writ Petition W.P.No.7241 of 2001 to restrain the Respondent Board from allocating the escrow, which the petitioner was legitimately entitled to, to others, prior to that of the petitioner.
- f) The petitioner has been repeatedly asking the Respondent on the status of Escrow and also informing the impending payments to be made to TPT for the land. Further TPT have also written directly to the Respondent seeking status on Escrow in order to take decision on the land. In the absence of any communication from Respondent Board, the petitioner was not able to further commit on payment and therefore land allotment was cancelled. It was only because of the Respondent Board, the said cancellation took place.
- g) The GOI have issued a clarification dated 24-2-2010, whereby they have categorically stated that the PPA between the petitioner and the Respondent Board approved by GOTN is a concluded one and the change, such as the one based on land, does not alter the concluded PPA.

- h) The petitioner would nevertheless comply with the capital cost ceiling, with its conditions thereof already agreed by the Respondent Board in the PPA along with the approval of GOTN and CEA.
- i) The petitioner states that the EPC contract approval is a procedural requirement under the PPA. The petitioner confirms that they would comply with the agreed capital cost ceiling even in case of a change in the EPC Contractor.
- j) The sharing facilities as mentioned in the PPA, were not available earlier and now. The petitioner has planned all these facilities on his own in his land leased by TPT. It is, thus, submitted that the change of location does not envisage change in sharing of facility leading to changes in capital cost. In this regard, it is, further, submitted that even if a new facility or sharing is envisaged by the petitioner, the same would be discussed with the Respondent on a case to case basis.

VII. Written submission of the Petitioner

- a. While referring to Section 185 (2) (a) of the Electricity Act, 2003 (Central Act of 2003) which relates to saving provision, the petitioner has contended as follows:-

“There is nothing in the PPA which can be stated to be inconsistent with the provisions of the Act and therefore the concluded PPA dated 12-02-1998 is deemed to be a valid and enforceable instrument”

- b. Clause 28 (2) of Tamil Nadu Electricity Regulatory Commission (Terms and conditions for determination of tariff Regulation 2005) provides that “in respect of the generating companies covered under Power Purchase Agreements the norms in the Power Purchase Agreements will be applicable till the expiry of the contract”. The petitioner is a generating company as stated in the PPA. The petitioner clearly satisfies the definition of a generating company. He entered into a binding PPA by virtue of the protection under Section 185.
- c. It is further submitted that it is now well settled by the judgment of the Hon’ble Appellate Tribunal for Electricity in BSES Rajdhani’s case dated

31-03-2010, that procurement by competitive bidding is not the only manner available for procurement of power even after issuance of the National Tariff Policy and the powers of the Regulatory Commissions under the Electricity Act, 2003. cannot be restricted or whittled down by way of a policy document or subordinate legislation.

- d. (i) As per the clarification No. 45/2/2006-R&R, dated 28-03-2006, the Government of India has clarified that “PPA executed between SEPC & TNEB and approved by GOTN is evidently covered under subsequent clarification dated 15-02-2008”.
- (ii) As per clarification No.45/2/2006-R&R, dated 15-02-2008, the Government of India has clarified that “the PPA between SEPC and TNEB is legally enforceable and the tariff policy cannot alter it”.
- (iii) As per clarification No.V-5/2009-IPC, dated 24-02-2010 by MOP, the Central Government has clarified as follows:-
1. PPA of SEPC is concluded ;
 2. Since Tariff Policy 2006 is subsequent to conclusion of PPA, it cannot alter the legal enforceability of PPA between SEPC and TNEB ;
 3. Change of land does not alter the legal enforceability of already concluded PPA”.

VIII. **Submissions of the Respondent Board in the comprehensive Counter Affidavit filed by the Respondent**

In the written submissions of the Respondent Board made in the comprehensive counter affidavit, the Respondent has stated as follows:-

“17. The Respondent had filed a additional counter affidavit on 22-09-2010 to set out the specific stand taken by the TNEB in view of the above. The Respondent Board is treating this PPA as a concluded PPA and the TNEB stand by the said PPA due to the clarification issued by MOP/GOI in their guidelines dated 15-02-2008 and 24-02-2010 and in the light of events that have taken place subsequently. Further the TNEB is desirous of procuring power from the petitioner so as to meet the power requirement of the state in case the project is established by the petitioner, subject to the condition that the capital cost of the project shall not exceed the capital cost approved in the PPA as per the Techno Economic Clearance letter dated 31-07-1997:.

IX. **Findings of the Commission**

1. This petition has been filed by M/s. Spic Electric Power Corporation Pvt. Ltd., Chennai, praying for an order directing the Respondent TNEB to act in accordance with the terms contained in the PPA concluded on 12-2-1998 between the petitioner and the TNEB for setting up a 525 MW thermal power project at Tuticorin.

2. This matter dates back to the era of liberalization in power sector during the early nineties, when generation projects were encouraged in private sector to supplement generating capacity in the public sector. The Government of India laid down the policy and frame work for execution of such projects by way of Gazette notifications and resolutions. As a sequel, MOUs were signed between parties for setting up power projects. These MOUs were later converted into power purchase agreements. While some projects succeeded in achieving financial closure and completion, some projects were stuck at the stage of MOU or PPA.

3. The petitioner signed a PPA in 1998 but for various reasons did not proceed further. The reasons are set out below:-

1. Though the PPA was signed on 12-02-1998 and the approval of Government of Tamil Nadu was communicated on 13-07-1998, the petitioner has stated that he could not proceed further in the matter for tying up of finances in the absence of provision of escrow by the TNEB. Five other power projects in the private sector namely GMR diesel power project, ST-CMS lignite based power project, Samayanallur diesel power project, Samalpatti diesel power project and PPN combined cycle power project, for which PPAs were signed around the same time, proceeded without waiting for escrow cover and commissioned their projects at different points in time before the enactment of Tariff Regulations, 2005. The petitioner approached the High court of Madras in writ petition 7241 of 2001 for directing the TNEB to provide escrow cover for their project. It is confirmed by the parties that this writ petition is still pending in the High Court of Madras. The petitioner has now changed his mind and is willing to execute the

project without escrow cover in view of change in approach of financial institutions for lending without escrow cover.

4. Yet another development was that the land allotted for the project by the Tuticorin Port Trust in June 1999 was cancelled in May 2003. Land lease rent was paid by the petitioner to the Tuticorin Port Trust regularly in the early years. Thereafter, there was default in payment of lease rent for the period from 28-07-1999 to 5-5-2003 amounting to Rs.1,48,13,310/- as revealed by the letter of the petitioner dated 01-03-2011 addressed to the Chairman, Tuticorin Port Trust. From the same letter, it is observed that an amount of Rs.5.33 crores approximately had to be paid as penal interest for the period up to 28-02-2011. During this period of default the land allotted to the petitioner was cancelled on 05-05-2003. Fresh efforts were made by the petitioner, consequent to which alternate land was allotted by the Tuticorin Port Trust on 13-10-2009. The petitioner has made further efforts to get various clearances for execution of the project in the alternate land allotted.

5. Be that as it may, certain developments have taken place in the interregnum as follows:-

- a) The Electricity Regulatory Commissions Act came into being in 1998.
- b) The Electricity Act was enacted in 2003.
- c) Regulatory Commissions were set up in several States and at the Centre.
- d) Tariff Regulations were framed by the CERC and TNERC.
- e) Tariff Policy was notified by the Government of India on 6th January 2006.
- f) Clarifications on Tariff Policy were issued by the Government of India on 28-03-2006, 15-02-2008 and project specific clarification on 24-02-2010.

6. The relevant provisions of the tariff policy and the clarificatory letters are reproduced below for ready reference.

6.1. Para 5.1 of Tariff Policy

“5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees for medium or long-term period vide gazette notification dated 19th January, 2005.

All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.

Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.”

6.2. Letter No. 45/2/2006-R&R dated 28th March 2006, Ministry of Power.

*“No.45/2/2006-R&R
Government of India
Ministry of Power*

New Delhi, the 28th March 2006.

*To
Shri A.K. Sachan,
Secretary,
Central Electricity Regulatory Commission,
SCOPE Complex, Lodhi Road, New Delhi*

Subject: Tariff Policy under the Electricity Act 2003

Sir,

I am directed to refer to CERC's letter No. I/20(6)2006- Tariff/Policy/CERC dated 2.2.06 requesting for clarification under the provisions of para 5.1 of the Tariff Policy (notified on 6.1.06) which reads as under:-

..... " All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity"

2. This matter has been considered taking into account the suggestions of the CERC and all relevant aspects. Accordingly, it is hereby clarified that the power generation projects which satisfy any of the following conditions would be well within this provision of the Tariff Policy:

i) Where the Power Purchase Agreement (PPA) has been signed and approved by the Appropriate Commission prior to 6.1.06 or PPA has been signed and is pending

before the Appropriate Commission on 6.1.06, such procurement would be treated as falling outside the scope of clause 5.1 of Tariff Policy as contractual obligation for procurement of power has been firmly established in such cases.

ii) Similarly, where the appraisal of any power project has started before 6.1.2006 by the relevant financial institutions for lending funds to the project on the basis of appropriate evidence of process of procurement of power by any utility, such procurement would be treated as falling outside the scope of clause 5.1 of the Tariff Policy provided that in all such cases final PPA is filed before the Appropriate Commission by 30th September, 2006.

iii) In case of hydro projects where detailed project report (DPR) has been submitted to the CEAI/CWC before 6.1.06 for concurrence (except for projects where concurrence of DPR is not mandatory) and appropriate evidence of process of procurement of power by any utility exists before 6.1.2006, such procurement would be treated as falling outside the scope of clause 5.1 of Tariff Policy, provided that in all such cases the final PPA is filed before the appropriate Commission by 30th September, 2006.

Yours faithfully,

Sd/-

(Alok Kumar)

Director (R&R)

Ph: 2371 4000

6.3. Letter No. 45/2/2006-R&R dated 15th February, 2008 of Ministry of Power.

*No.45/2/2006-R&R
Government of India
Ministry of Power*

*Shram Shakti Bhawan, Rafi Marg,
New Delhi, 15th February, 2008*

*To
The Secretary,
Central Electricity Regulatory Commission.
Core-3, Scope Complex,
Lodhi Road, NewDelhi*

Subject: Tariff Policy under Electricity Act, 2003- Clarification.

Sir,

Please refer to the clarification issued by the Ministry of Power under the provisions of the para 5.1 of the Tariff Policy vide letter No.45/2/2006-R&R dated 28.3.2006.

2. An issue had arisen recently as to what would be the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January, 2006. The issue has been examined in consultation with the Department of Legal Affairs. It has been advised that the provisions of the Tariff Policy would not alter the legal enforceability of the already concluded contracts unless until it is mutually altered on agreeable terms and conditions

Yours faithfully,

*(Alok Kumar)
Director
Tel: 23714000*

*6.4. Letter No.V-5/2009-IPC dated 24-02-2010 of Ministry of Power
No.V-5/2009-IPC
Government of India
Ministry of Power*

*Shram Shakti Bhawan, Rafi Marg,
New Delhi, 24th February, 2010*

To

*Shri C.P. Singh,
Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai – 600 022.*

*Sub: Clarification regarding change of land to M/s.
SPIC, Electric Power Corp. (SERC) Ltd.*

I am directed to refer to the minutes of the meeting of the Secretaries of Power, Coal, Shipping & Ports and others held in the Ministry of Power on 16.4.2009 on certain pending issues affecting the power projects of SPIC Electric Power Corporation (SEPC) and Neyveli Lignite Corporation (NLC) with particular reference to land allotted by the Tuticorin Port Trust (TPT).

2. M/s. SEPC had subsequently approached this Ministry for issuing clarification that the PPA between them and TNEB is a concluded contract and any amendments made in the PPA by mutual agreement could also be legally enforceable i.e. any changes such as land due to Escrow/legal issue would not alter legal enforceability of already

concluded PPA. This has since been examined in consultation with the Ministry of Law & Justice.

3. In view of the facts of the case that the land allotted by Tuticorin Port Trust (TPT) to M/s. SPIC Electric Power Corporation Ltd for the purpose of the Power Project has been cancelled on 5.5.2003 and the same was re-allotted for Neyveli Lignite Corporation (NLC) Power Project. As a result the matter was taken up before the High Court and an arbitrator has – been appointed to look into the matter. Subsequently as a result of the meeting of the Secretaries of Power, Coal and Shipping & Port, it has been decided and agreed to provide an alternative land to SPICEPCL upon a condition that SPICEPCL will withdraw the pending legal arbitration proceedings filed against TPT in the event of satisfactory resolution of the issues and allotment of alternative site. The TNEB also agreed to provide the necessary comfort letters to enable the project to proceed further at the alternative location. On the basis of the above facts and the provisions of the Electricity Act, 2003 and Tariff Policy, 2006, the following clarifications is furnished:

i) Since the Tariff Policy, 2006 is subsequent to the date of the Power Purchase Agreement, and its approval by Government of Tamil Nadu, which has been concluded earlier it appears that the same cannot alter the legal enforceability of the already concluded contract.

ii) Apart from the above, in the instant case admittedly there is no material change in the agreed terms and conditions of the concluded PPA between M/S. Spic Electric Power Corporation Limited (SEPC) and Tamil Nadu Electricity Board (TNEB) and the changes such as land are only consequential due to the delay arising out of inability of one of the parties to fulfill its obligations as per contract / PPA.

iv) Therefore, it is legally not correct to say that the Tariff Policy and the procedure laid down thereunder as per the provision of the Electricity Act, 2003 is applicable. Hence in the instant case of SEPC and TNEB it is concluded that the changes such as land would not alter the legal enforceability of already concluded PPA between them.

*Yours faithfully,
(S. Narayanan)*

Under Secretary to the Government of India

Copy to Shri Muthu Karuppan, Director, M/s. SPIC Ltd, TPL House, No.3, Cenotaph Road, Teynampet, Chennai – 18.

7. Consequent to various developments as discussed above, the petitioner requested the Respondent on 3-08-2009 to confirm implementation of the project. The Respondent in letter dated 18-08-2009 stated that it is desirable that the proposed power project should be set up by the petitioner and informed that the petitioner should take up the matter with the Appropriate Authority /

TNERC for necessary approval for implementation of the project. The petitioner at that stage replied that no further approval was required and that the Respondent is obliged to permit implementation of the project.

8. The petitioner further states that he has obtained all statutory clearances and revalidation of environmental clearances. The PPA has been kept alive and the petitioner is in a position to implement the said project, if the Respondent Board acts on the signed PPA and performs its obligations under the agreement. The petitioner states that the Respondent has failed to permit implementation of the project and a stalemate has arisen in as much as the Respondent is wrongly taking the position that further regulatory approval and permission from this commission would be required. Under these circumstances the petitioner has filed this miscellaneous petition with the following prayer:-

“Therefore, it is humbly prayed that this Hon’ble Commission may be pleased to pass an order directing the respondent to act in accordance with the terms contained in the concluded PPA between the petitioner and respondent for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage – IV and pass such further or other orders as this Hon’ble Commission may deem fit in the facts and circumstances of the case and thus render justice.”

9. The pleadings of the parties raise the following two issues:-

- 1) A direction to the Respondent to act in accordance with the PPA for putting up of the 1 x 525 MW Tuticorin thermal power project stage – IV
- 2) The effect of Tariff Policy and subsequent clarifications dated 28-03-2006, 15-02-2008 and 24-02-2010.

10. The Commission would like to deal with the above two issues in detail as follows:-

10.1 **Issue No. 1** The direction to the Respondent to act in accordance with PPA for putting up of the 1 x 525 MW Tuticorin thermal power project stage – IV.

10.1.1. The prayer of the petitioner is for a direction to the Respondent to implement the PPA. The Commission passed an interim order in this matter on 7-09-2010 which is reproduced below:-

“M.P. No. 18 of 2010 filed by M/s. SPIC Electric Power Corporation (Private) Limited (SEPC) praying for directing the Respondent to act in accordance with the terms contained in the concluded PPA between the petitioner and Respondent for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage – IV came up for hearing on 07-09-2010 before the Commission. The Commission upon perusing the above petition and the connected records and after hearing both sides passes the following:-

INTERIM ORDER

The Tamil Nadu Electricity Board is directed to furnish an additional affidavit whether they stand by the PPA executed with SEPC on 12-02-1998 as amended on 30-10-1998.

10.1.2 In response to the above interim order, the Respondent TNEB filed an additional counter. Para 4 and 5 of the said affidavit is reproduced below:-

“4) It is respectfully submitted that the Respondent Board is treating this PPA as a concluded PPA and the TNEB stand by the said PPA due to the clarification issued by MoP and in the light of the series of events that are taken place. Further the TNEB is desirous of procuring power from the Petitioner so as to meet the power requirement of the state. Subject to the condition that the Capital cost of the project shall not exceed the Capital cost approved in the PPA as per the Techno Economic Clearance letter dt 31.07.1997.

5) It is respectfully submitted that the PPA with M/s SEPC was signed on 12.02.1998, and it was amended on 13.10.1998 before enactment of Electricity Act 2003. In view of the above, the Hon’ble Commission may be pleased to pass an appropriate order and thus render justice.”

From the above paragraph of the additional affidavit, the Commission observes that the parties are ad-idem on the PPA. While the petitioner has sought a direction to the Respondent for proceeding with the PPA, the Respondent has confirmed that the TNEB stands by the PPA. In view of the position taken by the two parties, the Commission is of the view that there is no need for issue of any direction in the matter as prayed for by the petitioner.

10.2 This leaves us with the next issue of compliance with the Tariff Policy and the Electricity Act 2003. These issues are discussed in detail.

- 10.2.1 PPA was signed on 12-02-1998. The project is still on paper. The project has to achieve financial closure and thereafter construction work has to commence and commercial operation has to be achieved. In the interregnum, the Electricity Regulatory Commission Act 1998 was enacted. This Act has been subsumed by the Electricity Act, 2003. Electricity Regulatory Commissions were constituted under the ERC Act, 1998. They continued to function under Electricity Act, 2003. These Commissions have issued Tariff Regulations. Tariff policy was issued by the Government of India on 6th January 2006. Subsequent clarification issued by Government of India, Ministry of Power on tariff policy have been extracted in para ix (6). In accordance with the Tariff Policy, more specifically para 5.1, all future power procurement by the licensee shall be through competitive bidding. Clarification dated 28th March, 2006 of Ministry of Power on para 5.1 of the tariff policy, has two sub paragraphs under para 2 applicable for thermal projects. Since the PPA was not submitted to the Commission for approval, this clarificatory letter dated 28th March, 2006 has no application in this case.
- 10.2.2 Similarly, the petitioner has stated that appraisal of the power project by financial institutions did not start because of non tie up of escrow. Therefore, letter dated 28th March 2006 of Ministry of power would not apply as far as this project is concerned.
- 10.2.3 As regards the clarification dated 15th February 2008 of Ministry of Power, it is observed that this clarification relates to the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January 2006. The petitioner argues that since this PPA was concluded on 12-02-1998, well before the notification of Tariff Policy on 6th January 2006, the provisions of the tariff policy would not alter the legal enforceability of concluded contracts, such as this, unless until it is mutually altered on agreeable terms and conditions, as advised by the Ministry of power.
- 10.2.4 The petitioner further argues that in terms of the clarification dated 24-02-2010 of the Ministry of Power, which is specific to this project, the PPA between the petitioner and the Respondent Board is valid and is liable to be implemented without any further approval.

10.2.5 The Commission has examined para 5.1 of the Tariff Policy, and the three clarificatory letters dated 28-03-2006, 15-02-2008 and 24-02-2010. Procurement of power through competitive bidding stipulated in para 5.1 of the Tariff Policy was the subject matter of an appeal before the Appellate Tribunal for Electricity in BRPL vs DERC and BYPL vs DERC and others in Appeal nos. 106 & 107 of 2009. The APTEL ruled that Sections 62 and 63 are independent of each other. Both MoU route and competitive bidding route are available to a licensee for procurement of power. In the light of this and the clarifications furnished by the Ministry of Power, it is evident that this particular project will not be hit by para 5.1 of the Tariff Policy. Therefore, we are of the view that there is no impediment in continuing with this project under the MOU route.

10.2.6 The PPA in this case has also been subjected to examination with regard to Sec 185 (2) of the Electricity Act 2003. This section is reproduced below:-

“185 (2) Notwithstanding such repeal, -----

- a. anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act; “*

10.2.7. Section 185 mandates that any instrument executed prior to the enactment of Electricity Act shall be valid to the extent that it does not conflict with the provisions of the Electricity Act 2003. The Tariff Regulations 2005 of the Commission have been framed in exercise of authority conferred under Section 181 of the Electricity Act 2003. It is clear that PPAs executed prior to commencement of Electricity Act 2003 shall continue to be valid to the extent that they are not inconsistent with the Electricity Act 2003. The clauses of the PPA executed between the TNEB and the Petitioner in 1998 would remain valid to the extent that they do not conflict with the Tariff Regulations 2005 of the Commission. The Tariff Regulations prescribe certain norms for power plants existing

on the date of notification of the Regulations and tighter norms for power plants commissioned after the commencement of the Regulations. Whereas all other IPPs have been commissioned prior to the notification of the Tariff Regulations 2005, the project of the petitioner is still on paper and yet to see the light of the day. Therefore, for the petitioner to argue that a PPA executed in 1998 and a power plant, which is expected to be commissioned in 2015 / 2016 should override the Tariff Regulations 2005 is far fetched. Therefore, the norms contained in the PPA of the petitioner, which are in conflict with the provisions of the Tariff Regulations 2005, would be invalid.

10.2.8. Yet another point which needs to be considered is that the Government of India prescribed certain norms in their notification dated 30-3-1992. The PPA between the two parties was executed in 1998, six years after the notification of the Government of India. The PPA contains certain norms tighter than the norms contained in the Government of India notification dated 30-3-1992 and therefore the tighter norms contained in the PPA shall prevail.

10.2.9. The parties were advised to argue this matter of compliance of the PPA with respect to the Regulations of the Commission. The Commission felt the need for doing so in view of the fact that this project is still on paper, even though the PPA was signed way back in 1998. More than 12 years have elapsed since signing of PPA but the project is still on paper. The project is yet to achieve financial closure. whereafter it would take another 3 to 4 years for commissioning of the project. Under these conditions, the project cannot be commissioned before 2015 or 2016. The life of PPA would be another 30 years i.e. going up to 2046. Most of the norms prescribed in the notification of the Government of India dated 30-3-1992 have been incorporated in the PPA; some norms in the PPA are tighter than the norms contained in the notification. Consequent to the enactment of Electricity Act 2003 several changes have taken place in the regulatory domain. Norms have been tightened by the CERC as well as State Electricity Regulatory Commissions based on the experience gained over this period and therefore there is a need to examine this PPA vis-a-vis the

norms issued by this Commission. Accordingly, an opportunity was given to both the parties to argue this matter before the Commission.

10.3 The PPA was signed on 12-02-1998. This PPA was signed in accordance with the Government of India Tariff notification No.S.O. 251 (E) dated 30th March 1992. The petitioner in his submission and arguments relied on the following:-

10.3.1 Definition of generating company as contained in Sec 2 (25) of the Electricity Act which is reproduced below:-

"generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;"

10.3.2 Sec 2 (30) *"generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switchgear, switch yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;*

10.3.3 TNERC (Terms and conditions for determination of Tariff) Regulation, 2005

37. Norms of Operation

The norms of operation for the Thermal Generating Stations shall be as under:

(i) Target availability for recovery of full capacity (fixed) charges

(a) All Thermal Generating stations in Tamil Nadu except Ennore Thermal Power Generating Station	80%
(b) Ennore Thermal Power Generating Station (Till Renovation and Modernization works in all units are completed)	50%
(c) In respect of Generating Stations of Independent Power Producers	As per PPA
(d) New Thermal Stations	80%

(ii) Target Plant Load Factor for incentive

(a) All the Thermal Power Generating Stations except the existing Stations of Independent Power Producers covered under Power Purchase Agreements	- 80%
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(b) *Power Generating Stations of Independent Power Producers covered under existing Power Purchase Agreement*

.... As per PPA

(iii) Gross Station Heat Rate

(d) 'Norms for the existing Coal-based Thermal Power Generating Stations

<i>Station</i>	<i>Heat Rate</i>
1. ETPS	3200 kcal/kwh
2. TTPS	2453 “
3. MTPS	2500 “
4. NCTPS	2393 “

(e) Norms for the new Thermal Power Generating Stations

	<i>200/210/250 MW sets</i>	<i>500 MW and above sets</i>
<i>During Stabilisation period</i>	2600 KCal/kWh	2550 Kcal/kWh
<i>Subsequent period</i>	2500 KCal/kWh	2450 Kcal/kWh

Note-1 :

In respect of 500 MW and above units where the boiler feed pumps are electrically operated, the heat rate of 40 kCal/kWh shall be reduced from the Generating Station heat rate indicated above.

Note-2 :

For Generating Stations having combination of 200/210/250 MW sets and 500 MW and above sets, the normative gross Generating Station heat rate shall be the weighted average Generating Station heat rate of various sets.

(c) Lignite-fired thermal power Generating Stations

The station heat rate specified in clause (b) above for coal based Thermal Power Generating Station shall be corrected, using multiplying factors as given below:

- (i) For lignite having 50% moisture: Multiplying factor of 1.10*
- (ii) For lignite having 40% moisture: Multiplying factor of 1.07*
- (iii) For lignite having 30% moisture: Multiplying factor of 1.04*
- (iv) For other values of moisture content, multiplying factor shall be pro-rated for moisture content between 30-40 and 40-50 depending upon the rated values of multiplying factor for the respective range given under sub-clauses (i) to (iii) above.*

(d) Gas-Turbine / combined cycle Generating Stations

	<i>Advanced class machine</i>	<i>E/EA/EC/E2 class Machine</i>
<i>Open Cycle</i>	<i>2685 Kcal / kWh</i>	<i>2830 Kcal / kWh</i>
<i>Combined cycle</i>	<i>1850 Kcal/ kWh</i>	<i>1950 Kcal / kWh</i>

(iv) Secondary fuel oil consumption

- (a) *Coal-based Generating Stations:*
During stabilization period : 4.5 ml/kWh
Subsequent period (except ETPS) : 2.0 ml/kWh
ETPS : 12.ml/kWh

- (b) *Lignite fired Generating Stations:*
During stabilization period : 5.0 ml/kWh
Subsequent period (except ETPS) : 3.0 ml/kWh

(V) Auxiliary Energy Consumption

- (a) *Coal – based generating station.*

	<u><i>With cooling Tower</i></u>	<u><i>Without cooling tower</i></u>
<i>(i) 200 MW series</i>	9.00%	8.50%
<i>(ii) 500 MW series</i>		
<i>Steam driven boiler</i>		
<i>feed pumps</i>	7.50%	7.00%
<i>Electrically driven boiler</i>		
<i>feed pumps</i>	9.00%	8.50%

- (b) *Gas-based and Naphtha-based Generating Stations :*

- (i) *Combined Cycle :* 3%
(ii) *Open Cycle :* 1%

- (c) *Lignite fired Thermal Power Station*

The auxiliary consumption norms shall be 0.50 percentage point more than the auxiliary energy consumption norms for coal based Generating Stations indicated in a (i) and (ii) above.

(d) During stabilization period, normative auxiliary consumption shall be reckoned at 0.50 percentage point more than the norms indicated at (a), (b) and (c) above.

*(vi) **Stabilization period***

The stabilization period of a unit shall be reckoned commencing from the date of commercial operation of that unit as follows:

- | | |
|---|-------------------|
| <i>(a) coal-based and lignite-fired Generating Stations</i> | <i>- 180 days</i> |
| <i>(b) Gas turbine/combined Generating Stations</i> | <i>- 90 days</i> |

10.3.4 Regulation 28 of TNERC (Terms and Conditions of Tariff) Regulations, 2005.

Deviation from Norms

- 1) Norms of operation specified in these regulations are the ceiling norms and the Generating Company and the user may agree for improved norms. In such a case, the improved norms on the basis of their agreement shall be considered for the purpose of tariff determination.*
- 2) In respect of the Generating Companies covered under Power Purchase Agreements the norms in the Power Purchase Agreements will be applicable till the expiry of the contract.*

10.3.5 Relying on the above referred provisions of the Act and the Regulations, the petitioner argued that he is squarely covered by the definitions of both generating company and generating station. Relying upon Clause 28(2) of Tariff Regulations, 2005, the petitioner argued that the norms prescribed in the PPA bind both the parties. The petitioner relies on clause 37 (i) (c) to argue that in respect of generating stations of independent power producers the target availability for recovery of full capacity (fixed) charges shall be as per PPA. The petitioner further quotes Clause 37 (ii) (b) to claim that incentive shall be as per PPA.

10.3.6 The Respondent, having agreed to endorse the PPA, did not rebut the arguments of the petitioner.

10.4 **Analysis of the Commission**

10.4.1 The commission examined these issues based on the provisions of the Act and the Tariff Regulations. Sec 2 (28) of the Act defines

"generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

The definition of generating company emphasizes on owning or operating or maintaining a generating station. In this particular case, it should be noted that this project is still on paper and is not an operating generating station and therefore the word generating company used in the Regulations cannot be loosely interpreted.

10.4.2 Definition of Generating Station – Sec 2 (30) of the Electricity Act, 2003

"generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switchgear, switch yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;

In this definition also, a generating station or station means any station for generating Electricity. The second limb of this definition states that a site intended to be used for a generating station, and any building used for housing the operating staff of generating station and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs dams and other hydraulic works, but does not in any case include any sub-station for generating electricity.

The second limb of the definition deals with building and other civil structure related to the power station both thermal and hydro. Reading together the definition of both the "generating company" and "generating station" as contained in the Electricity Act and as discussed above, we reach the inescapable conclusion that a generating station can only be an operating station producing electricity. We are unable to endorse the contention of the petitioner that a project on paper can be brought under the definition of generating station.

10.4.3. We further refer to various definitions in the Regulations which are reproduced below:-

i) **Clause 2(1) (s)** “Existing Generating Station” means a generating station declared under commercial operation from a date prior to the notification of these Regulations”

ii) **Clause 2 (1) (t)** – “Existing Project” means the project declared under commercial operation from a date prior to the notification of these Regulations.

iii) Clause 37 regarding norms of operation is already extracted in para 8.3.2 of this order.

The definition of “existing generating station” and “existing project” as contained in the Regulation clearly envisages that only such of those stations or project which were in commercial operation prior to notification of this Regulation could be termed as existing generating station or existing project. Since the petitioner’s project is not a commissioned project, it cannot be considered as an existing generation station or an existing project. Consequently, this can only be treated as a new thermal power station and accordingly norms of operations for new thermal power station can only be applied to this project. The norms for a new thermal plant are as below:-

a) Target availability for recovery of full capacity (fixed) charges	-	80%
b) Target PLF for incentive	-	80%
c) Incentive rate	-	25 paise per kwh for generation in excess of 80%
d) Secondary fuel oil consumption	-	2 ml per kwh
e) Return on equity	-	14% post tax
f) O & M expenses	-	as per Clause 25 of Tariff Regulations 2005

We direct that the PPA be amended to incorporate the above norms. The Regulation also stipulates in clause 28 that the norms of operation specified in these Regulations are the ceiling norms and the parties may negotiate for improved norms. Accordingly, improved norms committed in the PPA would apply. The Government of India notification dated 30th March 1992, further, enabled the parties to adopt improved norms with regard to heat rate, etc.

10.4.4. Capital Cost

The capital cost of the project including financing cost shall be got approved from the Commission once the EPC contractor is selected. The selection of the EPC contractor shall be on the basis of international competitive bidding. The amendments directed by the Commission in para 10.4.3 shall be finalized by the parties within a period of 3 months of this order. The financing for the project shall be tied up within a period of nine months from the signing of the amended PPA. The commercial operation of the project shall be achieved within a period of 39 months as stipulated in the PPA. The Respondent states that the capital cost of this project works out to Rs.5.398 crores per MW at the current exchange rate as against the cost of Rs.4.69 crores per MW approved by the Commission for Cuddalore Power Project. Subsequently, the TNEB in their counter affidavit filed on 31-1-2011, has modified their stand to say that the capital cost of the project shall not exceed the capital cost approved in the PPA. The TNEB is directed to take a clear stand on the issue and amend the PPA, if necessary, to limit the capital cost at the rate of Rs.4.69 crore / MW.

X. Directions

1. The PPA shall be amended to correct the norms, as directed in para 10.4.3, so as to fall in line with the TNERC (Terms and Conditions for determination of tariff) Regulations – 2005 within a period of three months.
2. The project mile stones set out in sub-para 10.4.4 of para ix shall be complied with.

3. The amended PPA shall be submitted to the Commission in terms of Section 86 of the Electricity Act 2003 for approval.
4. Interim order dated 7-9-2010 is merged with this order.

XI. **Appeal**

An appeal against this order lies with the Appellate Tribunal for Electricity as per section 111 of the Electricity Act 2003 within a period of 45 days.

(Sd.....)
(S. Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

(Sd.....)
(S.Kabilan)
Chairman

/ True Copy /

**Assistant Secretary
Tamil Nadu Electricity
Regulatory Commission**